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THE
ATLANTIC REPORTER,
VOLUME 55

CONTAINING ALL THE REPORTED DECISIONS OF THE

Supreme Courts of MAINE, NEW HAMPSHIRE, VERMONT, RHODE ISLAND,
CONNECTICUT, and PENNSYLVANIA; Court of Errors and Appeals,
Court of Chancery, and Supreme and Prerogative Courts
of NEW JERSEY; Supreme Court, Court of Chancery,
Superior Court, Court of General Sessions, and
Court of Oyer and Terminer of DELAWARE;
and Court of Appeals of MARYLAND.

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ATLANTIC REPORTER, VOLUME 55.

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OF THE

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(111)

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¹ Resigned January 13, 1903.

² Appointed January 20, 1903.

³ Term expired.

⁴ Appointed February 18, 1903.

⁵ Became Judge April 30, 1903.

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V

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COURT RULES.

SUPREME COURT OF DELAWARE.

Court Rules and Amendments Adopted Since the Revision and Publication of the Law Court Rules in 1894, and Readopted in 1897.

Amendment to Rule VII.

He shall also, at least one week before the commencement of the trial term, mail to each member of the court a list of causes then at issue together with a copy of the printed record, and of the briefs of counsel, filed in each of said causes.

(Adopted June 21, 1899.)

Rule XXII.

Conferences and Opinions.

1. Upon the adjournment of this court, at the end of each term thereof, the presiding

judge shall appoint a day or days not later than two weeks thereafter for a meeting in Dover of the judges who sat in the causes argued at said term, for the purpose of conference upon said causes and the assignment of the judge or judges who shall prepare the opinion or opinions of the court therein.

2. The judge or judges so allotted shall, not later than one month before the next term of the court, submit to each of the other judges who sat in the cause, a copy of the opinion or opinions so prepared by him or them.

(Adopted January 22, 1902.)

SUPERIOR COURT OF DELAWARE.

Amendment to Rule V.

That paragraph 6 of rule 5 of the Superior Court of the state of Delaware be amended by adding to the end of said paragraph the following, viz.:

If by the return of the commissioner it shall appear that the taking of such oral testimony has not been completed, the court may remand the commission to the commissioner with like power and authority as were originally granted to such commissioner, returnable at such time as the court may direct.

(Adopted New Castle County, February Term, 1901.)

Amendments to Rule VII.

Upon the filing of a demurrer to any pleading the prothonotary shall forthwith enter joinder in demurrer, and the cause shall be placed on the trial list, as herein provided.

Any cause at issue on demurrer may be set down for argument at any time during a term of court, although said cause may not be published upon the trial list, upon ten days' written notice given by the party filing the demurrer, or upon five days' written notice given by the party whose pleadings may be demurred to.

55 A.

Amendments to Rule IX.

22½. No commissioner in cases of divorce shall be appointed before the first Friday of the term to which the summons is returnable.

(Adopted New Castle County, February Term, 1901.)

29. In all actions where a nonsuit shall be granted, the plaintiff shall at that time be entitled, upon motion, to a rule to show cause why such nonsuit should not be set aside.

(Adopted February 26, 1897.)

Rule XIV.

Records.

1. No record, document or paper of any kind or description filed in or belonging to the office of the prothonotary shall hereafter be taken from the said office for any purpose whatsoever, except upon order of court.

(Adopted January 8, 1896.)

Rule XV.

Pleadings.

1. A copy of any pleading or other paper, required to be filed in any cause or proceeding, shall be filed in the prothonotary's office together with said pleading or paper, and

(v)

such copy so filed shall be for the use of the adverse party or his attorney and shall be delivered by the prothonotary to such party or attorney upon application. The adverse

party shall not be required to plead, answer or reply until five days after such copy is filed.

(Adopted January 13, 1896.)

ORPHANS' COURT OF DELAWARE.

Amendment to Rule XI.

No foreign surety company shall be accepted by this court as surety for a penal sum exceeding ten thousand (10,000) dollars.

No such company shall be accepted in any case when the liability may continue more than two years.

(Adopted January 22, 1902.)

SUPREME COURT OF MAINE.

Ordered, by the court, all the Justices thereof concurring, that the following rule be established and promulgated as a rule of court, viz:

RULE.

Oral arguments before the law court, including the reading of briefs and arguments in reply, are limited to one hour for each side unless for cause shown the court shall fix a longer time before the arguments are begun.

Adopted December 20, 1902.

NATURALIZATION.

All the Justices being present, ordered, that

the following rule be established relative to naturalization cases, to wit:

Every applicant for naturalization shall file with the Clerk of the Court his application in writing, according to the Statutes of the United States, thirty days before the term of the Court in that County at which his application is to be heard. The Clerk shall enter such application upon a special docket in the order of filing and shall, at the expense of the applicant, cause notice thereof to be published in some public newspaper published in the county of the applicant's residence fourteen days at least before such term.

Adopted June 29, 1903.

CASES REPORTED.

	Page		Page
Ackerman v. Union Traction Co. (Pa.)...	16	Baumgardner, Norris v. (Md.).....	619
Adams v. Camden & S. R. Co. (N. J. Err. & App.).....	254	Beach, Appeal of (Conn.).....	596
Adams v. Reynolds (N. J. Ch.).....	1003	Beatty, Schrader v. (Pa.).....	958
Adams, Seeley v. (N. J. Ch.).....	820	Beebe, Rossbach v. (Pa.).....	320
Adamson v. Souder (Pa.).....	182	Behl v. Philadelphia (Pa.).....	1029
Adams Paper Co. v. Cassard (Pa.).....	949	Beideman v. Sparks (N. J. Err. & App.)..	1132
Addicks, Taylor v. (Del. Super.).....	1010	Bell, Woolley v., two cases (N. J. Sup.)..	66
Ætna Life Ins. Co., Tremblay v. (Me.)...	509	Bellis v. Flemington (N. J. Err. & App.)..	300
Alexander's Estate, In re (Pa.).....	797	Bennett, Richmond v. (Pa.).....	17
Alkazin, Lutz v. (N. J. Ch.).....	1041	Bennett, Town of Meriden v. (Conn.).....	564
Allaire Water Supply & Land Co. v. Freehold & J. Agricultural R. Co. (N. J. Sup.).....	1138	Bennington Water Co., Godfrey v. (Vt.)..	854
Allegheny Co. v. Allen (N. J. Err. & App.)	724	Berdan's Will, In re (N. J. Prerog.).....	728
Allen, Allegheny Co. v. (N. J. Err. & App.)	724	Bergen Bldg. & Imp. Co., Cleveland v. (N. J. Ch.).....	117
Allison Land Co. v. Tenafly (N. J. Sup.)..	39	Berlin Iron Bridge Co. v. American Bridge Co. (Conn.).....	573
Alward v. Alward (N. J. Ch.).....	996	B. F. Smith Fireproof Const. Co. v. Munroe (Md.).....	315
American Bonding Co. of Baltimore v. National Mechanics' Bank (Md.).....	395	Bishop Co., Paoline v. (R. I.).....	752
American Bridge Co., Berlin Iron Bridge Co. v. (Conn.).....	573	Black v. Black (Pa.).....	847
American Can Co., Schoenfeld v. (N. J. Ch.).....	1044	Blair, Diehl v. (N. J. Sup.).....	1133
American Palace Car Co. of New Jersey, Wilson v. (N. J. Err. & App.).....	997	Blauvelt v. Delaware, L. & W. R. Co. (Pa.)	857
American Soda Fountain Co. v. Vaughn (N. J. Sup.).....	54	Blivin v. Wheeler (R. I.).....	760
American Woolen Co., Cowett v. (Me.)...	494	Bloomberg, Cowen v. (N. J. Sup.).....	36
Anderson Food Co., Cook v. (N. J. Ch.)...	1042	Blue Ridge Packing Co., Andrews v. (Pa.)..	1059
Andrews v. Blue Ridge Packing Co. (Pa.)..	1059	Blythe, C. B. Coles & Sons Co. v. (N. J. Err. & App.).....	816
Andrews v. O'Reilly (R. I.).....	688	Board of Chosen Freeholders of County of Essex, Ross v. (N. J. Err. & App.).....	310
Appley, Appeal of (Pa.).....	795	Board of Home Missions v. Davis (N. J. Ch.).....	466
Asbury Park v. Layton (N. J. Sup.).....	86	Board of Police Com'rs of Jersey City, Quinn v. (N. J. Sup.).....	634
Asbury Park v. Mariner (N. J. Sup.).....	86	Board of Trustees of Village of Flemington, Hopewell v. (N. J. Sup.).....	653
Aschbacher, Weber v. (Pa.).....	534	Bobbs v. Union Traction Co. (Pa.).....	972
Asphalt Co. of America, Gallagher v. (N. J. Ch.).....	259	Boornazian, Zanturjian v. (R. I.).....	199
Aspinall v. Viney (Pa.).....	1038	Booth v. Callahan (Md.).....	625
Atkins v. W. & A. Fletcher Co. (N. J. Ch.).....	1074	Booye, Muth v. (N. J. Err. & App.).....	287
Atlantic City & S. Traction Co. v. West Jersey & S. R. Co. (N. J. Ch.).....	1134	Bormann, Du Bois v. (N. J. Ch.).....	634
Austin, Carson v. (Pa.).....	1135	Borough of Montooth v. Brownsville Ave. St. R. Co. (Pa.).....	1036
Austin, Potter County Water Co. v. (Pa.)	901	Boston & M. R. R. Day v. (Me.).....	420
Babcock, State v. (R. I.).....	685	Boston & M. R. R., Little v. (N. H.).....	190
Bainbridge v. Union Traction Co. (Pa.)...	836	Boston & M. R. R., Myers v. (N. H.).....	892
Baker, Moore v. (N. J. Ch.).....	106	Boston & M. R. R., Stone v. (N. H.).....	359
Baldwin v. Pennsylvania Fire Ins. Co. (Pa.)	970	Bosworth v. Union R. Co. (R. I.).....	490
Baldwin v. Tucker (N. J. Err. & App.).....	1132	Bowden v. Derby (Me.).....	417
Baltimore, Joesting v. (Md.).....	456	Bowers, Johnston v. (N. J. Sup.).....	230
Baltimore, Knight v. (Md.).....	388	Bowie v. Smith (Md.).....	625
Baltimore County Com'rs, Herbert v. (Md.).....	376	Howman v. Knorr, two cases (Pa.).....	976
Baltimore Trust & Guarantee Co. of Baltimore City, Findlay v. (Md.).....	379	Boyden, Hawkins v. (R. I.).....	324
Baltimore & O. R. Co., Campbell v. (Md.)	532	Bradford, Contas v. (Pa.).....	989
Baltimore & O. R. Co., Ouster v. (Pa.)...	1130	Brainerd, Fletcher v. (Vt.).....	608
Bamford Bros. Silk Mfg. Co., Koch v. (N. J. Err. & App.).....	271	Brew v. Hastings (Pa.).....	922
Bancroft v. Magill (N. J. Sup.).....	103	Bridgeman Bros. Co. v. Swing (Pa.).....	26
Barclay v. Barclay (Pa.).....	985	Bristol & Warren Waterworks, Town of Bristol v. (R. I.).....	710
Bares, Shmilovitz v. (Conn.).....	560	Broderick, Lahey v. (N. H.).....	354
Barker v. David (Del. Super.).....	334	Brotherhood of the Union, O'Brien v. (Conn.).....	577
Barlow Bros. Co. v. John W. Gaffney & Co. (Conn.).....	582	Brown v. Edwards (Me.).....	492
Barnard, Knupp v. (Pa.).....	981	Brown v. Ellsworth (N. H.).....	356
Barnes Mfg. Co., Green v. (N. J. Sup.)...	1083	Brown v. Paterson Parchment Paper Co. (N. J. Sup.).....	87
Bartlett v. Gilcreast (N. H.).....	189	Brown v. Rasin Monumental Co. of Baltimore City (Md.).....	391
Barton v. Harker (N. J. Sup.).....	105	Brown v. Street Lighting Dist. No. 1 of Woodbridge Tp. (N. J. Sup.).....	1080
Bassett v. New Haven, two cases (Conn.)..	579	Brown v. White (Pa.).....	848
		Brown, Hurlbutt v. (N. H.).....	1046
		Brown, Starkweather v. (R. I.).....	324
		Brown, Starkweather & Shepley v. (R. I.)	201

	Page		Page
Browne, Willey v. (Pa.).....	1029	Cole, McCrillis v. (R. I.).....	196
Browning v. Browning (N. J. Sup.).....	101	Coleman, Commonwealth Title Ins. & Trust Co. v. (Pa.).....	320
Browning, Canfield v. (N. J. Sup.).....	101	Coles & Sons Co. v. Blythe (N. J. Err. & App.).....	816
Brown's Ex'r v. Dunn's Estate (Vt.).....	364	Colgate, Slattery v. (R. I.).....	639
Brownsville Ave. St. R. Co., Borough of Montooth v. (Pa.).....	1036	Collins v. Toppin (N. J. Ch.).....	124
Brown University, Tillinghast v. (R. I.).....	758	Collins, O'Brien v. (Pa.).....	322
Brunswick Traction Co., Foley v. (N. J. Sup.).....	803	Colloty, Smith v. (N. J. Err. & App.).....	805
Bulletin Co., Naulty v. (Pa.).....	862	Colmary, Petit v. (Del. Super.).....	344
Bullock, Spaulding v. (Pa.).....	965	Colonial Woolen Co. v. Trenton Water Power Co. (N. J. Ch.).....	993
Burgess v. Shepherd (Me.).....	415	Comins, Mechanics' Nat. Bank v. (N. H.).....	191
Burke, In re (R. I.).....	825	Commercial & Farmers' Nat. Bank v. McCormick (Md.).....	439
Burke v. Ellinwood (N. H.).....	1132	Commissioners of Assessments of East Orange, Rowe v. (N. J. Sup.).....	649
Burke v. Wright (Conn.).....	14	Commissioners of Town of Laurel, George W. Emory & Co. v. (Del. Super.).....	1118
Burnham, Kase v. (Pa.).....	1028	Commonwealth v. Lenousky (Pa.).....	977
Burriss, Craig v. (Del. Super.).....	353	Commonwealth v. Pittsburg (Pa.).....	1058
Rush, Temple v. (Conn.).....	557	Commonwealth v. Shortall (Pa.).....	952
Butler, Woodruff v. (Conn.).....	167	Commonwealth v. Sutton (Pa.).....	781
Butterman v. McClintic-Marshall Const. Co. (Pa.).....	839	Commonwealth Title Ins. & Trust Co. v. Coleman (Pa.).....	320
Cahill, Meyer v. (N. J. Sup.).....	1134	Concord & M. R. R., Leighton v. (N. H.).....	938
Callahan, Booth v. (Md.).....	625	Connecticut Fire Ins. Co. of Hartford v. Cohen (Md.).....	675
Camden & S. R. Co., Adams v. (N. J. Err. & App.).....	254	Connecticut Trust & Safe Deposit Co. v. Chase (Conn.).....	171
Camden & S. R. Co., Zolpher v. (N. J. Err. & App.).....	249	Conshohocken Borough v. Conshohocken R. Co. (Pa.).....	855
Campbell v. Baltimore & O. R. Co. (Md.).....	532	Conshohocken R. Co., Conshohocken Borough v. (Pa.).....	855
Campbell v. T. A. Gillespie Co. (N. J. Err. & App.).....	276	Consolidated Fruit Jar Co., United New Jersey R. & Canal Co. v. (N. J. Ch.).....	46
Canfield v. Browning (N. J. Sup.).....	101	Consolidated Mineral Water Co., Field & Slocomb v. (R. I.).....	757
Carlucci, McCollum v. (Pa.).....	979	Consolidated Mineral Water Co., Scannevin & Potter v. (R. I.).....	751
Carney, State v. (N. J. Sup.).....	44	Contas v. Bradford (Pa.).....	989
Carpenter v. Webb (Del. Super.).....	1011	Cook v. Anderson Food Co. (N. J. Ch.).....	1042
Carragan, Gansevoort Bank v. (N. J. Err. & App.).....	741	Cook, State v. (Del. Gen. Sess.).....	1012
Carson v. Austin (Pa.).....	1135	Corbin, Uncas Paper Co. v. (Conn.).....	165
Carswell v. Patzowski (Del. Super.).....	342	Corbliss' Will, In re (N. J. Err. & App.).....	1132
Carswell v. Patzowski (Del. Super.).....	1013	Covey, Wickford Sav. Bank v. (R. I.).....	684
Carter v. Carter (N. J. Err. & App.).....	1132	Courtney v. William Knabe & Co. Mfg. Co. of Baltimore (Md.).....	614
Cassard, Peter Adams Paper Co. v. (Pa.).....	949	Cowen v. Bloomberg (N. J. Sup.).....	36
C. B. Coles & Sons Co. v. Blythe (N. J. Err. & App.).....	816	Cowett v. American Woolen Co. (Me.).....	494
Central R. Co. of New Jersey, Dwajkowski v. (N. J. Sup.).....	100	Craig v. Burris (Del. Super.).....	353
Central R. Co. of New Jersey, Miller v. (N. J. Err. & App.).....	245	Crawford, Duysters v. (N. J. Sup.).....	823
Chalfant, Ocean City Ass'n v. (N. J. Oh.).....	801	Croasdale v. Von Boyneburgk (Pa.).....	770
Chapman, State v. (N. J. Sup.).....	94	Cronan, Goldreyer v. (Conn.).....	594
Chardavoyne, Mechanics' Bank v. (N. J. Err. & App.).....	1080	Crosby v. Miller, Vaughn & Co. (R. I.).....	328
Chase, Connecticut Trust & Safe Deposit Co. v. (Conn.).....	171	Crosby, Phillips v. (N. J. Sup.).....	814
Chickering, State v. (N. H.).....	937	Crossan, Herbener v. (Del. Super.).....	221
Chmielewski, Laner Brewing Co. v. (Pa.).....	841	Crossan, Herbener v. (Del. Super.).....	223
C. H. Pearson Packing Co., Moore v. (Del. Super.).....	5	Crowe v. Nanticoke Light Co. (Pa.).....	1038
Citizens' Electric Light & Power Co., Lansdowne v. (Pa.).....	919	Crowe, Norris v. (Pa.).....	1125
Citizens' Gas Co. of Port Alleghany, Gray v. (Pa.).....	988	Crowley Co. v. Myers (N. J. Err. & App.).....	305
City of Baltimore v. Safe Deposit & Trust Co. of Baltimore (Md.).....	316	Culver v. Lieberman (N. J. Err. & App.).....	812
City of Philadelphia v. Neill (Pa.).....	1032	Cunningham, State v. (Vt.).....	654
City of Philadelphia v. Pemberton (Pa.).....	835	Currie v. New York Transit Co. (N. J. Ch.).....	1135
City of Philadelphia v. Philadelphia Traction Co. (Pa.).....	762	Custer v. Baltimore & O. R. Co. (Pa.).....	1130
City of Williamsport v. Williamsport Pass. R. Co. (Pa.).....	836	C. W. Leatherbee Lumber Co., Hirsch v. (N. J. Sup.).....	645
Clair v. Manchester (N. H.).....	935	Dailey v. Frey (Pa.).....	962
Clark v. Maksoodian (R. I.).....	640	Darnell, Truitt v. (N. J. Ch.).....	692
Clark, Searing v. (N. J. Sup.).....	690	David, Barker v. (Del. Super.).....	334
Clarke, Spencer v. (R. I.).....	329	Davis v. Starrett (Me.).....	516
Clear Spring Water Co., Leiby v. (Pa.).....	782	Davis, Board of Home Missions v. (N. J. Ch.).....	466
Clement, Miller v. (Pa.).....	32	Dawley v. Wilcox (R. I.).....	753
Cleveland v. Bergen Bldg. & Imp. Co. (N. J. Ch.).....	117	Day v. Boston & M. R. (Me.).....	420
Cloman, Maryland Telephone & Telegraph Co. v. (Md.).....	681	Day, Fairfield v. (N. H.).....	219
Clough, State v. (N. H.).....	554	De Gray v. Murray (N. J. Sup.).....	237
Coatesville & D. St. R. Co. v. West Chester St. R. Co. (Pa.).....	844	Delaney, De Long v. (Pa.).....	965
Codd Co. v. Parker (Md.).....	623	Delaware Cotton Co., Kennedy v. (Del. Super.).....	7
Cohen, Connecticut Fire Ins. Co. of Hartford v. (Md.).....	675	Delaware, L. & W. R. Co., Blauvelt v. (Pa.).....	857
		Delaware, L. & W. R. Co., Field v. (N. J. Err. & App.).....	241

	Page		Page
Delaware, L. & W. R. Co., McGrath v. (N. J. Err. & App.).....	242	Eureka Tempered Copper Co., Wright v. (Pa.).....	978
Delaware, L. & W. R. Co., Oeffinger v. (N. J. Sup.).....	1134	Evans, Wheeling Steel & Iron Co. v. (Md.)	373
Delaware & A. Telegraph & Telephone Co., Hackney v. (N. J. Err. & App.)....	252	Everhart, Lehigh Valley Coal Co. v. (Pa.)	864
De Long v. Delaney (Pa.).....	965	Kyre's Estate, In re (Pa.).....	541
De Maio, State v. (N. J. Sup.).....	644	Eyth, S. B. Ellis Co. v. (N. J. Sup.).....	54
Demeritt v. Young (N. H.).....	1047	Fahey, Reynolds v. (Del. Super.).....	221
Derby, Bowden v. (Me.).....	417	Fairfield v. Day (N. H.).....	219
De Wolf, Heinemann v. (R. I.).....	707	Fanwood Tp., Unger v. (N. J. Sup.).....	42
Diehl v. Blair (N. J. Sup.).....	1133	Farwell, Dole v. (N. H.).....	553
Di Guglielmo, State v. (Del. Gen. Sess.)..	350	Fell v. H. Fell Poultry Co. (N. J. Err. & App.).....	236
Dime Sav. Bank v. McAlenney (Conn.)..	1019	Fell Poultry Co., Fell v. (N. J. Err. & App.).....	236
Dimick v. Metropolitan Life Ins. Co. (N. J. Err. & App.).....	291	Fernald, Roberts v. (N. H.).....	942
Dives v. Fidelity & Casualty Co. of New York (Pa.).....	950	Fidelity Building & Loan Ass'n, Tyler v. (Del. Super.).....	714
Dobler, Marshall v. (Md.).....	704	Fidelity & Casualty Co. of New York, Dives v. (Pa.).....	950
Dochkus v. Lithuanian Ben. Soc. of St. Anthony (Pa.).....	779	Field v. Delaware, L. & W. R. Co. (N. J. Err. & App.).....	241
Doe v. Roe (Del. Super.).....	341	Field & Slocomb v. Consolidated Mineral Water Co. (R. I.).....	757
Dole v. Farwell (N. H.).....	553	Findlay v. Baltimore Trust & Guarantee Co. of Baltimore City (Md.).....	379
Donahoe v. Star Pub. Co. (Del. Super.)..	337	Fink v. Van Fossen (Pa.).....	1054
Donald, Rice v. (Md.).....	620	Finley, State v. (Del. Gen. Sess.).....	1010
Donnelly, Trenton Trust & Safe Deposit Co. v. (N. J. Ch.).....	92	First Church of Christ, Scientist, In re (Pa.).....	536
Donner's Ex'rs, In re (N. J. Prerog.).....	1104	Fitzpatrick v. Union Traction Co. (Pa.)..	1050
Donohoe v. Lonsdale Co. (R. I.).....	326	Flanagan, State v. (R. I.).....	876
Donohoe v. Wilmington City R. Co. (Del. Super.).....	1011	Flemington, Bellis v. (N. J. Err. & App.)..	300
Donohugh v. Lister (Pa.).....	23	Fleischhut v. Lehigh Valley R. Co. (Pa.)..	1039
Donovan, State v. (Vt.).....	611	Fletcher v. Brainerd (Vt.).....	608
Doolan, Munger v. (Conn.).....	169	Fletcher Co. v. International Ass'n of Machinists (N. J. Ch.).....	1077
Doremus v. Paterson (N. J. Err. & App.)..	304	Fletcher Co., Atkins v. (N. J. Ch.).....	1074
Doughty, McMullen v. (N. J. Ch.).....	115	Fogler, Furber v. (Me.).....	514
Doughty, McMullen v. (N. J. Ch.).....	284	Foley v. Brunswick Traction Co. (N. J. Sup.).....	803
Douglass, Unmack v. (Conn.).....	12	Forsyth, Hunter v. (Pa.).....	26
Dover, Roberts Bros. v. (N. H.).....	895	Foster v. Sargent (N. H.).....	423
Doyle v. Whitridge (Md.).....	459	Foster, Preston v. (Conn.).....	558
Dries' Will, In re (N. J. Prerog.).....	814	Fountain Water Co., King v. (Conn.)....	10
Drum v. Drum (N. J. Sup.).....	86	Fox v. Smith (R. I.).....	698
Du Bois v. Bormann (N. J. Ch.).....	634	Fralinger, Marvel v. (N. J. Ch.).....	818
Dunn's Estate, Brown's Ex'r v. (Vt.).....	364	Francis, Pease v. (R. I.).....	686
Duvall v. Hambleton & Co. (Md.).....	431	Frank v. Pennsylvania R. Co., two cases (N. J. Sup.).....	691
Duysters v. Crawford (N. J. Sup.).....	823	Franklin v. Warwick & Coventry Water Co. (R. I.).....	934
Dwajakowski v. Central R. Co. of New Jersey (N. J. Sup.).....	100	Fraternities Acc. Order, Weigand v. (Md.)	530
Dyer v. Union R. Co. (R. I.).....	688	Free, English v. (Pa.).....	777
Dyer, Thompson v. (R. I.).....	824	Freehold & J. Agricultural R. Co., Allaire Water Supply & Land Co. v. (N. J. Sup.).....	1133
Earl, Stevenson v. (N. J. Err. & App.).....	1091	Fretz, Rhymer v. (Pa.).....	959
Easton & N. St. R. Co., Shimer v. (Pa.)...	769	Frey, Dailey v. (Pa.).....	962
Eaton v. Ellsworth (N. H.).....	356	Fridenberg, National Bank v. (Pa.).....	960
Eberly v. Shirk (Pa.).....	1071	Frishie v. Morris (Conn.).....	9
Ebert v. Johns (Pa.).....	1064	Furber v. Fogler (Me.).....	514
Edwards, Brown v. (Me.).....	492	Furth v. Stahl (Pa.).....	29
Ege, Appeal of (Pa.).....	963	Gaddis, Grand Lodge A. O. U. W. v. (N. J. Ch.).....	465
Einwachter, Haines v. (N. J. Ch.).....	38	Gaffney & Co., Barlow Bros. Co. v. (Conn.)	582
El J. Codd Co. v. Parker (Md.).....	623	Gallagher v. Asphalt Co. of America (N. J. Ch.).....	259
Ela v. Ela (N. H.).....	358	Gallagher, Mallory v. (Conn.).....	209
Elizabethport Banking Co., Smith v. (N. J. Err. & App.).....	248	Gallowshaw v. Lonsdale Co. (R. I.).....	932
Elizabeth, P. & C. J. R. Co., Lee v. (N. J. Sup.).....	106	Galupo, Moore v. (N. J. Ch.).....	628
Ellinwood, Burke v. (N. H.).....	1132	Gans, Swedesboro Loan & Building Ass'n v. (N. J. Ch.).....	82
Elliot, Irvine v. (Pa.).....	859	Gansevoort Bank v. Carragan (N. J. Err. & App.).....	741
Ellis v. Ellis (N. J. Err. & App.).....	103	Garcin v. Roberts (N. J. Sup.).....	43
Ellis Co. v. Eyth (N. J. Sup.).....	54	Garrison v. United Railways & Electric Co. of Baltimore (Md.).....	371
Ellsworth, Brown v. (N. H.).....	356	Geary v. New Haven (Conn.).....	584
Ellsworth, Eaton v. (N. H.).....	356	Gehr v. McDowell (Pa.).....	851
Ellwanger v. Moore (Pa.).....	966	Geist v. Rapp (Pa.).....	1063
Ellwanger v. Moore (Pa.).....	1135	George W. Emory & Co. v. Commissioners of Town of Laurel (Del. Super.).....	1118
Elmgren v. Elmgren (R. I.).....	322	Germantown Real Estate Deposit & Trust Co. v. Moore, two cases (Pa.).....	1135
Emory & Co. v. Commissioners of Town of Laurel (Del. Super.).....	1118		
Empire Transp. Co. v. Johnson (Conn.)....	587		
English v. Free (Pa.).....	777		
English v. Rainear (N. J. Ch.).....	41		
Ennis v. R. B. Little & Co. (R. I.).....	884		
Enright v. Oliver & Burr (N. J. Err. & App.).....	277		
Epstein, State v. (R. I.).....	204		
Equitable Trust Co., Wheeler v. (Pa.)....	1065		
Erie R. Co., Huebner v. (N. J. Err. & App.).....	273		

	Page		Page
Gerrish v. Whitfield (N. H.).....	551	Hewes v. Hurff (N. J. Err. & App.).....	275
Gilcreast, Bartlett v. (N. H.).....	189	H. Fell Poultry Co., Fell v. (N. J. Err. & App.).....	236
Gill v. Staylor (Md.).....	398	Hicks v. Long Branch Commission (N. J. Err. & App.).....	250
Gillespie Co., Campbell v. (N. J. Err. & App.).....	276	Hinnershitz v. United Traction Co. (Pa.)..	841
Glenn v. Philadelphia & W. C. Traction Co. (Pa.).....	860	Hirsch v. O. W. Leatherbee Lumber Co. (N. J. Sup.).....	645
Glezen, Haskins v. (R. I.).....	639	Hitt, Varick v. (N. J. Ch.).....	139
Godfrey v. Bennington Water Co. (Vt.)..	654	Hoboken, Riccio v. (N. J. Err. & App.).....	1109
Godfrey v. Roberts (N. J. Ch.).....	353	Hodge v. Wetzler (N. J. Sup.).....	49
Goebel v. Pomeroy Bros. Co. (N. J. Sup.)..	690	Hodnett's Will, In re (N. J. Prerog.).....	75
Gold Bluff Mining & Lumber Corp. v. Whitlock (Conn.).....	175	Hogg's Estate, In re (Pa.).....	1057
Goldreier v. Cronan (Conn.).....	594	Hollister, Loomis v. (Conn.).....	561
Goss, Stone v. (N. J. Err. & App.).....	736	Holmes v. Standard Pub. Co. (N. J. Ch.)..	1107
Gourley, Miller v. (N. J. Ch.).....	1083	Holmes, State v. (Del. Gen. Sess.).....	343
Grand Lodge, A. O. U. W., v. Gaddis (N. J. Ch.).....	465	Holt v. Pennsylvania R. Co. (Pa.).....	1055
Graves v. Spry (Del. Super.).....	334	Hopewell v. Board of Trustees of Village of Flemington (N. J. Sup.).....	653
Gray v. Citizens' Gas Co. of Port Alleghany (Pa.).....	988	Horne v. Hutchins (N. H.).....	361
Grayson, Hanbest v. (Pa.).....	786	Hottle v. Weaver (Pa.).....	838
Greason, In re (Pa.).....	788	Hoxsie, Thompson v. (R. I.).....	930
Green v. Barnes Mfg. Co. (N. J. Sup.).....	1083	Hoyt v. Hancock (N. J. Prerog.).....	1004
Grey v. Morris & Cummings Dredging Co. (N. J. Ch.).....	59	Huebner v. Erie R. Co. (N. J. Err. & App.)	273
Guarantors' Liability Indemnity Co. of Pennsylvania, Quakertown & E. R. Co. v. (Pa.).....	1136	Hughes v. Miller (Pa.).....	793
Guarantors' Liability Indemnity Co. of Philadelphia, Quakertown & E. R. Co. v. (Pa.).....	1033	Humphrey, Stout v. (N. J. Err. & App.)...	281
Guardian Printing & Publishing Co., Knowlden v. (N. J. Err. & App.).....	287	Hunter v. Forsyth (Pa.).....	26
Gunn, Titus v. (N. J. Err. & App.).....	735	Hunterson v. Union Traction Co. (Pa.)....	543
Hackett v. Webster (Md.).....	480	Hurff, Hewes v. (N. J. Err. & App.).....	275
Hackney v. Delaware & A. Telegraph & Telephone Co. (N. J. Err. & App.).....	252	Hurlbutt v. Brown (N. H.).....	1046
Haight, Young v. (N. J. Sup.).....	100	Hutchins, Horne v. (N. H.).....	361
Haines v. Einwachter (N. J. Ch.).....	38	Hutchinson, Libby v. (N. H.).....	547
Hall v. Hall (N. J. Err. & App.).....	300	Iannucci, State v. (Del. Gen. Sess.).....	336
Hall, Hawkins v. (Del. Super.).....	4	Inland Traction Co., North Pennsylvania R. Co. v. (Pa.).....	774
Hallinger v. Zimmerman (N. J. Err. & App.).....	1132	Insurance Co. of Pennsylvania, Melcher v. (Me.).....	411
Hallwood Cash Register Co., Roth v. (Md.)..	1132	International Ass'n of Machinists, W. & A. Fletcher Co. v. (N. J. Ch.).....	1077
Hallwood Cash Register Co., Smith v. (Md.).....	525	Irvine v. Elliott (Pa.).....	859
Hallwood Cash Register Co., Wunder v. (Md.).....	1132	Irvine's Estate, In re (Pa.).....	795
Hambleton & Co., Duvall v. (Md.).....	431	Ivins v. Trenton (N. J. Err. & App.).....	1132
Hanbest v. Grayson (Pa.).....	786	J. C. Smith & Wallace Co. v. Lambert (N. J. Sup.).....	88
Hancock v. Supreme Council Catholic Benev. Legion (N. J. Err. & App.).....	246	Jenkins v. Scranton (Pa.).....	788
Hancock, Hoyt v. (N. J. Prerog.).....	1004	Jennings v. Union Traction Co. (Pa.)....	765
Hardcastle v. Stiles & McClay (N. J. Sup.)	104	Jersey City, H. & P. St. R. Co., Heidecamp v. (N. J. Err. & App.).....	239
Harker, Barton v. (N. J. Sup.).....	105	Jersey City, H. & P. St. R. Co., Schreck v. (N. J. Sup.).....	650
Harrigan, State v. (Del. Gen. Sess.).....	5	Jersey City Paper Co., In re (N. J. Sup.)	280
Harris v. Harris (Pa.).....	30	Joesting v. Baltimore (Md.).....	458
Hart v. Knapp (Conn.).....	1021	Johns, Ebert v. (Pa.).....	1064
Hartford Manilla Co., Wells v. (Conn.).....	599	Johns, Sargent v. (Pa.).....	1051
Hartford & W. H. Horse R. Co., Mersick v. (Conn.).....	664	Johuson, Empire Transp. Co. v. (Conn.)..	587
Haskins v. Glezen (R. I.).....	639	Johnston v. Bowers (N. J. Sup.).....	230
Hastings, Brew v. (Pa.).....	922	John W. Gaffney & Co., Barlow Bros. Co. v. (Conn.).....	582
Hatch, Richardson v. (N. J. Ch.).....	1115	Jolls v. Keegan (Del. Super.).....	340
Hathaway v. Osborne (R. I.).....	700	Jones v. Probate Court of East Greenwich (R. I.).....	881
Hawkins v. Boyden (R. I.).....	324	Jordan, Merritt v. (N. J. Ch.).....	1001
Hawkins v. Hall (Del. Super.).....	4	J. R. T. Samarreg Co., Saunders v. (Pa.)..	763
Hayes v. United States Phonograph Co. (N. J. Ch.).....	84	J. S. Rogers Co., Snyder v. (N. J. Err. & App.).....	303
Headley v. Leavitt (N. J. Err. & App.)...	731	Juniata Farmers' Mut. Fire Ins. Co., Shuman v. (Pa.).....	1069
Heidecamp v. Jersey City, H. & P. St. R. Co. (N. J. Err. & App.).....	239	J. W. Bishop Co., Paoline v. (R. I.).....	752
Heinemann v. De Wolf (R. I.).....	707	Kane's Estate, In re (Pa.).....	917
Hemsey v. Marlborough Hotel Co. (N. J. Ch.).....	994	Karnuff v. Kelch (N. J. Sup.).....	163
Hendrick v. Probate Court of East Greenwich (R. I.).....	881	Kase v. Burnham (Pa.).....	1028
Henning, Keeney v. (N. J. Ch.).....	88	Keegan, Jolls v. (Del. Super.).....	340
Herbener v. Crossan (Del. Super.).....	221	Keeney v. Henning (N. J. Ch.).....	88
Herbener v. Crossan (Del. Super.).....	223	Kelch, Karnuff v. (N. J. Sup.).....	163
Herbert v. Baltimore County Com'rs (Md.)	376	Kelley v. Shay (Pa.).....	925
Herr, Pfefferle v. (N. J. Ch.).....	1103	Kelley v. Shay (Pa.).....	927
Hertel, United Railways & Electric Co. of Baltimore v. (Md.).....	428	Kelley v. Shay (Pa.).....	1135
		Kemp, Swan v. (Md.).....	441
		Kennedy v. Delaware Cotton Co. (Del. Super.).....	7
		Kennelly, State v. (Conn.).....	555
		Kent v. Phenix Art Metal Co. (N. J. Sup.)	256
		Killam Carriage Co., Unmack v. (Conn.)..	12

	Page		Page
King v. Fountain Water Co. (Conn.).....	10	McAlenney, Dime Sav. Bank v. (Conn.)....	1019
King v. McElroy (R. I.).....	638	McAllister, Medairy v. (Md.).....	461
King v. Ryan (N. J. Err. & App.).....	730	McAlpin v. Universal Tobacco Co. (N. J. Ch.).....	999
Kipp, McFarlane & Co. v. (Pa.).....	983	McAndrew's Estate, In re (Pa.).....	1040
Knabe & Co. Mfg. Co. of Baltimore, Courtney v. (Md.).....	614	McClintic-Marshall Const. Co., Butterman v. (Pa.).....	839
Knapp, Hart v. (Conn.).....	1021	McCloskey v. McCloskey (Pa.).....	180
Knarr, Kossouf v. (Pa.).....	854	McCollum v. Carlucci (Pa.).....	979
Knickerbocker Trust Co. v. Penn. Cordage Co. (N. J. Ch.).....	231	McConnell v. Pennsylvania R. Co. (Pa.)....	1029
Knight v. Baltimore (Md.).....	388	McCormick, Commercial & Farmers' Nat. Bank v. (Md.).....	439
Knight v. Somerton Hills Cemetery (Pa.)..	535	McCrillis v. Cole (R. I.).....	196
Knorr, Bowman v., two cases (Pa.).....	976	McDaniel v. Townsend (Del. Super.).....	6
Knowlden v. Guardian Printing & Publishing Co. (N. J. Err. & App.).....	287	McDermott v. Sinking Fund Com'rs of Jersey City (N. J. Sup.).....	37
Knowles v. Knowles (R. I.).....	755	McDonald v. Standard Oil Co. (N. J. Err. & App.).....	289
Knupp v. Barnard (Pa.).....	981	McDowell, Gehr v. (Pa.).....	851
Knupp, Wheeler v. (Pa.).....	979	McElroy, King v. (R. I.).....	638
Koch v. Bamford Bros. Silk Mfg. Co. (N. J. Err. & App.).....	271	McFall, Martin v. (N. J. Ch.).....	465
Kohr, Perrine v. (Pa.).....	790	McFarlane & Co. v. Kipp (Pa.).....	986
Kossouf v. Knarr (Pa.).....	854	McGarrity v. New York, N. H. & H. R. Co. (R. I.).....	718
Krause v. Krause (N. J. Ch.).....	1095	McGee's Estate, In re (Pa.).....	776
Kuntz v. New York, O. & St. L. R. Co. (Pa.).....	915	McGoran v. New York, N. H. & H. R. Co. (R. I.).....	929
Lahey v. Broderick (N. H.).....	354	McGrath v. Delaware, L. & W. R. Co. (N. J. Err. & App.).....	242
Lakeland v. North Jersey St. R. Co. (N. J. Sup.).....	1133	McKeag, Warwick Iron & Steel Co. v. (Pa.).....	179
Lambert, J. O. Smith & Wallace Co. v. (N. J. Sup.).....	88	McKenna's Will, In re (R. I.).....	696
Lane v. Lane (Del. Sup.).....	184	McKensey v. McKensey (N. J. Ch.).....	1073
Lansdowne v. Citizens' Electric Light & Power Co. (Pa.).....	919	McKeon, Mullen v. (R. I.).....	747
Lantry v. Sage (N. J. Sup.).....	34	McMahon v. North Jersey St. R. Co. (N. J. Sup.).....	1133
Larkins v. Lindsay (Pa.).....	184	McMahon, Northern Cent. R. Co. v. (Md.)..	627
Lauer Brewing Co. v. Chmielewski (Pa.)....	841	McMahon, State v. (Conn.).....	591
Lavigne v. New Haven (Conn.).....	569	McMullen v. Doughty (N. J. Ch.).....	115
Law & Order Soc. v. Wilmington (Del. Super.).....	1	McMullin v. Doughty (N. J. Ch.).....	284
Layton, Asbury Park v. (N. J. Sup.).....	86	Macon Knitting Co. v. Leicester Mills Co. (N. J. Ch.).....	401
Leatherbee Lumber Co., Hirsch v. (N. J. Sup.).....	645	MacQueen, State v. (N. J. Sup.).....	45
Leavitt, Headley v. (N. J. Err. & App.)....	731	MacQueen, State v. (N. J. Sup.).....	1006
Leber, Wallace, Muller & Co. v. (N. J. Err. & App.).....	475	McTiernan v. Northrup (N. J. Sup.).....	1133
Lee, In re (N. J. Ch.).....	107	Magill, Bancroft v. (N. J. Sup.).....	103
Lee v. Elizabeth, P. & C. J. R. Co. (N. J. Sup.).....	106	Maksoodian, Clark v. (R. I.).....	640
Lee v. Maryland Telephone & Telegraph Co. of Baltimore City (Md.).....	680	Mallory v. Gallagher (Conn.).....	209
Lehigh Valley Coal Co. v. Everhart (Pa.)..	864	Manchester, Clair v. (N. H.).....	935
Lehigh Valley R. Co., Fleschhut v. (Pa.)....	1039	Manchester, New England Telephone & Telegraph Co. v. (N. H.).....	188
Leiby v. Clear Spring Water Co. (Pa.).....	782	Manhattan Life Ins. Co., Seely v. (N. H.)..	425
Leicester Mills Co., Macon Knitting Co. v. (N. J. Ch.).....	401	Mann v. Perr (Del. Super.).....	335
Leighton v. Concord & M. R. R. (N. H.)..	938	Manning v. Linsley (N. J. Ch.).....	1043
Lenonsky, Commonwealth v. (Pa.).....	977	Mansfield's Estate, In re (Pa.).....	784
Le Valley, Municipal Court of City of Providence v. (R. I.).....	640	Mariner, Asbury Park v. (N. J. Sup.).....	86
Lewis v. White (Del. Super.).....	830	Marlborough Hotel Co., Hemsley v. (N. J. Ch.).....	994
Lewis, Monahan v. (Del. Super.).....	1	Marshall v. Dobler (Md.).....	704
Lewis, State v. (Del. Gen. Sess.).....	3	Marshall v. Pilots' Ass'n (Pa.).....	916
Lewiston, Whitman v. (Me.).....	414	Marsh's Estate, In re (N. J. Prerog.).....	299
Libby v. Hutchinson (N. H.).....	547	Martin v. McFall (N. J. Ch.).....	463
Lieberman, Culver v. (N. J. Err. & App.)..	812	Marvel v. Fralinger (N. J. Ch.).....	818
Linck, Reid v. (Pa.).....	849	Marwick, Virgin v. (Me.).....	520
Lindsay, Larkins v. (Pa.).....	184	Maryland Telephone & Telegraph Co. v. Cloman (Md.).....	681
Linsley, Manning v. (N. J. Ch.).....	1043	Maryland Telephone & Telegraph Co. of Baltimore City, Lee v. (Md.).....	680
Lister v. Lister (N. J. Ch.).....	1093	Masker, Reichmann v. (N. J. Err. & App.)..	301
Lister, Donohugh v. (Pa.).....	23	Meany v. Standard Oil Co. (N. J. Sup.)....	653
Lithuanian Ben. Soc. of St. Anthony, Dochkus v. (Pa.).....	779	Mechanics' Bank v. Chardavoyne (N. J. Err. & App.).....	1080
Little v. Boston & M. R. R. (N. H.).....	190	Mechanics' Nat. Bank v. Comins (N. H.)..	191
Little & Co., Ennis v. (R. I.).....	884	Medairy v. McAllister (Md.).....	461
Locke, Pifer v. (Pa.).....	790	Mcgray's Estate, In re (Pa.).....	963
Long Branch Commission, Hicks v. (N. J. Err. & App.).....	250	Melcher v. Insurance Co. of Pennsylvania (Me.).....	411
Lonsdale Co., Donohoe v. (R. I.).....	326	Mercer, Valley Sav. Bank of Middletown, Frederick County, v. (Md.).....	435
Lonsdale Co., Gallowshaw v. (R. I.).....	932	Merchants' & Manufacturers' Fire Ins. Co., Schilansky v. (Del. Super.).....	1014
Loomis v. Hollister (Conn.).....	561	Meredith Creamery, True v. (N. H.).....	893
Lubrasky, Newcomb v. (N. J. Ch.).....	89	Merritt v. Jordan (N. J. Ch.).....	1001
Lutz v. Alkazin (N. J. Ch.).....	1041	Mersick v. Hartford & W. H. Horse R. Co. (Conn.).....	604
Lynch, Murray v. (N. J. Err. & App.)....	1133		
Lynch, State v. (N. H.).....	553		

	Page		Page
Metropolitan Life Ins. Co., Dimick v. (N. J. Err. & App.).....	291	Neshaminy Elevated R. Co., Philadelphia & T. R. Co. v. (Pa.).....	1034
Metropolitan Museum of Art, Pennington v. (N. J. Ch.).....	468	Newark, Wallace v. (N. J. Sup.).....	1073
Metting v. North Jersey St. R. Co. (N. J. Sup.).....	35	Newcomb v. Lubrasky (N. J. Ch.).....	89
Meyer v. Cahill (N. J. Sup.).....	1134	New England Telephone & Telegraph Co. v. Manchester (N. H.).....	188
Middlesex & S. Traction Co., Peter v. (N. J. Sup.).....	35	New England Telephone & Telegraph Co., Poff v. (N. H.).....	891
Mifflinville Bridge, In re (Pa.).....	1122	New Haven, Bassett v., two cases (Conn.).....	579
Mignogna, State v. (N. J. Sup.).....	644	New Haven, Geary v. (Conn.).....	584
Miles & Co. v. Odd Fellows' Mut. Aid Ass'n (Conn.).....	607	New Haven, Lavigne v. (Conn.).....	569
Miller v. Central R. Co. of New Jersey (N. J. Err. & App.).....	245	New Haven Mfg. Co. v. New Haven Pulp & Board Co. (Conn.).....	604
Miller v. Clement (Pa.).....	32	New Haven Pulp & Board Co., New Haven Mfg. Co. v. (Conn.).....	604
Miller v. Gourley (N. J. Ch.).....	1083	Newton v. People's R. Co. (Del. Super.)..	2
Miller v. Wilkesbarre Gas Co. (Pa.).....	974	New York Cent. & H. R. R. Co., Randolph v. (N. J. Err. & App.).....	240
Miller, Hughes v. (Pa.).....	793	New York, C. & St. L. R. Co., Kuntz v. (Pa.).....	915
Miller, Vaughn & Co., Crosby v. (R. I.)..	328	New York, N. H. & H. R. Co., McGarrity v. (R. I.).....	718
Milliken's Estate, In re (Pa.).....	853	New York, N. H. & H. R. Co., McGoran v. (R. I.).....	929
Mindermann v. Tillyer (N. J. Sup.).....	690	New York Transit Co., Currie v. (N. J. Ch.).....	1135
Miner, In re (N. J. Ch.).....	1102	Nicholson v. Snyder (Md.).....	484
Minnich's Estate, In re (Pa.).....	1067	Norris v. Baumgardner (Md.).....	619
Mitchell v. Spaulding (Pa.).....	968	Norris v. Crowe (Pa.).....	1125
Mitchell, Prince George's County Com'rs v. (Md.).....	673	Northern Cent. R. Co. v. McMahon (Md.)..	627
Monahan v. Lewis (Del. Super.).....	1	North Jersey St. R. Co., Lakeland v. (N. J. Sup.).....	1133
Moore v. Baker (N. J. Ch.).....	106	North Jersey St. R. Co., McMahon v. (N. J. Sup.).....	1133
Moore v. C. H. Pearson Packing Co. (Del. Super.).....	5	North Jersey St. R. Co., Metting v. (N. J. Sup.).....	85
Moore v. Galupo (N. J. Ch.).....	628	North Jersey St. R. Co., Rosenberg v. (N. J. Sup.).....	1134
Moore v. Seymour (N. J. Sup.).....	91	North Jersey St. R. Co., Schmidt v. (N. J. Sup.).....	1134
Moore, Ellwanger v. (Pa.).....	966	North Jersey St. R. Co., Zelf v. (N. J. Sup.).....	96
Moore, Ellwanger v. (Pa.).....	1135	North Pennsylvania R. Co. v. Inland Traction Co. (Pa.).....	774
Moore, Germantown Real Estate Deposit & Trust Co. v., two cases (Pa.).....	1135	Northrup, McTiernan v. (N. J. Sup.).....	1133
Moore, Star Loan Ass'n v. (Del. Super.)..	946	Norton v. Perrine (N. J. Err. & App.)....	1133
Morgan, Simmons v. (R. I.).....	522	Norton, Strite v. (Pa.).....	851
Morris, Frisbie v. (Conn.).....	9	Norwalk Heating & Lighting Co. v. Ver-nam (Conn.).....	168
Morris Canal & Banking Co., Ryerson v. (N. J. Sup.).....	98	Nussenholtz, State v. (Conn.).....	589
Morrison v. Taylor (Del. Super.).....	335	O'Brien v. Brotherhood of the Union (Conn.).....	577
Morris & Cummings Dredging Co., Grey v. (N. J. Ch.).....	59	O'Brien v. Collins (Pa.).....	822
Moser v. Union Traction Co. (Pa.).....	15	O'Brien v. Traynor (N. J. Err. & App.)..	807
Moses, Appeal of (Pa.).....	210	O'Callahan, State Mut. Building & Loan Ass'n v. (N. J. Err. & App.).....	1002
Moses, Appeal of (Pa.).....	213	Ocean City Ass'n v. Chalfant (N. J. Ch.)..	801
Moses, Appeal of (Pa.).....	218	Odd Fellows' Mut. Aid Ass'n, Wm. A. Miles & Co. v. (Conn.).....	607
Motter, Washington County Nat. Bank v. (Md.).....	313	Oeffinger v. Delaware, L. & W. R. Co. (N. J. Sup.).....	1134
Moughan, Appeal of (Pa.).....	1040	Ogden, In re (R. I.).....	933
Mullen v. McKeon (R. I.).....	747	Oliver & Burr, Enright v. (N. J. Err. & App.).....	277
Muncy Creek Tp., Smith v. (Pa.).....	767	Opinion of Justices, In re (Me.).....	828
Munger v. Doolan (Conn.).....	169	Opinion of the Justices (N. H.).....	943
Municipal Court v. Whaley (R. I.).....	750	Order of Sparta, Schoales v. (Pa.).....	766
Municipal Court of City of Providence v. Le Valley (R. I.).....	640	O'Reilly, Andrews v. (R. I.).....	689
Munroe, B. F. Smith Fireproof Const. Co. v. (Md.).....	315	O'Reilly, Throckmorton v. (N. J. Ch.)....	56
Murphy v. Prudential Ins. Co. of America (Pa.).....	19	Osborne, Hathaway v. (R. I.).....	700
Murphy, Supreme Council Catholic Beney Legion v. (N. J. Ch.).....	497	Osborne, Wisner v. (N. J. Ch.).....	51
Murray v. Lynch (N. J. Err. & App.).....	1133	Paoine v. J. W. Bishop Co. (R. I.).....	752
Murray v. Pawtuxet Valley St. R. Co. (R. I.).....	491	Parker, E. J. Codd Co. v. (Md.).....	623
Murray, De Gray v. (N. J. Sup.).....	237	Parker Mercantile Co., Puster v. (N. J. Ch.).....	817
Muth v. Booye (N. J. Err. & App.).....	287	Paterson, Doremus v. (N. J. Err. & App.)..	304
Mutual Reserve Fund Life Ass'n, Vincent v. (Conn.).....	177	Paterson Parchment Paper Co., Brown v. (N. J. Sup.).....	87
Myers v. Boston & M. R. R. (N. H.).....	892	Patzowski, Carswell v. (Del. Super.).....	342
Myers, S. E. Crowley Co. v. (N. J. Err. & App.).....	305	Patzowski, Carswell v. (Del. Super.)....	1013
Nanticoke Light Co., Crowe v. (Pa.).....	1038	Pawtuxet Valley St. R. Co., Murray v. (R. I.).....	491
National Bank v. Fridenberg (Pa.).....	960	Payne v. Payne (Md.).....	368
National Bedstead Mfg. Co., Singer v. (N. J. Ch.).....	868		
National Mechanics' Bank, American Bond-ing Co. of Baltimore v. (Md.).....	395		
Natter v. Turner (N. J. Ch.).....	650		
Naulty v. Bulletin Co. (Pa.).....	862		
Neill, City of Philadelphia v. (Pa.).....	1032		
Nelson v. Willey (Md.).....	527		

	Page		Page
Payne v. Sheets (Vt.).....	656	Queen City Glass Co. v. Pittsburg Clay	
Peabody, State v. (R. I.).....	323	Pot Co. (Md.).....	447
Pearson Packing Co., Moore v. (Del.		Quinn v. Board of Police Com'rs of Jersey	
Super.).....	5	City (N. J. Sup.).....	634
Pease v. Francis (R. I.).....	686	Rainear, English v. (N. J. Ch.).....	41
Pemberton, City of Philadelphia v. (Pa.)..	835	Raleigh's Estate, In re (Pa.).....	1119
Penn Oordage Co., Knickerbocker Trust		Randolph v. New York Cent. & H. R. R.	
Co. v. (N. J. Ch.).....	231	Co. (N. J. Err. & App.).....	240
Pennington v. Metropolitan Museum of Art		Rapp, Geist v. (Pa.).....	1063
(N. J. Ch.).....	468	Rasin Monumental Co. of Baltimore City,	
Pennsylvania Fire Ins. Co., Baldwin v.		Brown v. (Md.).....	391
(Pa.).....	970	R. B. Little & Co., Ennis v. (R. I.).....	884
Pennsylvania R. Co., Frank v., two cases		Reading, Stauffer v. (Pa.).....	1072
(N. J. Sup.).....	691	Reid v. Linck (Pa.).....	849
Pennsylvania R. Co., Holt v. (Pa.).....	1055	Reischmann v. Masker (N. J. Err. & App.)	301
Pennsylvania R. Co., McConnell v. (Pa.)..	1029	Reynolds v. Fahey (Del. Super.).....	221
Pennsylvania R. Co., Sanker v. (Pa.).....	833	Reynolds, Adams v. (N. J. Ch.).....	1003
Pennsylvania R. Co., Seifred v. (Pa.).....	1061	Rhode Island Hospital Trust Co. v. Tax	
Pennsylvania R. Co., Smith v. (Pa.).....	768	Assessors of Providence (R. I.).....	877
Pennsylvania R. Co., Snyder v. (Pa.).....	778	Rhode Island Motor Co. v. Providence (R.	
Pennsylvania R. Co., Sutliff v. (Pa.).....	973	I.).....	696
People's R. Co., Newton v. (Del. Super.)..	2	Rhymer v. Fretz (Pa.).....	959
People's R. Co., Wilman v. (Del. Super.)..	332	Ricards v. Safe Deposit & Trust Co. of	
Perr, Mann v. (Del. Super.).....	335	Baltimore (Md.).....	384
Perrine v. Kohr (Pa.).....	790	Riccio v. Hoboken (N. J. Err. & App.)....	1109
Perrine, Norton v. (N. J. Err. & App.)....	1133	Rice v. Donald (Md.).....	620
Perrine, Warwick v. (N. J. Err. & App.)....	738	Rich v. Treu (R. I.).....	492
Peter v. Middlesex & S. Traction Co. (N.		Richardson v. Hatch (N. J. Ch.).....	1115
J. Sup.).....	35	Richmond v. Bennett (Pa.).....	17
Peter Adams Paper Co. v. Cassard (Pa.)..	949	Richmond's Estate, In re (Pa.).....	970
Petit v. Colmary (Del. Super.).....	344	Ridgely v. Wilmer (Md.).....	488
Pfefferle v. Herr (N. J. Ch.).....	1103	Roberts v. Fernald (N. H.).....	942
Phenix Art Metal Co., Kent v. (N. J. Sup.)	256	Roberts, Garcin v. (N. J. Sup.).....	43
Philadelphia, Behl v. (Pa.).....	1029	Roberts, Godfrey v. (N. J. Ch.).....	353
Philadelphia Traction Co., City of Phila-		Roberts Bros. v. Dover (N. H.).....	895
delphia v. (Pa.).....	762	Roe, Doe v. (Del. Super.).....	341
Philadelphia & T. R. Co. v. Neshaminy		Rogers, In re (Vt.).....	661
Elevated R. Co. (Pa.).....	1034	Rogers v. Rogers (Md.).....	450
Philadelphia & W. C. Traction Co., Glenn		Rogers v. Safe Deposit & Trust Co. of	
v. (Pa.).....	860	Baltimore (Md.).....	679
Phillips, In re (R. I.).....	696	Rogers v. Sisters of Charity of St. Joseph	
Phillips v. Crosby (N. J. Sup.).....	814	(Md.).....	318
Phillips' Estate, In re (Pa.).....	210	Rogers Co., Snyder v. (N. J. Err. & App.)	303
Phillips' Estate, In re (Pa.).....	212	Rohrer, Svenson v. (Pa.).....	1070
Phillips' Estate, In re (Pa.).....	213	Rosenberg v. North Jersey St. R. Co. (N.	
Phillips' Estate, In re (Pa.).....	216	J. Sup.).....	1134
Phillips' Estate, In re (Pa.).....	218	Rosenthal, State v. (Vt.).....	610
Pifer v. Locke (Pa.).....	790	Ross v. Board of Chosen Freeholders of	
Pilots' Ass'n, Marshall v. (Pa.).....	916	County of Essex (N. J. Err. & App.)....	310
Pim, Warren v. (N. J. Ch.).....	66	Rosbach v. Beebe (Pa.).....	320
Pittsburg, Commonwealth v. (Pa.).....	1058	Roth v. Hallwood Cash Register Co.	
Pittsburg Clay Pot Co., Queen City Glass		(Md.).....	1132
Co. v. (Md.).....	447	Rowe v. Commissioners of Assessments of	
Pittsley v. Young (Pa.).....	920	East Orange (N. J. Sup.).....	649
Poff v. New England Telephone & Tele-		Rowe, United Rys. & Electric Co. v. (Md.)	703
graph Co. (N. H.).....	891	Ryan, Kinkead v. (N. J. Err. & App.)....	730
Pomeroy Bros. Co., Goebel v. (N. J. Sup.)..	690	Ryerson v. Morris Canal & Banking Co.	
Potter, Appeal of (Pa.).....	27	(N. J. Sup.).....	98
Potter, Probate Court of Westerly v. (R.		Safe Deposit & Trust Co. v. Turner	
I.).....	524	(Md.).....	1023
Potter County Water Co. v. Austin (Pa.)..	991	Safe Deposit & Trust Co. of Baltimore,	
Power v. Power (N. J. Ch.).....	111	City of Baltimore v. (Md.).....	316
Preston v. Foster (Conn.).....	558	Safe Deposit & Trust Co. of Baltimore,	
Prince George's County Com'rs v. Mitchell		Ricards v. (Md.).....	384
(Md.).....	673	Safe Deposit & Trust Co. of Baltimore,	
Probate Court of East Greenwich, Hend-		Rogers v. (Md.).....	679
rick v. (R. I.).....	881	Sage, Lantry v. (N. J. Sup.).....	34
Probate Court of East Greenwich, Jones		Samarreg Co., Saunders v. (Pa.).....	763
v. (R. I.).....	881	Sanker v. Pennsylvania R. Co. (Pa.).....	833
Probate Court of Westerly v. Potter (R. I.)	524	Sargent v. Johns (Pa.).....	1051
Providence, Rhode Island Motor Co. v.		Sargent, Foster v. (N. H.).....	423
(R. I.).....	696	Saunders v. J. R. T. Samarreg Co. (Pa.)..	763
Providence County Sav. Bank v. Vadrals		Saunders v. Sutton (N. J. Sup.).....	652
(R. I.).....	754	S. B. Ellis Co. v. Eyth (N. J. Sup.).....	54
Prudential Ins. Co. of America, Murphy		Scannevin & Potter v. Consolidated Min-	
v. (Pa.).....	19	eral Water Co. (R. I.).....	754
Pucca, State v. (Del. Gen. Sess.).....	831	Schaun, Western Maryland R. Co. v. (Md.)	701
Puster v. Parker Mercantile Co. (N. J. Ch.)	817	Schilansky v. Merchants' & Manufactur-	
Quakertown & E. R. Co. v. Guarantors'		ers' Fire Ins. Co. (Del. Super.).....	1014
Liability Indemnity Co. of Pennsylvania		Schmidt v. North Jersey St. R. Co. (N.	
(Pa.).....	1186	J. Sup.).....	1134
Quakertown & E. R. Co. v. Guarantors'		Schoales v. Order of Sparta (Pa.).....	766
Liability Indemnity Co. of Philadelphia		Schoenfeld v. American Can Co. (N. J.	
(Pa.).....	1033	Ch.).....	1044

	Page		Page
Schrader v. Beatty (Pa.).....	958	State v. Iannucci (Del. Gen. Sess.).....	336
Schreck v. Jersey City, H. & P. St. R. Co. (N. J. Sup.).....	650	State v. Kennelly (Conn.).....	555
Schultz v. Van Doren (N. J. Err. & App.).....	1133	State v. Lewis (Del. Gen. Sess.).....	3
Schuylkill County v. Shoener (Pa.).....	791	State v. Lynch (N. H.).....	553
Schwind Quarry Co. of Baltimore City, State v. (Md.).....	366	State v. McMahon (Conn.).....	591
Scranton, Jenkins v. (Pa.).....	783	State v. MacQueen (N. J. Sup.).....	45
Searing v. Clark (N. J. Sup.).....	690	State v. MacQueen (N. J. Sup.).....	1006
S. E. Crowley Co. v. Myers (N. J. Err. & App.).....	305	State v. Mignogna (N. J. Sup.).....	644
Seeley v. Adams (N. J. Ch.).....	820	State v. Nussenholtz (Conn.).....	589
Seely v. Manhattan Life Ins. Co. (N. H.).....	425	State v. Peabody (R. I.).....	323
Selfred v. Pennsylvania R. Co. (Pa.).....	1061	State v. Pucca (Del. Gen. Sess.).....	831
Seymour, Moore v. (N. J. Sup.).....	91	State v. Rosenthal (Vt.).....	610
Shay, Kelley v. (Pa.).....	925	State v. Schwind Quarry Co. of Baltimore City (Md.).....	366
Shay, Kelley v. (Pa.).....	927	State v. Sienkiewicz (Del. Gen. Sess.).....	346
Shay, Kelley v. (Pa.).....	1135	State v. Sunapee Dam Co. (N. H.).....	899
Sheets, Payne v. (Vt.).....	656	State v. Webb's River Imp. Co. (Me.).....	495
Shepherd, Burgess v. (Me.).....	415	State v. Young (N. J. Sup.).....	91
Shimer v. Easton & N. St. R. Co. (Pa.).....	769	State v. Zdanowicz (N. J. Err. & App.).....	743
Shirk, Eberly v. (Pa.).....	1071	State Mut. Building & Loan Ass'n v. O'Callahan (N. J. Err. & App.).....	1002
Shmilovitz v. Bares (Conn.).....	560	State Taxation, In re (Me.).....	827
Shoener, Schuylkill County v. (Pa.).....	791	Stauffer v. Reading (Pa.).....	1072
Shortall, Commonwealth v. (Pa.).....	952	Staylor, Gill v. (Md.).....	393
Shuman v. Juniata Farmers' Mut. Fire Ins. Co. (Pa.).....	1069	Stevenson v. Earl (N. J. Err. & App.).....	1091
Sibell v. Weeks (N. J. Err. & App.).....	244	Stiles & McClay, Hardcastle v. (N. J. Sup.).....	104
Sienkiewicz, State v. (Del. Gen. Sess.).....	346	Stone v. Boston & M. R. R. (N. H.).....	359
Simmons v. Morgan (R. I.).....	522	Stone v. Goss (N. J. Err. & App.).....	736
Singer v. National Bedstead Mfg. Co. (N. J. Ch.).....	868	Stout v. Humphrey (N. J. Err. & App.).....	281
Sinking Fund Com'rs of Jersey City, McDermott v. (N. J. Sup.).....	87	Street Lighting Dist. No. 1 of Woodbridge Tp., Brown v. (N. J. Sup.).....	1080
Sisters of Charity of St. Joseph, Rogers v. (Md.).....	318	Strite v. Norton (Pa.).....	851
Slattery v. Colgate (R. I.).....	639	Sturgis' Estate, In re (Pa.).....	27
Smith v. Colloty (N. J. Err. & App.).....	805	Suit v. Suit (Md.).....	382
Smith v. Elizabethport Banking Co. (N. J. Err. & App.).....	248	Sullivan v. Visconti (N. J. Err. & App.).....	1133
Smith v. Hallwood Cash Register Co. (Md.).....	525	Sunapee Dam Co., State v. (N. H.).....	899
Smith v. Muncy Creek Tp. (Pa.).....	767	Supreme Council Catholic Benev. Legion v. Murphy (N. J. Ch.).....	497
Smith v. Pennsylvania R. Co. (Pa.).....	708	Supreme Council Catholic Benev. Legion, Hancock v. (N. J. Err. & App.).....	246
Smith v. Union Ins. Co. (R. I.).....	715	Sutliff v. Pennsylvania R. Co. (Pa.).....	973
Smith, Bowie v. (Md.).....	625	Sutton, Commonwealth v. (Pa.).....	781
Smith, Fox v. (R. I.).....	698	Sutton, Saunders v. (N. J. Sup.).....	652
Smith Fireproof Const. Co. v. Munroe (Md.).....	315	Svenson v. Rohrer (Pa.).....	1070
Smith & Wallace Co. v. Lambert (N. J. Sup.).....	88	Swan v. Kemp (Md.).....	441
Snyder v. J. S. Rogers Co. (N. J. Err. & App.).....	303	Swedesboro Loan & Building Ass'n v. Gans (N. J. Ch.).....	82
Snyder v. Pennsylvania R. Co. (Pa.).....	778	Swing, Bridgeman Bros. Co. v. (Pa.).....	26
Snyder, Nicholson v. (Md.).....	484	T. A. Gillespie Co., Campbell v. (N. J. Err. & App.).....	276
Somerton Hills Cemetery, Knight v. (Pa.).....	535	Tallman, Ward v. (N. J. Ch.).....	225
Souder, Adamson v. (Pa.).....	182	Tasker's Estate, In re (Pa.).....	24
Sparks, Beideman v. (N. J. Err. & App.).....	1132	Tax Assessors of Providence, Rhode Island Hospital Trust Co. v. (R. I.).....	877
Spaulding v. Bullock (Pa.).....	965	Taylor v. Addicks (Del. Super.).....	1010
Spaulding, Mitchell v. (Pa.).....	968	Taylor v. Wahl (N. J. Sup.).....	40
Spencer v. Clarke (R. I.).....	329	Taylor, Morrison v. (Del. Super.).....	335
Spencer v. Spencer (R. I.).....	637	Temple v. Bush (Conn.).....	557
Spengler v. Spengler (N. J. Ch.).....	285	Tenafly, Allison Land Co. v. (N. J. Sup.).....	89
Spry, Graves v. (Del. Super.).....	334	Thompson v. Dyer (R. I.).....	824
Stahl, Furth v. (Pa.).....	29	Thompson v. Hoxsie (R. I.).....	930
Standard Oil Co., McDonald v. (N. J. Err. & App.).....	289	Thompson's Estate, In re (Pa.).....	539
Standard Oil Co., Meany v. (N. J. Sup.).....	653	Throckmorton v. O'Reilly (N. J. Ch.).....	56
Standard Pub. Co., Holmes v. (N. J. Ch.).....	1107	Tillinghast v. Brown University (R. I.).....	758
Starkweather v. Brown (R. I.).....	324	Tillinghast's Account, In re (R. I.).....	879
Starkweather & Shepley v. Brown (R. I.).....	201	Tillyer, Mindermann v. (N. J. Sup.).....	690
Star Loan Ass'n v. Moore (Del. Super.).....	946	Titus v. Gunn (N. J. Err. & App.).....	735
Star Pub. Co., Donahoe v. (Del. Super.).....	337	Toppin, Collins v. (N. J. Ch.).....	124
Starrett, Davis v. (Me.).....	516	Town of Bristol v. Bristol & Warren Waterworks (R. I.).....	710
State v. Babcock (R. I.).....	685	Town of Meriden v. Bennett (Conn.).....	564
State v. Carney (N. J. Sup.).....	44	Townsend, McDaniel v. (Del. Super.).....	6
State v. Chapman (N. J. Sup.).....	94	Traynor, O'Brien v. (N. J. Err. & App.).....	307
State v. Chickering (N. H.).....	937	Tremblay v. Aetna Life Ins. Co. (Me.).....	509
State v. Clough (N. H.).....	554	Trenton, Ivins v. (N. J. Err. & App.).....	1132
State v. Cook (Del. Gen. Sess.).....	1012	Trenton Trust & Safe Deposit Co. v. Donnelly (N. J. Ch.).....	92
State v. Cunningham (Vt.).....	654	Trenton Water Power Co., Colonial Woolen Co. v. (N. J. Ch.).....	993
State v. De Maio (N. J. Sup.).....	644	Tren, Rich v. (R. I.).....	492
State v. Di Guglielmo (Del. Gen. Sess.).....	350	True v. Meredith Creamery (N. H.).....	893
State v. Donovan (Vt.).....	611	Truitt v. Darnell (N. J. Ch.).....	692
State v. Epstein (R. I.).....	204	Tucker, Baldwin v. (N. J. Err. & App.).....	1132
State v. Finley (Del. Gen. Sess.).....	1010	Turner, Natter v. (N. J. Ch.).....	650
State v. Flanagan (R. I.).....	876	Turner, Safe Deposit & Trust Co. v. (Md.).....	1023
State v. Harrigan (Del. Gen. Sess.).....	5		
State v. Holmes (Del. Gen. Sess.).....	343		

	Page		Page
Tyler v. Fidelity Building & Loan Ass'n (Del. Super.)	714	Weeks, Sibell v. (N. J. Err. & App.).....	244
Uncas Paper Co. v. Corbin (Conn.).....	165	Weigand v. Fraternities Acc. Order (Md.)..	530
Unger v. Fanwood Tp. (N. J. Sup.).....	42	Weintz, Zane v. (N. J. Ch.).....	641
Union Ins. Co., Smith v. (R. I.).....	715	Wells v. Hartford Manilla Co. (Conn.)....	599
Union Mut. Fire Ins. Co., Wilson v. (Vt.)	662	West Chester St. R. Co., Coatesville & D.	
Union R. Co., Bosworth v. (R. I.).....	490	St. R. Co. v. (Pa.).....	844
Union R. Co., Dyer v. (R. I.).....	683	Western Maryland R. Co. v. Schaun (Md.)	701
Union Traction Co., Ackerman v. (Pa.)....	16	West Jersey & S. R. Co. v. Waterford Tp.	
Union Traction Co., Bainbridge v. (Pa.)....	836	(N. J. Ch.)	157
Union Traction Co., Bobb v. (Pa.).....	972	West Jersey & S. R. Co., Atlantic City &	
Union Traction Co., Fitzpatrick v. (Pa.)..	1050	S. Traction Co. v. (N. J. Ch.).....	1134
Union Traction Co., Hunterson v. (Pa.)....	543	Wetzler, Hodge v. (N. J. Sup.).....	49
Union Traction Co., Jennings v. (Pa.).....	765	Whaley, Municipal Court v. (R. I.).....	750
Union Traction Co., Moser v. (Pa.).....	15	Wheeler v. Equitable Trust Co. (Pa.).....	1065
United Electric Co. of New Jersey, Verdon v. (N. J. Sup.).....	99	Wheeler v. Knapp (Pa.).....	979
United New Jersey R. & Canal Co. v. Con- solidated Fruit Jar Co. (N. J. Ch.).....	46	Wheeler v. Young (Conn.).....	670
United Rys. & Electric Co. v. Rowe (Md.)..	703	Wheeler, Blivin v. (R. I.).....	760
United Railways & Electric Co. of Balti- more v. Hertel (Md.).....	428	Wheeling Steel & Iron Co. v. Evans (Md.)	373
United Railways & Electric Co. of Balti- more v. Woodbridge (Md.).....	444	White v. White (N. J. Err. & App.).....	739
United Railways & Electric Co. of Balti- more, Garrison v. (Md.).....	371	White, Brown v. (Pa.).....	848
United Security Life Ins. & Trust Co., Ap- peal of (Pa.).....	216	White, Lewis v. (Del. Super.).....	830
United States Phonograph Co., Hayes v. (N. J. Ch.).....	84	Whitfield, Gerrish v. (N. H.).....	551
United Traction Co., Hinnershitz v. (Pa.)	841	Whitlock, Gold Bluff Mining & Lumber Corp. v. (Conn.).....	175
Universal Tobacco Co., McAlpin v. (N. J. Ch.)	999	Whitman v. Lewiston (Me.).....	414
Unmack v. Douglass (Conn.).....	12	Whitridge, Doyle v. (Md.).....	459
Unmack v. Killam Carriage Co. (Conn.)..	12	Wickford Sav. Bank v. Corey (R. I.).....	684
Vadrais, Providence County Sav. Bank v. (R. I.)	754	Wilcox, Dawley v. (R. I.).....	753
Valley Sav. Bank of Middletown, Fred- erick County, v. Mercer (Md.).....	435	Wilhelm, Appeal of (Pa.).....	776
Van Doren, Schultz v. (N. J. Err. & App.)..	1133	Wilkesbarre Gas Co., Miller v. (Pa.).....	974
Van Kossen, Pink v. (Pa.).....	1054	Willey v. Browne (Pa.).....	1029
Varick v. Hitt (N. J. Ch.).....	139	Willey, Nelson v. (Md.).....	527
Vaughn, American Soda Fountain Co. v. (N. J. Sup.).....	54	Wm. A. Miles & Co. v. Odd Fellows' Mut. Aid Ass'n (Conn.).....	607
Verdon v. United Electric Co. of New Jersey (N. J. Sup.).....	99	William Knabe & Co. Mfg. Co. of Balti- more, Courtney v. (Md.).....	614
Vernam, Norwalk Heating & Lighting Co. v. (Conn.).....	168	Williams v. Williams (Pa.).....	835
Vincent v. Mutual Reserve Fund Life Ass'n (Conn.)	177	Williamsport Pass. R. Co., City of Wil- liamsport v. (Pa.).....	836
Viney, Aspinall v. (Pa.).....	1038	Willis' Will. In re (R. I.).....	889
Virgin v. Warwick (Me.).....	520	Willman v. People's R. Co. (Del. Super.)..	332
Visconti, Sullivan v. (N. J. Err. & App.)..	1133	Wilmer, Ridgely v. (Md.).....	488
Von Boyneburgk, Croasdale v. (Pa.).....	770	Wilmington, Law & Order Soc. v. (Del. Super.)	1
Wahl, Taylor v. (N. J. Sup.).....	40	Wilmington City R. Co., Donohoe v. (Del. Super.)	1011
Wallace v. Newark (N. J. Sup.).....	1078	Wilson, In re (N. J. Ch.).....	160
Wallace, Muller & Co. v. Leber (N. J. Err. & App.)	475	Wilson v. American Palace Car Co. of New Jersey (N. J. Err. & App.).....	997
Wallace's Estate, In re (Pa.).....	848	Wilson v. Union Mut. Fire Ins. Co. (Vt.)..	662
Ward v. Tallman (N. J. Ch.).....	225	Wisner v. Osborne (N. J. Ch.).....	51
Warren v. Pim (N. J. Ch.).....	66	Woodbridge, United Railways & Electric Co. of Baltimore v. (Md.).....	444
Warthman, In re (Del. Super.).....	6	Woodruff v. Butler (Conn.).....	167
Warwick v. Perrine (N. J. Err. & App.)..	738	Woolley v. Bell, two cases (N. J. Sup.)....	66
Warwick Iron & Steel Co. v. McKeag (Pa.)	179	Wright v. Eureka Tempered Copper Co. (Pa.)	978
Warwick & Coventry Water Co., Franklin v. (R. I.)	934	Wright, Burke v. (Conn.).....	14
Washington County Nat. Bank v. Motter (Md.)	313	Wunder v. Hallwood Cash Register Co. (Md.)	1132
Waterford Tp., West Jersey & S. R. Co. v. (N. J. Ch.).....	157	W. & A. Fletcher Co. v. International Ass'n of Machinists (N. J. Ch.).....	1077
Waterhouse v. Waterhouse (Pa.).....	1067	W. & A. Fletcher Co., Atkins v. (N. J. Ch.)..	1074
Weaver, Hottle v. (Pa.).....	838	Young v. Haight (N. J. Sup.).....	100
Webb, Carpenter v. (Del. Super.).....	1011	Young, Demeritt v. (N. H.).....	1047
Webb's River Imp. Co., State v. (Me.)....	495	Young, Pittsley v. (Pa.).....	920
Weber v. Aschbacher (Pa.).....	534	Young, State v. (N. J. Sup.).....	91
Webster, Hackett v. (Md.).....	480	Young, Wheeler v. (Conn.).....	670
		Zane v. Weintz (N. J. Ch.).....	641
		Zanturjian v. Boornazian (R. I.).....	199
		Zdanowicz, State v. (N. J. Err. & App.)....	743
		Zeliff v. North Jersey St. R. Co. (N. J. Sup.)	96
		Zimmerman, Hallinger v. (N. J. Err. & App.)	1132
		Zolpher v. Camden & S. R. Co. (N. J. Err. & App.).....	249

THE
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(4 Pen. 364)

MONAHAN v. LEWIS, Receiver of Taxes.
(Superior Court of Delaware. New Castle.
June 9, 1903.)

**TAXATION—RURAL REAL ESTATE—RATE—
STATUTES—REPEAL.**

1. Act Gen. Assem. March 22, 1897 (20 Del. Laws, p. 669, c. 555), providing that all of a certain part of the city of Wilmington, between Seventh and Twelfth streets, being unimproved property, should pay for city and school taxes a rate not exceeding one-fourth of the regular rate levied on persons and estates in the remaining parts of the city, was repealed by Act May 20, 1898 (21 Del. Laws, p. 244, c. 106), providing that the lowest tax on any real estate therein was fixed at one-half the highest rate of taxes required to be levied on built-up portions of the city for each year, and repealing acts inconsistent with its provisions.

Action by Patrick Monahan against Thomas S. Lewis, as receiver of taxes, etc. Judgment for defendant.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Robert Pennington, for plaintiff. David J. Reinhardt, City Sol., for defendant.

LORE, C. J. From the case stated, it appears: That by the act of the General Assembly of March 22, 1897 (volume 20, Laws Del. p. 669, c. 555), it was provided that all that part of the city of Wilmington between Seventh and Twelfth streets and Greenhill and Woodlawn avenues, being unimproved property, should pay for city and school taxes "a rate not exceeding one-fourth of the regular rate levied on persons and estates in the remaining parts of the said city." That the plaintiff was the owner of certain real estate within said limits. That subsequently the act of May 20, 1898, was passed (chapter 106, vol. 21, Laws Del. p. 244), which was entitled "An act to classify real estate for the purposes of taxation, and to exempt certain lands from municipal taxation within the city of Wilmington." Under the last act, all the real estate of said city, other than marsh land, was classified as "rural or suburban, and built up portions," and the lowest tax upon any real estate therein was fixed at one-half the highest rate

of tax required to be levied on the built-up portions for each year. Section 7 of this act expressly repeals all acts or parts of acts inconsistent with its provisions. The taxes on the plaintiff's real estate for the year 1899 were rated and collected under the act of 1898 at one-half the regular tax rate for that year, and for 1900 at the full rate. That the said taxes were paid under protest by the said plaintiff, as being illegally exacted, and with the avowed intention to sue for their recovery. That the excess of taxes paid by the plaintiff over a one-fourth rate for the year 1899 was \$45.22, and for the year 1900 was \$150, aggregating \$195.22, which, with interest on each sum from the date of payment, plaintiff claims in this action.

One of the questions raised in the case is whether the act of 1897 is repealed by the act of 1898. The act of 1897 fixes the taxes on the lands in question at one-fourth the regular rate for any year. The act of 1898, on the other hand, fixes the lowest rate of taxes thereon for any one year at one-half the regular rate. In this respect, therefore, the two acts are clearly inconsistent, and to that extent the law of 1898 repeals the act of 1897. As this conclusion disposes of the case, it is unnecessary for us to decide the other questions raised and discussed.

Let judgment be entered for the defendant for costs, under the terms of the case stated.

(4 Pen. 366)

**LAW & ORDER SOC. v. MAYOR, ETC., OF
CITY OF WILMINGTON.**

(Superior Court of Delaware. New Castle.
June 9, 1903.)

MUNICIPAL CORPORATIONS—FINES—DISTRIBUTION OF PROCEEDS.

1. Act Gen. Assem. May 26, 1897 (20 Del. Laws, p. 714, c. 597), gives the Law & Order Society one-half of all fines collected in any county where the evidence securing the conviction is procured by the society, and Wilmington city charter (17 Del. Laws, p. 491, c. 207) provides that all fines shall, except as otherwise provided, be put into the city treasury for the use of the corporation. *Held*, that the exception in the charter applied to such laws as

might be passed thereafter, and hence the Law & Order Society was entitled to one-half of the fines collected on a prosecution under the city charter, where it furnished the evidence securing conviction.

Action by the Law & Order Society against the mayor and council of the city of Wilmington. Judgment for plaintiff.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

William S. Prickett, for plaintiff. David J. Reinhardt, City Sol., for defendant.

LORE, C. J. The plaintiff claims in this action one-half of certain fines imposed by the municipal court for the city of Wilmington under an act of the General Assembly passed at Dover May 26, 1897, which gave to the plaintiff "one-half of all the fines, penalties and forfeitures imposed and collected in any county of this state where evidence to secure the conviction shall be produced and furnished by the Law and Order Society of Wilmington, a corporation of the state of Delaware, or its agent or agents." 20 Del. Laws, p. 714, c. 597. A part of the said fines were imposed for the sale of intoxicating liquors without a license, under section 19, c. 418, p. 398, vol. 14, Laws of Delaware. The plaintiff's right to one-half of these fines is not denied by defendant. The residue of the fines claimed were imposed under the charter and ordinances of the said city. The defendant claims that the last-named fines belonged to the city under section 148 of the city charter, which is as follows: "All fines and forfeitures incurred under this act, or under any ordinance of the said city, shall, except in cases otherwise provided for by law, be enforced, collected and paid into the city treasury for the use of the corporation." 17 Del. Laws, p. 491, c. 207. In our judgment, the Legislature was acting within the exception above named in section 148 of the said charter when it gave the one-half of the fines to the plaintiff in the cases named in the act of May 26, 1897; that the exception applies not only to laws then in existence, but also to such as might be passed thereafter in pursuance thereof. Our opinion, therefore, is that the plaintiff is entitled to one-half of all the fines claimed in the case stated.

(4 Pen. 350)

NEWTON v. PEOPLE'S RY. CO.

(Superior Court of Delaware. New Castle.
June 1, 1903.)

CARRIERS—INJURY TO PASSENGER—PLEADING
—DEMURRER—CERTIFICATE OF COUNSEL.

1. 21 Laws Del. p. 269, c. 126, requiring a demurrer to be accompanied by certificate of counsel that he believes it good in law and not made for delay, is not repealed by 21 Laws Del. p. 582, c. 303, requiring judgment of respondent master to be entered on issues joined on demurrer in certain cases, and containing no requirement for a certificate.

2. In an action against a street railway for injuries to a passenger, a narr. averring generally that the company negligently used insufficient and defective brakes and other appliances, by reason of which its servants lost control of the car, and plaintiff was injured while endeavoring to escape, was demurrable for not specifying the particular appliances that caused the injury, and how the injury was received.

Action for personal injuries by Georgeanna Newton against the People's Railway Company. Demurrer to petition sustained.

The narr. contained five counts. The allegations in the first count of the declaration were, *inter alia*, as follows: "(1) For that whereas, heretofore, to wit, at the time of the committing of the grievances hereinafter mentioned, of the said People's Railway Company, the defendant above named was, and still is, a corporation existing under the laws of the state of Delaware, in control of and operating, as a common carrier of passengers, a certain line of railway in the city of Wilmington, county and state aforesaid. And the said plaintiff avers that heretofore, to wit, on the 12th day of November, A. D. 1902, at New Castle county aforesaid, the said plaintiff was a passenger, for hire, of the said defendant, on one of the cars then and there being controlled and operated by said defendant on its said line of railway on one of the streets of said city, known as 'Clayton Street,' and that said defendant, in disregard of its duty to said plaintiff, then and there negligently and carelessly suffered and permitted to be used on its said car insufficient and defective brakes and other appliances to stop said car, and by reason thereof the servant or servants of said defendant in charge of said car upon which said plaintiff, passenger as aforesaid, was then and there riding, lost control of said car, and by reason thereof said plaintiff, while in the exercise of due care and caution on her part, to wit, the day and year aforesaid, at New Castle county aforesaid, being in imminent peril of her life, and while endeavoring to escape from the condition of peril arising from said negligence and carelessness of said defendant, was badly hurt, bruised, and injured," etc. The fourth count differed from the first only in that it alleged that the plaintiff, "being in imminent peril of her life, and while endeavoring to escape from the condition of peril arising from said negligence and carelessness, was, by and through the negligence and carelessness aforesaid, badly hurt, bruised, and injured," etc. The fifth count differed from the said first count in alleging that "the said plaintiff avers that heretofore, to wit, on the 12th day of November, A. D. 1902, at New Castle county aforesaid, that the said defendant negligently and carelessly suffered and permitted the bed and tracks of its said railway to be and remain in bad condition, out of order and repair, and that by reason

¶ 2. See Carriers, vol. 2, Cent. Dig. § 1275.

thereof one of its cars, wherein the said plaintiff then and there was a passenger for hire, became and was upset and overturned, thereby causing great damage and injuries to the said plaintiff, who was then and there in the exercise of due care and caution on her part," etc.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Levin F. Melson, for plaintiff. William S. Hilles, for defendant.

Defendant filed the following causes of demurrer, *inter alia*, to the first, fourth, and fifth counts of plaintiff's declaration, *viz.*: "(1) Because it does not appear therefrom how the plaintiff was injured; (2) because there is no connection therein stated between the alleged negligence of the defendant and the alleged injuries to the plaintiff."

Mr. Melson, for plaintiff, objected to the demurrer as insufficient in law, because it did not contain the certificate of counsel that he believed the same was good in law, and was not made for the purpose of delay, and asked that the demurrer be dismissed.

Mr. Hilles, for demurrant, contended that the statute providing for such certificate (21 Laws Del. p. 269, c. 126) was found to be an imperfect statute, and in 1899 the statute found in 21 Laws Del. p. 582, c. 803, was passed as a substitute for the original statute, and virtually repealed the first one, and, as the latter statute had no provision relative to the certificate in question, no such certificate was necessary to be made by counsel in filing the demurrer.

Mr. Nelson: The court have held, since the passing of the latter statute, referred to by counsel for defendant, that such certificate was necessary to be filed with the demurrer, and it is virtually established either as a rule of court, or as the settled practice.

LORE, C. J. I have no recollection that the court have ever held that this latter statute relieved counsel from filing this certificate with the demurrer. We fail to see that there is any inconsistency between this act and the former one, as far as the certificate is concerned. The door is now thrown wide open, and counsel may come in and file a demurrer, and in any case may take a judgment of respondeat ouster. Is there not, therefore, the greater reason why there should be some such certificate that the demurrer is not being filed for the purposes of delay? We hold that you must file such a certificate with your demurrer, *viz.*, that the said demurrer is, in the opinion of counsel, good in law, and is not filed for the purposes of delay.

Mr. Hilles: I ask leave to amend my demurrer by filing such a certificate now.

Mr. Melson: I have no objection.

LORE, C. J. Let the amendment be made and filed by consent.

LORE, C. J. We think these counts averring "insufficient brakes and other appliances to stop said car" are too general. The narr. must specify the particular appliance that caused the injury, and especially how the injuries were received—by falling, jumping, being struck, or otherwise, which is within the plaintiff's knowledge. We sustain the demurrer.

Upon the election of plaintiff's counsel, let judgment of respondeat ouster be entered.

(4 Pen. 332)

STATE v. LEWIS.

(Court of General Sessions of Delaware. New Castle. May 18, 1903.)

ASSAULT AND BATTERY—HIGHWAYS—USE—VEHICLES—PASSING PEDESTRIANS.

1. Where defendant willfully and intentionally drove or forced his horse in contact with a person lawfully walking along a public highway, such act was sufficient to constitute an assault and battery.

2. Where at the time defendant's horse was driven against another, who was lawfully walking along the highway, defendant was present aiding, counseling, or assisting the person who was managing the horse and wagon, he was guilty of an assault, though he did not have the lines or the immediate guidance of the horse.

3. Where defendant, who was traveling in a highway with a horse and vehicle, undertook to pass another who was walking in the highway, he was bound at his peril not to strike the pedestrian in so doing.

Prosecution against Howard Lewis for assault and battery. Acquitted.

The prisoner was indicted for assault and battery. At the trial proof was offered tending to show that on March 14, 1903, while the prosecuting witness, Mrs. Lucy Hallett, with her husband and her sister, were walking along a public road between Middletown and Odessa, a team containing the defendant, a colored man, and five colored women, and being either driven by or under the control of the defendant (the testimony being conflicting upon the point as to who was driving at the time of the accident), came up behind the prosecuting witness, and that the horse's head struck her upon the shoulder. The testimony further showed that the three persons had been, a short time before the collision, walking along a sidepath, but, owing to the wet condition of the same, had stepped out into the road, and were walking along the extreme right-hand side thereof, when the collision occurred; that the road was wide enough at that point for three teams to go abreast; that the horse was in a walk at the time of striking the prosecuting witness; and that the prisoner made no attempt to drive around the persons who were walking, but asked them to get out of the way so that he could pass. This the husband of the prosecuting witness refused to do, and when his wife stepped aside, told her to come back behind him, which she did.

¶ 1. See Assault and Battery, vol. 4, Cent. Dig. §§ 1, 68.

and immediately the collision occurred. The Attorney General asked the court to charge the jury, first, that, as all the persons had an equal right to the use of the road, and that as the pedestrians were on the right-hand side of the road—the proper side—going in the same direction as the team, it was the duty of the persons coming behind them in the vehicle to avoid colliding with the persons walking in front; second, that if the jury believe that Howard Lewis had hold of the lines, or that he had charge of the team and should have had control, he would be responsible for colliding with the prosecuting witness on the ground that he was present, aiding and abetting. Counsel for defendant asked the court to charge the jury: First. That where a loaded wagon and foot passengers are passing along a public highway, and there is a footpath, it is the duty of the foot passenger to keep to the footpath, rather than the wagon road, and, if he goes out of the footpath, on account of the wet condition (as the testimony shows in the present case). Into the wagon road, it is the duty of the foot passenger to give the right of way to the loaded wagon, rather than the loaded wagon to drive out of the way to accommodate the foot passenger. If any one has to yield in such case it is the foot passenger, because it is more easy for him to get out of the road than for the loaded wagon. Second. That the jury, in order to convict the defendant, Howard Lewis, must believe beyond a reasonable doubt that he had charge or control of the horse when the collision happened.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Herbert H. Ward, Atty. Gen., for the State.
J. Frank Ball, for defendant.

LORE, C. J. (charging jury). Howard Lewis, the defendant in this case, is charged with an assault and battery. An assault is an attempt to do violence to the person of another with the means at hand of carrying that intention into execution. The battery is the actual infliction of the injury, however slight that may be. If you should find from the evidence in this case that the horse which was attached to the wagon was willfully or intentionally driven into or forced in contact with the person of Mrs. Lucy Hallett on the occasion which is charged in this indictment by some person, we say to you that that would constitute an assault and battery in law. If, at the time the horse's head came in contact with the person of Mrs. Lucy Hallett, the horse and wagon were under the control and management of Howard Lewis, the defendant, then he would be the person who would be liable. He would be equally so, gentlemen, although he did not have hold of the lines, or the immediate guidance of the horse and wagon, if he was there present aiding, procuring,

commanding, counseling, or assisting the person who had hold of the lines and who was managing the horse and wagon. We have been asked to charge you with respect to the right of way of a foot passenger and a loaded team upon a public highway. It is conceded that the road between Middletown and Odessa is a public highway. That highway is open, gentlemen, in all its length and breadth to the reasonable, common, and equal use of people on foot and on horseback or in vehicles. The law upon this question has been very clearly laid down in the case of *McLane v. Sharpe*, 2 Har. 483: "Where one undertakes to pass another, he who passes undertakes to go by at his own peril, if the other carriage leaves him road enough; and even when a horse in a gig has balked or stopped on the highway, the driver of a carriage behind, wishing to pass, is bound to stop if there be not road enough left for both carriages; for, although every man has a right to pass on the public road, yet he must take reasonable care to exercise that right so as not to injure another." Having stated to you what constitutes the offense of assault and battery, and also the law as it relates to the highway, it is now for you, from the evidence before you, to inquire whether the defendant is guilty of assault and battery or not guilty. If, after a careful consideration of the evidence, there is a reasonable doubt in your minds as to the guilt of the defendant, that doubt should inure to the benefit of the accused.

Verdict, Not guilty.

(4 Pan. 291)

HAWKINS v. HALL.

(Superior Court of Delaware. Kent. April 29, 1903.)

REFEREES' REPORT—FAILURE TO SHOW THAT ALL REFEREES ACTED—AMENDMENT—REMAND.

1. Where a report of three referees is signed by only two of them, and does not show that the other acted, it will be remanded to the referees for amendment.

Action by Samuel W. Hall against John D. Hawkins, in which certain questions were referred to referees. On application to amend the report. Report remanded.

Application to amend the report of referees. In the above-stated case the referees were duly qualified, and, after hearing the proofs and allegations of the parties, two who favored the report signed the same, but the one dissenting did not sign. The report failed to show that the three referees acted. Mr. Ridgely asked that the report be amended so as to conform to the facts, and show that all of the referees acted.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Henry Ridgely, Jr., for plaintiff. Richard R. Kenney and Arley B. Magee, for defendant.

LORE, C. J. We understand that the application is to remand the report to the referees, so that they may correct it.

Mr. Ridgely: The motion was to amend, and that can be done by remanding.

Mr. Kenney objected to the report being remanded to the referees, contending that there was no such practice known to the members of the Kent county bar, and inquired whether the court, in a case of this kind, could bring the parties themselves into court and examine them.

SPRUANCE, J. We have not reached that stage yet. We do not know what sort of an amendment they will make to this report.

LORE, C. J. We send it to the persons who are presumed to know. If, when it comes back, it shows that all three referees did not act and hear the allegations, and that two of them only acted and made the decision, you can then except to that. We remand this report to the referees to amend it according to the facts. If there be any exception, we will hear it afterwards.

(4 Pen. 290)

MOORE v. C. H. PEARSON PACKING CO.
(Superior Court of Delaware. Kent. April 27, 1903.)

JUSTICES OF THE PEACE—APPEAL—TIME OF TRIAL.

1. Rev. Code, c. 99, p. 755, § 26, provides that an appeal from a judgment of a justice shall be entered in the superior court on or before the first day of the term next after the appeal, and on delivery of the transcript the prothonotary shall issue summons; that the pleadings shall be as in other cases, but the trial shall be had at the first term, unless the court continue the cause. *Held* that, where the transcript was filed between adjournment of October term and before the beginning of the April term, the case was properly placed on the trial list for the April term.

Appeal from Justice of the Peace.

Action by the C. H. Pearson Packing Company against George W. Moore. Judgment for plaintiff. Defendant appeals. Application for continuance refused.

The transcript was filed between the adjournment of the October term, 1902, and the beginning of the April term, 1903, and the case was placed upon the trial list for said April term. Counsel for plaintiff contended that the case should not be placed on the trial list, it being the first term after the filing of the transcript, and that, this being the appearance term, the case was not at issue, and they therefore asked that it be continued until the next term. Mr. Ridgely opposed the application, contending that the case was properly on the trial list, and that the first term after the filing of the transcript was the trial term in appeal cases, as provided by the statute.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Richard R. Kenney and Arley B. Magee, for appellant. Henry Ridgely, Jr., for respondent.

LORE, C. J. The statute (Rev. Code, c. 99, § 26, p. 755) provides that the trial shall be had at the first term, and the appeal shall be placed upon the trial list at the first term after the filing of the transcript, and be tried then unless continued by the court for cause. As the counsel for plaintiff below (respondent) asks for trial, and no legal ground for continuance has been laid, and it being properly placed upon the trial list, we hold that it must be tried at this term.

(4 Pen. 129)

STATE v. HARRIGAN.

(Court of General Sessions of Delaware. New Castle. Nov. 20, 1902.)

ASSAULT AND BATTERY—STATUTES—WIFE-BEATING.

1. On a prosecution for wife-beating under Act Feb. 22, 1901 (22 Del. Laws, p. 493, c. 204), making it an offense for any husband to beat his wife, the jury must be satisfied from the evidence that defendant is the husband of the woman.

2. A single blow may constitute beating within the statute, though the jury may consider the character of the blow, and whether it amounts to a beating.

3. An assault is an unlawful attempt to do violence to the person of another.

4. A battery is the accomplishment of an unlawful attempt to do violence to the person of another.

5. No mere words, however vexatious they may be, will justify an assault or battery.

6. Where one is assaulted, it is his first duty to get out of the way, but, if he cannot reasonably do so, he may use as much force as is necessary to stay the act of violence against him or protect his person from injury; but, if he uses more force than is necessary, he is guilty of a wrongful assault.

Jeremiah Harrigan was convicted of wife-beating.

Argued before SPRUANCE and GRUBB, JJ.

Robert H. Richards, Dep. Atty. Gen., for the State. Daniel O. Hastings, for defendant.

SPRUANCE, J. (charging jury): Jeremiah Harrigan stands indicted under a statute passed by the Legislature of this state on February 22, 1901, the material part of which is: "That if any person being the husband of any woman, shall assault and strike or beat his wife he shall be deemed guilty of a misdemeanor." 22 Del. Laws, p. 493, c. 204. The charge in this indictment is "that Jeremiah Harrigan, being then and there the husband of a certain woman, to wit, Elizabeth Harrigan, did then and there assault and beat her, the said Elizabeth Harrigan, she, the said Elizabeth Harrigan, being then and there the wife of the said Jeremiah Har-

§ 5. See Assault and Battery, vol. 4, Cent. Dig. § 58.

rigan." You will notice that this offense is not an ordinary case of assault and battery. It is a statutory offense, and to convict, you must be satisfied from the evidence that this man is the husband of the woman who is alleged to be his wife, and that he did assault and beat her.

The counsel for the defendant has asked us to say to you that, if you are satisfied from the evidence that Jeremiah Harrigan struck his wife but a single blow, that you cannot convict him under this indictment. We cannot so instruct you. You have heard the evidence, and you may find him guilty if you find from the evidence that he struck her only a single unlawful blow. Of course, you are to consider the character of the blow and whether it comes up to the measure of beating. As you have often been told, an assault is an unlawful attempt to do violence to the person of another, and a battery is the actual accomplishment of such attempt. No mere words, however opprobrious or vexatious they may be, will justify even an assault, much less a battery. Where one is assaulted it is his first duty to get out of the way. If he cannot reasonably do so, he may use just so much force as is necessary to stay the act of violence against him, or to protect his life or his person from injury. If he uses more force than is necessary for the purpose, he is himself guilty of an unlawful assault. If you find that Jeremiah Harrigan did assault and beat his wife, it is your duty to find a verdict of guilty. If, on the contrary, upon all the evidence, you are not so satisfied, you are bound to find a verdict of not guilty.

Verdict: Guilty.

(4 Pen. 359)

McDANIEL v. TOWNSEND.

(Superior Court of Delaware. New Castle.
June 2, 1903.)

**JUDGMENT—VACATION—LIMITATIONS—
FAILURE TO PLEAD.**

1. A judgment by default for plaintiff in an action for tort will not be vacated because suit was not brought within one year, as required by 20 Laws Del. p. 712, c. 594, as such defense must be pleaded.

Action by Henry McDaniel, by his next friend, against Charles De K. Townsend. On rule to show cause why a judgment for plaintiff should not be stricken out and vacated. Rule discharged.

Cause of action was for damages for injuries occasioned on September 23, 1900, to the plaintiff by reason of the collapsing of a brick building owned by defendant in the city of New Castle, Del. Writ issued January 20, 1902. Lands attached. Narr. filed same day, and, on motion of plaintiff's attorney, judgment for want of an appearance. May 28, 1902, the following petition in said case, supported by affidavit of defendant,

was filed: "In the Superior Court of the State of Delaware, in and for New Castle County. * * * City of New York, County of New York—ss.: Personally appeared before me, Mortimer S. Brown, a notary public in and for the state and county of New York, residing in the city of New York, Charles De K. Townsend, the defendant in the above-stated suit, who, being by me solemnly sworn, deposes and says that the above action is brought for the recovery of damages upon a claim for alleged personal injuries to said plaintiff; that the said alleged personal injuries were received by said plaintiff on the 23d of September, A. D. 1900; that the said action was brought and the said suit of foreign attachment was issued out of the said superior court on the 20th of January, A. D. 1902; and that the said action was brought after the expiration of one year from the date upon which it is claimed that such alleged injuries were sustained. * * *"

On motion of Alexander B. Cooper, rule granted upon plaintiff that the proceedings be stayed or dismissed, or the action stricken from the record, and property attached be discharged. Plaintiff's counsel accepts service of said rule May 28, 1902. June 26, 1902, after argument by respective counsel, rule discharged. March 4, 1903, amount ascertained by inquisition at bar, \$5,000. March 7, 1903, petition and affidavit filed, and, on motion of Alexander B. Cooper, rule granted upon plaintiff to show cause why the inquisition in the above case should not be set aside, and a new trial had. May 28, 1903, affidavit filed, and, on motion of Alexander B. Cooper, rule granted upon plaintiff to show cause why the judgment in the above case should not be stricken off and vacated on the ground that the action was not commenced within one year, as required by 20 Laws Del. p. 712, c. 594. Plaintiff claimed that failure to plead limitations waived the bar of the statute. Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

William S. Hilles, for plaintiff. Alexander B. Cooper (special appearance), for defendant.

LORE, C. J. The court are unanimous that both of these rules ought to be discharged, and so order.

(4 Pen. 319)

In re WARTHMAN.

(Superior Court of Delaware. Kent. May 8, 1903.)

**JUDGMENTS—DEFAULT—APPLICATION TO
OPEN—FOREIGN ATTACHMENT
—DISSOLUTION.**

1. Where a judgment has been rendered against defendant in foreign attachment, and he alleged in an application to open the same and for permission to defend that he had had no notice of the proceedings, and had not, therefore, appeared, and that he was not indebted to the plaintiff, and had a just and legal defense

to the whole cause of action, his application to open the judgment will be granted.

2. Where defendant was sued by foreign attachment, and a judgment recovered was subsequently opened to permit defendant to defend, the attachment would be retained, subject to the further order of the court.

Application by John Warthman to open a judgment in an action against him by foreign attachment. Application granted.

The petition was in the following form, to wit:

"The petition of John Warthman, of the town of Port Norris, and state of New Jersey, respectfully represents: That at the October term, A. D. 1902, of this court, a judgment upon foreign attachment proceedings at the suit of Hezekiah Harrington was recovered against your petitioner for the sum of two hundred and ninety-two dollars and ninety-six cents, said judgment being of record in the office of the prothonotary of this court in continuance docket No. 18, page 29. That the writ of foreign attachment upon which said judgment was obtained was issued out of this court on the 18th day of March, A. D. 1902, the same being No. 39 to the April term, 1902, of this court. That your petitioner had no notice or knowledge of the said proceedings, nor the issuance of the said writ of foreign attachment, nor the recovery of the said judgment, and that he was not present in person or by attorney at the rendition of the judgment aforesaid, nor at any stage of the proceedings. That your petitioner was never informed by the said Hezekiah Harrington, nor by any one for him, of any claim against him, nor did he know that any such existed until after the rendition of the said judgment and the holding of the inquisition thereon. That to the best of his knowledge and belief he is not now, nor was he at the time of the issuance of the said writ of foreign attachment, indebted to the said Hezekiah Harrington in any amount whatever. That your petitioner has a just and legal defense to the whole of the cause of action in the said suit. Your petitioner therefore prays that the said judgment may be opened, and that he may be permitted to appear in this court, and disprove or avoid the said debt or claim; and he will ever pray," etc. The above petition was duly signed and sworn to. The property attached was stock of the First National Bank of Harrington.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

James H. Hughes, for plaintiff. George M. Jones, for defendant.

Mr. Jones asked that he be allowed to enter into a recognizance, appear in court, and move to dissolve the attachment.

LORE, C. J. Your application is to open the judgment for the purpose of ascertaining

what is due thereon, if anything. The judgment is opened for that purpose, but the attachment remains. It is not dissolved. Until we dispose of this question, the property is held by the attachment, subject to the judgment of the court.

(4 Pen. 353)

KENNEDY v. DELAWARE COTTON CO.

(Superior Court of Delaware. New Castle.

June 1, 1903.)

MASTER AND SERVANT—DEATH OF SERVANT
—DECLARATIONS—ACTS OF NEGLIGENCE—SPECIFICATIONS.

1. In an action for the death of a servant, a narr. averring that deceased was employed by defendant, and stationed at a machine known as a "calender," and that the appliances connected therewith, which were dangerous to life, were unprotected, and moved by steam power, and that by means of the premises such deceased was caught, bruised, and instantly killed by such machine and appliances, was not demurrable for indefiniteness.

2. Counts in a narr. to recover damages for the death of a servant, alleged to have been caused by defendant's negligence in failing to keep a particular machine in repair, and in omitting to provide sufficient instrumentalities and guards for the protection of such servant, were demurrable, where they did not specify in what respect defendant omitted to repair the machine, or what appliances defendant omitted to provide.

3. A count in a narr. for the death of a servant, alleging negligence in carelessly starting a certain machine without notifying deceased, was insufficient, where it did not designate the particular machine claimed to have been negligently started.

Action by James Lea Kennedy against the Delaware Cotton Company. On demurrer to narr. Sustained, except as to first count.

Action on the case by the father of the plaintiff for damages by the latter's death, alleged to have been occasioned by the negligence of the defendant. The narr. consisted of seven counts, all of which were demurred to by the defendant, except the second count.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Levin F. Melson, for plaintiff. William S. Hilles, for defendant.

The allegations contained in the first count of the narr. were, inter alia, as follows: "(1) For that whereas, heretofore, to wit, at the time of the committing of the grievances hereinafter mentioned, the said the Delaware Cotton Company, the defendant above named, was, and still is, a corporation existing under the laws of the state of Delaware, in control of and operating a certain factory at the city of Wilmington, in the county of New Castle aforesaid, and the said plaintiff's son James Lea Kennedy was then and there a minor hired and employed by the said defendant to work for it in its said factory. And the said plaintiff avers that heretofore, to wit, on the 25th day of October, A. D. 1901, at New Castle county aforesaid, the

said James Lea Kennedy, then and there a minor under the age of fourteen years and a half, to the knowledge of said defendant, was employed by said defendant in a certain room in its said factory, known as the 'finishing room,' and that the said defendant then and there negligently and carelessly, in violation of law, employed the said James Lea Kennedy in a place unsafe and dangerous to the life and limb of him, the said James Lea Kennedy, to wit, at, near, or on a certain machine known as a 'calender,' and the appliances connected thereto, they being then and there uncovered, unprotected, and moved by steam power, and thereby and by means of the premises the said James Lea Kennedy, who was then and there in the exercise of due care and caution on his part, to wit, on the day and year aforesaid, at New Castle county aforesaid, was caught, bruised, mangled, and instantly killed by said machine and appliances," etc.

The demurrers to the first count were as follows: "(1) That the said count is uncertain and indefinite. (2) That there is no connection between the alleged negligence of the defendant and the injury to James Lea Kennedy set forth in said count. (3) That it does not appear from the said count in what particular said defendant has violated any law of the state of Delaware. (4) It does not appear therefrom what appliances were uncovered or unprotected."

Mr. Hilles: My cause of demurrer to that count is that it is uncertain and indefinite.

LORE, C. J. We think that the first count is sufficient. It avers that the deceased was employed at the place or machine known as a "calender," with the appliances connected therewith, which was dangerous to life, being then and there uncovered, unprotected, and moved by steam power, and that by means of the premises said James Lea Kennedy was caught, bruised, mangled, and instantly killed by the said machine and the appliances. We overrule the demurrer as to that count.

Mr. Hilles: I will ask leave to plead to that count. Now we come to the third count, which states, as to the calender, that "the said defendant negligently and carelessly suffered and permitted a certain calender to be out of order and repair, whereby the said James Lea Kennedy, who was then and there engaged in his occupation as aforesaid, and at work upon the said calender, in the exercise of due care and caution on his part, was, by reason of said calender so being out of order and repair as aforesaid, thereby greatly injured, and * * * by means of the premises instantly killed," etc. The defendant is not informed by that count whether the deceased was hurt with the same calender that was out of order, nor is it alleged in what particular it was out of order and repair.

LORE, C. J. The third count comes directly within the decision in the case of *Clark v. Diamond State Steel Company*, 2 Pennewill, 522, 47 Atl. 1014. We sustain the demurrer to the third count, because the narr. does not specify in what respect the defendant omitted to provide for the repair or keeping in repair of the machine.

Mr. Melson: That will apply also to No. 6.

LORE, C. J. The demurrer as to No. 3 and No. 6 is sustained.

Mr. Hilles: The fourth count alleges "that the defendant negligently and carelessly omitted to provide for a certain machine in the said factory, known as a 'calender,' sufficient tools, instrumentalities, and proper guards for the protection of the said James Lea Kennedy, working thereon, whereby the said James Lea Kennedy, who then and there, to wit, on the 25th day of October, 1901, at New Castle county aforesaid, in the exercise of due care and caution on his part, was so greatly bruised and injured that he afterwards, to wit, on the same day, died, of and from the bruises and injuries so received as aforesaid," through the negligence of the said defendant, etc. My demurrers to that count are: (1) It does not appear therefrom what tools, instrumentalities, or proper guards should have been placed on the said calender; (2) there is no connection between the allegation of negligence in the said count and the injury to the said James Lea Kennedy.

LORE, C. J. That count does not state what the defendant omitted to provide that he should have provided. The narr. must give the defendant reasonable notice of what he is to meet. We sustain the demurrer to No. 4.

Mr. Hilles: The fifth count alleges that the said plaintiff "was in the said factory, at, near, or on one certain machine of the said defendant; that the said defendant then and there knew, or by the exercise of due care and caution should have known, of said James Lea Kennedy's said situation and position, yet the said defendant, in disregard of its duty to him in that behalf, negligently and carelessly started or put in motion the said machine, without giving proper notice or warning to the said James Lea Kennedy, whereby the said James Lea Kennedy, who was then and there in the exercise of due care and caution on his part, to wit, on the day and year aforesaid, at New Castle county aforesaid, was thereby crushed and killed," etc. Our demurrers to that count are (1) that the said count is uncertain. (2) It does not appear therefrom what duty, if any, the defendant owed to the said James Lea Kennedy as to giving notice of the starting of the said machine.

LORE, C. J. That count is insufficient, because it does not designate any particular machine. The declaration must notify the

defendant of what he is to meet. We sustain the demurrers to the fifth count.

Mr. Hilles: The seventh count is similar to the sixth—not stating the name of the machine.

LORE, C. J. We have just ruled upon that. It must specify the machine. We overrule the demurrer to the first count, and sustain the demurrers to the third, fourth, fifth, sixth, and seventh counts.

At the election of the plaintiff's counsel, judgment of respondent ouster was entered, leave being given defendant to amend.

(75 Conn. 657)

FRISBIE v. MORRIS et al.

(Supreme Court of Errors of Connecticut. June 4, 1903.)

MALICIOUS PROSECUTION—APPOINTMENT OF CONSERVATOR—OUTSTANDING JUDGMENT—PROBABLE CAUSE.

1. Gen. St. 1902, § 1105, provides that, if one shall commence a suit against another without probable cause and with malicious intent, he shall suffer treble damages. *Held*, that the fact that the judgment of a probate court appointing a conservator for plaintiff was outstanding and unappealed from was conclusive against him in his action under the statute against the selectmen for instituting the proceedings, since it showed probable cause.

Appeal from Superior Court, New Haven County; Milton A. Shumway, Judge.

Action, for the malicious prosecution of a civil suit, by Walter L. Frisbie against Perry C. Morris and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Wilson H. Pierce and Percy S. Bryant, for appellant. Lucien F. Burpee and Terrence F. Oarmody, for appellees.

TORRANCE, C. J. The statute (Gen. St. 1902, § 1105) provides, in substance, that if any person shall commence and prosecute any suit or complaint against another "without probable cause, and with a malicious intent to unjustly vex and trouble him, he shall pay him treble damages." This statute appears to have been first enacted in 1672 (Revision of 1808, p. 671, tit. 167), and it has, with some changes in phraseology, formed part of our law ever since. The present action is brought upon this statute. The complaint sets forth, in paragraph 1, the following facts:

"On July 2, 1900, the defendants brought an application against the plaintiff to the probate court for the district of Waterbury, claiming the appointment of a conservator over the plaintiff, and caused said application to be served upon him, returnable to said probate court on the 14th day of July, 1900, and on said day prosecuted said application against the plaintiff."

The remaining paragraphs of the complaint (2, 3, 4) allege, in substance, that said application was commenced and prosecuted without probable cause, and with a malicious in-

tent unjustly to vex and trouble the plaintiff, and had caused him a loss of \$450. The first paragraph of the answer denied the allegations contained in paragraphs 2, 3, and 4 of the complaint; and the remaining paragraphs of the answer (2, 3, 4, 5, 6, 7, 8) set up, in substance, the following facts: (2) The defendants were selectmen of Waterbury during the year ending October 1, 1900; (3) the town of Waterbury is in the probate district of Waterbury; (4 and 5) during the year last aforesaid the plaintiff resided and had his domicile and had a large amount of property in said town of Waterbury; (6) "all of the acts alleged in paragraph 1 of the complaint were done by the defendants, acting as selectmen as aforesaid, pursuant to the law of this state in such case made and provided"; (7 and 8) on July 14, 1900, the court of probate aforesaid appointed a conservator over the plaintiff, on the application set forth in the complaint, and no appeal has been taken from said appointment.

The plaintiff demurred on the following grounds: (1) "The fact that the defendants acted in the capacity of selectmen of the town of Waterbury does not constitute a legal justification or excuse for the commission of the acts alleged in the plaintiff's complaint; (2) the laws therein referred to do not authorize or justify a complaint made with malicious intent unjustly to vex and trouble the person complained of." To the other paragraphs of the answer, setting up new matter, the plaintiff made no reply. The court overruled the demurrer. The plaintiff then, by consent, filed a reply in which he admitted the truth of all the new matter set up in the answer, except that contained in paragraph 6, as to which he alleged that he had "no knowledge or information sufficient to form a belief," and left the defendants to their proof.

As soon as this reply was filed, the defendants, in writing, made a motion for judgment in their favor, "based on the allegations of the plaintiff in his complaint, and his admissions contained in his reply" to the answer. The court granted the motion, and rendered judgment for the defendants.

The reasons of appeal are based solely upon the action of the trial court in overruling the demurrer and in granting the motion.

An action brought under our statute for the malicious prosecution of a civil suit "is subject to the same general principles as are actions on the case, for malicious prosecutions at common law." *Goodspeed v. East Had-dam Bank*, 22 Conn. 530, 535, 58 Am. Dec. 439. In actions for malicious prosecutions and in actions under our statute for vexatious suit, two of the essential allegations are (1) that no probable cause existed for instituting the prosecution or suit complained of; and (2) that such prosecution or suit terminated in some way favorably to the defendant therein. 1 *Swift's Digest*, pp. 491, 494, 047; *Munson v. Wickwire*, 21 Conn. 513, 515; *Wall v. Toomey*, 52 Conn. 35; *Thompson v.*

Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554. So long as the prosecution claimed to be malicious, or the suit claimed to be vexatious, is pending, "it cannot be known but that the party will be convicted upon it, or that it was commenced and carried on from motives of malice, without probable cause." 1 Swift's Digest, p. 491. In both actions, if it appears that probable cause existed, the defendant will prevail, even though it also appear that he instituted the proceeding complained of maliciously. "Let there be ever so much malice, if there was probable cause, the prosecution was justifiable." 1 Swift's Digest, pp. 491, 492; Thompson v. Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554. "For maliciously prosecuting a good cause of action in the manner provided by law, * * * there is no remedy, because there is no wrong." Johnson v. Reed, 136 Mass. 421, 423. Moreover, if in the action for malicious prosecution or for vexatious suit it appears that the prosecution properly ended in a judgment of conviction, or that in the civil suit judgment was properly rendered against the defendant therein, such outstanding judgment is, as a general rule, conclusive evidence of the existence of probable cause for instituting the prosecution or the suit. "The conviction of the plaintiff is justly considered as conclusive evidence of probable cause." Carpenter, J., in Brown v. Randall, 36 Conn. 56, 63, 4 Am. Rep. 35; Monroe v. Maples, 1 Root, 553; Goodrich v. Warner, 21 Conn. 432, 443; 19 Amer. & Eng. Ency. of Law (2d Ed.) pp. 667, 668, and cases cited.

Applying the foregoing principles to the case at bar, we think the trial court committed no error in overruling the demurrer, and in rendering judgment upon the motion. Upon the pleadings as they stood when the demurrer was overruled, and when the motion was granted, it conclusively appeared from the record that the proceeding of which the plaintiff complained had terminated in a valid outstanding judgment against him. It thus, in effect, conclusively appeared from the record that at least probable cause existed for the action of the selectmen of which the plaintiff complained, and therefore that the plaintiff had no cause of action.

There is no error. The other Judges concurring.

(75 Conn. 621)

KING v. FOUNTAIN WATER CO.

(Supreme Court of Errors of Connecticut. June 4, 1903.)

ARBITRATION—SUBMISSION AND AWARD—CONSTRUCTION—DAMAGES COVERED.

1. A submission providing for a determination of damages resulting or which might result to plaintiff by reason of the maintenance of a dam by defendant, thus forcing back water on plaintiff's land above the dam, and diverting water from his mill below the dam, and giving defendant a perpetual right to set back water on plaintiff's land to the extent that the same

could be flowed by said dam as then constructed, and the right to divert in pipes from said dam "all the water needed to supply any useful demand," and an award of \$300 for rights granted and damages caused by reason of the continuance of the dam and flowage of water, and of \$300 for damages past and future by reason of the diversion of water "for all purposes for which defendant could use said water," covered all future damages resulting from the diversion of the water by reason of the maintenance of the dam at its then height or at a greater height.

Appeal from Superior Court, New Haven County; John M. Thayer, Judge.

Action by John King against the Fountain Water Company for damages for diverting the water of a stream to the injury of the plaintiff's mill privilege, and for fouling the stream. Judgment for the plaintiff upon the first and second counts of the complaint, and appeal by the defendant for alleged errors in the rulings and judgment. Error in judgment upon first count. No error in judgment upon second count.

William H. Williams, for appellant. Verence Munger and Robert L. Munger, for appellee.

HALL, J. The defendant company was duly incorporated, prior to 1872, for the purpose, among other things, of furnishing the inhabitants of West Ansonia with an abundant supply of pure water and ice for public and domestic use. For this purpose, in July, 1872, the defendant constructed a dam and reservoir across a stream which contributed to the supply of a water power and mill privilege below, and laid pipes in the streets of West Ansonia for the diversion and distribution of the water of said stream. In December, 1872, the plaintiff, who owned the land above the defendant's dam, and the owners of the mill and mill privilege below (of whom the plaintiff, now the sole owner thereof, was one) and the defendant company, executed a written instrument, by which, after reciting that in pursuance of the object of its incorporation the defendant had constructed said dam, and that it would set back the waters of said stream upon the plaintiff's land, and that the defendant had "laid pipes in the highways and streets" for conducting water, and that the water of said stream, "when permitted to flow through said pipes for distribution," would, "to the extent the same shall flow through said pipes, be diverted from said stream," to the injury of the water power below, the said parties, for the purpose of determining the matters in controversy between them and ascertaining the damages, as stated in the words of the submission, "for all trespasses and injuries that are proved, and for injury that may occur hereafter, by the flowing of the land of said John King, and all damage that may occur to said proprietors of said sawmill and land below said dam by reason of said diversion of water hereafter," mutually agreed in part as follows: "Said Fountain

Water Company, its successors and assigns, shall forever hereafter have the right to dam and set back the water on the land of said John King to the extent the same can be flowed by said dam as now constructed." "Said water company shall forever hereafter have the right to divert in said water pipes, or others to be laid from said dam, all the water that it shall need to supply any useful demand they may have on the line of their present water pipes, or whatever water pipes may be laid in extension or continuance of the water pipes." "All question of damages, compensation, or pay to any of said parties * * * for any and all acts, past, present, and future, and for all rights herein given and granted, are hereby left to the final arbitrament, award, and determination of [naming three persons]." In accordance with the terms of such submission, the arbitrators named awarded to the plaintiff \$300, which, in the language of the written award, was "for all rights and privileges granted by John King to the Fountain Water Company, and in consideration of all damages past, caused by any workmen, agents, and contractors, and for all damages that will hereafter occur to said John King on the land of said King, near said dam, by the continuance of said dam, and the flowage of water over the land of said King"; and awarded to the owners of said mill and mill privilege \$300 for damages, as described in the award, "that will hereafter occur or which have occurred" to said named owners "by reason of the diversion of the water of the stream crossed by said dam, through the pipes of said Water Company for all purposes for which said Water Company can use said water." The terms of said award were complied with by said parties. When the dam was constructed it was supposed by all parties that the reservoir thus formed, was large enough to furnish and store a sufficient supply of water for the defendant's purposes; but, as the demand for water increased with the growth of the town, the capacity of the reservoir and the flow of the stream proved to be insufficient, and in 1870, and again in 1888, in order to supply the useful demand for water by the inhabitants of said town, it became necessary for the defendant to increase the capacity of the reservoir by raising the height of the dam, so that the water of the stream, which, at certain seasons of the year, had flowed over the dam and to the plaintiff's mill, should be held back, and stored for the defendant's use. The dam was thus raised about eight feet above its original height. While such raising of the dam flooded no land above, excepting what was then owned by the defendant, and diverted no more water than was necessary to supply the proper demands of the people of the described district, it held back and stored for the defendant's use, a considerable quantity of water, which, after the construction of the original dam, and before such raising thereof, had, at certain sea-

sons of the year, flowed over the dam, and to the plaintiff's mill, and had been useful to the plaintiff's mill privilege. The depriving the plaintiff of the use of the water so held back and ponded by the raising of the dam is the injury described in the first count of the complaint, and for which the trial court awarded damages to the plaintiff.

This judgment is apparently based upon the conclusion that by the terms of the written agreement of submission and award thereunder the quantity of water which the defendant may divert from the mill privilege below is not to be measured by the needs of the company in order to supply the proper demand of the public, but by the height of the dam as originally constructed. Such is not the correct construction of the language of these instruments. It is true that the contemplated injury by the flooding of the land above the dam was, by the terms of the submission and award, clearly described as that which would result from the use of the then existing dam. As such injury would necessarily be increased by any raising of the dam, its height would naturally be limited by the language of the submission and award. But the contemplated injury to the owners of the water power below was the diversion of the water of the stream so that it would not flow to their sawmill, and nowhere, either in the submission or award, do we find any statement or claim that the quantity of water which would be so diverted or the extent of the injury which they would suffer, would be affected by the height of the dam, or any language showing any intention upon the part of such owners in making the submission, or of the arbitrators in making the award, that the dam was to be limited to its height at that time. We should expect to find no such limitation, if the real purpose of the agreement of submission, as between the owners of the mill privilege and the defendant, was to enable the latter to use the entire stream if required for its purposes; since, if the defendant was to have the right to divert, if necessary, the entire stream, it could make no difference to the owners below whether it did so by raising the dam or by some other means. The language of the recital of the agreement of submission describing the contemplated injury to the mill owners as that which would result to their water power by the diversion of the water of the stream to the extent that such water would flow through the conducting and distributing pipes laid in the streets, the statement in the submission that it was the purpose of the parties to have determined all damage that might occur by reason of said diversion of water (no diversion having been before spoken of except that caused by the flow of the water through the pipes laid in the streets), the provision that the defendant should have the right to divert "in said water pipes" all the water it should need to supply any useful demand it might have, and the words of the award that

the sum to be paid to the mill owners was for damages that had occurred or would thereafter occur to them "by reason of the diversion of the water of the stream crossed by said dam through the pipes of said water company for all purposes for which said water company can use said water," show sufficiently clearly that it was not the intention of the owners of the mill privilege below the dam to limit the water which the defendant might divert to the quantity which could be ponded or held back by the dam as it was originally constructed, even though it may then have been supposed by all parties to be sufficient for the present and future uses of the company. It cannot be claimed that the water to be diverted was intended to be limited to such quantity as would flow through the pipes which had been laid at the time of the award, as it is expressly provided in the submission that the defendant may divert the water by laying other pipes to the dam, and by extending and continuing existing pipes, in order to supply any useful demand. From the language of the submission and of the award, which was accepted and performed by all the parties, read in the light of the known purposes for which the water company was organized, and which it was endeavoring to carry out, it is apparent that the owners of the mill privilege agreed that the defendant should have the right to use all the water of the stream in question which it might need in order to furnish its customers with an abundant supply of water and ice for public and domestic use, and that in accepting the sum awarded, them they received payment for all damage that might result to them from the necessary diversion by the defendant of the entire water of the stream. As the defendant has only diverted such water as was necessary for its lawful purposes, and as the manner of diverting it is a proper one, causing the plaintiff no injury beyond that for which he and his grantors have already received compensation, he was not entitled to damages upon the first count of the complaint.

Upon the second count of the complaint the trial court awarded the plaintiff \$5 damages for an injury sustained by him from the act of the defendant in discharging into the stream and mill pond below the dam, by means of a blow-off pipe at the bottom of the dam, foul and stagnant water which had accumulated in the bottom of the defendant's reservoir. This judgment does not appear to be erroneous. It may fairly be understood from the finding that the trial court held that, while it was necessary, in order to enable the defendant to furnish pure water to its customers, that the foul water which at times accumulated at the bottom of the dam should in some way, and at the times and in the quantities stated in the finding, be let off from the defendant's reservoir, yet it was not reasonably necessary that it should be discharged into the stream and mill pond

below in the manner it was on the occasion in question.

Since judgment must be for the defendant upon the first count, it is unnecessary to consider the questions raised by the defendant's demurrer to that count.

The judgment upon the first count is erroneous, and is reversed. There is no error in the judgment upon the second count. The other judges concurred.

(75 Conn. 633)

UNMACK v. DOUGLASS.

SAME v. KILLAM CARRIAGE CO.

(Supreme Court of Errors of Connecticut. June 4, 1903.)

CONDITIONAL SALE—UNRECORDED CONTRACT—BANKRUPTCY—TRANSFER BY BANKRUPT—VALIDITY—REPLEVIN—ACTION BY RECEIVER IN BANKRUPTCY—DAMAGES AND COSTS.

1. A contract providing for the delivery of personal property to one agreeing to pay a monthly rental therefor for a designated period, with the privilege of purchasing the same for a nominal sum after the date of the last payment, is a conditional sale, within Gen. St. 1902, §§ 4864, 4865, providing that contracts for the sale of personal property shall be in writing and recorded, and that conditional sales not made in conformity with the statute shall be considered absolute sales, except as between the vendor and vendee.

2. Under the express provisions of Bankr. Act 1898, § 67 (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]), transfers of property made by a bankrupt within four months of the commencement of the bankruptcy proceedings, with intent to defraud his creditors, are void, "except as to purchasers in good faith and for a present fair consideration."

3. A transfer of property by a bankrupt a few weeks before the commencement of the bankruptcy proceedings against him, under an agreement whereby the transferee assumes and agrees to pay the balance of the purchase price of the property due from the bankrupt to his vendor, is as valid as though the amount thus assumed by the transferee had been paid by him to the bankrupt in cash; and by the latter paid over to his vendor.

4. A sale by a bankrupt a few weeks before bankruptcy proceedings is not rendered void merely because it is on credit.

5. Where judgment in an action of replevin brought by a receiver in bankruptcy with permission of the federal court is rendered for defendant, damages and costs awarded against plaintiff as receiver are properly included therein, so as to render the sureties on the receiver's recognizance given in the action personally liable therefor.

Appeal from Court of Common Pleas, New Haven County; Julius C. Cable, Judge.

Actions of replevin by William H. Unmack, receiver in bankruptcy, against John W. Douglass, and by the same plaintiff against the Killam Carriage Company. From judgments for defendants, plaintiff appeals. Affirmed.

James M. Sullivan, for appellant. Charles S. Hamilton, for appellees.

BALDWIN, J. These two actions turn upon the same questions of law, and may be conveniently considered together.

Galwey, the bankrupt, was a livery stable keeper. A few weeks before the commencement of the bankruptcy proceedings, Douglass agreed to enter into partnership with him in his business, provided the former, after full investigation of its condition and prospects, became satisfied therewith; he meanwhile assisting in the business on wages of \$2 a day, and allowing property of his own to be used in connection with it, for the resulting depreciation of which he was to receive \$100 more, and the absolute title to which he was to retain. While working for Galwey under this agreement, Douglass bought of him, for \$400, which was their fair market value, a hack and a pair of horses then in the possession of certain creditors having liens upon them. Of this \$400, he paid \$72 to discharge the liens, and the rest, later, to other creditors of Galwey, including \$42 due to himself for his wages. On payment of the \$72, Galwey gave him an absolute bill of sale of the hack and horses, reciting the receipt of a consideration of \$400. At this time Galwey owed the defendant \$12, only, for wages; but possession was delivered, and openly and continuously thereafter retained by the defendant. Three days before the bill of sale was given, Douglass had bought of Galwey his interest in three carriages under a so-called lease from the Henry Killam Company, dated in October, 1898. By this lease Galwey had agreed to pay a monthly rental of \$60 for 21 months, and, should he do so, might buy the carriages for \$1 within a week from the date of the last payment. Galwey had not made the full payments thus required, and owed the company \$432 on that account. Douglass agreed, as the consideration of his purchase, to pay \$100 of this sum to it, provided it would accept him as its debtor in place of Galwey for the balance. To this it consented, on receiving from him the \$100, and thereupon Galwey gave him a bill of sale of his interest in the carriage for an expressed consideration of "one dollar and other valuable considerations," and he took them openly into his possession, keeping them till about the time of the bankruptcy, when they were turned over to the possession of the company. The fair cash market value of the carriages was \$432, and, after his payment of \$100, Douglass paid the company \$80 more on account, to take up notes of Galwey which it held for that amount. Both these sales to Douglass were on his part made in good faith, without any purpose to defraud Galwey's creditors, and, so far as he knew, the same was true of Galwey; nor, when they were made, did Douglass know or believe, or have reasonable cause for knowing or believing, that Galwey was in failing circumstances, or liable to become insolvent or bankrupt.

The paper under which Galwey derived his title from the Henry Killam Company was, in substance, a conditional sale, and, never having been acknowledged or recorded; was,

as to his creditors and the plaintiff, an absolute sale. Gen. St. 1902, §§ 4864, 4865; In re Wilcox & Howe Co., 70 Conn. 220, 39 Atl. 163.

The bankrupt act of 1898, § 67, Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], provides that all transfers of property made by a person thereafter adjudged a bankrupt, and within four months prior to the commencement of the bankruptcy proceedings, with the intent on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against them, and such property shall remain part of the assets of the estate, and pass as such to the trustee in bankruptcy, except as to purchasers in good faith, and for a present fair consideration. Transfers made within such period, which would be voidable by creditors under the laws of the state in which the property transferred is situated, are likewise voidable by the trustee in bankruptcy. The plaintiff, as a receiver in bankruptcy, had (section 2, Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420]), under the order of the district court, the right of action thus created for the recovery of assets so wrongfully transferred.

The facts found by the trial court show that neither of the transfers to Douglass was voidable by creditors under the laws of this state. If Galwey had any fraudulent intent, it was not known to, nor participated in by, Douglass. *Partelo v. Harris*, 26 Conn. 480. Nor were either of them voidable for any cause specified in the bankrupt act, since Douglass purchased in good faith and for a full and valuable consideration. What was done and agreed between him, the Henry Killam Company, and the bankrupt, extinguished, by a novation, the latter's obligation to the company, and had the same effect, as respects the plaintiff, as if Galwey had received \$432 from Douglass, and paid it over to the company. Nor is the fact material that the expressed consideration of the bill of sale of the hack and horses was the receipt of \$400, although only \$84, at most, had been in fact paid over at its date. The sum named was the true consideration. A bankrupt has the right to sell on credit, as well as for cash, to a bona fide purchaser. That possession of the property sold was not retained by the bankrupt is settled by the finding.

It is contended that there is error in the judgments, because they award damages and costs against the plaintiff as a receiver in bankruptcy. He sought his remedy in a court of this state, and by actions in which it was necessary to give recognizances with surety for the return of the property replevied, and for damages and costs in case he should fail to establish his right to retain the possession gained under the writ. Into such a recognizance—a joint and several one—he entered, and he and his surety must abide by its terms. It constituted an obligation of re-

ord, voluntarily assumed, which must necessarily have been contemplated by the district court when it gave him permission to bring these actions. It is unnecessary to inquire whether it binds the plaintiff personally. It certainly binds his surety personally, and in order to bind the surety it was necessary that the judgments in question should be rendered against his principal, and in the capacity in which he sued.

There is no error in either judgment. The other Judges concurred.

(75 Conn. 641)

BURKE v. WRIGHT et al.

(Supreme Court of Errors of Connecticut. June 4, 1903.)

PLEADINGS—DEMURRER—AMENDMENT—WAIVER—APPEAL—NECESSITY OF FINDINGS—PERFECTING APPEAL—TIME—EXTENSION—DISMISSAL.

1. Where defendant filed an amended answer after a demurrer had been sustained to his original answer, error, if any, in sustaining of such demurrer, was waived.

2. Where, after the sustaining of a demurrer to defendant's amended answer, no further answer was filed, whereupon judgment was rendered for plaintiff, and defendants appealed, findings of fact were not required in order to review such demurrer on appeal.

3. Gen. St. 1902, § 791, provides that, if no finding of facts or further action of the judge be necessary to properly present the questions in the cause, the party appealing shall, within 10 days from the judgment, file an appeal in writing, unless the trial judge shall extend the time therefor. *Held* that, where no findings or other action of the judge were required to obtain a review of a ruling on demurrer, the fact that after judgment appellant's counsel filed proposed findings, which were retained by the judge until after the 10 days expired, when they were returned, without action, on the judge's statement that defendants would still have a week in which to perfect their appeal, did not constitute an extension of time so as to sustain an appeal subsequently perfected.

Appeal from Court of Common Pleas, New London County; Walter C. Noyes, Judge.

Action by John H. Burke against Alvin H. Wright and others. From a judgment in favor of plaintiff, defendants appeal. Plea to abate appeal sustained. Appeal dismissed.

Seneca S. Thresher, John H. Barnes, and Roderick M. Douglass, for appellants. Frank T. Brown and Jeremiah J. Desmond, for appellee.

TORRANCE, C. J. The plaintiff in the court below brought an action against the defendants upon a written lease. To the answer filed in that action the plaintiff demurred, and the demurrer was sustained. The defendants then voluntarily filed an amended answer, to which the plaintiff demurred, and that demurrer was also sustained. No further answer was filed, and thereupon the court, on the 17th day of January, 1903, rendered judgment in favor of the plaintiff. On the 24th of January, 1903,

the defendants filed a notice of appeal from that judgment to this court. The appeal was filed and allowed on the 26th day of March, 1903, and the plea in abatement is based upon the claim that the appeal was not filed within the time allowed by law.

The statute (section 791, Gen. St. 1902) provides that, "if no finding of facts or further action of the judge be necessary to present properly the questions in the cause, the party appealing shall, within ten days from the rendition of the judgment," file with the clerk an appeal in writing, and give security for prosecution, as required by law. It further provides that the trial judge may, for cause shown, extend the time for filing and perfecting the appeal. The plea in abatement alleges, in substance: (1) That no finding of facts or further action of the trial judge was necessary to present properly the questions in said cause; (2) that no appeal in writing from said judgment to this court was filed within 10 days from the rendition of said judgment, nor was any such appeal filed except the one filed on the 26th day of March, 1903; and (3) that the trial judge did not extend the time for filing such appeal. The answer denied the first and third of the above allegations, and then set up the following facts, in substance: That, after final judgment was rendered, the defendants gave notice of appeal, and, believing that a finding of facts or further action of the judge was necessary to properly present the questions in the cause, they requested the judge in writing for such a finding, and lodged said request with the clerk, with a proposed finding; "that said judge held such request and proposed finding in his possession until March 20, 1903, when he returned the same to the clerk, and said to the defendants' counsel that he did not think any finding necessary, and the defendants then perfected their appeal, to wit, on March 26, 1903." To the facts thus set up in the answer the plaintiff demurred. Before the argument in this court, the parties, through their counsel, agreed in writing that when the proposed finding was returned to the clerk the judge said to counsel for the defendants, "You will now have one week in which to perfect your appeal." This was done to avoid sending the issue of fact raised by the answer to the plea in abatement (as to whether or not the time for filing the appeal had been extended by the judge) to be tried under the rule. By voluntarily filing an amended answer after the demurrer to the first answer was sustained, the defendants waived their right to except to the action of the court in sustaining the demurrer to the first answer (*Mitchell v. Smith*, 74 Conn. 125, 49 Atl. 909), and, if the demurrer to the amended answer was properly sustained, there was no error in the judgment rendered; so that the only question which, upon the record before us, the defendants could possibly raise upon appeal from that judgment,

¶ 1. See Pleading, vol. 29, Cent. Dig. § 1402.

was whether the demurrer to the amended answer was properly sustained. Upon this state of facts it is clear that, after judgment rendered, no finding of facts or further action of the judge was necessary to properly present that single question before this court. Clearly, then, an appeal in this case could be taken only within 10 days from the date of judgment, or within some extension of that time allowed by the judge. As the appeal was not taken within 10 days from the date of judgment, the question is whether it was taken within an extension of that period allowed by the judge, and the answer to that question depends upon the answer to the controlling question whether the judge made or allowed any such extension. No order for any such extension appears of record anywhere, but the defendants contend that what the judge did and what the judge said, as admitted by the pleadings and stipulation of counsel, constituted in legal effect an extension of the time for filing an appeal. In cases like the one between these parties in the court below the statute says that the judge "may, for due cause shown, extend the time" for filing an appeal. This implies that the judge, before he extends the statutory period for appeal, shall find, upon hearing after notice, if necessary, that due cause exists for making such extension; and that the order extending or refusing to extend the time shall be communicated to the clerk, and be minuted by him in writing upon the files or records of the case. This certainly is the safe and orderly method of procedure in such cases. Orders of this kind ought not to be left in the air, nor committed solely to the custody of "slippery memory." Whether in all cases of this kind, evidence of the making or existence of such an order should be confined exclusively to the written memorial thereof, it is not necessary here to decide; for upon the admitted facts and evidence in this case we think it ought not to be held that the judge did extend the time for filing the appeal. The fact that the judge took the proposed finding, and kept it till March 20, 1903, cannot of itself be regarded as, in legal effect, an extension of the time for filing an appeal. The request for a finding and the proposed finding were both absolutely unnecessary to the defendants' right to appeal, and court and counsel must, upon the record, be charged with knowledge of that fact. They both knew that what the judge did or might do with these unnecessary papers could not in any way affect the defendants' right to appeal, and that the judge was under no duty to act upon the proposed finding, or to inform counsel for the defendants that the proposed finding or further action of the court was necessary or unnecessary to their right of appeal.

It is, however, strongly insisted that what the judge said to counsel for the defendants after he handed the papers back to the clerk

on the 20th of March, 1903, was, in legal effect, an extension of time for filing the appeal. Assuming, without deciding, (1) that the judge could then exercise the power to extend the time, and (2) that the evidence agreed to is admissible upon the question as to whether he did then exercise it, we think that such evidence fails to show that he extended or intended to extend the time for filing an appeal. It does not appear that due cause existed for such extension. Indeed, the record shows that no such cause existed. What the judge said does not appear to have been communicated to the clerk or to the opposing counsel, nor does it appear that the judge intended that it should be communicated; and no entry of what he so said was made anywhere by anybody. The words attributed to the judge, read in the light of the circumstances under which they were uttered, appear to be nothing more than an expression of opinion that by law the defendants had still one week left in which to take an appeal; but, whatever other construction may be given to them, we think it would be very unreasonable to hold that by them the judge extended or intended to extend the time for filing the appeal.

The plea in abatement is sustained, and the appeal is dismissed. The other judges concurred.

(206 Pa. 481)

MOSER v. UNION TRACTION CO.

(Supreme Court of Pennsylvania. May 4, 1903.)

STREET RAILROADS—COLLISION—EVIDENCE—NEGLIGENCE.

1. Evidence in action against a street railway to recover damages for a collision at a street crossing with plaintiff's horse and wagon examined, and held to justify the court in directing a verdict for defendant.

2. The failure to look for an approaching street car is negligence per se, and the duty is not performed by looking when first entering on a street, but continues until the track is reached.

Appeal from Court of Common Pleas, Philadelphia County.

Action by William O. Moser against the Union Traction Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Edward A. Anderson and John H. Fow, for appellant. Thomas Leaming and Charles Biddle, for appellee.

POTTER, J. Upon the trial of this case it appeared that the plaintiff did not look for an approaching car at the moment when he was about to cross the track, nor did he see that the car which struck him was near until after the collision occurred. For this reason, at the close of the plaintiff's testimony the learned trial judge entered a judgment of compulsory nonsuit. He was entirely justified in so doing. The plaintiff testified that

as he came up Thirtieth street, to the southern line of Girard avenue, he stopped his horse and wagon at a point about opposite the building line, and waited for an east-bound car upon the track on Girard avenue nearest him to take on a passenger. While waiting there he looked up, and saw a west-bound car approaching upon the other track at Twenty-Ninth street. He made no move until the car going east had passed, and then he started his horse and wagon at a slow walk across Girard avenue, but did not look again for the approaching west-bound car, nor did he notice its position as he was entering upon the track in front of it, nor did he see it until after it struck his wagon. It was apparent that the plaintiff acted in disregard of the simple but effective rule of safety, which required him to look for the car just before he entered the track. The rule has often been declared by this court, and is reiterated in *Burke v. Union Traction Company*, 198 Pa. 497, 48 Atl. 470, as follows: "The duty to look for an approaching car is an absolute duty, and failure to do so is negligence per se. This duty is not performed by looking when first entering on the street, but continues until the track is reached. *Ehrisman v. East Harrisburg City Passenger Railway Company*, 150 Pa. 180 [24 Atl. 596, 17 L. R. A. 448]; *Omslaer v. Pittsburg, etc., Traction Company*, 168 Pa. 519 [32 Atl. 50, 47 Am. St. Rep. 901]; *Smith v. Electric Traction Company*, 187 Pa. 110 [40 Atl. 966]." The opinion emphasizes the fact that no question arises as to the proper place to look, in the crossing of the tracks of electric roads in cities, but that clearly the duty is to look just before crossing. The excellence of this rule as a measure of safety is so apparent that it needs no argument in its justification. No possibility of collision exists until the entry upon the line of the track is made. The driver of a wagon may stop so close to the track of a street railway that the nose of his horse may almost touch the passing car, and yet be safe. But when he undertakes to look for an approaching car while he is yet some distance away from the track, he can be guided by nothing more than conjecture as to the varying rates of speed with which both car and wagon are approaching a common point. Nothing is more commonly erroneous than the estimate of distance passed over by a continuously moving body in a short space of time. In the present case the plaintiff saw the car, which afterwards struck him, while it was yet some distance away. But he probably failed to take due note of the fact that it was steadily nearing, at a rapid gait, the point at which he wanted to cross its track. When he saw it, his team was standing at a point about opposite the southern building line of Girard avenue, waiting for an intervening car to pass out of his way. When it did so, he started his horse. To do this, with a slow-moving animal, would take an appreciable amount of time. He then

drove slowly across the space between the line of the sidewalk and the first track, and across the first track, and upon the second track, without looking again to see where the car was. He was not justified in this indifference to the approach of the car. It was his plain duty to look for it and observe its position before driving upon the track in front of it. For his disregard of this duty, the trial court held that he could not recover in this action.

The judgment is affirmed.

(305 Pa. 477)

ACKERMAN v. UNION TRACTION CO.

(Supreme Court of Pennsylvania. May 4, 1903.)

STREET RAILROADS—INJURY TO BOY—NEGLIGENCE OF MOTORMAN.

1. Evidence in action against a street car company, causing death of boy riding on the side steps of a freight car on a track parallel to the street car, considered, and held to show the motorman not guilty of negligence.

2. Where a motorman is confronted with a sudden danger, he is not liable for failure to follow what might appear on reflection to be the wiser course.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Charles W. Ackerman against the Union Traction Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Bernard Harris, for appellant. Thomas Leaming and Russell Duane, for appellee.

FELL, J. This action is by a father to recover damages for the loss of his son 13 years of age, who was killed under the following circumstances: The boy was riding on the side steps of a freight car of the Philadelphia & Reading Railroad Company, which was running north on Second street. The defendant's electric car was running south, and the tracks of the two roads were parallel, and so close that there was a space of only a few inches between the sides of the cars as they passed. The freight train approached Second street on a curve, and turned onto the street a short distance from the place of the accident. The freight car could be seen by the motorman when it was 300 feet distant, but the boy could not be seen until the freight car reached a position where the tracks were parallel. This was about 150 feet from the spot where the accident occurred. The boy was on the sixth car of the freight train, and according to the testimony the train and the electric car were running as fast as cars usually run between crossings, or, as stated by some of the witnesses, much faster than a horse could trot. As soon as the motorman saw the boy, he called to him and made gestures to indicate that he should jump off the step, or climb on

the bumper at the end of the car, which was one foot from the step. This warning was disregarded. The boy attempted to avoid injury by straightening his body and keeping close to the side of the car. He was struck on the shoulder, thrown to the narrow space between the tracks, and injured by the wheels of both cars. We find nothing in this situation from which negligence on the part of the motorman can fairly be inferred. He first saw the boy when the distance between them was 150 feet, and they were approaching each other at the rate of at least 15 or 20 miles an hour. With a clear understanding that the boy would be injured unless he got out of the way of the electric car, the motorman called and motioned to him to jump off or climb on the bumper. Possibly, under the circumstances, it would have been better to stop the car, and thus lessen the injury, than attempt to avert it altogether; but, since he was confronted by a sudden and unexpected danger, and had but a moment in which to act, the motorman cannot be held liable for failure to see and follow what might appear on reflection to have been the wiser course. *Hestonville, etc., R. Co. v. Kelley*, 102 Pa. 115; *Phillips v. People's Pass. Ry. Co.*, 190 Pa. 222, 42 Atl. 686.

The judgment is affirmed.

(205 Pa. 470)

RICHMOND v. BENNETT.

(Supreme Court of Pennsylvania. May 4, 1903.)

SHERIFF'S DEED — INTEREST CONVEYED — EASEMENT — NONUSER — REFERENCE — OBJECTIONS WAIVED — INJUNCTION.

1. A sheriff's deed on a foreclosure affects a transfer of an easement appurtenant to the land, though no mention of it is made in the deed.

2. After a mortgage was executed on certain land, a right of way was created in favor of the land. *Held*, that a sheriff's deed on foreclosure passed the easement.

3. Nonuser will not terminate an easement created by express grant.

4. Where, by agreement, a case in equity has been referred to referee, defendant cannot first raise the question of jurisdiction after the testimony has been closed.

5. Where, in a bill to restrain the obstruction of an easement, the evidence as to plaintiff's title is such that a judge in an action at law would direct a verdict, equity will grant relief, though there has been no adjudication of title at common law.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by James Richmond against S. Bennett. Decree for plaintiff, and defendant appeals. Affirmed.

Plaintiff was owner of a lot on Fortieth street, in the city of Philadelphia, running back to a 10-foot strip of ground extending northward from Locust street to the property of defendant. Defendant, claiming that the 10-foot strip was a private way, the fee

of which was in him, began the construction of a hay scale in the strip, which would obstruct its use as a wagonway, whereupon plaintiff, claiming an easement of passage through the strip, filed a bill for injunction. The referee made the following findings of law:

"The complainant in this suit seeks to enjoin the respondent, Bennett, from building a hay scale upon land adjoining said complainant's property, and over which said complainant claims a right of way, granted as appurtenant to his lot by deed. The respondent does not deny the act complained of, but defends his conduct on the ground that there exists no right of way over the land referred to; that he (the respondent) is the owner in fee of the soil thereof; and that in building the said structure he is but exercising his proper rights as owner of the soil, and that the complainant has no rights therein for passage, or for any other purpose. There has been no serious effort made by either party to establish an adverse possession, or to set up a prescriptive right as opposed to the records of title and grants. The question, therefore, is one of real estate law, depending more on the interpretation of recorded deeds than on the conduct of the various holders of the titles, as testified to by the witnesses called. That the right sought to be enforced by the complainant did at one time exist cannot be seriously doubted. Joshua Paxon, owning both the dominant and the servient tenement, sold his land in two portions, the one now belonging to the respondent being expressly subjected to a right of way in favor of the other, now owned by the complainant. As will appear from the deeds themselves, the conclusion is unavoidable that this easement was created as appurtenant to the lot now owned by plaintiff. It was binding upon Paxon himself, and, by record, notice upon his immediate successor, Grau.

"It remains to inquire whether, by any means, the easement once existing has since been extinguished. In general, an easement created by express grant cannot be destroyed by anything short of a new grant of equal solemnity or adverse possession constituting a prescriptive right. Nonuser, even if established, would not terminate it, and I have found that there is no evidence of a release, and none showing adverse possession. That nonuser is immaterial is shown by *McKee v. Perchment*, 69 Pa. 342. There the subject of contention was an alley, which was fenced through the middle, and had stables, coal-houses, and other buildings upon it, with trees and bushes, for a period of more than twenty-one years. It was held that, as the right to the alley was conveyed by express grant, and as the obstructions were not shown to have been accompanied by adverse possession, the easement must be sustained. It was urged, however, that in the present case there is a lack of continuity in the line of deeds transferring the easement to the

¶ 1. See Easements, vol. 35, Cent. Dig. § 73.

present claimant. The contention is that, granting the previous existence of the right, it expired because it was omitted from a deed by which the sheriff transferred the dominant tenement. I am unable to see how this omission can affect the rights of the parties. There is nothing amounting to a release, for the owner of the servient tenement was not privy to these transactions, and was fully informed of the existence of the easement by the record in his own line of title. Moreover, the presumption is that, where notice is given to the servient holder either by apparent use of the way or upon the record, all rights created to assist in the enjoyment of the dominant land become appurtenant thereto, and pass therewith, even though not mentioned in the deed. This rule is established by numerous authorities, among which may be mentioned the following cases: *Swartz v. Swartz*, 4 Pa. 353, 45 Am. Dec. 697; *Rhea v. Forsyth*, 37 Pa. 503, 508, 78 Am. Dec. 441; *Ott v. Kreiter*, 110 Pa. 370, 1 Atl. 724; *Held v. McBride*, 39 Wkly. Notes Cas. 284; *Wright v. Chestnut Hill Iron Ore Co.*, 45 Pa. 475; *Erb v. Brown*, 69 Pa. 216. Especially is it true that an omission from a sheriff's deed is not fatal. A sheriff's sale operates to transfer the mortgagor's title such as it is, not merely such as it is described to be. In *Kieffer v. Imhoff*, 26 Pa. 438, it is said: "The omission to specify the privilege particularly does not change the qualities annexed to the estates, nor do the other trifling inaccuracies produce that effect. Precision of description is never expected in a sheriff's deed, and it is always construed with great liberality." See, also, *Buckholder v. Sigler*, 7 Watts & S. 154; *Wright v. Chestnut Hill Iron Ore Co.*, 45 Pa. 475; *Middleton's Ex'rs v. Middleton*, 106 Pa. 252; *Overdeer's Adm'r v. Updegraff*, 69 Pa. 110; *Zell v. Universalist Society*, 119 Pa. 390, 13 Atl. 447, 4 Am. St. Rep. 654; and *Geible v. Smith*, 146 Pa. 276, 23 Atl. 437, 28 Am. St. Rep. 796. I am of opinion, accordingly, that the said sheriff's deed effected a transfer of an appurtenant easement, even without express mention of it.

"It is true that the mortgage to satisfy which this sheriff's sale took place was prior in time to the creation of the easement. It is settled, however, by *Cannon v. Boyd*, 73 Pa. 179, where the facts were very similar to those in the present case, that the easement passes notwithstanding the priority of the mortgage.

"Both parties have inquired at some length into the nature of the respondent's title to the soil of the alley. This question it is unnecessary to consider. The most perfect title to the soil would not relieve the respondent from his duty to respect the plaintiff's right of way thereover. The important fact in this case in the line of title is that the existence of the servitude was on record in Paxon's deed to Grau. Binding Grau, it also bound the subsequent purchaser at the sheriff's sale, and constituted a sufficient no-

tice to all claiming under him, including the respondent. Therefore I report a right of way appurtenant to the complainant's lot was created with due regularity, and notice thereof placed on record for all purchasers of the servient tenement. This easement was never released. It was never overriden by any prescriptive right. Nor did it expire merely because it was not mentioned in one of the deeds through which the complainant obtains his title. Of the respondent's title, it is enough that the record show full notice to him that he bought subject to the easement.

"After the testimony had closed, and during the argument, the respondent contended for the first time that the bill should be dismissed for want of jurisdiction, although this question had not been set up by demurrer or suggested in the answer. Under the decisions of the Supreme Court it should not now be considered. The following language, taken from the opinion in *Shillito v. Shillito*, 160 Pa. 167, 28 Atl. 637, is in point: "Moreover, the jurisdiction of the court was not denied or questioned by demurrer, plea, or answer. The first intimation of a want of jurisdiction came after the most of the testimony had been taken by a master appointed on the agreement of the parties, and after the most of the expenses of the litigation had been incurred. We have, therefore, a case to which the language of this court in *Adams' Appeal*, 113 Pa. 449, 6 Atl. 100, is applicable, even if it be conceded that there is room for doubt respecting jurisdiction. In delivering the opinion of the court in the case cited, the present Chief Justice Green said: "While it is true that manifest want of jurisdiction may be taken advantage of at any stage of the cause, the court will not permit an objection to its jurisdiction to prevail in doubtful cases after the parties have voluntarily proceeded to a hearing on the merits, but will administer suitable relief." See, also, *Evans v. Goodwin*, 132 Pa. 136, 19 Atl. 49; *Searight v. Carlisle Deposit Bank*, 162 Pa. 504, 29 Atl. 783; *Drake v. Lacoe*, 157 Pa. 17, 27 Atl. 538; *Edgett v. Douglass*, 144 Pa. 95, 22 Atl. 868; and *Margarge & Green Co. v. Ziegler*, 9 Pa. Super. Ct. 438.

"But, even if the objection to the jurisdiction of equity be considered at this stage of the proceeding, it is not at all clear that the plaintiff is not entitled to equitable relief. It is true that in actions respecting real property, where the plaintiff's right has not been established at law, or is not clear, he is generally not entitled to remedy by injunction; but where in a proceeding in equity the plaintiff's title is clear, and all the evidence relating to it is of such a character that a judge in a trial at law upon the same evidence would not be at liberty to submit the question of the plaintiff's title to the jury, equity will grant relief although there has been no adjudication of the title

at common law. *Edgett v. Douglass*, 144 Pa. 95, 22 Atl. 863; *Manbeck v. Jones*, 190 Pa. 171, 42 Atl. 536. In *Manbeck v. Jones*, a bill in equity was filed for an injunction to restrain the closing up of an alleged road across defendant's land. The answer denied the existence of the road. Although the question of the existence of the right of way had not been tried in an action at law, the court below heard testimony on both sides, and decided that the defendant took his conveyances subject to the right of way. Judge Bechtel, delivering the opinion of the court below, cites authorities to the effect that the right should be clear to warrant a decree and injunction to compel the keeping open of a way, and, if the right be doubtful, a chancellor will pause until it be established by law. He then says: 'Of course, the right should be clear, and no chancellor would interfere in a doubtful case until it is established; but when the right is clearly shown, as in this case, a suit at law is unnecessary, and really a useless expense. * * * We think, if the testimony before us was submitted to a jury, there could be but one finding, to wit, in favor of the existence of the road. Nor could any other be conscientiously sustained.' The court entered a decree ordering that the road be opened, and restraining any further obstruction of plaintiff's right of way. The decree was affirmed by the Supreme Court, which held: 'For reasons given by the learned trial judge in his opinion, we are satisfied he was right in concluding that the plaintiff was entitled to equitable relief, and in adequately providing therefor by the terms of the decree from which this appeal was taken.'

"For the reasons given, I report in favor of the complainant, and respectfully recommend that a decree be entered in accordance with the prayer of the bill in the form herewith submitted and attached."

On exception to his report, the referee further found as follows:

"In reply specially to the complainant's twenty-fourth exception, in which the error assigned is my finding as a matter of law that the servitude imposed upon respondent's land was not discharged by the sheriff's sale for taxes of 1887, I refer to the cases of *Irwin v. Bank of United States*, 1 Pa. 349, and *Lesley v. Morris*, 9 Phila. 110, not cited in my original report. In the latter of these cases it is held that a building restriction upon real estate is not removed by a subsequent judicial sale for taxes. On page 111, 9 Phila., Judge Thayer, in delivering the opinion of the court, says: 'It would be a very dangerous doctrine to establish that a covenant who is not a party to the proceedings for the collection of the taxes, and who had no notice of their existence, should, without any fault of his, be deprived of a valuable right—a right which is as much property as the land itself. Such a doctrine would furnish a very easy method by which covenant-

ors and their assigns might evade the most solemn obligations, and fraudulently rid themselves of troublesome servitudes for which they have received a large price. Such a construction of the laws relating to the collection of taxes does not appear to be necessary in order to secure the payment of the tax, and would produce a manifest injustice without any important advantage to the state or the city. This, then, is precisely the case in which the argument from inconvenience is decisive of the construction. The words of the various acts of assembly relating to the levying and collection of taxes have no such necessary meaning or effect as that which the argument for the plaintiff attributes to them, and, this being so, the great inconvenience which would result from the construction which he contends for supplies a powerful reason for believing that such a construction was never contemplated by the Legislature, and fully warrants us in rejecting it. The decisions and the general current of legislation upon this subject tend greatly to strengthen this conclusion. That a ground rent was not divested by a judicial sale for taxes assessed upon the land was settled by the courts before the passage of the act which expressly so enacts. *Irwin v. Bank of United States*, 1 Pa. 349; *Salter v. Reed*, 15 Pa. 260. The legislation which protects mortgages which are prior to tax claims is also a clear indication of the policy of the state upon the subject. The right which is acquired by the covenantee and his assigns in a building restriction, such as that which exists in that of the line of his title, is a right not in the land, but appurtenant to the land. Like a ground rent, it is an interest not in the land itself, but incident to the ownership of another, and arising out of a covenant fastened upon it by a former owner. The same reasoning and the same policy which protects a ground rent from being divested by the sale of the land for taxes, ought, therefore, to protect the right which a covenantee and his assigns have in a building restriction.'"

Argued before MITCHELL, DEAN, FELL, MESTREZAT, and POTTER, JJ.

William S. Divine and Arthur B. Huey, for appellant. A. I. Phillips, Dimmer Beeber, and J. Levering Jones, for appellee.

PER CURIAM. This decree is affirmed on the findings of law by the learned referee, costs to be paid by appellant.

(205 Pa. 444)

MURPHY v. PRUDENTIAL INS. CO. OF AMERICA.

(Supreme Court of Pennsylvania. May 4, 1903.)

LIFE INSURANCE — ACTION ON POLICY — EVIDENCE — MISSTATEMENTS IN APPLICATION — CROSS-EXAMINATION.

1. Where the defense to an action on a life policy was false responses to questions of med-

ical examiner, the physician called for the plaintiff cannot be cross-examined as to whether the treatment of the disease of which the insured died was a proper treatment.

2. A physician, called as a witness for plaintiff in an action on a life policy, cannot be asked whether, if he had been told that shortly before the application insured had consulted another physician for a cough and night sweats, that fact would have had any effect with regard to passing applicant as a first-class risk.

3. Where, in an action on a life policy, the defense is false answers made by the insured in his application, defendant can show that deceased had consumption within a year after the date of the policy and died therefrom, after showing that insured was treated for consumption within the year preceding the policy.

4. Where, in an action on a life policy, the evidence for defendant shows that insured had consumption during the year before the issue of the policy and died of that disease thereafter, and insured stated in his application that he never had any spitting of blood or serious illness, the trial judge should instruct the jury that the statements alleged by the defendant to be false were material to the risk, and if they were false would avoid the policy.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Mary E. Murphy against the Prudential Insurance Company of America. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Frederick J. Shoyer, for appellant. Thomas A. Fahy and Walter Thomas Fahy, for appellee.

MESTREZAT, J. This is an action of assumpsit on an insurance policy issued by the defendant company on the life of Edward Joseph Murphy, the husband of the plaintiff, who was named as the beneficiary. The application was signed by the insured on November 18, 1899, the medical examination was made the next day, and the policy was issued November 24, 1899. The death proofs state that Murphy died April 5, 1901, of pyelonephritis. The application contains the following questions and answers: "16. Are you in good health? Yes. 17. When were you last attended by a physician? Four years ago. For what complaint? Neuralgia of the face due to a bruise. 23. Have you ever had (answer 'Yes' or 'No' to each) * * * spitting of blood? No. 24. Have you ever had any serious illness? No." The defense to the action is that the answers to these questions were not true, and were known to be untrue by the applicant, Edward Joseph Murphy, when they were made. It is claimed by the defendant company that at the time the insured signed the application he was not in good health, had consulted physicians for hemorrhages and spitting of blood, and died subsequently, on April 5, 1901, of consumption. The application contains, *inter alia*, the following language: "I hereby declare and warrant that all the statements and answers to the above questions, as well as those

made or to be made to the company's medical examiner, are or shall be complete and true, and that they, together with this declaration, shall form the basis and become a part of the contract of insurance hereby applied for. And it is agreed that if any of the said answers be incorrect in whole or in part, then the policy which may be granted in pursuance hereof shall be null and void, and all payments made thereon shall be forfeited to the company. And it is further agreed that the policy herein applied for shall be accepted subject to the conditions and agreements therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said company, and the first premium paid thereon in full, while my health is in the same condition as described in this application." In the application, under the questions to be answered by the insured, and which were answered by him before the medical examiner of the company, is the following: "I hereby warrant that the answers to these questions are true, and agree that they shall form a part of the contract of insurance applied for." The case was submitted to the jury by the learned trial judge to determine the truth or falsity of the answers to the questions in the application, with instructions that, under the act of 1885 (P. L. 134), answers which are in fact incorrect and untrue would not avoid the policy if they were immaterial to the risk, provided they were made in good faith by the insured, and in the belief that they were true. The verdict and judgment were for the plaintiff, and the defendant company has appealed.

The first assignment complains that the court erred in refusing to permit the defendant, on cross-examination, to ask Dr. Clark, a witness for plaintiff, the following question: "Would you say that was not a proper treatment for tuberculosis?" The treatment referred to was alleged to have been administered by Dr. Atlee prior to the date of the application. The question was properly excluded. The treatment of the disease was not in issue, and therefore the question was irrelevant. An affirmative reply to the question would have tended to show that the treatment administered by Dr. Atlee was, in the opinion of the witness, proper for tuberculosis, but it would not have aided the jury in determining whether the patient was suffering with that disease, which was the question at issue.

The second, third, and fourth assignments allege error by the court in excluding the answers to questions, on cross-examination, put by the defendant to Dr. Clark, the physician who had examined the insured for the risk, to ascertain whether, if the witness had been told by the applicant that shortly prior to the application he had consulted Dr. Atlee for a cough and for night sweats, that fact would have had any effect with regard to passing him as a first-class risk. The only

effect of the reply to this question would have been to show the opinion of the witness as to whether, in view of the alleged undisclosed facts, the risk was first-class, and whether, if the alleged fact had been known, the risk would have been accepted by the company. The issue to be determined by the jury, however, was the truth or falsity of the answers of the insured to the questions put to him by the medical examiner; and, as affecting that issue, it is apparent that it was wholly immaterial and of no consequence what, under other facts than those disclosed by the application, the witness thought about the character of the risk, whether it was good or bad, and whether the company would or would not have accepted it. The testimony was therefore properly excluded. This question has been ruled in other states, and a like conclusion reached. In *Rawls v. American Mutual Life Insurance Co.* (N. Y.) 84 Am. Dec. 280, a physician was asked on cross-examination, if he had known the insured had been addicted to certain practices, would he have regarded his conduct as likely to impair his health; and then the medical examiner was asked on cross-examination: "If you had known, at the time you had made this examination [referring to the examination made for the defendants], that Fisher was in the habit of using intoxicating liquors to excess, would you have regarded his life healthy and the risk good?" The court held that the testimony was properly rejected, and observed: "This testimony was incompetent both on principle and authority. It was of no consequence what, in the opinion of these physicians in certain cases, and under a certain state of facts, would be a good or bad risk for a life insurance company to take, or what circumstances should be considered on the question of increasing or lessening the rates of insurance. These witnesses might give their opinion on matters of science connected with their profession, but were not receivable to state their views on the manner in which others would be influenced if certain specific facts existed." This decision was followed in *New York, in Higbie v. Guardian Mutual Life Insurance Co.*, 53 N. Y. 603. There the medical examiner, called as a witness for defendant, was asked in substance whether, if he had been advised of certain alleged undisclosed facts, it would have called upon him to make further inquiries, and as to the effect such knowledge would have had upon his answer to the question as to the propriety of taking the risk. It was held that these questions were properly rejected. In *Illinois* a similar view is taken of the admissibility of such testimony. In *Mutual Aid Association v. Hall*, 118 Ill. 169, 8 N. E. 764, the medical examiner of the company was the witness being interrogated. The court approved the ruling of the trial court in sustaining the objection to the testimony, and said: "They [questions] were, in sub-

stance, whether Hall's application for membership in the association would have been favorably passed upon if it had been stated in such application that he drank liquor. We think that the objections to these questions were properly sustained. The real issue was whether the statements made in the application were true or false. What would have been the effect if some different statement from that therein contained had been made to the association was of no consequence."

The fifth assignment may be dismissed with the remark that a responsive answer to the question put to the witness would not, in itself, have tended to disclose any existing disease, which, as stated by counsel on argument, was the purpose of the question.

The sixth to the twelfth assignments, inclusive, and the twenty-second assignment, may be considered together. The defense to this action in the court below was, as we have seen, that the insured made false answers to the questions put to him by the medical examiner. For the purpose of establishing this fact, the defendant offered to show that the insured was afflicted with consumption during the latter half of the year 1900, and that he died of that disease in the spring of 1901. The trial court held that the evidence was not admissible; that "to ascertain whether he had consumption at the time [of the issuance of the policy], to prove that he had consumption in September, 1900, would not be any evidence in this case." The learned judge, therefore, excluded the testimony offered by the defendant to show the condition of the insured's health in 1900, and that he subsequently died of consumption; and these assignments under consideration raise the question of the correctness of this ruling. We think the evidence should have been admitted. The defendant had introduced testimony tending to show that during the year 1899, immediately prior to the date of the policy, the insured was afflicted with consumption, and during that time was treated for that disease. It would have been evidence confirmative of this testimony to show that the insured was suffering with and being treated for consumption from a date a few months after the policy was issued till he died with the disease in the spring of 1901. The well-understood character of this disease, as being usually slow and lingering, should not be overlooked in determining the relevancy of the excluded evidence. It is doubtless true, we think, that the insured could have been first attacked by the disease subsequent to the date of the policy, and under the evidence the jury could have so found. On the other hand, if the testimony convinced the jury that during the greater part of the year 1900 the insured was afflicted with consumption, and that he died with that disease in the spring of 1901, there would have been

evidence, taken in connection with like testimony as to the condition of the insured previous to the issuance of the policy, to justify the jury in finding that he had the disease at the date he made his answers to the questions of the defendant's medical examiner in November, 1899. Whether the disease, if shown to have been present in the insured in 1900, existed at any prior date, would have to be determined from the progress it had then made, and from the facts disclosed by expert medical testimony. This evidence should go to the jury, with the testimony showing the alleged similar physical condition of the insured in 1899, as bearing upon his condition at the time of the issuance of the policy, and hence upon the truth or falsity of the statements in his application. The weight of the testimony and the credibility of the witnesses were, as in other cases, for the jury. We are therefore of opinion that the trial court was in error in rejecting the testimony offered by the defendant tending to show that the insured was suffering with consumption in 1900 and died of that disease in the spring of 1901.

The numerous remaining assignments of error may be considered without special reference being made to them separately. The correctness of the questions raised by these assignments requires an interpretation of the act of June 23, 1885 (P. L. 134), *Purd. Dig.* 1046, and its application to the case in hand. The first section of the act is as follows: "Whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application made in good faith by the applicant, shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation or untrue statement relate to some matter material to the risk."

Hartman v. Keystone Insurance Co., 21 Pa. 466, was an action on a life insurance policy in which it was stipulated that any untrue or fraudulent allegations in effecting the insurance should avoid the policy, and that the statements of the assured should form the basis of the contract. Chief Justice Black, delivering the opinion, says: "The plaintiff can only recover if the declaration of the assured, upon the faith of which the risk was taken, was strictly true in every material part. It will not do to say that this was immaterial. Every fact is material which increases the risk, or which, if disclosed, would have been a fair reason for demanding a higher premium. Nor is it of any consequence that the death was not, in fact, produced by a cause connected with the subject of the misrepresentation. One who falsely declares himself free from consumption cannot effect a valid insurance on his own life, though he died of cholera. A sol-

dier or sailor who warrants himself a merchant has a void policy, even though he is not slain in battle, or does not perish at sea." In *Wall v. Royal Society*, 179 Pa. 355, 36 Atl. 748, it is said (Green, J.): "The general doctrine that in actions on policies of insurance, with a warranty of the truth of the facts, the validity of the contract depends on the truth of the warranty, and that the engagement of the policy holder is absolute that the facts shall be as they are stated when his rights under the policy attach, is so very familiar, and has been so frequently declared, that a mere reference to a few of our modern decisions will suffice."

The act of 1885 has frequently been before this court for construction. In the recent case of *Lutz v. Metropolitan Life Insurance Co.*, 186 Pa. 527, 40 Atl. 1104, it was held error to refuse to instruct the jury that, "the applicant and beneficiary in their application having stated and warranted that the insured 'never was sick,' and had no previous 'spitting of blood,' and had consulted no other physician, and had 'no consumption,' and the written and printed statement in the proof of death, and the contradicted proof and testimony, showing that he had spitting of blood, was sick previously, had consumption, and had consulted Dr. Muhlenburg, the plaintiff cannot recover." In reversing the trial court, the late Chief Justice Green said: "In a case of very recent occurrence in which we have just filed an opinion (*March v. Metropolitan Life Insurance Co.*, 186 Pa. 629, 40 Atl. 1100, 65 Am. St. Rep. 887), we have had occasion to consider and decide this identical question. We there determined that the act of 1885 had no application in cases where the answer was false, and related to some matter material to the risk. Where it was doubtful whether the matter was material, the question of materiality must be submitted to the jury; but where the matter involved was palpably and manifestly material to the risk, the law was not changed either by the act of 1885 or by any decision before or since. Thus, in the present case, all the questions above enumerated were intrinsically and essentially material to the risk, and have always been so held by all courts of last resort. As the act of 1885 made no change in the law where the matter in question was material to the risk, the duty of the court to pronounce upon this subject was the same after as before the act. As a matter of course there could not be any doubt that previous spitting of blood, or illness, or confinement to the house by reason of illness, or medical service, or the attendance of physicians, or having consumption, were subjects of the most serious and material character, and they have always been so held by the courts. As it was always the duty of the court before the act of 1885 to determine the materiality of the question and answer in cases which were perfectly manifest and free from

all doubt, and the act makes no change in the law in such cases, so the same duty remains since its passage." We have held it to be error to submit the case to the jury where the uncontroverted evidence shows that the insured made false answers to questions as to when insured was last attended by a physician and for what cause, how long since he had consulted a physician and for what disease, and as to whether he had ever been sick, had any serious illness, had ever consulted a physician, had ever had spitting of blood, did not have consumption, was insured in any other company, had applied for insurance in any other company and been rejected, had always been temperate, had had any medical attendance within the year prior to the application, and if so, state disease and give name of physician. It has always been held that the court must declare as material a false statement to a request that the insured give full particulars of any illness he might have had, and also an untrue statement that no life insurance company had declined or postponed an acceptance of a proposal to insure applicant's life. In each instance it was held to be the duty of the court to pronounce the answer material to the risk.

Under the interpretation placed upon the act of 1885 by the numerous decisions of this court, it is clear that the statements or answers made by the insured in this case, alleged by the defendant to be false, relate to matters material to the risk. The statements were made in reply to questions asked for the evident purpose of ascertaining the true condition of the applicant's health at the time of the delivery of the policy and prior thereto. The acceptance or rejection of the risk, as well as the rate of the premium, would depend on the information elicited by the questions. If the applicant was in bad health, it needs no argument to show that the risk to the company would have been increased, and would therefore have been rejected, or a greater premium would have been demanded. The answers to the other questions were equally material to the defendant company. A truthful response to any of the questions was a prerequisite to intelligent and safe action by the defendant in passing upon the application of the insured.

For the reasons given we are of opinion that the trial court should have instructed the jury that the statements contained in the application, and alleged by the defendant to be false, were material to the risk, and, if they were found to be false or untrue, would avoid the policy. The trial judge was right in refusing to withdraw the case from the jury, as requested in the defendant's twelfth point. The evidence submitted by the parties on the questions at issue was conflicting, and hence the case was necessarily for the jury. The defendant, in the twenty-fifth assignment, alleges that the charge was inadequate. If there is any merit in this assignment, the

error will doubtless be corrected on the next trial.

The judgment is reversed, with a venire de novo.

(205 Pa. 464)

DONOHUGH v. LISTER et al.

(Supreme Court of Pennsylvania. May 4, 1903.)

HIGHWAYS—EVIDENCE—PUBLIC USE.

1. A property owner sued to enjoin the maintenance of a gateway from lots into a street which plaintiff claimed as a private way. The court found that for more than 40 years the way had been used as a city street without objection; that no express dedication appeared of record, and the street was not shown on any confirmed plan, yet the city had paved and repaved it, charging the abutting owners with the curbing, and that plaintiff had paid for that on his side; that the gateways had existed for 40 years, though for a part of the time the opening had been boarded up. *Held* to show a public way.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by William J. Donohugh against Roseanna Lister and Susan Nichols. From a decree dismissing the bill, plaintiff appeals. *Affirmed*.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

George C. Bowker and Thomas S. Donohugh, for appellant. William O. Gross and Harry S. Ambler, Jr., for appellees.

PER CURIAM. Plaintiff, being the owner of houses on Branner's court, or Reese street, and claiming that it was a private way, filed this bill against property holders whose lots abutted at the rear on Reese street, to enjoin the maintenance of a gateway from the lots into the said street, and the use of the street as a passageway into Summer street. The learned judge, sitting as chancellor, found that, for more than 40 years before the filing of the bill Branner's court, now called "Reese Street," had been paved and used as a city street by the public, including the defendants, without objection by the plaintiff or his predecessors in title; that though no express dedication to public use appeared of record, and the street, though plotted on the planbooks of the survey department, was not on any confirmed plan, yet the city had treated it as a public street, had repaved it in 1894 with Belgian blocks, and reset the curbs, charging the plaintiff and defendants, respectively, as abutting owners, for the curbing; and that plaintiff had paid for the curbing on his side, but not that on defendants' side, nor for paving the cartway. He further found that the gateways complained of had existed as openings in the rear walls of defendants' lots for 40 years, and used from time to time, though for a part of that period—not appearing exactly—the openings had been boarded up and disused. On these facts, the judge, quoting *Weiss v. So. Bethlehem Boro.*, 136 Pa. 294,

20 Atl. 801, found that Reese street was a public street, and the use of it by defendants was under their right as abutting owners. He therefore dismissed the bill. We have not been convinced that he was in error in his view of the facts, and on them the law is not open to question.

Decree affirmed, with costs.

(205 Pa. 455)

In re TASKER'S ESTATE.

(Supreme Court of Pennsylvania. May 4, 1903.)

WILLS—DEVISAVIT VEL NON—REFUSAL OF ISSUE.

1. Where, on an application for an issue of *devisavit vel non* on the ground of lack of testamentary capacity, it appears that the testator, though a man of intemperate habits, was at the time of the execution of the will perfectly sober, and understood exactly what he was doing, the issue was properly denied.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of P. M. Tasker, deceased. From a decree dismissing an appeal from the register of wills, Charles P. Tasker appeals. Affirmed.

The following is the opinion of the court below (Hanna, J.):

"Rice, P. J., in *Seller's Est.*, 14 Pa. Super. Ct. 504, following many decided cases upon the subject, said: 'It has been held repeatedly that, in determining whether or not there is such a dispute as should be submitted to and passed upon by a jury, it is the duty of the court to consider all the pertinent evidence.' This rule is again announced and reiterated by the Supreme Court in the latest decisions of that tribunal. In *Schusler's Est.*, 198 Pa. 81, 47 Atl. 966, where it was alleged the testator did not possess testamentary capacity, by reason of his long-continued excessive use of intoxicating liquors, and drunkenness almost all the time for a year prior to his death, the orphans' court of Allegheny county considered the evidence produced by the contestants, supplemented by that of the appellee, and found that when not intoxicated the testator had testamentary capacity, and was not intoxicated when he executed the will. They therefore dismissed the appeal. This was affirmed by the Supreme Court. Again, in *Masson's Est.*, 198 Pa. 636, 43 Atl. 811, an issue to determine the genuineness of the signature of testator to his will, alleged to be a forgery, was refused by this court upon the preponderating testimony of the proponents' witnesses that the signature was that of the testator. This was also affirmed by the Supreme Court. And see, also, *Englert v. Englert*, 198 Pa. 826, 47 Atl. 940, 82 Am. St. Rep. 808, and *Friend's Estate*, 198 Pa. 368, 47 Atl. 1106. It is therefore well settled that the entire testimony is to be considered in determining the propriety of granting an issue, whether it be to determine the question

of testamentary capacity, or the exercise of undue influence. Even then the rule also firmly established is to be applied, and it is quoted by Rice, P. J., in *Seller's Est.*, supra, and repeatedly followed by this court, viz.: 'If the testimony be such that after a fair and impartial trial, resulting in a verdict against the proponents of the alleged will, the trial judge, after a careful review of all the testimony, would feel constrained to set aside the verdict as contrary to the manifest weight of the evidence, it cannot be said that a dispute, within the meaning of the act, has arisen. On the other hand, if the state of the evidence is such that the judge would not feel constrained to set aside the verdict, the dispute should be considered substantial, and an issue should be directed. This simple and only safe test is supported alike by reason and authority.'

"In applying these rules for our guidance in the present case, it is first to be said that, with regard to the allegation that in the execution of the will the testator was improperly and unduly influenced, there is not a scintilla. Being unmarried and without issue, it is most natural he should select his grand-nephew, who appeared to be worthy, intelligent, and reputable in every respect, as the principal object of his bounty. He is his namesake, and testator was evidently much attached to him, and had contributed towards his maintenance and education. There is not the slightest proof that any request or solicitation was made by any person to testator that a gift should be made by him for his or her benefit, except that by a sister of testator—and, strange to say, a witness for the contestant, and called to prove the mental unsoundness of her brother—who requested his attorney, whom she knew was preparing his will, to recommend her brother to provide for her and her kindred. This is not consistent with the effort of the witness to cast a doubt upon the testamentary capacity of her brother. And as confirmation of the power of testator's mind to discriminate and select the objects of his bounty, he complied with some of the requests of his sister, and refused others. There was no secrecy attending either the preparation or execution of the will. His intention was known to the persons composing his household. He gave instructions for its preparation to his counsel many days prior to its final engrossing and execution in the privacy of his room. And at its execution no one was present but his counsel, his assistant, well known to and familiarly greeted by testator, his attending physician, and the subscribing witnesses, both disinterested, and strangers to testator until that moment, when they were formally introduced to and recognized by him as the persons who were to witness the execution of his will. The testamentary paper was previously read to testator by his counsel, whose clerk was present at the time, and testator expressed his entire satisfaction therewith.

That he was not intoxicated at the time, and had full knowledge of the testamentary act in which he was then engaged, are clearly shown. All the facts and circumstances connected with the preparation and execution of the will strikingly resemble those shown in the case of *Wainwright's Appeal*, 89 Pa. 220. The allegation of undue influence need not be further discussed, nor was it urged by counsel.

"The great effort was to show such a state of facts as would justify the granting of an issue to determine the mental capacity of testator, and his ability to intelligently dispose of his estate. A careful examination of the entire testimony negatives the thought. The testator had long been engaged in active business, and continued his attention to his investments and business—being a member of a copartnership—down to the day of his death. He had, until a few years prior to his death, been temperate and abstemious, careful and cleanly in his person, dress, and language, and then began to be the reverse. He used intoxicating liquors to excess, until he undermined his health, and caused the disease which eventually terminated in his death, and became filthy in his personal habits and language. Still he was able to attend to his business, and conversed about its affairs until within a few hours of his death. He was also able to consult his counsel, and give him instructions relative to the disposition of his estate, and continuance of his firm's business after his death, and not only this, but also to provide for the consumption of his remains by fire, rather than burial in the earth, even against the objections of his counsel and the contrary sentiment of his near relatives. But these were unavailing, and the testator insisted upon his own wish being carried out. The will itself, by its careful provisions for the benefit of those whom testator selected as recipients of his bounty, speaks forcibly of his entire testamentary capacity; and, as shown in *Schusler's Est.*, supra, to warrant an issue upon the ground of intoxication, it must be proved that this was the condition of the testator at the time he executed his will. See, also, *Probst's Will*, 2 *Lanc. Law Rev.* 97; *Hannum v. Worrall*, 2 *Del. Co. R.* 49; *Weisman's Est.*, 5 *Pa. Co. Ct. R.* 561; and *Fow's Est.*, 147 *Pa.* 264, 23 *Atl.* 447.

"The testimony is overwhelming that testator well understood the nature of the act in which he was engaged, not only when he gave the instructions to his counsel, but at the time he affixed his trembling hand and assisted signature to the testamentary paper. That he possessed sufficient intelligence to comprehend what he was doing is also evident from his jocular remark that, his will being executed, the next 'is the undertaker.' All the witnesses present at the execution—every one disinterested—unite in the opinion that testator evinced an intelligent comprehension of his act, and was fully compe-

tent to dispose of his property. This was the testimony of the attending physician, who was also the medical attendant upon the sister of testator, and at whose request he became the physician of testator, and whose testimony is attempted to be overcome by that of another physician, not in attendance upon testator, who related declarations by the attending physician tending to discredit his testimony, but which were not only solemnly denied by him, but which are wholly uncorroborated and incredible. The testimony of this blatant witness, who, by his rudeness and impertinence, overanxiety to blacken the character of a reputable physician, and display of personal animosity towards him in a matter of no personal interest to himself, may well be disregarded, and safely said to have no weight whatever.

"Expert witnesses were also produced by the contestants. They are distinguished and eminent in their profession. But they testified, not from any knowledge of testator, but from hearing portions of testimony for the contestants, and a supposititious state of facts presented. They were careful, cautious, and guarded in the expression of opinion; and it is difficult to gather that, if they had seen and conversed with the testator within forty-eight hours of his death, they would have considered him totally incapable of executing a will.

"Opposed to this is the testimony of those who were actually present at the drafting of the will, its engrossing and submission to testator, heard his assent to its provisions, saw him affix his signature thereto, listened to his remarks and conversation, and had cognizance of his mental and physical condition both previous to and at the time of the execution of the will, and subsequent thereto. Such testimony is entitled to far greater belief and reliance. And it is a noteworthy fact the contestant did not venture to be a witness in his own behalf.

"In conclusion, it need only be said, adopting the language of *Paxson, J.*, in *Cauffman v. Long*, 82 *Pa.* 72, 'A man's will, the most solemn instrument he can execute, shall not be set aside without any sufficient evidence to impeach it.' And being of opinion the evidence, if submitted to a jury, would not justify a verdict against the will, the issues prayed for are refused, the petition dismissed, and the action of the register in admitting the will to probate affirmed. The contestant to pay the costs."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Charles E. Aull and George W. Boyer, for appellant. C. Berkley Taylor and John G. Johnson, for appellee.

PER CURIAM. This decree is affirmed on the opinion of the president judge of the court below, costs to be paid by the appellant.

(205 Pa. 479)

BRIDGEMAN BROS. CO. v. SWING et al.
(Supreme Court of Pennsylvania. May 4, 1903.)

**ASSUMPSIT—STATEMENT—SUFFICIENCY—
JUDGMENT BY DEFAULT.**

1. A statement in an action of assumpsit, setting forth a debt on book account for merchandise sold and delivered to defendants at their request, that the charges were just and reasonable, and setting out a copy of the account sued on, is sufficient to require an affidavit of defense.

2. Where defendant in assumpsit demurs to a statement, and the court holds it sufficient, it may enter judgment against the defendant without giving him leave to file an affidavit of defense.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Bridgeman Bros. Co. against Thomas C. Swing and William H. Bateman, Jr. From a judgment entering judgment on demurrer to statement, defendants appeal. Affirmed.

The grounds of demurrer were as follows: "(1) Said statement fails to disclose a delivery of any goods or chattels by the plaintiff to the defendants. (2) The statement of claim fails to show any liability on the part of the defendants, or either of them. (3) The alleged copy of plaintiff company's book of original entry, upon which the action is based, fails to disclose any charge against the defendants by the plaintiff company." The court found that the statement was sufficient, and entered judgment in favor of the plaintiff, denying defendants' request for leave to file an affidavit of defense on the merits.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

J. H. Brinton, for appellants. Julius C. Levi, for appellee.

PER CURIAM. The procedure act of 1887 relieved plaintiffs from a certain amount of formality in the statement of their claims, but not from any obligations of substance in the stated cause of action. *Fritz v. Hathaway*, 135 Pa. 274, 19 Atl. 1011. But if the substance was there, the act was not intended to increase mere technicality of presentation. The statement in the present case sets forth an indebtedness on "a book account for merchandise sold and delivered to the defendants at their request," with a further averment that the charges are "just and reasonable," and a copy of the account, showing in detail the articles and their prices. This would have been entirely good as a common count with bill of particulars under the previous practice, and no defect has been pointed out as to precision or certainty of parties and amounts, which would make it bad in any of the features the procedure act was intended to require. The defendant, instead of filing an affidavit of his defense, if

any he had, chose to demur, and the court had a right to hold him to the strict legal consequences.

Judgment affirmed.

(205 Pa. 466)

HUNTER v. FORSYTH.

(Supreme Court of Pennsylvania. May 4, 1903.)

JUDGMENT—RULE TO VACATE—AFFIDAVIT OF DEFENSE.

1. Where an affidavit of defense is not filed in time, but comes before the court on a rule to open judgment, regularly entered, the court will examine the averments, and require further evidence as to the facts, as in other cases of an application to open judgment.

2. In an action on a note, judgment was rendered for want of affidavit of defense. Thereafter, on motion to open judgment, an affidavit of defense was filed, alleging "that it does not appear from the plaintiff's statement of claim that the note was stamped." *Held*, that such an averment was a mere argumentative denial, and a technical objection to the pleading, which is not the office of the affidavit of defense or an application to open judgment.

Appeal from Court of Common Pleas, Philadelphia County.

Action by John B. Hunter, doing business as John B. Hunter & Co., against William F. Forsyth. Judgment for plaintiff. From an order discharging a rule to open it, defendant appeals. Affirmed.

Judgment was entered for want of an affidavit of defense on May 16, 1902. Upon the following day defendant filed an affidavit of defense, which was as follows: "Defendant avers that the said note was given by deponent without consideration, and was given for accommodation of one Elworth B. Shearer, who was indebted or about to become indebted to the plaintiff. The said note was given to guaranty the indebtedness of said Shearer to the plaintiff. Defendant avers that it was well known to said plaintiff that said note was given by defendant for the accommodation of said Shearer. Plaintiff knew that the said note was given to guaranty the said Shearer's indebtedness, and that Shearer was to pay the said note; that the defendant was never notified as to the fact or amount of said Shearer's indebtedness, and said plaintiff never brought suit against the said Shearer, and has never made any attempt to collect from the said Shearer money which may be due, if any money be due from said Shearer to said plaintiff. Defendant further avers that the indebtedness, to guaranty which the said note was given, was incurred by the sale and delivery of hardware by said plaintiff to said Shearer; that defendant was induced to sign the said note and guaranty the said indebtedness of said Shearer to said plaintiff upon the faith of representations made to this defendant by the said Shearer, and concurred in by said plaintiff, that the actual, bona fide amount

¶ 2. See Pleading, vol. 39, Cent. Dig. § 570.

¶ 2. See Judgment, vol. 30, Cent. Dig. § 295.

of the contract or indebtedness of said Shearer to said plaintiff was \$1,353.25, viz., the amount of the note upon which suit is brought. Defendant subsequently has ascertained that the said Hunter and said Shearer unlawfully agreed together to add to the said contract or indebtedness of Shearer to said Hunter a certain sum, in fraud of this plaintiff's rights, which this defendant is informed, believes, and avers to be at least ten per centum of the actual, bona fide indebtedness of said Shearer to said plaintiff, which fraudulent and fictitious sum, being added to the actual indebtedness of said Shearer to said plaintiff, makes the sum of \$1,353.25 for which the defendant was induced to become a guarantor. Defendant further avers that the statement of claim filed by the plaintiff is insufficient to support a judgment in this case, in this: that it does not appear from the plaintiff's statement of claim filed that the note upon which plaintiff brings this suit was stamped with internal revenue stamps of the United States of America, as required by the act of Congress in force on the date of the execution of said note, viz., March 20, 1899; that the same, not being stamped according to law, is, under said act of Congress, to be deemed invalid and of no effect. All of which is true, and defendant expects to be able to prove the same at the trial of the cause." The court discharged the rule to open the judgment.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

William F. Johnson and A. L. Lewis, for appellant. H. B. Hodge, C. R. Woodruff, and W. D. Neilson, for appellee.

PER CURIAM. When an affidavit of defense is filed, and its sufficiency is in question, the court must accept it for verity, and regard all the facts properly set forth in it as proved. But where the affidavit is not filed in time, as in the present case, and comes before the court only on a rule to open a judgment regularly entered, the court is entitled to examine the averments critically, and to require further evidence as to the facts, as in other cases of application to open judgments. The court below was not satisfied that a prima facie defense was sufficiently made out to justify sending this case to a jury. Plaintiff sued on a promissory note of which defendant was the maker. The defense was that defendant was a guarantor for the real debtor, one Shearer, and made the note on the faith of representations made by Shearer, "and concurred in by the plaintiff," that it represented the actual debt of Shearer to plaintiff, but that defendant had "subsequently ascertained that the said Hunter and said Shearer unlawfully agreed together to add to the said contract or indebtedness of Shearer to said Hunter a certain sum, in fraud of this plaintiff's rights, which this defendant is informed, believes, and

avers to be at least 10 per centum of the actual, bona fide indebtedness of said Shearer to said plaintiff." It is objected to this affidavit that it is vague, *inter alia*, in not stating whether the debt of Shearer was due at the date of the note, or was to be incurred thereafter; in not stating either the actual debt, or the amount added, with any certainty; and especially in not averring any representations by plaintiff, except inferentially, by the use of the word "concurred." For these and perhaps other objections, the court did not deem the defense sufficiently made out. It was entitled to satisfactory depositions or further evidence, and we cannot say that there was error in requiring something more than this affidavit.

A further defense is based on the want of a revenue stamp on the note, as required by the act of Congress of June 13, 1898, 30 Stat. 448, c. 448 [U. S. Comp. St. 1901, p. 2284]. It was held in *Chartiers, etc., Turnpike Co. v. McNamara*, 72 Pa. 278, 13 Am. Rep. 673, that the act of Congress of 1896 (14 Stat. 98, c. 184) prohibiting the admission in evidence "in any court" of an unstamped paper applied to state as well as federal courts. That decision was made by a divided court, and has never commanded the general acquiescence of the profession. The decisions in other courts of high authority are against the power of Congress to interfere, even indirectly, with the rules of evidence in state courts. Whether the same construction would now be given to the act of 1898 may therefore be open to doubt. But the question does not arise in the present case, for the affidavit is not that the note was not duly stamped, but that "it does not appear from the plaintiff's statement of claim" that it was so stamped. This is merely an argumentative denial, and amounts, at most, to a technical objection to the pleadings, which is not the office of an affidavit of defense, and still less of an affidavit to open a judgment.

Judgment affirmed.

(205 Pa. 435)

In re STURGIS' ESTATE.

Appeal of POTTER.

(Supreme Court of Pennsylvania. May 4, 1903.)

WILL—CONSTRUCTION—ESTATE CONVEYED.

1. Testatrix devised the residue of her estate to her seven children. If any of them were dead, leaving issue or married, she gave the share of such deceased child to the uses of his or her will; and if such child should have died intestate, leaving issue or a widow, such share should go to the persons and for the estates they would have taken, had such child died the owner of that share. In the event of the death of any of the devisees before testatrix, so much of the share of such child as did not vest by the provisions of the will was given to the persons and the estates to whom the residue of testatrix's estate was devised. One son died before testatrix, leaving a widow and children; giving to his widow all his estate for life, with full power to dispose of the

same by will, and, in default of such disposition, to his children living. *Held*, that the widow's power of appointment by will, being unlimited, carried the fee, and that her children had no standing to demand partition of the real estate of the testatrix.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Susan B. Sturgis, deceased. From a decree dismissing the petition for partition, James Potter, guardian of Mary L. Sturgis and Henrietta H. B. Sturgis, appeals. Affirmed.

The material portion of the will of Robert Sturgis, deceased, is as follows: "I give, devise, and bequeath all of my property both real and personal of every kind and nature whatsoever and wheresoever situated which I now possess or to which I may hereafter become entitled, to my beloved wife, Marlon Sturgis for life, with full power to dispose of the same by will, but if she should die without leaving any last will and testament, then I give, devise and bequeath all of my said property, on the death of my said wife, absolutely and in fee to such of our children who may be living at the time of her death, share and share alike, provided, however, that if any of our said children shall have died before the death of my said wife, leaving issue, the child or children of such deceased child, living at the time of the death of my said wife, shall be entitled to the share the parent would have taken if living, share and share alike."

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

James E. Hood, for appellant. John G. Johnson, for appellee.

MITCHELL, J. The testatrix, after devising the residue of her estate to her seven children, provided: "If any of these devisees are dead leaving issue or married, I give the share such deceased child would have taken if living, to the uses of his or her will; and if he or she should have died intestate, leaving issue or a widow, I give the said share to the persons and for the estates they would have taken in the same had such child died the owner of that share. If any of the said devisees or if my two daughters, hereinafter named, or either of them, shall have died before me; I give so much of the share of that child, as does not vest in his or her issue, husband or wife by the provisions of this will, to the persons and for the estates to whom and for which the residue of my estate is devised." Robert Sturgis, a son, died before the testatrix, leaving a widow and children, and the questions in this case arise under the first clause of the passage above quoted. The language in itself is not at all ambiguous. The expression "to the uses of his will" means exactly the same thing as the phrase in the next clause, "had such child died the owner of that share." Having expressed the intent in the first clause in a way

inappropriate to a case of intestacy, the testatrix changed the form of expression in the next, but used one that conveyed the same meaning, to wit, that the share of the child dying before her, leaving a widow or children, should pass, whether he died testate or intestate, as if he had died the owner of that share, or, as the older lawyers would have expressed it, quasi seised in his demesne as of fee. On the words of the clause, this meaning is not at all doubtful. But it is urged that a different interpretation must be put on it, in view of the concluding clause of the same paragraph, to wit: "If any of the said devisees or if my two daughters hereinbefore named or either of them shall have died before me, I give so much of the share of that child, as does not vest in his or her issue, husband or wife, by the provisions of this will, to the persons, and for the estates to whom and for which the residue of my estate is devised." This, as said by the learned judge below, is obscurely expressed, but, by reading the whole paragraph together, it is sufficiently clear that this clause does not in any way affect the first, with which alone we are concerned. Taking the whole paragraph together, it provides for three contingencies that might arise by the death of a child in the lifetime of the testatrix: First, death testate, leaving widow or issue; second, death intestate, leaving widow or issue—the devolution of the property in either case being as if the child had died the owner of the share. But a third contingency was possible, to wit, death in the lifetime of the testatrix without leaving widow (or husband) or issue. This was what the last clause of the paragraph was intended to meet. It was not to put any limit on the disposition by will of a child under the first clause, but to provide for a possible contingency not provided for in the first and second clauses. It gives to the persons, etc., to whom the residue is devised, "so much of the share of that child (dying before me) as does not vest in his or her issue, husband or wife, by the provisions of this will," not the provisions of his or her (the child's) will but of this (the testatrix's) will. It is not, therefore, as suggested, to meet the case of a child excluding by will his widow or issue from the succession. That case was already covered by the first clause, by which the will of a child dying testate in the lifetime of testatrix, leaving widow or issue, is to apply to the share devised to him, as if it had vested in his lifetime. The new clause was not intended to be inconsistent with this. The testatrix had already provided for the widow and issue of a deceased child, so far as she could without limiting the estate in fee she intended to give the child; that is, the widow and issue took what the child gave them by will, or, in case of intestacy, what they would take under the intestate law. In either case they were provided for, as far as might be, by "this" (i. e., the testatrix's) will. But if there should be

neither widow nor children, then there would be a contingency not provided for, and the last clause was to meet this. It has no bearing on the first or second clauses of the paragraph.

The share of Robert therefore passed under his mother's will as if it had vested and been part of his estate in his lifetime. By his will his estate passed to his widow for life, with a general power of disposition by will, and, in default of such disposition, to his children living at her death, with right of representation in their issue if any. The widow's power of appointment by will, being unlimited, will carry the fee; and the estates of the appellant's wards are therefore contingent on her failure to exercise the power, as well as on their own survivorship. The court was therefore right in holding that they were not entitled to partition.

Decree affirmed.

(205 Pa. 429)

FURTH v. STAHL et al.

(Supreme Court of Pennsylvania. May 4, 1903.)

AUDITOR'S REPORT—OPINION OF COURT—BANKRUPTCY—FORECLOSURE SALE—ESTOPPEL—PREFERENCES—ATTORNEY'S FEE.

1. On overruling an auditor's report, the court should file an opinion stating its grounds for so doing.

2. A trustee in bankruptcy is estopped from contesting the jurisdiction of the court to appoint an auditor to report distribution of a fund raised by the sale of the real estate of a bankrupt under a mortgage when he had agreed to such sale.

3. Under Bankr. Act July 1, 1898, § 60, 30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p. 3446], a person who anticipates the filing of a petition in bankruptcy against himself may employ an attorney, and give to him a mortgage to secure to him payment of the fees for services to be rendered in the bankruptcy proceedings.

4. The state court has jurisdiction to appoint an auditor to distribute fund arising on foreclosure of the real estate of a bankrupt.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Emanuel Furth against Gustav Stahl and another. From an order dismissing exceptions to the auditor's report, plaintiff appeals. Reversed.

From the auditor's report it appeared that on November 24, 1899, the firm of Stahl & Straub, composed of Gustav Stahl and Joseph H. Straub, stockbrokers, suspended payments. On the following day Emanuel Furth, Esq., a member of the Philadelphia bar, was retained by Stahl. Shortly afterwards Stahl agreed to give to Mr. Furth a second mortgage on real estate to secure Mr. Furth's fees for services in bankruptcy proceedings which were then in contemplation by creditors. The mortgage was executed on December 19, 1899, while the efforts of Mr. Furth were in progress to avoid the bankruptcy proceedings. The petition in bankruptcy was filed on December 28, 1899.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

John G. Johnson, Max Herzberg, and Jacob Singer, for appellant. Julius C. Levi, for appellees.

MITCHELL, J. It is to be regretted that the court did not file an opinion, or give reasons in any form for its decree. Where the decision of an auditor, referee, or other officer acting in a judicial capacity is overruled by the court, justice to the court itself, as well as to the officer and the parties, suggests that the reasons should be stated. In the present case, to a careful and elaborate report made by the auditor, the court's own officer, exceptions which went merely to the result, without indicating the grounds, were sustained. No reasons were given by the court, and no sufficient ones are advanced by the appellee or perceived by this court. We are obliged, therefore, to discuss the case from the report of the auditor.

The jurisdiction of the court is clear. The auditor found, and it is not questioned, that the trustee in bankruptcy expressly agreed that the property should be sold under the mortgage. For this there was good reason, as such sale divesting dower would be likely to bring a larger fund than a sale under the bankruptcy proceedings, which would leave the dower existing as an inchoate incumbrance. The purchase money was then paid into court, and an auditor appointed to report distribution on the petition of the trustee. He was, therefore, estopped from contesting the jurisdiction.

But, independently of his acts or agreement, the jurisdiction is clear. The court was distributing a fund in its own hands, raised by it on its own process. Its authority to do so did not depend on any one's consent. See *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Louisville Trust Co. v. Cominger*, 7 Am. Bank. Rep. 421, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413.

The second question raised before the auditor, and elaborately discussed by him, is equally clear. The appellant was the mortgagee in the mortgage upon which the fund was realized, the mortgagor being one of the bankrupt firm; and the point made against the claim is that it was void as a preference under the bankrupt act. But, under the facts as found and reported by the auditor, it was within the express exception of paragraph "b" of section 60 of the act (Act July 1, 1898, 30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p. 3446]): "If a debtor shall, directly or indirectly in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court, on petition of the trustee or any cred-

itor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate." A pledge or payment for a consideration given in the present or to be given in the future, whether in money or goods or services, is not a preference. The object of prohibiting preferences is to prevent favoritism, whether for secret benefit to himself or other reason, among a debtor's creditors, who ought, in fairness, to stand on the same footing. A transaction by which the debtor parts with something now in return for something he acquires or is to acquire in the future, is not within the mischief the act was aimed against. Section 60, therefore, expressly recognizes this class of transactions, but, as it is capable of abuse, provides for a re-examination, and reduction, if necessary, to a reasonable amount, by the court, on petition of the trustee or a creditor. No such examination has been called for in the present case, and the auditor finds expressly that the amount of plaintiff's fee was reasonable for the services rendered.

It was urged before the auditor that the services were not of the kind mentioned in section 64 of the act (30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), and therefore could not be allowed. But the two sections have no necessary connection. The language of section 64 is: "The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petitions; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow," etc. Clause 3 is the one under which the objection is made. The two sections have entirely different objects. Section 64 defines the debts which are to have priority and be paid in full by virtue of the statute itself, without regard to any act or agreement of the parties. The services of an attorney included in this class are those "actually rendered * * * while performing the duties herein prescribed." The services referred to in section 60 (30 Stat. 562 [U. S. Comp. St. 1901, p. 3446]), on the contrary, are those "to be rendered," which are paid for in advance, "in contemplation of the filing of a petition by or against" the bankrupt. Such fees are not determined by the statute, and allowed in full out of the bankrupt estate, as the other class are, but

depend, both as to payment and amount, on the acts of the parties; and what the statute does is to recognize the validity of their payment, but subject the reasonableness of the amount to the supervision of the court. The services of the plaintiff belong to this class. They were none the less rendered in contemplation of the filing of a petition in bankruptcy because directed primarily and principally to the prevention of such petition. A man is usually very much in contemplation of a result which he employs counsel to avoid.

The argument of the appellee in this court is based on the view that, as the mortgage was not actually executed until after the services of the plaintiff were partly rendered, it was a payment or pledge for an antecedent debt, and therefore must stand in the same class as the claims of general creditors. But this view ignores the facts as found by the auditor. The plaintiff was retained as counsel on November 25th, and within a few days his compensation was agreed upon, "without regard to the length of time occupied"; the services, as already noted, being primarily to try to arrange the affairs of the firm with the creditors so as to avoid proceedings in bankruptcy. The mortgage was executed on December 19th, while the efforts of plaintiff were still in progress, and the petition in bankruptcy was not filed until December 28th. The character of the act as to whether it should be regarded as a preference or not must be determined by the circumstances under which it was done. Here the compensation was agreed to in advance on the retainer of the plaintiff, and payment by the mortgage was made during the continuance of his professional efforts "in contemplation of the filing of a petition." It was within the letter as well as the spirit of the act.

The judgment is reversed, and distribution directed to be made in accordance with the report of the auditor; the costs of this appeal to be paid by the appellee Frank M. Crawford.

(205 Pa. 460)

HARRIS v. HARRIS et al.

(Supreme Court of Pennsylvania. May 4, 1903.)

WILLS—CONSTRUCTION—ACTION—TRUST.

1. Testatrix devised her real estate to her executors, in trust to divide the profits among her children, with full power to sell any part thereof till such time as such children shall determine that the whole shall be sold or divided, when the real estate, or remaining portion thereof, should be equally divided among the children. Held to constitute an active trust, which could be terminated only by the consent of all of the children or their survivors.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Albert H. Harris against Henry G. Harris and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The court below (Willson, J.) filed the following opinion:

"The bill alleges that the parties named as plaintiff and defendants together hold several pieces of real estate, which are described in the bill, in undivided interests. The plaintiff desires to have partition made of those properties, and has filed this bill for the purpose of having such partition made. Whatever right or title the parties plaintiff and defendants have to the properties referred to arose by virtue of the provisions of the will of their mother, Amanda G. Harris, who died seized of the said pieces of real estate on November 15, 1897. By her will, which was duly proved, she directed as follows: 'My real estate I give and devise to my executors, in trust to hold the same, and to divide the rents and profits thereof among my said children, and with full power to sell and dispose of the same, or any part thereof, till such time as all my said children, or the survivors, agree that the same shall be sold or divided, when the said real estate, or the remaining portion thereof, and the proceeds of all the sales thereof, shall be equally divided among them. All other estate of which I may die possessed I give to my said children.' The parties to this proceeding are the children in whose favor said provision of the will was made, and they were all living and of full age at the time of the death of the testatrix. Whether or not the plaintiff is entitled to obtain relief in the court and have partition of the properties concerned made depends upon the construction which is to be given to the portion of the will already quoted. The plaintiff's bill is founded upon the theory that the trust which was in terms created by the will over the real estate in question was a dry trust, and that the estate which passed to the testatrix's children under the will was a vested estate. On the part of the defendants it is claimed that the trust was an active one, and that no partition can be made against the objection of any one of the children of the testatrix; in other words, that the trust will be operative until such time as all of the children, or the survivors of the children, of the testatrix shall agree that the real estate shall be sold or divided. It is conceded on all sides that, if the trust created by the will is and remains to the present time an active trust, then the bill asking for a partition cannot be sustained. The question to be determined, therefore, is whether the clause of the will before quoted ought to be interpreted as creating such an active trust.

"We are of the opinion that the trust is still active and operative. The real estate was devised to the executors of the will. The trust imposed on them was to hold the same, and to divide the rents and profits thereof among the children of the testatrix. That, of course, imposed upon the executors the right and duty of collecting the rents and profits. Power was given to them to sell

and dispose of the real estate, or any part of it, 'till such time as all my said children, or the survivors, agree that the same shall be sold or divided.' If the devise had been in the terms just stated, without any postponement of the time when the children should, by the directions of the will, be entitled to receive the full benefit of it, it would undoubtedly be proper to hold that the trust was a dry one, and that the estate was vested in fee in the children. It seems to us, however, that we must conclude that the testatrix had some purpose in mind when she postponed the time for distribution and division until there should be a unanimous desire on the part of the children that the distribution and division should be made. What this purpose was we may not be able to determine, but that the testatrix had some purpose in mind would seem to be made clear by the final clause of the portion of the will referred to, which applied to the personal estate of the testatrix. This clause reads as follows: 'All other estate of which I may die possessed I give to my said children.' By that provision they took at once on the death of their mother, on the probate of her will, an absolute, immediate estate in all her personal property. As to the real estate, for some reason she seems to have contemplated and provided for a postponement of the time when they would have a like interest. It may have been that she did not desire or intend that any one of her children immediately upon her death should acquire such an estate as could be parted with, and thus be taken from the survivors of her children, who, at a later date, might constitute a class much smaller in number than the four who were intended, in the first instance, to be provided for by the will. The testatrix seems, so far as the express language of her will indicates anything upon the subject, to have had in her thought only her children, and to have endeavored to provide for them and their survivors. We do not intend to decide that the issue of any deceased child would take no interest in the property devised in trust. That is a question to be decided at the proper time, if it should ever arise. What we do mean to hold is this: That, as we construe the will in question, it vested the title to the real estate in the executors in trust, with active duties, which were intended and directed to continue for a definite lawful purpose to the time when all the children, or the survivors of the children, of the testatrix, should agree upon a sale or division of the property. That time has not yet arrived, and the duties of the executors and trustees must, therefore, be regarded as still active and operative.

"We do not think that the case of *Caldwell v. Snyder*, 178 Pa. 420, 35 Atl. 996, 35 L. R. A. 198, militates against the view which we have expressed. In that case it appears that the testator provided that all of the rest and residue of his estate, real and personal,

should be equally divided between his children, subject to certain deductions. He also directed his executors to sell or lease any or all of his real estate at any time that it might be possible, and by the agreement of his wife and the majority of his heirs. The Supreme Court in that case held that a partition of the estate should be made at the instance of one of the devisees under the will; but it is to be noted that in that case the devise of the property was to the children directly, and no general unrestricted duty of collecting and distributing rents and profits and making sale of the property was imposed upon the executors. No power of sale was conferred upon them, excepting in case of an agreement between the wife and the majority of the heirs. In the case in hand the real estate was devised in trust to the executors. They were given the power to collect and distribute rents and profits, and they were also given power to sell and dispose of the real estate, or any part of it, until the time should arrive when the children, or the survivors of them, by unanimous act, should terminate the trust by requiring that the property should be sold or divided. We think there is a radical difference between the two cases. There is some resemblance between the present case and *Baum's Appeal*, 4 Penny. 25. In that case the testator disposed of all the residue of his estate, real and personal, 'in the same manner that it would descend and be distributed under the intestate laws of the commonwealth now in force.' He also gave to the executors of his will full power to make sale of any of his real estate. In addition, he directed that in case his grandchildren, who were the persons the will was intended to benefit, 'at any time, by unanimous consent, elect to take the unsold land instead of the proceeds thereof, they may do so.' Several years after the death of the testator in that case one of the grandchildren filed a petition asking that a partition should be made of the real estate, which was refused in the lower court, and in the Supreme Court the decree of the lower court was sustained. The opinion was *per curiam*, and brief. It reads as follows: 'No fact is shown to justify the court in interfering with the large discretionary power given to the executors as to the time of selling the real estate, and the unanimous consent of all the grandchildren to take the unsold land, instead of the proceeds thereof, had not been obtained.'

"It seems to us that the case before us presents stronger elements against the right to demand partition than does *Baum's Appeal*. So far as the latter case has any bearing upon the questions which are involved in the matter in hand, we think it sustains the view previously expressed, and upon that view we are of the opinion that the demurrer filed to the bill must be sustained, and the bill dismissed, with costs."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Frank P. Prichard, for appellant. Thomas Cahall and Charles C. Lister, for appellee.

PER CURIAM. The decree is affirmed on the opinion of the learned judge below.

(205 Pa. 484)

MILLER v. CLEMENT et al., School Directors.

(Supreme Court of Pennsylvania. May 4, 1908.)

MANDAMUS — APPLICATION — QUESTIONS DETERMINED — PUBLIC SCHOOLS — REFRACTORY PUPILS — EXPULSION.

1. In mandamus proceedings under Act June 8, 1893 (P. L. 345), prescribing the mode of procedure, on filing the petition the only question before the court is whether the substance of a case for mandamus is presented; and, if it is, the writ should be directed to issue in the alternative form.

2. Under Act May 8, 1854 (P. L. 622, § 23, subd. 6), regulating common schools in Pennsylvania, and Act March 3, 1818 (P. L. 127, § 9) regulating schools in the city of Philadelphia, the board of directors is given power, on full examination, to suspend or expel all refractory pupils after hearing. *Held*, that the investigation of charges against a pupil may be delegated to a committee of the board, when the action is afterwards reported to and reviewed by the full board.

3. Where, on petition for writ of mandamus to compel the restoration of a pupil who had been expelled from a public school, the petition shows a hearing by a committee of the board of school directors, and that the judgment of such committee was approved by the full board, which declined to change it at the request of the petitioner, the writ is properly denied.

Appeal from Court of Common Pleas, Philadelphia County.

Action by William Miller against George W. Clement and others, school directors of the city of Philadelphia. From an order refusing a writ of mandamus, plaintiff appeals. Affirmed.

The petition for the writ, as amended, was as follows: "That your petitioner is a resident, a citizen, and a taxpayer of the city of Philadelphia and state of Pennsylvania, and resides at No. 2130 Market street, in the said city. That your petitioner is the father of George Miller, who is fourteen years of age, and who was, prior to the month of May, 1900, duly entered and admitted as a pupil in the Keystone Public School, at Nineteenth and Ludlow streets, Philadelphia, which is under the direction and control of the board of directors of the Ninth School Section of the said city. That said school is a free school provided under the public school laws of the state of Pennsylvania, and is supported by public taxation. That in May, 1900, certain charges were made by the principal of the said school against the said George Miller, to the school committee of the said board, and the said committee thereupon undertook to expel the said George Miller from the said school, and he was thereafter denied admission to the school by the principal, and refused further instruction therein. That the said expulsion was by

a committee of said board, consisting of three members thereof, and not by the board of directors themselves, and no examination nor hearing of the charges against the said George Miller was had before the said board as required by law. That the said committee gave an ex parte hearing only to the charges against the said George Miller and declined to hear witnesses on his behalf, and, although the testimony of the witnesses heard was insufficient to convict him of refractory or incorrigibly bad conduct, they ordered his expulsion from the school. That at the next meeting of the said board of directors, which was held June 28, 1900, your petitioner requested that an examination and hearing in accordance with law should be given his said son, but no such examination nor hearing was given, and no attention was paid by the board of directors to his request. That no further meeting of the board of directors was held until fall, when your petitioner repeated his said request; but no examination nor hearing has yet been given by the said board, and his son is still excluded from the said school. That under the school laws of this commonwealth a board of school directors have power to suspend or expel a pupil only when found guilty, on full examination and hearing, of refractory or incorrigibly bad conduct; and your petitioner submits that they have no power to delegate the power thus vested in them to a committee, or to any other person or body whatsoever. That the said George Miller has not been found guilty of refractory or incorrigibly bad conduct, after full examination and hearing, either before the said board of directors, or before any committee thereof, and has therefore been illegally expelled and excluded from the said school. Your petitioner is without other adequate and specific remedy at law, and therefore prays your honorable court to award a writ of mandamus, directed to the said defendants, commanding them to appear at a day certain, either to confess or deny the charges hereinbefore set forth, and, if they confess the same, to order them to grant an examination and hearing before the said board of directors to the said George Miller upon the charges made against him, or else readmit him as a pupil of the said school, in accordance with the rights of your petitioner." A rule to show cause was granted, an answer was filed, and subsequently the rule for the alternative mandamus was discharged.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

James O. Sellers, for appellant. James Alcorn, Asst. City Sol., and John L. Kinsey, City Sol., for appellees.

POTTER, J. This was a petition for a writ of mandamus. Such proceedings are now governed by the act of June 8, 1893 (P. L. 345), which outlines clearly the proper practice. Section 2 of this act provides that

any person desiring to obtain a writ of mandamus shall present his petition therefor, verified by affidavit, to the judge or judges of the proper court, either in session or at chambers, setting forth the facts upon which he relies for the relief sought, the act or duty whose performance he seeks, his interest in the result, the name of the person or body at whose hands performance is sought, demand or refusal to perform the act or duty, and that the petitioner is without other adequate and specific remedy at law. If such petition presents the substance of a case for mandamus, the court shall direct that such writ issue in the alternative form. Provided, however, that if the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be awarded in the first instance, and directed to issue forthwith. The mode of procedure thus prescribed is essentially that which was pointed out and commended by this court in *Keasy v. Bricker*, 60 Pa. 9. The only question to be determined by the court upon the filing of the petition is whether the substance of a case for mandamus is presented. If so, the writ should be directed to issue in the alternative form. It will be observed that no room is left for the issue of a preliminary rule to show cause. The granting of such a rule in this case was irregular. It injected a useless feature into the proceedings, which only tended to complicate that which the act of assembly had made simple. To the rule thus granted an answer was filed, which went to the merits of the case, and shortly afterwards the rule was discharged. But the court below filed no opinion, and we are therefore without information as to whether it considered the answer, in dismissing the rule, or whether its action was based simply upon an examination of the petition. If the petition was insufficient, the alternative writ was properly refused.

Turning to the petition, we find that it sets forth that petitioner is the father of George Miller, who is 14 years of age, and who was prior to the month of May, 1900, duly entered and admitted as a pupil in the Keystone Public School, at Nineteenth and Ludlow streets, Philadelphia; that in May, 1900, certain charges were made by the principal of said school against the said George Miller, to the school committee of said board, and the school committee thereupon undertook to expel the said George Miller from the said school, and he was thereafter denied admission to the school by the principal, and refused further instruction therein. The petition admits inferentially that a hearing upon the charges was had before the committee, but complaint is made because the examination and hearing was not given to the boy at a full meeting of the board. But it is alleged that the matter was afterwards brought to the attention of the full board, and a hearing before them was demanded,

which was refused, and the action of the committee was approved and sustained. Sufficient appears from the allegations of the petition to show that charges were made against a pupil of the school, which charges were investigated by a committee of the board of directors, and after a hearing the pupil was expelled. It is not averred that the full board took no action with regard to the matter, but only that it refused to order another hearing before the full board. Under the act of May 8, 1854 (P. L. 622, § 23, subd. 6), power is given to the board of directors, on full examination and hearing, to suspend or expel from the school all pupils found guilty of refractory or incorrigibly bad conduct. The requirement is that the examination and hearing shall be full, but this does not necessarily mean that it should be by the full board. We see no reason why the investigation of charges and the conduct of a hearing may not be delegated to a committee of the board, when the action of the committee is afterwards reported to, and is reviewed and considered and sustained by, the full board. Especially in Philadelphia may this method be followed, as section 9 of the act of March 3, 1818 (P. L. 127), which is still in force, authorizes the school directors of various school districts of the city of Philadelphia to divide themselves into as many committees as there may be schools, so that every committee may have the management of one school only.

We conclude, therefore, that the petition discloses the fact that the board of directors have acted upon a matter which required of them the exercise of discretion and judgment. As mandamus will not lie to control the exercise of discretion, or to determine in any way the decision reached thereby, the court below would have been justified in holding that the petition did not present the substance of a case for mandamus, and, if put upon that ground, the writ was properly refused. The amended petition presented by appellant in no way strengthens his case. On the contrary, it only sets forth more clearly the fact that a hearing was held by the committee, that the testimony of witnesses was heard, and that, in the exercise of judgment and discretion, a conclusion was reached, which the full board approved and adopted, and declined to change or modify at the request of appellant. The right of judgment was in the board, and we will not attempt to regulate its exercise.

The assignments of error are overruled, and the judgment is affirmed.

(99 N. J. L. 560)

LANTRY v. SAGE.

(Supreme Court of New Jersey. June 9, 1903.)
TAX SALE—REDEMPTION—COSTS OF SEARCH—CERTIORARI—PRESUMPTIONS.

1. A mayor's approval of a search is not his approval of the amount to be paid for the search, which is required under the act of April

5, 1892 (P. L. p. 395), in order to charge that amount against a person redeeming lands sold for taxes.

2. On final hearing it will be assumed that the prosecutor in certiorari has sufficient interest to give him a standing in court, unless his interest has been previously challenged.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Mathew Lantry, against Henry J. Sage. Order annulled.

Argued February term, 1903, before GARRISON, SWAYZE, and DIXON, JJ.

H. H. Voorhees, for prosecutor. William H. Richards, for defendant.

DIXON, J. This writ is prosecuted to review a certificate signed by the mayor of Camden respecting a search against a lot of land in the city which had been sold for taxes under what is known as the "Martin Act." The matter is controlled by the supplements to that act approved April 5, 1892 (P. L. p. 395), and April 3, 1902 (P. L. 344). These statutes declare that a person desiring to redeem lands sold for taxes shall, in addition to other payments required, pay the cost and expenses, not exceeding \$25 for each parcel, that are necessarily incurred by the purchaser at the tax sale in proceedings taken for the purpose of perfecting title, provided the mayor of the city shall approve of the amount to be paid to such purchaser. In the case before us the certificate of the mayor indorsed on the memoranda of search is as follows: "I, Joseph E. Mowrey, mayor of the city of Camden, state of New Jersey, by virtue of authority under the statute, do hereby approve of the within search as set forth." This, manifestly, is not the specific approval of the amount which the statute authorizes and requires.

But the defendant questions the right of the prosecutor to review the matter, because his interest, it is claimed, is not now shown. His interest, we think, is at this stage of the proceedings to be assumed, since no contrary suggestion was made before final hearing. Such was the deliberate judgment of the Court of Errors in *Avon v. Neptune City*, 57 N. J. Law, 701, 32 Atl. 220. Although in the opinion delivered by Chief Justice Beasley in *West Jersey Traction Company v. Camden*, 58 N. J. Law, 362, 33 Atl. 966, there is expressed some disapproval of that rule, the expression is merely obiter, for not only was the proof there lacking necessary to show the illegality of the action under review, but the status of the prosecutor was expressly challenged by the defendant while the evidence in the case was being produced. We regard the rule laid down in *Avon v. Neptune City* as being still in force. But the case now presented shows affirmatively the interest of the prosecutor. One of the witnesses, being asked, "Who has the legal title to this property now?" answered, "Mathew Lantry, by deed from Binder, Belderbeck, and Schmidhauser." No objection was made to either question or

answer, and cross-examination was waived. This should be deemed an acquiescence in the legality of the testimony.

The order of the mayor is annulled, with costs.

(68 N. J. L. 456)

PETER v. MIDDLESEX & S. TRACTION CO.

(Supreme Court of New Jersey. June 12, 1903.)

MASTER—SERVANT'S INJURIES—DECLARATION—SUFFICIENCY—GENERAL DEMURRER—DEFECTS REACHED—MOTIONS TO STRIKE.

1. A declaration, for servant's injuries, alleging that it was defendant's duty to use due care in the selection of competent persons to operate its cars, and yet, neglecting its duty, it did not use due care in that behalf, but negligently employed incompetent persons, and so negligently managed a certain car being propelled towards the car upon which plaintiff was that by reason of said negligence, and by reason of the car being in control of incompetent persons negligently employed by defendant for that purpose, a collision occurred, etc., does not charge defendant as an insurer, but states a good cause of action.

2. A declaration founded on separable demands, some of which are good and some bad, will prevail against a general demurrer, and, since the abolition of special demurrers, an objection thereto must be made on motion to strike out.

Action by Philip Peter against the Middlesex & Somerset Traction Company. On demurrer to declaration. Demurrer overruled.

Argued February term, 1903, before GUMMERE, C. J., and FORT, HENDRICKSON, and PITNEY, JJ.

George S. Silzer, for plaintiff. Willard P. Voorhees, for demurrant.

GUMMERE, C. J. This action is brought by an employé of the defendant company to recover damages for injuries received by him while engaged in operating one of its cars.

The principal ground upon which the declaration is attacked is that it charges the defendant with responsibility as an insurer of the safety of the plaintiff while in its employ, rather than for the use of due and reasonable care to protect him from injury. While some of the averments contained in the declaration may be open to this criticism, this is not true as to all of them. The following averment, extracted from the pleading, shows a legal liability on the part of the defendant to answer for the plaintiff's injury, viz.: "That it was the duty of the said defendant to use due and proper care in the selection of competent persons to run and propel its cars upon its tracks; yet the defendant, neglecting its duty in that behalf, did not use due and proper care in the selection of competent persons to run and propel its other cars [i. e., cars other than that which was being operated by the plaintiff] upon its tracks, * * * but negligently employed incompetent persons to run and propel its said other cars, and so

negligently, unskillfully, and improperly managed and controlled a certain one of said other cars, then and there being run and operated upon its road, and which was then and there being propelled in an opposite direction in front of and towards the said car upon which the plaintiff was then and there as aforesaid, that by reason of the said negligence, unskillfulness, and improper management and control of said car, and by reason of the same being then and there in the management and control of incompetent persons, so as aforesaid negligently employed by the defendant for that purpose," a collision between the two cars occurred, in which the plaintiff received the injury for which he sues.

It is further urged, on the part of the defendant, that the demurrer should be sustained because "the plaintiff's claim, as set out in his declaration, is greater than his right," and *Condit v. Neighbor*, 13 N. J. Law, 83, 97, is cited in support of this contention. But, as has been pointed out by Beasley, C. J., in *Hendrickson v. Penna. R. R. Co.*, 43 N. J. Law, 464, 467, the case relied upon was decided on a special demurrer, and is not authority for the sustaining of a general demurrer based on the reason cited. On the contrary, the decisions are quite clear that where the plaintiff's demand is made up of separable demands, some of which are good and some bad, such a declaration will prevail against a general demurrer. *Hendrickson v. Penna. R. R. Co.*, supra, and cases cited therein. Since the abolition of special demurrers in our practice, such an objection can be made only on motion to strike out. *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. Law, 52.

The demurrer should be overruled.

(68 N. J. L. 606)

METTING v. NORTH JERSEY ST. RY. CO.

(Supreme Court of New Jersey. June 12, 1903.)

RAILROADS—NONSUIT—EVIDENCE.

1. The trial court properly refused to order a nonsuit where it could only have been done by entirely disregarding plaintiff's testimony.

Error to Circuit Court, Essex County.

Action by William Metting against the North Jersey Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued February term, 1903, before GUMMERE, C. J., and FORT, HENDRICKSON, and PITNEY, JJ.

Ohauncy H. Beasley, for plaintiff in error. Samuel Kalisch, for defendant in error.

PER CURIAM. The only assignment of error argued by counsel is upon the refusal of the trial judge to order a nonsuit at the close of the plaintiff's case. This could only have been done by entirely disregarding the testimony submitted on the part of the plain-

tiff, on the ground that it was unworthy of belief. It was for the jury, not for the trial court, to pass upon the question of credibility.

The judgment should be affirmed.

(66 N. J. L. 462)

COWEN v. BLOOMBERG.

(Supreme Court of New Jersey. June 11, 1903.)

SALE — RESCISSION — FRAUD — SALE BY PURCHASER — EVIDENCE — CROSS-EXAMINATION.

C. obtained of G. C. certain glass upon fraudulent representations as to his financial condition. G. C. rescinded the contract, and brought his action of replevin against B., who had purchased the glass under a sheriff's sale on a judgment entered by default against C. in favor of B. The judgment was founded upon promissory notes made by C. to B. for an indebtedness incurred before the sale, and alleged to have been for the labor and services of B. to C., and for money loaned by B. to C. *Held:*

1. That a representative of Dun's Commercial Agency could testify to the statements made to him by C., and which had been communicated to G. C., through the agency, prior to the sale to C.

2. That it was permissible to prove judgments of record against C. at the time of the purchase of G. C. to establish the falsity of his statements to G. C. as to his solvency.

3. That B. having testified on his direct examination to the recovery of his judgment against C., and to the bill of sale given to him by the sheriff for the glass after the alleged sale under the execution issued upon the judgment of B. against C., it was permissible upon the cross-examination of B. to inquire into his whole conduct as to the judgment, the sale, and the debt for which the notes were given. This was not an attack upon the judgment collaterally. It was admissible to lay bare the whole plan or scheme of C. and B. to cheat G. C. out of his property.

(Syllabus by the Court.)

Error to Circuit Court, Hudson County.

Action by George Cowen against Samuel Bloomberg. Judgment for plaintiff. Defendant brings error. Affirmed.

Argued November term, 1902, before the CHIEF JUSTICE, and VAN SYCKEL, PITNEY, and FORT, JJ.

James F. Minturn, for plaintiff in error. McBurney & McBurney, for defendant in error.

FORT, J. There are several exceptions in the record upon which error has been assigned, but most of them are without substance and need no consideration.

This is an action of replevin, in which the plaintiff declares for certain glass, itemizing it. The defendant pleads three pleas: (1) He did not take the glass; (2) that Casper purchased the glass of the plaintiff, and had possession thereof for his own use, and that afterwards the defendant recovered a judgment in the Hudson circuit court against Casper, and the sheriff sold the glass under that judgment to the defendant, giving him a bill of sale therefor; (3) that the glass was not the glass of the plaintiff at the time

of issuing the writ of replevin. The plaintiff replies, alleging fraud in the purchase by Casper, and knowledge thereof in the defendant; that plaintiff rescinded the contract as soon as he discovered the fraud; that the judgment of the defendant against Casper, under which the glass was sold, was one obtained by collusion after knowledge by the defendant of the fraud and rescission; that both Casper and the defendant knew of Casper's insolvency when the goods were purchased.

To prove the fraudulent representations of Casper in the purchase, the court permitted evidence of the statements of Casper made to a representative of the Dun Commercial Agency just before the time of the sale of the glass by plaintiff to him. This evidence, as offered, was undoubtedly competent. It was not an attempt to offer a report made to the agency, as in *Cowen v. Bloomberg*, 66 N. J. Law, 385, 49 Atl. 451, but it was proof of the declaration of Casper by the man to whom they had been made.

Another assignment was that the records of judgments entered against Casper prior to the time of the sale were improperly admitted in evidence. We think these judgments were admissible after the proof of Casper's representations as to his financial condition, which were at variance with the fact of the existence of the judgments. *Wilson v. White*, 80 N. C. 280.

The defendant was a witness, and upon cross-examination he was asked about the good faith of his judgment against Casper. This was objected to as impeaching the judgment in a collateral proceeding. On the direct examination the defendant had testified to securing the judgment, and the sale under it, and the bill of sale from the sheriff. The cross-examination was proper. The allegation of the replication was fraud. The whole conduct of the defendant was open to inquiry after he justified under the sheriff's sale. It was a part of the facts and circumstances from which the jury might determine whether the defendant was in conspiracy with Casper, and not only familiar with the fraud of Casper in the purchase, but was engaged with Casper in a further attempt at defrauding the plaintiff by conspiracy with him to obtain a fraudulent judgment against Casper, and a fraudulent sale thereunder, to cheat the plaintiff out of his property. This cross-examination was not an attack upon the judgment collaterally. It was the developing of the whole plan or scheme of fraud between Casper and the defendant to cheat the plaintiff. *Shinn on Replevin*, § 465, note at page 429.

We think, also, that the court rightly refused to direct a verdict for the defendant because the evidence of identification of the glass replevied, as the glass of the plaintiff, was insufficient. The second plea of the defendant admitted the glass in the plaintiff's declaration to have been purchased by Casper

from the plaintiff. There was also evidence of identification, which made it a question for the jury.

There is no error, and the judgment of the Hudson county circuit court is affirmed.

(9 N. J. L. 575)

**McDERMOTT v. SINKING FUND COM'RS
OF JERSEY CITY.**

(Supreme Court of New Jersey. June 9, 1903.)
**MUNICIPAL CORPORATION—SINKING FUND—
CANCELLATION OF CITY BONDS.**

1. The "sinking fund of 1873" of Jersey City is not pledged to the redemption of any specific bonds, and the sinking fund commissioners of Jersey City have power, under the act of 1895 (P. L. 1895, p. 69), to cancel bonds of the city held in that fund.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Walter L. McDermott, against the sinking fund commissioners of Jersey City, to review a resolution. Resolution affirmed.

Argued February term, 1903, before
DIXON, GARRISON, and SWAYZE, JJ.

Allan L. McDermott, for prosecutor.
George L. Record, for defendants.

SWAYZE, J. The object of this proceeding is to set aside a resolution of the sinking fund commissioners of Jersey City canceling bonds of the city held by the commissioners. The bonds canceled amount to \$68,064.42. The resolution was passed November 18, 1902. Prior to that date all of the bonds, except one for \$2,500, had been held by the commissioners for certain sinking funds, which were especially appropriated to the ultimate redemption of specific issues of bonds, and known by several different names. Upon that date the commissioners had in a fund known as the "Sinking Fund of 1873" securities of the par value of \$2,500, and cash to the amount of \$68,332.64. Sixty thousand dollars of the cash came from fees for liquor licenses received by the city after July 1, 1902, and appropriated to the sinking fund of 1873 by a resolution of the board of finance adopted July 25, 1902. On November 18, 1902, the sinking fund commissioners first passed a series of resolutions for the purchase for the sinking fund of 1873 of the bonds in question from the sinking funds for which the bonds were then held. The effect was to transfer the cash to the other sinking funds, and to transfer the bonds to the sinking fund of 1873. At the same time they bought the \$2,500 bond of a private corporation. Thereupon the commissioners passed the resolution removed by the writ of certiorari, canceling these bonds. In substance, the action complained of was the payment of these bonds, to the extent of \$60,000, out of the money derived from license fees, and, to the extent of \$8,000, out of other assets of the sinking fund of 1873. Some of the canceled bonds had been issued to procure money for the ordinary expenses

of the city. Some had been authorized by statutes which provided for the payment of the bonds by money raised in the next tax levy. All had been issued under different statutes, which, in different language, required the bonds authorized thereby to be paid by taxation.

It is contended on the part of the prosecutor that the action of the sinking fund commissioners is, in effect, a payment of current expenses out of bonds, instead of the annual tax levy, and is an evasion of the statutes requiring bonds to be met by taxation. The action of the sinking fund commissioners now questioned is the cancellation only. Their right to transfer these bonds from the other sinking funds in return for the cash is not questioned.

As to the contention that the bonds should have been met by taxation, it was no part of the duty of the sinking fund commissioners to make up the tax levy. That duty devolved upon another body. If the board of finance, in fixing the appropriations for the fiscal year, ought to have appropriated \$68,000 more for the payment of bonds than they actually appropriated, their action cannot be reviewed in this proceeding.

It is difficult to see how the prosecutor, a taxpayer of Jersey City, is injured by the action of the sinking fund commissioners. He is no worse off by having the bonds canceled than he would be by having them uncanceled. If he is injured at all, it is by the failure of the municipal authorities to raise as much by taxation as they should raise, with a view to the redemption of bonds at maturity; but this failure of the municipal authorities is not the result of any act or neglect of the commissioners, and would not be remedied by setting aside the resolution now drawn in question. The prosecutor is not a bondholder complaining of a misuse of the funds held in trust for the ultimate payment of his bonds. What the prosecutor complains of is substantially the administration of city affairs by boards other than the sinking fund commissioners, and the object of this proceeding is indirectly to compel the other boards to do what the prosecutor claims is their statutory duty.

We think that the act of 1895 (P. L. 1895, p. 69; Gen. St. p. 716, § 1232) authorized the action taken. The act authorizes the sinking fund commissioners in a city whose municipal debt exceeds 15 per cent. of the assessed valuation of real and personal property "to cancel all bonds that have been or may hereafter be purchased by them for the redemption of the debts of such city, notwithstanding such bonds may not be by their terms due and payable at the time of such purchase." This act is attacked because it is said to violate the constitutional provision against laws impairing the obligation of contracts. The answer to this argument is that no contract appears to be impaired. The sinking fund of 1873 is not pledged to the

redemption of any particular bonds. The sinking fund of 1873 was created by a supplement to the city charter approved March 24, 1873 (Sp. Pub. Laws 1873, p. 402). It appropriates certain receipts to the "sinking fund of Jersey City," and provides "that said sinking fund shall be used exclusively to satisfy bonds of Jersey City." We think it is so used when bonds are bought as in this case, and canceled before maturity. It is true that there are yet outstanding \$550,000 of city bonds issued prior to 1873, but it is not even contended that the sinking fund of 1873 is limited to the redemption of that debt. The argument is that the sinking fund cannot be used to pay bonds issued under acts directing that they shall be paid by insertion of the amounts in annual tax levies. We see no reason why the powers of the sinking fund commissioners should be denied merely because other municipal authorities are required to provide means of payment. The object of the sinking fund is to discharge the city debt, and it can make no difference what debt is discharged, provided the bonds canceled have not been pledged for the payment of other bonds.

The resolution should be affirmed, with costs.

HAINES et al. v. EINWACHTER et al.

(Court of Chancery of New Jersey. June 8, 1903.)

DEEDS—RESTRICTIONS—CITY LOTS—ENFORCEMENT—GENERAL PLAN OF IMPROVEMENT—DEFENSES—PLEADING.

1. Where restrictions as to the use of certain lots when conveyed by the owner to several grantees were not part of a general plan of improvement, but were imposed on each lot separately as sold, it was no defense to a suit to enforce restrictions against one of the lots that the grantor had waived the same by permitting grantees of other lots to disregard them.

2. In a suit to enforce restrictions in a deed to a certain city lot, the fact that the grantor imposed the same restrictions on a number of other lots was not of itself sufficient to show a general plan of improvement, to which such restrictions related.

3. In a suit to restrain the use of a lot for the sale of intoxicating liquors in violation of a restriction in the deed, defenses that the restriction should not be enforced, by reason of a change in the character of the neighborhood, and that defendant had been permitted to go to expense to change his property to use the same for the sale of liquor without objection, could not be considered, where they were not pleaded, and were raised for the first time at the argument.

4. Where the restrictions in a deed were not imposed in pursuance of a general plan for improving several lots, a subsequent grantee of an adjoining lot is not entitled to enforce them.

Suit by Mary T. Haines and John F. Starr against Ellen Einwachter and another. Decree in favor of plaintiff Starr.

E. H. Chandler, for complainants. G. A. Bourgeois, for defendants.

GREY, V. C. The bill is filed to enforce restrictions imposed by the complainant John F. Starr upon a certain lot of land on the west side of Virginia avenue, in Atlantic City, in a deed made by him on the 30th day of December, 1887, to one Solomon Sternberger, and recorded in Atlantic county clerk's office in Book 1234 of Deeds, folio 93, etc. The restrictions are recited in that deed as follows: "Under and subject to the restriction that no slaughterhouse, bone-boiling establishment or fat-rendering establishment or livery stable, shall hereafter be erected thereon, nor shall any building be erected on said premises within thirty feet of the front line of said lot, nor more than one house erected thereon, nor shall any spirituous, vinous or malt liquors be manufactured or sold upon said premises." By various intermediate conveyances this lot has been conveyed to the defendant Ellen Einwachter, who is now its owner. A hotel or boarding house called the "Belmont" has been built on the lot. This property Mrs. Einwachter has leased to the defendant Edwin S. Watson, who presently occupied it. The complainant Starr, by another deed, dated the 14th day of December, 1897, recorded in Book No. 122 of Deeds, p. 150, conveyed another lot on the same side of Virginia avenue to one Charles F. Wahl, the title in which by intermediate conveyances has come to the complainant Mary T. Haines. The deed from Starr to Wahl also contained the restrictions above recited. The breaches alleged are that the defendant Watson has obtained a license for the sale of liquor on the lot leased to him, and has opened a bar, and intends to conduct on the premises a business in selling spirituous and other liquors, and, at the time when the bill was filed, was constructing a barroom within 15 feet of the front line of the lot in question. The bill prays that the defendants may be restrained from building the barroom or other structure within 30 feet of the front line of their lot, and from selling spirituous or other liquors on the premises described in their deed, and for further relief, etc.

The defenses set up in the pleadings are that the complainant Starr has abandoned and waived the restrictions by permitting numerous buildings to be built within 30 feet of the line of Virginia avenue on lots on which he had imposed the restrictions in question, and that he and his grantees have acquiesced in the building thereof; that he abandoned the restrictions against the sale of liquor at the Jackson House, another property on the same street, and had consented to the sale of liquor there. This defense misconceives the nature of the restrictions set up in the bill and shown by the proofs. There is neither allegation in the bill, nor proof in the testimony, that Mr. Starr imposed these restrictions as part of a general plan of improvement, whereby each grantee of a lot became interested in

¶ 4. See Deeds, vol. 14, Cent. Dig. § 543.

them, and Mr. Starr became correspondingly bound to impose them upon all the lots within the plan. In this case each grantee accepted his deed with the particular restrictions therein recited, imposed upon the lot thereby conveyed. Nothing shows that Mr. Starr agreed, expressly or impliedly, to impose like restrictions upon other adjoining or neighboring lots which he might sell. In truth, he varied or omitted the restrictions in several cases, and apparently dealt with each lot as a separate and unrelated property. The fact that he imposed the same restrictions upon a number of lots is not sufficient, of itself, without other allegation or proof, to show that there was any general plan of improvement to which these restrictions related. It is, therefore, no answer to this suit to enforce the restrictions imposed upon the defendants' lot that they should say that Mr. Starr has waived the enforcement of, or omitted to impose, like restrictions elsewhere.

On the hearing, the defendants also claimed that, since the restrictions above cited were imposed, the character of the neighborhood has changed from cottage uses to hotel uses, and that this justifies the breach of the covenant under which the land was purchased; that the defendant Watson openly and publicly applied for his liquor license, and spent money in changing the premises in order that the sale of liquor might conveniently be carried on there, without opposition or notice that the restriction would be enforced. Neither of these defenses was set up in the defendants' answer, and therefore ought not to be considered on argument. If it be assumed that they were well and forcefully pleaded, they are not sustained by the proofs.

The case appears to stand substantially in the same position as that of *Evans and Starr v. Phoebeus* (decided in April, 1902, by Vice Chancellor Reed, but not reported), in which a covenant of like character was sustained and enforced. In that case the complainant *Evans* was not shown to be in privity with the complainant *Starr*, because of the adoption of a general plan for improving the property dealt with, and the bill was dismissed as to her. In this case the same result follows as to the complainant *Haines*. She has no status to enforce the covenant imposed by Mr. Starr. The latter only is entitled to relief.

A decree will be advised in accordance with the views above expressed.

(60 N. J. L. 537)

ALLISON LAND CO. v. MAYOR, ETC., OF BOROUGH OF TENAFLY.

(Supreme Court of New Jersey. June 8, 1903.)
MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENT OF BENEFITS.

1. The borough act (P. L. 1898, p. 399), as amended (P. L. 1899, p. 171), confers the

power to assess benefits for street improvements upon lands not upon the line of the street that is improved.

(Syllabus by the Court.)

On rehearing. Affirmed.

For former opinion, see 52 Atl. 231.

This cause was heard on the original argument at the February term, 1902, upon the reasons filed therein, and a decision was rendered setting aside the assessment brought up by the writ. The certiorari was brought to review an assessment made by the borough of Tenafly for the improvement of Clinton avenue, in the said borough, upon lands belonging to the Allison Land Company which do not front upon the avenue.

The opinion of this court was that the assessment should be set aside, upon grounds, however, that could be cured by reassessment. 52 Atl. 231. The prosecutor, not desiring to put the defendant to the expense of making a reassessment, has requested a decision upon the main question in the case, viz., the power to assess lands that do not front upon the street improved.

The following stipulation was thereupon made: "It is hereby stipulated by and between the parties hereto that we join in an application to the Supreme Court for permission to resubmit and reargue the above-entitled action upon the following conditions and stipulations, which are hereby agreed upon and consented to: That the report of the commissioners of assessment be amended by inserting at the end of said report the following: 'That we, the commissioners of assessment, do further certify that the assessments made herein do not exceed the actual benefits received from the said improvement. The lands assessed for this improvement are severally and respectively benefited by said improvement to the full amount of the assessment.' That the return to the writ be amended by adding to the copy of the report of the commissioners of assessment the same amendment as made above (page 23 of printed case). That the reasons filed herein be all struck out, with the exception of the first and second reasons (pages 7 and 8 of the printed case), and that the case be presented and argued upon those reasons alone, and that in case of the affirmation of the assessment no interest or costs shall be charged or allowed as against the plaintiff or defendant, and that a rule for reargument may be entered in said cause. Attorney for prosecutor, William M. Seufert. Attorney for defendant, Edmund W. Wakelee."

On the above stipulation the following rule was entered: "It appearing to the court that the above-entitled action was argued at the February, 1902, term of this court, and a decision therein rendered, but that no judgment has been entered herein, and that the return made by the defendant herein has been amended by a stipulation filed herein, it is on this second day of February, 1903, ordered that the parties hereto have leave

to resubmit and reargue the above-entitled action upon the writ and return as amended by the stipulation filed herein. Let the within rule be entered. Jonathan Dixon, Justice Supreme Court. On motion of Edmund W. Wakelee, Attorney for Defendant."

Argued February term, 1903, before DIXON, GARRISON, and SWAYZE, JJ.

W. M. Seufert, for prosecutor. E. W. Wakelee, for defendant.

PER CURIAM. The opinion delivered upon the original argument of this cause, *Allison Land Co. v. Borough of Tenafly*, 52 Atl. 231, disposes properly of the only question involved in this reargument, viz., the effect of the amendment to the borough act (P. L. 1899, p. 171).

The assessment is affirmed, with costs.

(69 N. J. L. 471)

TAYLOR v. WAHL.

(Supreme Court of New Jersey. June 8, 1903.)
MECHANIC'S LIEN—ENFORCEMENT—DEFENSES—PLEA—RES JUDICATA—AMOUNT OF CLAIM.

1. An owner sued by a workman or materialman on a notice and demand of payment, under the third section of the mechanics' lien law (Gen. St. p. 2073), may plead that there was due at the time of the service of the notice by the claimant "a sum less than the amount claimed in said notice and demand." Such a plea is not demurrable.

2. The fact that the declaration recites that after the notice and demand, and before commencing the suit, the claimant had obtained a judgment against the contractor for the amount claimed, does not defeat such a plea. Such a statement in the declaration is surplusage, being merely a statement of the plaintiff's evidence.

3. A judgment by a claimant against the contractor is not conclusive upon the owner. It may be offered as evidence of the amount due, but it will not prevent the owner from showing the truth to be that the claim made is knowingly excessive, to the knowledge of the claimant.

4. The conclusion here reached we think to be in conformity with the principles declared in *Reeve v. Elmendorf*, 38 N. J. Law, 125, and *Camden Ironworks v. City of Camden* (N. J. Err. & App.) 52 Atl. 477.

(Syllabus by the Court.)

Action by Samuel O. Taylor against William F. Wahl. Demurrer to plea. Overruled.

Argued February term, 1902, before the CHIEF JUSTICE, and HENDRICKSON, PITNEY, and FORT, JJ.

G. A. Bourgeois, for plaintiff. Thompson & Cole, for defendant.

FORT, J. This was a suit upon a notice given under the third section of the mechanics' lien act (Gen. St. p. 2073). The defendant is the owner of premises being erected under contract. The declaration recites the service of the notice, and alleges that there was due to the contractor by the defendant, the owner, upon the contract, money in excess of the amount demanded by the notice.

The declaration alleges that after the giving of the notice, and before the suit was instituted, the plaintiff established his debt as claimed in the notice, by obtaining a judgment thereon against the contractor.

The defendant's sixth plea is, in part, as follows: "And for a further plea in this behalf, by leave of the court for this purpose first had and obtained, defendant says that at the time of the alleged demand made by the plaintiff on the said Crammer, and that at the time of the alleged demand made by the plaintiff on this defendant, there was due from said Crammer to said plaintiff a sum less than one thousand dollars, the amount claimed in said notice and demand, to the knowledge of this defendant." This is a sufficient recital from the plea. The plea contains other matters which are mere surplusage and might have been omitted, and concludes with a verification and prayer for judgment. To this plea the plaintiff demurs. The demurrer cannot be sustained. The contention of the plaintiff, on the brief, that because he has set out in his declaration that, before suit brought, he had obtained judgment against the contractor for the amount stated in his notice, and hence, under *Reeve v. Elmendorf*, 38 N. J. Law, 125, his claim is conclusive upon the defendant, is not sustainable. Whatever force this judgment may have as evidence in the cause, it is unnecessary to here discuss. It was not necessary to recite it in the declaration, and it is a mere statement of evidence therein. The sixth plea avers that, at the time the demand was made by the plaintiff upon the defendant by the notice set out in the declaration, "there was due from the said contractor to the said plaintiff a sum less than one thousand dollars, the amount claimed in said notice and demand, to the knowledge of this defendant." The demurrer admits this statement, viz., that there was due to the plaintiff "a sum less than one thousand dollars, the amount claimed in the notice," etc. That admission is fatal. If there was less due the plaintiff than his notice called for, his whole claim falls. He makes an excessive claim at his peril. The owner is not liable to answer for any amount, where the claimant seeks to impound more money than is actually due him. Chief Justice Beasley, in *Reeve v. Elmendorf*, supra, says: "In view of the just rights of the contractor, as the owner is obliged to be satisfied of the correctness of the claim of the materialman or workman before he pays it, it follows that neither of the latter can sue the owner, without first establishing, to the exclusion of all reasonable doubt, the justness of his claim. * * * But so long as an honest—which is the same thing as a reasonable—dissatisfaction exists on the part of the owner with respect to the fairness of the debt claimed, he is not suable under this clause." For the plaintiff to admit, as the demurrer does, that his notice to the owner, the de-

defendant, was for more than was actually due him from the contractor, is to admit he has no cause of action, for, says Chief Justice Beasley at another point in the same opinion quoted from above, "If the workman or materialman claim, therefore, more than has in fact been earned by him, such exaggeration is, I think, fatal to his right to use the statutory procedure against the owner." Nor do we think the owner is bound by the fact that a judgment has been recovered against the contractor by the claimant. The recovery of such a judgment is evidential of the amount due on his claim, and, without other proof, may be conclusive. But it does not prevent the owner from showing at the trial the truth to be that the claim is excessive, and the judgment thereon is likewise so, or that it is fraudulent. The owner is in a position where other workmen and materialmen may claim that a duty is cast upon him to see that the claim made is just, because, if unjust, they may have rights in the fund. He may not be compelled to contest, or liable to other claimants who may be subsequent in priority of claim, if he fail to do so—that is not decided—but he certainly has the right to contest the claim made in any notice similar to the notice of the plaintiff in this case; and if it appear by the proof, uncontroverted, or the jury so find, that the claim, as made, is excessive, to the knowledge of the claimant, the claimant cannot recover anything, and the owner is entitled to a verdict and judgment thereon in his favor. The principle controlling in such a case as this is the same as that declared by the Court of Errors and Appeals to apply where a notice to hold back is given to a city by a claimant against a contractor upon work done under a public contract. *Camden Ironworks v. City of Camden*, 52 Atl. 477.

The demurrer will be overruled, with costs, but leave is given to the plaintiff to plead issuably within 20 days after entry of the rule overruling his demurrer.

ENGLISH v. RAINEAR et al.

(Court of Chancery of New Jersey. June 2, 1903.)

MORTGAGOR AND MORTGAGEE—RELATION—CONVEYANCE BY MORTGAGEE—EFFECT—RIGHTS OF PARTIES.

1. R. held a mortgage on a farm, and had sued to foreclose. Complainant induced a third person, to whom he owed money, to buy in the property at the sale, under an arrangement whereby the third person was to execute a new mortgage of the land to R. At the same time complainant entered into a written contract with the third person whereby the latter was to convey to complainant on repayment of the amount, together with the amount which complainant owed him, etc.; complainant to assume the new mortgage. Complainant was to retain possession of the farm, etc. *Held*, that the relation between complainant and the third person was that of mortgagor and mortgagee.

2. Complainant having failed to make the

payments at the time stipulated, by an arrangement between him, R., and the third person, the latter conveyed the farm to R., who knew all the circumstances. *Held*, that R. took subject to the rights of complainant against the third person.

3. R. afterwards conveyed the premises to his brother. Complainant was in open and notorious possession at the time. *Held*, that the brother was put on inquiry as to complainant's rights, and took subject thereto.

Bill to compel specific performance, brought by Abram English against Schuyler Rainear and another. Decree rendered.

Peter Backes, for complainant. R. S. Gaskill, for defendant Schuyler Rainear. Howard Flanders, for defendant Samuel Rainear.

REED, V. C. This is a suit to compel Schuyler Rainear and Samuel Rainear to convey certain property to Abram English upon the payment by Mr. English of a certain sum due by Mr. English to one Martin C. Ribsam. The facts are substantially these: Schuyler Rainear held a mortgage upon a farm which was the old homestead of Mr. English's family. He began a suit to foreclose his mortgage. Abram English was anxious to save the farm. He had had some dealings with Martin C. Ribsam, and owed Ribsam about \$100. He applied to Mr. Ribsam to help him keep the farm. Mr. Ribsam consented to do so if Mr. Rainear could be persuaded to take a new mortgage for \$2,000 upon the farm. Messrs. Ribsam and English saw Mr. Rainear, who consented, if his interest was paid up, and Mr. Ribsam would take the title to the farm, to leave \$2,000 upon it, to be secured by bond and mortgage thereon, to be executed by Mr. Ribsam. Under this arrangement, Mr. Ribsam bought the farm at the sale under the decree made in Rainear's foreclosure suit, took the deed from the sheriff, paid the interest due upon the mortgage and the costs of the suit, and executed a mortgage to Schuyler Rainear. His payments, together with the amount English owed him, and the \$2,000 mortgage made to Rainear, amounted, altogether, as I understand the testimony, to \$2,845. At the time Mr. Ribsam took the deed, he entered into a written agreement with Mr. English. This agreement was dated June 21, 1899. By the terms of this agreement, Ribsam covenanted to sell the farm to Abram English, upon demand made before the 1st day of January, 1903, for \$2,845, to be paid by the assumption of the mortgage debt of \$2,000 made to Rainear, and the balance in cash, and upon the payment of all moneys which Ribsam may have expended in improvements, or for interest and taxes and insurance premiums, together with interest upon the money paid for improvements in carrying on farm operations. English was to have possession of the farm, and conduct it, paying all interest upon the mortgage and all taxes against the property. English was to pay \$425 on account of the purchase money on or before

the 1st day of January, 1902, and was to pay the balance on or before the 1st day of January, 1903. English covenanted to make these payments, and it was agreed that if default was made in any payment of interest, taxes, or on account of the purchase price, and said payment should be in default for 30 days, Ribsam could rescind the agreement and enter upon the premises, and English was to forfeit all payments made. Mr. English went into possession of the farm upon the execution of this agreement. The first year, Mr. Ribsam says, English paid the taxes and interest, but was behind in his account, but Mr. Ribsam gave him a chance for another year. At the end of the second year he was behind in his interest and taxes. Mr. Ribsam says he told English at that time that, if Mr. Rainear was satisfied, he (Ribsam) was willing to try him another year. A few days thereafter Mr. Rainear demanded his interest due upon the mortgage; and Mr. Ribsam says he then told English that, if his old neighbor and friend (meaning Rainear) would not stand by him better than that, he did not see why he (Ribsam), a stranger, should stand by him any better. He says he told English to go back and tell Rainear that he (Ribsam) would sell the place, and whatever profit there was, he would divide. Ribsam paid the interest to Rainear on January 9, 1902. By an arrangement between English, Rainear, and Ribsam, the latter conveyed the property on January 13, 1902, to Rainear, for the sum of \$2,750. This amount represented what English then owed Ribsam, together with the \$2,000 secured by the Rainear mortgage.

It is apparent from the testimony that Mr. Ribsam bought in this property at the foreclosure sale as trustee for Mr. English. It is equally apparent that he took the title in his own name to secure himself the amount which he had advanced to Mr. English. Ribsam held the title as mortgagee, and Mr. English went into possession as mortgagor. The agreement between Ribsam and English contained a covenant by English, as already remarked, to pay the amount secured by the deed. Upon the face of the agreement, therefore, there existed a debt, for the security of which, title was held by Ribsam. This displayed that the relation between Ribsam and English was that of mortgagee and mortgagor. Now, Schuyler Rainear knew the circumstances which led to the purchase of the property by Ribsam at the foreclosure sale, and I have no doubt that he read the agreement, which was for a time in his possession; nor do I doubt that at the time of the sale to him by Ribsam, and at other times, he led both Ribsam and English to suppose that he was helping English, and that English would have the right to redeem. In my judgment, he took the property subject to all the rights which English held against Ribsam. But the right of an-

other party was intervened. On May 30, 1902, Schuyler Rainear sold, of the 116.48 acres which he had bought of Ribsam, 103.81 acres to his brother, Samuel Rainear, for \$3,633. Samuel Rainear on September 23, 1902, began an action of ejectment against English to recover possession of this tract. The bill charges that he bought with notice of the agreement between Ribsam and English. The defendant seeks to enjoin this action of ejectment, and prays that, upon payment by English of the amount due under agreement with Ribsam, the two Rainears may be ordered to reconvey the property to him. It is claimed by counsel of Samuel Rainear that he stands in the attitude of a bona fide purchaser for value, and, as such, is entitled to hold the land he bought, free from any equity which may have existed against Ribsam or Schuyler Rainear. There is one fact, however, which destroys the force of this insistence, and that fact is that English was in open and notorious possession of the farm at the time Samuel Rainear made his purchase. So far as appears, he made no inquiries of English respecting his interest in the premises. The title not having come through English, Samuel Rainear is chargeable with all the information which he would have obtained had he made such inquiries. Stew. Dig. p. 902.

I shall advise a decree permitting English to redeem upon payment of the amount which Schuyler Rainear paid to Ribsam, which was as, I understand it, the amount which English owed Ribsam, together with the interest, within 60 days after decree is signed, and that, upon the failure of English to make such payment within that time, the bill shall be dismissed.

(99 N. J. L. 543)

UNGER v. INHABITANTS OF FANWOOD TP.

(Supreme Court of New Jersey. June 8, 1903.)

CERTIORARI—ORDINANCE—VALIDITY OF—VIOLATION—ACTION FOR PENALTY—JURISDICTION OF JUSTICE—RIGHT TO JURY TRIAL.

1. The validity of an ordinance affecting the general public cannot be challenged by certiorari unless the prosecutor shows some injury peculiar to himself.

2. In a prosecution for violating an ordinance, certiorari will not be allowed before final decision in the court below. It is not within the exception to the rule stated in *Hoxsey v. Paterson*, 39 N. J. Law, 489.

3. When authority is given to prosecute a suit before a justice of the peace to recover a penalty for violating an ordinance, it is regarded as a civil suit in a justice's court unless a contrary intention is indicated in the statute. In such case the remedy is by appeal to the common pleas.

4. Where the punishment prescribed for violating the ordinance is imprisonment to be imposed by a justice of the peace, the suit is in the nature of a criminal proceeding before the justice, and is not a civil suit in the small-cause court.

5. The criminal prosecution before the justice is a summary proceeding, which may be

tried without a jury, as it was before the Constitution of 1844 was adopted.

6. The question does not arise whether a jury may be demanded when the penalty exceeds \$16.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Herman Unger, against the inhabitants of the township of Fanwood, to review an ordinance regulating the speed of automobiles. Writ dismissed.

Argued February term, 1903, before VAN SYCKEL and GARRETSON, JJ.

Reed & Coddington, for prosecutor. Coddington & Swackhamer, for defendant.

VAN SYCKEL, J. The writ in this case brings up for review only an ordinance passed by the township committee of Fanwood regulating the speed of automobiles and providing punishment for its violation. The affidavit upon which the writ was allowed sets up that the prosecutor was arrested for an alleged violation of the ordinance, but the proceedings in that suit are not by this writ certified into this court.

The prosecutor is met with the objection that in this posture of affairs he has no standing to sue out a certiorari. It is the established rule that a right of action does not exist in favor of one who is only damned as one of the public in common with his fellow citizens. *Kean v. Bronson*, 35 N. J. Law, 468; *Montgomery v. Trenton*, 36 N. J. Law, 85; *Jersey City v. Traphagen*, 53 N. J. Law, 434, 22 Atl. 190; *Tallon v. Hoboken*, 60 N. J. Law, 212, 37 Atl. 895; *Hamblet v. Asbury Park*, 61 N. J. Law, 502, 39 Atl. 1022; *Kendall Co. v. Jersey City*, 65 N. J. Law, 123, 46 Atl. 647. In *Hamblet v. Asbury Park*, Mr. Justice Garrison, in delivering the opinion of the court, said, "Conviction alone can furnish evidence that the ordinance affects the prosecutor."

The prosecutor's writ is an attack upon the ordinance exclusively, and not upon the proceeding which he alleges has been illegally instituted against him. For the purpose of arresting the further prosecution of that suit, the writ was prematurely granted. He should have waited judgment in the case before he sued out his writ. He is not within the exception to the rule that certiorari will not be allowed before a final decision is reached in the inferior tribunal. *Hoxsey v. Paterson*, 39 N. J. Law, 489. Under the present aspect of the case, therefore, the prosecutor has no interest in the validity of the ordinance other than that which is common to all citizens.

But if the validity of the ordinance may be challenged by the prosecutor, is there any infirmity in it? The act of 1899, p. 385, § 32, gives the town committee power to pass ordinances to prevent immoderate driving or riding on any street or highway. Section 22, page 380, gives power to the town committee to prescribe by ordinance a penalty

for violating any ordinance by fine not exceeding \$100, or by imprisonment in the township lockup or county jail not exceeding 90 days, or by both. Such ordinance may prescribe the amount of fine or term of imprisonment, or it may provide that the justice before whom the proceeding shall be instituted shall determine whether the penalty shall be by fine or imprisonment, and, if by fine, the amount thereof, and, if by imprisonment, the term thereof, within the limits above prescribed. This ordinance was duly passed, and was within the granted power. Section 23, p. 381, of the act of 1899 authorizes arrest without warrant on view of the officer for violating the ordinance. The cases hold that, where the violation of an ordinance is punishable by fine only, the proceeding before a justice of the peace is a civil suit. *Penna. R. Rd. v. N. J. Society*, 39 N. J. Law, 400; *Greely v. Passaic*, 42 N. J. Law, 429; *Brophy v. Perth Amboy*, 44 N. J. Law, 217; *White v. Neptune City*, 56 N. J. Law, 222, 28 Atl. 378. In the case last cited Mr. Justice Dixon held that the construction that it is a civil suit should be favored, and that in such cases certiorari will not lie, the remedy being by appeal to the common pleas, the justice having jurisdiction in the small-cause court.

In the case in hand the justice may punish by fine or by imprisonment. The act of 1899 expressly giving to the township committee the power to confer upon a justice of the peace the right to adjust the penalty in each case within the statutory limits, the ordinance in that respect is valid. *Young v. Atlantic City*, 60 N. J. Law, 126, 37 Atl. 444. The justice having power to impose punishment by imprisonment alone, the case is not within the authorities above cited which apply to a civil suit. This is in the nature of a criminal proceeding before a justice of the peace, and not a civil suit in a justice's court. *Johnson v. Barclay*, 16 N. J. Law, 1; *McGear v. Woodruff*, 33 N. J. Law, 216. It is a summary proceeding which may be tried without a jury as before the Constitution of 1844 was adopted. The question does not arise whether a jury may be demanded when the penalty exceeds \$16. If it is a civil suit, certiorari will not lie, but appeal to the pleas is the appropriate remedy. If it is a summary proceeding to inflict punishment, certiorari will lie after judgment below, but the denial of a jury will be no ground for reversal.

The writ is dismissed, with costs.

(69 N. J. L. 572)

GARCIN v. ROBERTS.

(Supreme Court of New Jersey. June 8, 1903.)
WILLFUL TRESPASS—ACTION BEFORE JUSTICE
—DEFENSES—JURISDICTION.

1. An action brought before a justice of the peace under "An act to prevent willful trespassing upon lands" (Gen. St. p. 3682) proceeds

according to the provisions of the act constituting courts for the trial of small causes (Gen. St. p. 1870), and in such an action the defendant may plead title as provided in section 25 of the last-mentioned act.

2. The plea filed in this cause is not such as to oust the justice of his jurisdiction.

(Syllabus by the Court.)

Action by Edward H. Garcin against Samuel M. Roberts. Judgment for plaintiff, and defendant brings certiorari. Affirmed.

Argued November term, 1902, before GARRISON and GARRETSON, JJ.

Samuel M. Roberts, pro se. Franklin C. Woolman, for respondent.

GARRETSON, J. The writ removes into this court a judgment rendered by a justice of the peace. The plaintiff brought suit against the defendant under the provisions of an act entitled "An act to prevent willful trespassing upon lands," approved February 17, 1857 (Gen. St. p. 3682), which are: "If any person or persons shall unlawfully enter upon any lands not his own after having been forbidden so to do by the owner or legal possessor of such lands, he shall forfeit and pay for each offense to the owner of said lands or his or her tenant in possession, the sum of three dollars to be sued for and recovered with costs in an action of debt before any justice of the peace in the state."

The state of demand set out that the plaintiff was in possession of a certain messuage and lot of land in Burlington county, and that on May 5, 1902, the defendant with force and arms, after being forbidden by notices placed and exposed in prominent places on said premises, and by words personally spoken to him by said plaintiff and other members of his household, willfully and unlawfully entered upon the lands not his own, but in lawful possession and occupation of the plaintiff, being the premises above described, against the provisions of the above act; and demanded judgment for the sum of \$3 and costs. The defendant pleaded to this demand that the close in the state of demand mentioned at the time when, etc., was not the close, freehold, or land of the said plaintiff, and that the said plaintiff is not and was not the owner or the tenant in possession thereof, and that the defendant entered upon and committed the said trespasses because he had a right and lawfully might do so. The justice overruled this plea, and, after hearing, gave judgment for \$3 debt and \$2.90 costs, and by this writ the defendant seeks to have this judgment reversed.

The defendant founds his right to file the plea of title on, and claims the jurisdiction of the justice was ousted by, the twenty-fifth section of "An act constituting courts for the trial of small causes" (Gen. St. p. 1870)—that when, in any action brought by virtue of this act, the defendant pleads title to any real estate in himself or another under whom he acted or entered, and commits the plea to writing, and observes certain other directions,

the plaintiff may prosecute his suit in the Supreme Court. While the trespass act directly confers jurisdiction upon the justice, such jurisdiction, if not directly conferred, would have existed by the fifth section of the small cause act, which gives the justice jurisdiction of suits to recover every sum of money or penalty not exceeding \$100, to be sued for and recovered by virtue of any law of this state in any court of record or court having cognizance thereof; and in this latter case the entire conduct of the cause and all proceedings therein are regulated by the provisions of that act, except so far as the proceedings are modified by the statute prescribing the penalty. *Penna. R. R. Co. v. Society*, 39 N. J. Law, 400. The trespass act only provides for the recovery of \$3 and costs. Of course, the costs recoverable must be the costs provided in the small cause act, and the conclusion is irresistible that all the proceedings must be in accordance with that act. The unlawful entering upon lands of another with or without being forbidden so to do by the owner or legal possessor of such lands gave a right of action to such owner without the trespass act. In such case the owner or possessor would be entitled to recover at least nominal damages, but no more damages unless proved. The trespass act does no more than fix the amount of damages for the simple act of entering; therefore the action is subject to the provisions of the small cause act in all respects, one of which is the right to plead title.

But the defendant has not brought himself within the provisions of this section. He does not by his plea allege title in himself or in any other person under whom he acted or entered, but simply says that he entered upon and committed the said trespasses because he had a right and lawfully might do so. Nor is he aided in this plea by the allegation that the close mentioned was not the close, freehold, or land of the plaintiff, or that the plaintiff is not and was not the owner or tenant in possession thereof. Such an allegation is no part of such a plea. The plea must show that the defendant has some right to the possession of the premises. This plea does not show that. The plaintiff's case is that he was in possession, not as owner, but as tenant. This the plea does not traverse. If the defendant's purpose is to contest the fact of the plaintiff's possession, it is within the competence of the court in which the action is pending.

The judgment below will be affirmed, with costs.

(39 N. J. L. 478)

STATE v. CARNEY.

(Supreme Court of New Jersey. June 8, 1903.)

SUICIDE—CRIMINAL OFFENSE.

1. Attempt at suicide is an indictable offense in this state.

(Syllabus by the Court.)

Error to Court of Quarter Sessions, Essex County.

Frank H. Carney was convicted of an attempt to commit suicide, and brings error. **Affirmed.**

Argued February term, 1903, before the CHIEF JUSTICE and HENDRICKSON, PITNEY, and FORT, JJ.

Hampson & Parry, for plaintiff in error. Chandler W. Riker and Louis Hood, for the State.

FORT, J. The plaintiff in error was convicted in the Essex county quarter sessions upon an indictment alleging that he "did unlawfully administer and cause to be taken by himself into his stomach a deadly quantity of a certain deadly poison called 'turpeth mineral,' with intent himself then and there, feloniously and of his malice aforethought, to kill and murder," etc.

There is but one question in this case: Is it a crime to attempt suicide in this state? Section 215 of "An act for the punishment of crimes" (revision of 1898), approved June 14, 1898 (Laws 1898, p. 854), enacts as follows: "215. Assaults, batteries, false imprisonments, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits and all other offenses of an indictable nature at common law, and not provided for in or by this or some other act of the legislature, shall be misdemeanors, and be punished accordingly." It will thus be seen, as there is no independent enactment making attempt at suicide a crime, that whether it is a crime in this state will depend upon whether or not it was a crime at common law.

Mr. Bishop in his *New Criminal Law* (volume 2, § 1187) asks and answers the question thus: "If one attempts to commit self-murder and fails, is he indictable for a misdemeanor as though the attempt were on a third person? There would seem to be no ground for distinguishing the two cases, or distinguishing the common law of England and of our states on this question. And by the common law as administered in England this is an indictable misdemeanor." Self-murder, like any other murder, was a common-law felony. 1 Hale, P. C. 411; 1 East, P. C. 219; Rex v. Russell, 1 Moody, 356; Bishop's *New Criminal Law*, vol. 1, § 511. Attempt at suicide was an indictable offense at common law. Regina v. Doody, 6 Cox, Crim. Cases, 463; Regina v. Buyers, 9 Cox, Crim. Cases, 247.

It is contended in the brief of the plaintiff in error that the cases just cited to sustain the statement that an attempt at suicide was criminal at common law were decided long after this country adopted the common law of England, and that by our first Constitution it was the common law of England as it then existed, and not as declared by subsequent decisions, which became the common law of this state. Conceding this position to be correct, that does not affect the force of

these decisions. They hold that it has always been the common law of England that one guilty of suicide or attempt at suicide was *felo de se*. That suicide was a felony at common law, and that attempts at suicide were likewise criminal, is clearly stated, and the authorities fully reviewed, by the Supreme Court of Massachusetts. *Commonwealth v. Mink*, 123 Mass. 422, 25 Am. Rep. 109. In Massachusetts, attempts at suicide are not punishable, or were not in 1870; but the fact that such attempts were criminal at common law is affirmed, and the fact that they are not indictable in that commonwealth is placed squarely on the ground that the common-law offense has been repealed by implication by their statute. *Commonwealth v. Dennis*, 105 Mass. 162. The reverse is the case in this state. Our statute, *supra*, makes all offenses of an indictable nature at common law, and not otherwise provided for by act of the Legislature, misdemeanors. Attempt at self-murder is a misdemeanor in this state.

In reaching this result we have not overlooked the dictum of Mr. Justice Collins in *Campbell v. Supreme Conclave Heptosophs*, 86 N. J. Law, 274, 49 Atl. 550, 54 L. R. A. 576, wherein he says that since 1776 neither suicide nor attempts to commit suicide are criminal in this state. It will be noticed that the learned justice does not cite or refer to section 215 of our own crimes act, above quoted. That the forfeiture of estates for crimes against the state was abolished by the first Constitution in 1776, and is still abolished, does not affect the criminal character of the offenses to which the nonforfeiture applies. Suicide is none the less criminal because no punishment can be inflicted. It may not be indictable because the dead cannot be indicted. If one kills another, and then kills himself, is he any less a murderer because he cannot be punished? If our statute were like that of Massachusetts, which provided that the punishment for attempts should only be one-half the penalty inflicted for the offense, then it might be said here, as there, that, as there was no punishment for suicide, there could be no indictment for an attempt unless the Legislature had provided punishment for it. But our statute makes it a misdemeanor, because a common-law offense, and expressly provides the penalty for it as for other misdemeanors; hence the reasoning in *Commonwealth v. Dennis*, *supra*, goes to uphold the indictment in this case, rather than to overthrow it.

The judgment of the Essex county quarter sessions is affirmed.

(69 N. J. L. 476)

STATE v. MACQUEEN et al.

(Supreme Court of New Jersey. June 8, 1903.)
CRIMINAL LAW—EXCEPTIONS TO CHARGE—ASSIGNMENTS OF ERROR.

1. Where a general exception is taken to a charge under section 140 of the criminal pro-

reduce act, any assignment of error thereon must, under section 141 of the act, set out "the portion of the charge" alleged to be erroneous.

2. An assignment of error in the following form: "Because the whole charge of the said court was contrary to law and injurious to the interests of the defendant"—is not good. It alleges the parts of the charge which are unquestionably good to be as bad as the parts which may not state the correct legal principle. Such an assignment is not within section 141 of the act.

(Syllabus by the Court.)

Error to Court of Quarter Sessions, Passaic County.

William MacQueen and Rudolph Grossmann were convicted of crime, and bring error. Affirmed.

Argued February term, 1908, before the CHIEF JUSTICE and HENDRICKSON, PITNEY, and FORT, JJ.

Robert E. Hovenberg, for plaintiffs in error. Eugene Emley, for the State.

FORT, J. There are no assignments of error based upon the charge of the court in this case which this court is called upon to consider. There was a general exception taken to the charge of the trial judge, but no portions of the charge have been pointed out as erroneous and error assigned thereon.

By sections 140 and 141 of the criminal procedure act it is enacted as follows:

"140. Upon the trial of any indictment it shall be lawful to take a general exception to the charge of the court to the jury, without specifying any particular ground or grounds for such exception, and without specifying what portions of said charge are excepted to, and it shall be the duty of the judge to settle a bill of such exception, and to sign and seal the same, to the end that the same may be returned with a writ of error to the court having cognizance thereof.

"141. It shall be lawful where such a general exception has been taken to assign any error or errors of law upon any portion of the charge so excepted to."

P. L. 1898, p. 916.

It will be seen that upon a general exception to a charge it is made lawful to assign error on any portion of the charge so excepted to. In this case the counsel of the defendants assign error on the charge only in this general way: "Third. Because the whole charge of the said court was contrary to law and injurious to the interests of the defendant." Such an assignment is of no force, and does not assign error "upon any portion of the charge so excepted to." It assigns error upon the whole charge, alleging it as a whole to be bad and injurious to the defendant. An assignment of this kind is a mere conclusion—a mere statement of an alleged result; not a pointing out of any error complained of. We have, however, considered the charge of the court with care, and find no error of law as therein stated.

The assignments of error as to alleged il-

legality in the admission of evidence are also improperly framed. They are too general, and in no way refer to the evidence alleged to have been erroneously admitted; but notwithstanding this we have considered them, and there is no error found to sustain the assignments either as made or as they should have been made.

The judgment of the quarter sessions is affirmed.

UNITED NEW JERSEY R. & CANAL CO. v. CONSOLIDATED FRUIT JAR CO. et al.

(Court of Chancery of New Jersey. March 4, 1908.)

CONDEMNATION PROCEEDINGS—TITLE OF PROPERTY OWNERS—RIGHT TO CONTEST—CO-TENANTS—TRUST RELATION—PURCHASE OF OUTSTANDING TITLE.

1. In condemnation proceedings, property owners whose title depends on conveyance from the heirs of a former owner cannot contest the title of other heirs whose interest they have not acquired.

2. A purchaser of the interest of a person who has not been in adverse possession for 20 years, but for only a part thereof, does not thereby acquire a title superior to the holder of the paper title.

3. Where a relationship of confidence is shown to exist between holders of the paper title to property, one of them cannot acquire an outstanding title, and use it for the purpose of defeating his co-tenant's rights, though they hold by distinct conveyances.

Condemnation proceedings by the United New Jersey Railroad & Canal Company against the Consolidated Fruit Jar Company. On exceptions to the master's report. Modified.

Alan H. Strong, for Clark. Mr. Booraem, for Consolidated Fruit Jar Co. Willard P. Voorhees, for Smith & Welsh.

STEVENS, V. C. This case comes up on exceptions to the master's report. The facts are so fully stated by the master that I shall not here repeat them. The controversy is over the division of money paid into court by the United New Jersey Railroad & Canal Company on a condemnation proceeding. This money was paid out to Smith & Welsh under an order of this court, obtained upon an imperfect presentation of the facts. The order was opened, and the case is to be decided as if the fund were still in the hands of the clerk. No question is raised as to the form of the proceeding; the jurisdiction of the court over the matter in controversy being, of course, indisputable.

The question whether Smith & Welsh were entitled to be paid the whole of the fund depends upon whether they were the owners of the land condemned. They claim title in three ways: (1) Because they are grantees of the heirs of Alpheus Freeman, who, it is admitted, died seised of the lands in 1818. (2) As to tracts A and B, because the Consolidated Fruit Jar Company deeded its title,

acquired by adverse possession, to them; and that title is, it is said, good against those heirs. (3) As to tract C, because one Martin A. Howell acquired title by adverse possession as against the same heirs, and his executors conveyed that title to Smith & Welsh.

In 1892 it became known that the Pennsylvania Railroad Company would require an additional strip of land on each side of its track between its present passenger station and the Raritan river. Smith & Welsh conceived the idea of getting the title of the Freeman heirs to this land, and selling it to the company, which did not at that time have the power to condemn. Accordingly Mr. Grimstead, their attorney, began to bargain for deeds from the numerous heirs of Alpheus Freeman. One of those heirs was Mary T. Clark. The evidence shows very plainly that Mr. Grimstead secured the co-operation of James P. Clark, Mary's husband, in his work of investigation. Mr. Grimstead obtained many deeds for Smith & Welsh, and Clark, with the knowledge and approval of Mr. Grimstead, secured deeds from some of the heirs himself, and thus became entitled to $\frac{2}{11}$ of the land. Mary T. Clark's interest was $\frac{2}{11}$. This appears not only from Mr. Grimstead's letters, but also by a deed prepared by him, which is dated May 11, 1894, made between James P. Clark and Mary, his wife, and Philip Smith and Patrick M. Welsh. In this deed it is recited that Mary Clark and James P. Clark's grantors are tenants in common with Smith & Welsh, and they agree to join in a deed to the Pennsylvania Railroad Company. Smith & Welsh did not sign this deed, and they now say they did not know of it; but Mr. Grimstead testifies that he put it on record at Smith's request, and I have no doubt whatever that it was obtained in furtherance of their general plan of proceeding.

If the money in court represents the value of the title of the heirs of Alpheus Freeman, there can be no doubt but that Mr. and Mrs. Clark are entitled to $\frac{2}{11}$ of it. It is claimed, however, that notwithstanding the fact that Smith & Welsh took deeds from the heirs of Alpheus Freeman, and paid in the aggregate several thousand dollars for them, those heirs did not, in fact, have any title, and that consequently Mr. and Mrs. Clark have no right to a share of the money, and so the master reported.

I will consider this contention first with respect to tracts A and B. The original title of Alpheus Freeman is beyond all question. That title appears to have been recognized by the New Jersey Railroad Company as late as May, 1836, for in that month commissioners appointed by the Chief Justice of the Supreme Court awarded for the right of way then taken, to the widow of Alpheus Freeman, \$1,500, and to his heirs \$1,750. The land on both sides of the track for some years after that remained open. Some time between 1845 and 1850 it was partially

fenced by Martin A. Howell, but the fencing inclosed the land of the railroad company as well; its tracks at that point being laid above grade, on a bridge or trestle. The fence appears to have been put up for the purpose of preventing a nuisance. Howell had shortly before built a paper factory to the north of the railroad tracks, and he made some use of the land under and on both sides of them for storing clay and dumping ashes. In 1873 he leased his factory property to the Consolidated Fruit Jar Company, which held under leases until 1880, when it took title by a description which it is admitted did not include the locus in quo. A perusal of the evidence will show that, if Howell had adverse possession of the land in controversy, such possession commenced when he fenced, and that was prior to 1850, so that, when he conveyed to the fruit jar company the adjoining factory property, his title had become indefeasible. It is admitted he did not convey the land, if thus acquired, to the fruit jar company. Smith & Welsh are therefore placed in this dilemma: If Howell had title, the money paid into court did not represent that title, for Howell's heirs (he having died in 1889) were not parties to the condemnation proceeding, and their title was not condemned. Inasmuch, therefore, as the money represents nothing but the Freeman title, it does not lie in the mouths of Smith & Welsh to deny the right of the Clarks to share in it. If, on the other hand, Howell had no title—and he never appears to have claimed any—then, of course, the title being indisputably in the Freeman heirs, the Clarks take their share of the money, as a matter of course.

It is argued, however, that under the decision of *Davock v. Nealon*, 58 N. J. Law, 21, 32 Atl. 675, the Consolidated Fruit Jar Company could tack its possessory title of less than 20 years to the possessory title of Howell, and that in this way it became the owner of the land by 20 years' adverse possession had prior to the year 1895, when the condemnation proceedings were taken. The difficulty with this contention is that, if the evidence shows that Howell had adverse possession from 1875 to 1880, the year in which he conveyed to the fruit jar company, it also shows that he had such possession for over 25 years prior thereto. His possession was of precisely the same character prior to 1875 as it was after 1875, and so he must have become absolute owner at least 10 years before the conveyance. And so it is not a case of tacking one possession of less than 20 years to another possession of less than 20 years, so as to make a title absolute in the second possessor. The master, whose report indicates that he gave the case careful consideration, appears to have overlooked this.

I think it quite plain that, in any view of the matter, the Clarks are entitled to their share of the money representing tracts A and B.

The situation of strip C is somewhat different. The evidence indicates that Howell did claim to be its owner for several years prior to his death. This strip, which is only part of the tract conveyed by his executors to Smith & Welsh in June, 1894, lies between Water street, on the west, and the Raritan river, on the east, and the canal runs through it. Its frontage on Water street is 38 feet. Of this frontage, only 10 feet were taken by the railroad company. Smith & Welsh paid \$2,000 for the entire tract. The jury awarded \$3,676.21 for the portion of it taken, the commissioners having given still more. It will thus be seen that the executors were content to take, for such title as their testator had in it, a sum much below its market value. The evidence relating to this branch of the case is as follows: Van Duzen testifies that in 1873 he made a bargain with John R. Howell, a son of Martin Howell, to store some bricks upon the property. Kenny testifies that in 1874 or 1875 one Schenck started a coalyard there. Fisher testifies that when he came to New Brunswick in 1881 the land in question was occupied by one Cole for a stoneyard. In 1885 the fruit jar company and Howell used the property for the storage of brick. After 1885 the property was occupied by John R. Howell for a coal and stone yard. Back of 1873 the evidence of possession is extremely vague. Mr. Louis Howell, a nephew of Martin Howell, testifies that in 1844 the property was all open, and not docked out; that it was not docked out as late as 1862, but was docked out at some indefinite period after that. The property appears to have been fenced at the time that Schenck came there in 1874. Prior to 1873, I doubt very much whether the evidence shows anything more than that, the land being open, any one who wished to make a temporary use of it could have done so. Prior to that time I do not find any tangible evidence of hostile and exclusive possession on the part either of Martin Howell or of his sons. After that time, Howell, who owned dock property north and south of it, appears to have taken possession. Possibly, on the principle laid down in *Davock v. Nealon*, 53 N. J. Law, 21, 32 Atl. 675, Howell's heirs or devisees (the will is not in evidence) might be deemed to have gained title by adverse possession. But Howell died in 1889, and the deed to Smith & Welsh was not made by his heirs and devisees, but by his executors. It purports to convey by virtue of the power and authority given in the will. It does, indeed, declare that it conveys the right, title, and interest of the party of the first part, viz., Frederic De Coppet, Abel I. Smith, and the widow, as well as of the testator; but what that interest, if any, is, does not appear. As no title by adverse possession for 20 years prior to 1889 is shown, it cannot be asserted that by this deed Smith & Welsh acquired a title superior to the paper title held in common with the Clarks. The evi-

dence as to all the land condemned would indicate that Smith & Welsh first acquired title from the Freeman heirs, availing themselves of the assistance of the Clarks in so doing; that, having got this title, they used it to make an advantageous bargain with the fruit jar company, to whom they paid nothing, and with the Howell estate, to whom they paid \$2,000; and that, being thus fortified with the appearance of an adverse title, they utilized that, first, by means of a bill to quiet title, to cut off those Freeman heirs (except the Clarks) who had not conveyed to them; and, secondly, to bar the Clarks from any share of the condemnation money. Even if the title by adverse possession were clearer than it is, I do not think Smith & Welsh could use it for the purpose of defeating the Clarks' right. They were tenants in common with the Clarks of the paper title. They expressly admitted this relationship in the sealed instrument to which I have already referred. If this tenancy in common did not of itself create a relation of a trust or confidence, the letters and action of Mr. Grimstead, no less than Clark's letters, show that such a relation did, in point of fact, exist. It appears that, after Smith & Welsh had obtained the conveyances I have mentioned, they filed a bill to quiet title against the heirs of Alpheus Freeman who had not conveyed to them. Mr. Grimstead, their solicitor in that suit, did not make the Clarks parties, because, as Mr. Grimstead says, "it might prejudice any claim he [Clark] had in the property." "I would not make him a party defendant," he testifies further, "because I did not want to cut off any interest he might have. I wished to preserve to him any right, title, or interests or claim which he might have to this property, or any portion of it, intact, which he could enforce at any time he saw fit." Mr. Grimstead says, indeed, that he told Clark he could not make him a party complainant, because his interests were antagonistic to the interests of Smith & Welsh, but this must be a mistake. If they were antagonistic, they were antagonistic for the same reason that the interests of the other heirs were antagonistic. This would be a reason for making them parties defendants, and not a reason for not making them parties at all. Unless I attribute want of good faith to Mr. Grimstead, I must conclude that the Clarks were not made parties because Mr. Grimstead really wished, as he says, to preserve, and not to destroy, their interest, inasmuch as they were allies, and not enemies. It is perfectly plain that at that time he desired and obtained their assistance in a common undertaking. The very purpose of filing the bill would have been defeated by making them parties defendant, for they would then have resisted the suit, and in doing so might have established not only their own right to part of the money, but that of the heirs who had not executed conveyances. It is well settled that,

as a general rule, one tenant in common will not be permitted to purchase a superior outstanding claim for his own exclusive benefit. Freeman on Co-Tenancy, § 154. If the tenants claim, as here, under separate conveyances, it has been doubted in some of the cases whether a relation of confidence should be held to arise out of the mere fact of common ownership. In Bracken v. Cooper, 80 Ill. 221, and Montague v. Selb, 106 Ill. 50, it was held that the fact that title was derived through separate conveyances made no difference. It is not necessary to decide this question, for here, as I have stated, a relation of confidence did in fact exist, and, according to all the cases, this would prevent the tenant purchasing the outstanding title from claiming the exclusive benefit of his purchase.

I think the order directing the payment of the money to Smith & Welsh should be so modified as to permit the Clarks to come in and share in the fund on making proper contribution. They have offered to recognize the agreement made with the fruit jar company, and I think they should contribute to the payment made to Howell's executors.

(69 N. J. L. 490)

HODGE v. WETZLER.

(Supreme Court of New Jersey. June 8, 1903.)
MARRIED WOMEN—ENTICING AWAY HUSBAND
—RIGHT OF ACTION.

1. A married woman could not, at the common law, maintain an action for enticing away the husband and for the alienation of his affections.

2. Nor is such a right of action conferred upon a married woman in this state under the married woman's act (Gen. St. p. 2012), or under the twenty-fourth section of the practice act (Gen. St. p. 2536).

3. The demurrer to a declaration setting forth such a cause of action in this case was sustained.

(Syllabus by the Court.)

Action by Alphine Hodge against Leana Wetzler. Demurrer to declaration sustained.

Argued February term, 1903, before GUMMERE, C. J., and FORT, PITNEY, and HENDRICKSON, JJ.

Warren Dixon, for plaintiff. Corbin & Corbin, for defendant.

HENDRICKSON, J. This action is brought by the plaintiff, a married woman, against the female defendant, to recover damages for the alleged alienation of the husband's affections and the resulting loss of his society, comfort, aid, assistance, and support. There are two counts to the declaration, each setting forth substantially the same cause of action, the only difference being that in the first count there is added to the averment of enticing away the husband, etc., the more aggravated charge of criminal conversation. The gist of the action is the same

in either case, and that is the loss of "consortium" or the society and comfort of the husband. There is a demurrer to each of the counts. The causes of demurrer are (1) that no such action at law can be brought by the wife; and (2) that the husband is not joined in the action as coplaintiff. This right of action has been known to exist at the common law in favor of a husband against a seducer of his wife's affections since the decision in Winsmore v. Greenbank, Willes, 577, in the year 1747. But no case appears in the long line of English decisions where the wife has brought a corresponding action for a similar invasion of her marital rights. This is not surprising when we reflect upon the disabilities which attached to the wife as a result of coverture, under the common law; for in order to obtain redress for torts to her person or reputation it was necessary for the husband to join in the action, and the damages, when recovered, if collected in his lifetime, belonged to the husband. To have entertained an action of the character we are now considering in favor of the wife it would have become necessary to join the husband, and thus enable the wrongdoer to realize a profit from his own wrongdoing. We find no allusion to the existence of such a right of action in favor of the wife, in the decisions and treatises upon the common law, until the appearance of a dictum of Lord Campbell in the case of Lynch v. Knight, 9 H. L. Cases, 577, which was decided in 1861. The action was for slanderous words affecting the character of the wife, whereby it was alleged that she had lost the affection and society of her husband. It must be observed that in this case the husband joined the wife in bringing the action "for conformity," as there was no enabling act authorizing her to sue. Lord Campbell said: "If it can be shown there is presented to us a concurrence of loss and injury from the act complained of, we are bound to say this action lies. Nor can I allow that the loss of consortium or conjugal society can give a cause of action to the husband alone." In a subsequent portion of his decision he says that the better opinion is that a wife could not maintain or join in an action for criminal conversation against the paramour of her husband who had seduced him. Lord Cranworth was strongly inclined to think that the view expressed by Lord Campbell was correct, but did not feel called upon to express a decided opinion, as it was agreed that the judgment of the court should be put upon another ground. Lords Brougham and Wensleydale expressed the view that the action would not lie. In the American cases there has been developed a divergence of views as to whether the married woman had the right of action at common law for the alienation of her husband's affections. This right is denied in the following, among other, cases: Lellis v. Lambert, 24 Ont. App. 653; Morgan v. Martin, 92 Me. 190, 42 Atl.

¶ 1. See Husband and Wife, vol. 22, Cent. Dig. § 112.

354; *Doe v. Roe*, 82 Me. 503, 20 Atl. 83, 8 L. R. A. 838, 17 Am. St. Rep. 499; *Crocker v. Crocker* (C. C.) 98 Fed. 702; *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79; *Mehrhoff v. Mehrhoff* (C. C.) 26 Fed. 13; *Clow v. Chapman*, 125 Mo. 101, 28 S. W. 328, 26 L. R. A. 412, 46 Am. St. Rep. 468. Among the cases where this right is held to have existed are the following: *Foot v. Card*, 58 Conn. 4, 18 Atl. 1027, 6 L. R. A. 829, 18 Am. St. Rep. 258; *Haynes v. Nowlin*, 129 Ind. 584, 29 N. E. 389, 14 L. R. A. 787, 28 Am. St. Rep. 213; *Postlewaite v. Postlewaite*, 1 Ind. App. 473, 28 N. E. 99; *Smith v. Smith*, 98 Tenn. 101, 38 S. W. 439, 60 Am. St. Rep. 838; *Bassett v. Bassett*, 20 Ill. App. 543; *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553. In the majority of these cases, and in a large number of others noted in 15 Am. & Eng. Enc. (2d Ed.) 865, notes 3 and 4, it has been held that by reason of the disability of coverture the right of action remained in abeyance, and could not be prosecuted by the feme covert in her own name. But it has been generally held in these cases that, where the ban of coverture has been removed by enabling statutes giving her the right to sue as a feme sole, she may maintain this action.

This case is one of first impression in this state, for although *McKenna v. Algeo* (Feb., 1902) 51 Atl. 936, was a similar action, the case was heard upon a motion for a new trial, and the opinion shows that the right to bring the action was not considered by the court. The new trial was granted upon another ground. We are entirely satisfied, both upon principle and authority, that, whatever may be the true theory of the wife's right of action in the abstract at common law, no remedy then existed whereby such right of action could be maintained. We do not deem it necessary in this case to discuss the question of abstract right just alluded to, for the reason that, conceding its existence, we fail to find a statute of this state empowering a married woman to sue as a feme sole in actions of this character. I may say that it was conceded on the part of the demurrant that the right of the wife to maintain this action at common law was at least debatable; but it was contended that such right arises under section 11 of an act entitled "An act to amend the law relating to the property of married women" (Gen. St. p. 2012), and under section 24 of the practice act (Gen. St. p. 2536).

It is contended that the "consortium" may be regarded as property, and that therefore the former act will apply. The section provides "that a married woman may maintain an action in her own name and without joining her husband therein for all breaches of contract, and for the recovery of all debts, wages, earnings, money and all property, both real and personal, which by this act is declared to be her separate property, and for

all damages done thereto, and she shall have in her own name, the same remedies for the recovery and protection of such property as if she were an unmarried woman; and in any civil or criminal proceedings it shall be sufficient to allege such property to be her property." Under that act, sections 1, 2, 3 and 4 define what is meant by separate property, to wit, real and personal property, and the rents, issues, and profits thereof, which she receives or obtains "by purchase, gift, grant, devise, descent, bequest or in any manner whatever"; also, her wages and earnings and the investment thereof. In the interpretation of statutes like this, though they may be regarded as remedial in character, being in derogation of the common law, they must be construed strictly. *Alpaugh v. Wilson*, 52 N. J. Eq. 424, 28 Atl. 722; 23 Am. & Eng. Enc. of L. 386-389. We must also have regard to the fact that notwithstanding this and other statutes have been passed removing, in many respects, the disabilities of a feme covert, it is held by our courts "that the rule of the common law that the husband and wife are to be regarded as one person has not been abrogated in this state." *Alpaugh v. Wilson*, supra, affirmed. 52 N. J. Eq. 589, 33 Atl. 50. The property intended by this act is so earmarked by the words "real and personal property," "separate property," "the rents, issues and profits thereof," as to leave no doubt but that the words "real and personal property" are used in their ordinary, natural meaning as indicating property that has a present money value, and from which income and profits ordinarily arise. It would be giving the words an exceedingly broad and unusual meaning, under the circumstances, to have them embrace within their meaning the "consortium," which at most is only a marital right growing out of the marriage relation. It was held by the Court of Errors in Penn. *R. R. v. Goodenough*, 55 N. J. Law, 577-588, 28 Atl. 3, 22 L. R. A. 460, that the language of the above section is inapplicable to a right to sue for a tort, on the ground that no rent, issue, or profit, in the sense of the statute, can arise out of a tort. It seems clear that the section in question fails to confer the right to bring this action. We turn to the twenty-fourth section of the practice act, which provides that any married woman "living separate from her husband" may bring suit in her own name for the recovery of damages for any injury done to her person or reputation. The injury complained of does not purport to be one to plaintiff's reputation. Is it an "injury to her person," within the meaning of the statute? The cause of action complained of is the alleged violation of conjugal rights. Clearly, it is not an "injury to the person," in the strict sense of the term, but to the relative rights of the individual. If it be contended that the words "injury to the person" are equivalent to the expression "injury to personal

rights," then why does the statute use the words "damage to the person or reputation"? For under such a construction the words "injury to the person" must include injury to reputation as well as to all other personal rights, and the use of the word "reputation" in the statute would be superfluous. And applying that rule of construction which gives effect to every word of a statute when possible, it follows that the words "injury to the person" are not the equivalent of the words "injury to personal rights." Similar views are expressed in *Wagner v. Lathers*, 26 Wis. 436, and in *Lellis v. Lambert*, supra.

We think it is apparent that this statute was not designed to create new causes of action, but to give to the wife, when living separate, the right to sue alone in the same actions in which, prior to the act, it was necessary that the husband should join. The result would seem to follow that, if the wife had no action at common law for the alienation of her husband's affection, she cannot derive such a right from the statute in question. In some jurisdictions the denial of this right of action to the wife has been characterized by the judges as an unjust discrimination against her. In other jurisdictions this class of actions has been regarded as of doubtful expediency. But we think these and similar considerations are for the Legislature rather than the courts, and that it is our duty, if possible, to declare the law as it is, and not as we may think it should be. For the reasons stated, we think the present action cannot be sustained. Therefore the other grounds of the demurrer need not be considered.

The demurrer is sustained, with costs.

(64 N. J. E. 614)

WISNER v. OSBORNE et al.

(Court of Chancery of New Jersey. May 16, 1903.)

INFANCY—WAGES OF SON—RIGHTS OF CREDITORS OF FATHER.

1. An insolvent debtor permitted his infant son who lived with him to contract for wages to be paid to the son. *Held*, that the stock of a corporation into which the wages were afterwards converted, and which stood in the name of the son, was not subject to the claims of his father's creditors.

(Syllabus by the Court.)

Bill by Ferdinand H. Wisner against J. K. Osborne and others. Decree for defendants.

J. A. Beecher and Mr. Thompson, for complainant. John R. Hardin, for defendants.

STEVENS, V. C. This case is in its essential features like *Taylor v. Wands*, 55 N. J. Eq. 495, 37 Atl. 315, 62 Am. St. Rep. 818. There John Taylor, as here J. K. Osborne, having failed in business and being heavily indebted, undertook to form a corporation, putting in, as capital, money derived from the surrender of an insurance policy issued

for the benefit of the wife. There, as here, the stock representing the money put in was, most of it, issued to the wife. There, as here, the debtor took one share of stock to qualify him to become a director and president, and there, as here, the stock, chiefly through the debtor's skill and experience, increased greatly in value and the company earned and paid large dividends. It was there held by the Court of Errors that the wife and her transferees were not only entitled to retain the stock as against her husband's creditors, but were also entitled to the company's earnings, although, as Mr. Justice Magie said in that case, the corporation owed its success to the husband's business ability and exertions.

I cannot find anything in the proofs to differentiate that case from this. The evidence is voluminous, and some of it vague and conflicting, but the material facts are few in number and not controverted. Much of the evidence relates to a period when the company's affairs became prosperous, and has little, if any, bearing upon the merits, being admitted only because it was claimed that it would throw a reflex light upon the period of organization in 1892. It does not seem to me to illumine that period at all, or to cast any doubt upon the real character and the good faith of the original transaction, if we view it in the light of the law as authoritatively laid down in *Taylor v. Wands*. For three years the company had a precarious existence, having few assets, loaded down with debts and subject to chattel-mortgage sales. Had this suit been brought during that period, there would have been absolutely nothing on which to found a decree that the stock or the property was really the husband's and subject to his debts. The mere fact that this company, after that time, became prosperous, and that its prosperity was due in large measure to the efforts of the husband, in his character of officer and manager, cannot convert that into his property which before belonged to his wife. Section 9 of the bill of complaint charges that the stock of the company belongs to Joseph K. Osborne, but that 50 shares stand in the name of his son Edgar; and section 15 charges that the stock is in equity subject to the lien of the judgment. In support of this vague allegation, the plaintiff relies upon the following facts: Edgar came of age on June 29, 1894. Both before and after that time he lived with his father. At the age of 17, he went to work in a printing office in New York. He received first \$5 a week, and afterwards \$10. A part of his earnings he, with his father's consent, invested in stock of the Eighth Ward Building & Loan Association. The investment was made in his own name. When the J. K. Osborne Manufacturing Company was organized he sold this stock, and gave the proceeds (\$400) to its treasurer. For this he received on October 29, 1892, three shares of the J. K. Os-

borne Company. About the same time he went into that company's employ, receiving, first, \$5 a week, then \$10, and afterwards more. On April 27, 1895, the company was indebted to him for salary the sum of about \$800. On that day an agreement in writing was entered into between himself, his father and mother, and one Wolfe for an apportionment of 175 shares of unissued stock, by the terms of which he was to receive and did in fact receive 32 shares. This was received by him apparently in satisfaction of the moneys owing to him at the time by the company. The stock-certificate book and the minutes show that the stock was issued to the stockholders in a very irregular way, but, so far as Edgar's liability to the complainant is concerned, these irregularities are not very material. The issue to Edgar of three shares is thus shown to have been made at a time when he was a minor, and the \$800 for which the 32 shares were issued represented wages or salary due in part before and in part after he came of age. The contention is that the money which Edgar put in and the wages due for his labor before his majority belonged to his father, and that consequently the stock given for them is, in law, stock held by him in trust for his father and subject to the claims of his father's creditors.

I will assume that the before-mentioned allegations of the bill are sufficiently specific to permit of this contention being urged. On that assumption, I do not think that the claim can be maintained. The question is, can a father who is indebted permit his minor son, as against his creditors, to receive and invest his earnings and hold them as his own? According to the Roman law, children of any age, begotten in lawful wedlock, were under their father's power. As regarded the person this power, until after the time of Augustus, extended to their life and liberty; as regarded property, in the words of the Institutes, lib. 2, tit. 9, "Anciently whatever came to children, male or female, was acquired for the parents without any distinction, if we except the *'peculium castrense'*, and this so absolutely that what was acquired by one child the parent might have given to another or to a stranger, or sold it or applied it in what manner he thought proper." In the time of Justinian, however, the father was only permitted to take the usufruct of what the son had acquired by any other means than his father's fortune. The father might indeed have emancipated the son, but emancipation, at any age, depended almost entirely upon the father's will. In striking contrast with the civil law is the common law. That law gives the infant's property to the infant. It does not even give the father the usufruct or enjoyment of it during the limited period of the son's minority. Says Blackstone (volume 1, p. 453): "A father has no other power over his son's estate than as his trustee or guar-

dian; for though he may receive the profits (of land held by socage tenure) during the child's minority, yet he must account for them when he comes of age." As to personality, says Judge Vredenburg, in *Graham v. Houghtalin*, 30 N. J. Law, 557, when a child in the lifetime of its father becomes vested with it, "no one is strictly entitled to take it as guardian until a guardian has been duly appointed by some public authority." Under paragraph 38 of the orphans' court act (Gen. St. p. 2363), first enacted in 1843 (P. L. p. 84), the father may be appointed guardian of the estate real and personal of his minor children. The law is that the minor's property, however acquired, is his own, and that even the father, if he be trusted with its administration, must account to the infant for it when he comes of age.

This is the status of the minor's property. Now, as to his earnings. Says Blackstone (volume 1, p. 453): "He [the father] may indeed have the benefit of his children's labor while they live with him and are maintained by him, but this is no more than he is entitled to from his apprentices or servants." But it has been held that if the contract, made with his father's consent, be to pay the child, then the child is entitled to his earnings, and may enforce his right to them by suit. *Snediker v. Everingham*, 27 N. J. Law, 143. They belong to him just as any other property belongs to him. It is obvious that the contract may assume several phases. The father may (1) contract with the employer for his son's service, and may expressly stipulate that the wages shall be paid to him (the father); or (2) he may stipulate generally for such service without saying to whom the wages shall be paid, and in either case he alone will be entitled to sue for them; or, (3) as was done in *Snediker v. Everingham*, 27 N. J. Law, 143, he may stipulate that the wages shall be paid to the son, in which case the son may sue for them; or (4) the son, with the father's consent, may make the bargain for wages payable to himself (the son), in which case also the son may sue for them, and the father's consent may be expressly given or it may be implied from circumstances. *Stall v. Fulton*, 30 N. J. Law, 430. It has always been the law that an infant's contract, beneficial to himself, is not necessarily void, but, in general, voidable at the option of the infant when he arrives at full age. It is often capable of being enforced by the infant against the other party to it. The law is thus stated in Bacon's abridgment (title "Infancy and Age," vol. 5, p. 134): "It is laid down as a general rule that infancy is a personal privilege, of which no one can take advantage but the infant himself, and that therefore, though the contract of the infant be voidable, yet that it shall bind the person of full age. For being an indulgence which the law allows infants to protect and secure them from the fraud and imposition of others, it can only be in-

tended for their benefit, and is not to be extended to persons of years of discretion, who are presumed to act with sufficient caution and security. And were it otherwise, this privilege, instead of being an advantage to the infant, might in many cases turn greatly to his detriment." It has been held that where a contract for service, made by an infant, is shown to be beneficial to him, it may be binding upon him. *Leslie v. Fitzpatrick*, 3 Q. B. Div. 229. Tested by these well-established rules, it is entirely clear that the creditors of J. K. Osborne cannot assert with success that the stock held by Edgar belongs to his father. The fair implication from the evidence is that the agreement with the printer was made for Edgar's benefit, and that the wages were to be paid and were actually paid to him. His ownership of the money thus received is further evidenced by his investment of it, in his own name, without objection on the part of his father, in a building association, and by his subsequent payment of it to the J. K. Osborne Company. So, too, as far as appears, the contract of the J. K. Osborne Company was to pay, not his father, but Edgar; and his father's assent to the arrangement appears not only from the fact that he was the company's manager, but also from the fact that he joined in the agreement of April 27, 1895, which gave the stock to Edgar. Up to the moment when Edgar took the stock the wages, therefore, were his own, and if his, then the stock into which they were converted was his also.

But it is said that while a father may give to his son his son's earnings when solvent, he may not do it when insolvent. This proposition is fallacious in that it implies that all the son's earnings, past and future, under all circumstances, belong absolutely to the father, who, it is said, has no more right to make a gift of them than he has to make a gift of any other of his property. This might be true of a case in which the father has bargained for payment to himself, if wages might be claimed in a creditors' bill—a claim, under the law of New Jersey, of more than doubtful validity, in view of the provisions of our execution and chancery acts (Gen. St. p. 1423, § 40; Gen. St. p. 390, § 91), which exempt from seizure what is due for the labor or personal services of the debtor or any member of his family, and of what is said in *Whitney v. Robbins*, 17 N. J. Eq. 363, viz., that the court of chancery has no original jurisdiction to collect the choses in action of a debtor and apply them to the payment of his debts. If a son's wages are not subject to the claims of creditors, either at common law or by statute, their transfer to the son cannot be fraudulent. But however this may be, the proposition above contended for could not be true of a case in which the bargain, made with the father's consent, was that the wages should be paid to the son. In such a case they would belong to the son ab initio. He might, as I have shown, enforce payment of

them by action. The contention would then go to this extent: That when a father is indebted, he is under a disability that will prevent him from allowing his son to make a bargain for wages; he must compel his son to labor for the benefit of his father's creditors. No such doctrine is to be found in our law. *Atwood v. Holcomb*, 89 Conn. 275, 12 Am. Rep. 386. There are two cases in our court of last resort which are very much in point. The first is *Peterson and Wife v. Mulford*, 86 N. J. Law, 481. In that case it was decided that a husband might permit his wife to labor for herself and to appropriate to her own use the avails of her labor, and that such permission is good against the creditors of the husband if such proceeds have not actually been reduced into his possession. In this case the wife had saved \$200 out of her earnings. She took the money and with it and with a note which she gave procured an assignment to herself of a mortgage upon property of her husband at a time when he was heavily indebted. She did it at his suggestion and with his consent, and it was held that the transaction was valid as against her husband's creditors. This was a stronger case than that of an infant, for at common law the husband's control over his wife's earnings was absolute. At the time of the decision the statute had not, as it now has, given to the married woman her own earnings. The court nevertheless said: "Though the earnings of a wife are not within the provisions of the married woman's act, yet, in a series of decisions in this state arising out of the spirit of that act and in accordance with its provisions, it has been held that the earnings of a married woman, working on her own account by her husband's permission, or earned in working for herself without his permission, if given to her by him, are her separate property and within the provisions of that act, and that a husband is not bound to compel his wife to labor for his creditors or to appropriate her earnings for them, and that such permission and gift are valid as against his creditors." A still more direct authority is that of *Costello v. The Prospect Brewing Co.*, 52 N. J. Eq. 557, 30 Atl. 682. The syllabus of that case is as follows: "A wife to whom her husband had made a voluntary conveyance of an equity of redemption of real estate paid with her husband's consent out of her own and her children's earnings a portion of the mortgage debt. On a bill filed by her husband's precedent creditors to set aside the conveyance to the wife as fraudulent, held that the decree should preserve the right of the wife to a lien for the amount which she had so paid." Judge Reed, delivering the opinion of the court, said: "The right of a father to forego his claim to the earnings of his children is equally clear. He may sell or give to the infant his time, or authorize him to make contracts in his own name and receive pay therefor, and in such case the minor may sue for and recover his

wages. There is no rule of law which requires the husband to compel the wife, or the parent to compel the children, to work for his creditors."

In the case in hand it is, as I have said, a fair inference from the evidence that the contract for wages was made with the father's consent, and that it contemplated payment to the son. The wages, therefore, belonged to the son, and not to the father. They were as much his property as anything that came to him by gift or bequest. When he received them he could invest them as he pleased.

(69 N. J. L. 579)

S. B. ELLIS CO. v. EYTH.

(Supreme Court of New Jersey. June 8, 1903.)

PLEADING—STATE OF DEMAND—WAIVER OF OBJECTIONS—APPEAL FROM DISTRICT COURT.

1. A failure to object to a formal and amendable defect in the state of demand before the district court is a waiver of the objection.

2. This court will not reverse a finding of fact by the district court which is supported by evidence.

(Syllabus by the Court.)

Appeal from District Court of Jersey City.

Action by the S. B. Ellis Company against George C. Eyth. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued February term, 1903, before DIXON, GARRISON, and SWAYZE, JJ.

Potts, Midlge & Higgins, for appellant. Carrick & Wortendyke, for appellee.

SWAYZE, J. Two reasons are relied on for the reversal of the judgment rendered in favor of the plaintiff below:

1. The state of demand was defective, in that claim was made, among other items, for a "balance" of \$58.60, without setting out the specific items of the account from which the balance arose. No objection was made at the trial to the state of demand. It is not now suggested that the balance as claimed is not due the plaintiff. The objection is purely formal, and, if it had been made at the trial, the state of demand might have been amended. The objection now comes too late. *Steward v. Sears*, 36 N. J. Law, 173—a case in which no state of demand was filed. In *Butts v. French*, 42 N. J. Law, 397, there was a fatal variance between the state of demand and the proofs. This objection was duly made before the justice, so that the plaintiff had opportunity to amend. This he failed to do. On the trial of the appeal before the common pleas, the same variance appeared as before the justice, and the plaintiff, under the statute, was then precluded from making an amendment. If the defendant had renewed the motion to nonsuit made before the justice, the plaintiff's case would have failed. No such motion was made by the defendant, and this court held

that he was precluded from raising the question here. The rule was applied in a case of summary proceedings between landlord and tenant in *McQuade v. Emmons*, 38 N. J. Law, 397, and in a case under the forcible entry and detainer act (Gen. St. p. 1596) in *O'Hagan v. Crossman*, 50 N. J. Law, 516, 14 Atl. 752.

2. The state of demand, in addition to the item already mentioned, contained items under four different dates. The amount of each of these items was paid on the delivery of the goods. The defendant urges that these payments should be appropriated to these four items. The plaintiff has applied them generally on account, and thereby reduced the balance claimed upon the earlier portion of the account to \$58.60, as above stated. No doubt, if nothing more had appeared than the fact of the payment of the exact amount due for each lot of goods, upon their delivery, the necessary inference would have been that the payments were to be appropriated to those particular items. There was evidence, however, that the payments were made generally on the account. This was disputed, but, the trial court having found against the defendant on evidence upon which its finding may be supported, we will not review that finding. The principle has recently been restated, and the earlier cases collected, in *McAdam v. Block*, 63 N. J. Law, 508, 44 Atl. 208.

It is argued that the plaintiff should not be heard to say that the payments were appropriated to the earlier items of the account, because evidence of the previous indebtedness could not legally be given under the state of demand. This argument obviously rests upon the insufficiency of the demand for the balance due upon the earlier portion of the account. If the objection had been raised at the trial, an amendment could have been made setting out the earlier items both of debit and credit, and this argument would have then been without force. It is too late to urge it now.

The judgment is affirmed, with costs.

(69 N. J. L. 582)

AMERICAN SODA FOUNTAIN CO. v. VAUGHN.

(Supreme Court of New Jersey. June 8, 1903.)

CONDITIONAL SALE—DELIVERY—LOSS BY FIRE—RECOVERY OF PRICE.

1. In a contract of sale, where the title remains in the vendor until the purchase price is paid, and notes are given for unpaid installments of the purchase price, if it appears upon a construction of the contract that the consideration for the notes was the delivery of the goods, with the right to acquire title by payment, it is no defense to an action upon the notes that the subject of the sale was destroyed by fire before the title passed.

(Syllabus by the Court.)

Certiorari to District Court of Paterson.

Action by the American Soda Fountain Company against Charles B. Vaughn. Judg-

¶ 1. See Pleading, vol. 39, Cent. Dig. § 1260.

ment for defendant, and plaintiff brings certiorari. Reversed.

Argued February term, 1908, before DIXON, GARRISON, and SWAYZE, JJ.

Wilcox, Blauvelt & Tuttle, for prosecutor.
C. Frank Kireker, for defendant.

SWAYZE, J. This is an action upon one of a series of promissory notes given by the defendant for the purchase price of soda water apparatus bought of the plaintiff. The note refers to a contract between the parties dated September 6, 1900, and by its terms provides that the title to the apparatus shall not pass until all the notes are paid. The contract of September 6, 1900, is in the form of an order for the apparatus, by which the defendant agrees, upon receipt of the bill of lading or tender of the goods, to honor sight draft or other demand for \$57, and to pay the balance as follows: \$170 on April 1, 1901; \$35 per month for six months, and \$15 per month for six months, in each year until paid. This order also contains an agreement on the part of the defendant to insure the apparatus; making the loss, if any, payable to the plaintiff as 'its interest may appear, and to keep the same insured until the payments are made. It contains, also, the following clause: "The delivery of said apparatus to be conditional upon compliance with the above terms and conditions, and said apparatus to remain the property of American Soda Fountain Company until paid for." The apparatus was destroyed by fire February 9, 1902. The note in suit matured October 1, 1902. The defense interposed was a total failure of consideration for the note, and the district court of Paterson, upon this issue, found in favor of the defendant.

The question to be determined is, what was the consideration of the note? If the passing of the title to the apparatus was the consideration, the defense must prevail. If the delivery of the apparatus, with the right to acquire title, was the consideration, the plaintiff must prevail. We think the consideration for the note was the delivery of the apparatus, with the right to acquire title. The note itself states the consideration to be certain soda water apparatus "which I have received of said American Soda Fountain Company." The order of September 6, 1900, as above stated, provides for partial payment upon the receipt of the bill of lading or tender of the goods, and a payment of a considerable sum on April 1, 1901, and the payment of monthly installments thereafter. Delivery of the apparatus is conditioned upon compliance. The consideration for these payments, and for the monthly installments as they fell due, must necessarily be the same as the consideration for the notes not yet matured. It can hardly be contended that the consideration for the payments already made, and for the notes

which matured prior to the fire, which we may assume are paid, has failed. It must have failed if the consideration was the passing of the title. The language of the note and order also indicate that the obligation of the defendant was absolute immediately upon the delivery of the goods, and was not conditioned in any way upon the passing of the title. The title was retained by the plaintiff merely as security for the unpaid purchase money. Nothing remained to be done by the plaintiff to perfect the title of the defendant. That title would have become perfect immediately upon payment. As was said by the late Chief Justice Depue in *Marvin Safe Company v. Norton*, 48 N. J. Law, 410, 7 Atl. 418, 57 Am. Rep. 568: "When the terms of sale are agreed upon, and the vendor has done everything that he has to do with the goods, the contract of sale becomes absolute. Delivery of the safe to the carrier, in pursuance of the contract, was delivery to Swartz and was the execution of the contract of sale. His title, such as it was, under the terms of the contract, was thereupon complete." This conclusion seems to be the necessary result, also, of the reasoning in the case of *Campbell Printing Press & Manufacturing Company v. Rockaway Publishing Company*, 56 N. J. Law, 676, 29 Atl. 681, 44 Am. St. Rep. 410. In this case judgment had been recovered upon notes given for installments of the purchase price of a printing press. Subsequently the vendor brought suit in replevin for the press. The trial court held that the institution of the suit by the vendor upon the notes for the purchase price was an election of its remedy, and a waiver of its right to retake the property. The Court of Errors reversed the judgment, and held that the vendor had a right to enforce the payment of the notes without surrendering its right to claim the press under the title reserved by the contract of sale. The exact question presented in the present case has been considered in other states, and, although there is conflict in the authorities, the weight of authority is in favor of the plaintiff. *Burnley v. Tufts*, 68 Mass. 49, 5 South. 627, 14 Am. St. Rep. 540; *Tufts v. Griffin*, 107 N. O. 47, 12 S. E. 68, 10 L. R. A. 526, 22 Am. St. Rep. 863; *Osborn v. South Shore Lumber Co.*, 91 Wis. 526, 65 N. W. 184. A similar question was considered by the Supreme Court of Massachusetts in *White v. Solomon*, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537. Mr. Justice Holmes, in the opinion of the court, uses the following language: "If a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so, and thereby bind himself to pay the whole sum." Each case must be determined by the terms of the contract involved. For instance, in the case of *Arthur v. Blackman* (C. C.) 63 Fed. 537, a different result was reached.

but in that case the contract stated the sole consideration to be an agreement of the plaintiffs to sell and transfer the property to the defendant upon payment of the note. This clearly made an executory contract of sale. The learned judge said: "I will admit that the actual delivery of the machinery to the defendants, although they took it as bailees, would be sufficient to constitute a lawful consideration for the giving of the note, if it were left for the court to give effect to that transfer of possession; but the plaintiff has taken from the defendants a written contract which not only specifies what are to be the rights of the parties until payment is made, but goes on and specifies precisely what is the consideration for the defendants' promise to pay this amount of money." From the report of the case of *Swallow v. Emery*, 111 Mass. 355, it appears that the contract in that case was an executory contract. Chief Justice Chapman says: "It appears that the plaintiff delivered the horse, wagons, and harness to Waby, to be used, and under a contract of sale that the stipulated price should be paid." The contract also provided that after payment of the price the plaintiff was to give Waby a bill of sale. In that case something remained to be done by the vendor. In the present case nothing remains to be done by the vendor. The contract was entirely executed on its part. All that remained to be done was for the vendee to pay the purchase price.

It is strongly urged on behalf of the defendant that the effect of allowing the plaintiff to recover upon the notes when the property is destroyed by fire before the title passes is to subject the defendant to the risk of loss by fire, contrary to the general rule that the risk is with the owner of the property. Upon this subject the language of Lord Blackburn in *Martineau v. Kitching*, L. R. 7 Q. B. 436, 455, 41 Law Journal, Q. B. 227, is noteworthy: "As a general rule, res perit domino is both the old civil-law maxim and a general rule of our law, and, when you can show that the property passed, the risk of the loss prima facie is in the person in whom the property is. If, on the other hand, you go beyond that, and show that the risk attached to the one person or the other, it is a very strong argument for showing that the property was meant to be in him. But the two are not inseparable. It may very well be that the property shall be in one, and the risk in another." In the present case the defendant expressly agreed to insure the apparatus, and to keep the same insured. This is a strong indication that the intention of the parties was that the risk of fire should be the risk of the vendee, regardless of who was the legal owner of the property.

The judgment is reversed and the record remitted for a new trial. Costs must abide the event.

THROCKMORTON v. O'REILLY et al.
(Court of Chancery of New Jersey. May 23, 1903.)

MORTGAGES—FORECLOSURE—SURPLUS—EXECUTION PURCHASER—REDEMPTION BY OWNER—BILL—SUFFICIENCY OF ALLEGATIONS—MORTGAGES' FRAUD—ACQUIREMENT OF EQUITY OF REDEMPTION.

1. On a bill by a mortgagor to recover the surplus proceeds of a foreclosure sale, it is not necessary to allege that a trust whereby a prior execution purchaser of the equity held it for the mortgagor's benefit was created by writing; that being, under the statute of frauds, merely the method of proving a trust, and not of creating it.

2. The bill alleged a purchase at execution sale by the judgment creditor, and that afterwards the mortgagor endeavored to settle with such creditor, and to pay him the money due him, and have him convey to her, and that the creditor had agreed upon a sum which he would accept and make such conveyance, which sum was, as near as the mortgagor could remember, about \$1,200, etc. *Held*, that it was sufficiently alleged that the creditor had agreed with the mortgagor to permit her to redeem the premises within a reasonable time upon the payment of \$1,200 or thereabouts.

3. Where a judgment creditor for less than \$300 purchases at his own execution sale an equity of redemption worth \$8,500 for \$750, the unconscionable character of his bargain, and the consequent right to redeem arising in the owner, furnish a sufficient consideration for the creditor's agreement to permit redemption.

4. It is not necessary to the validity of an agreement by an execution purchaser to permit the debtor to redeem from the sale that a time for such redemption be fixed.

5. A judgment creditor purchasing at his own execution sale will be presumed to know of the existence of prior incumbrances.

6. A bill by a mortgagor to recover the surplus proceeds of foreclosure alleged the prior purchase of the equity of redemption by a judgment creditor at his own execution sale; that the mortgagor had arranged with such creditor to redeem; that the attorneys and agents of the mortgagees called upon the mortgagor, and endeavored to purchase her interest, which was refused, she informing them that she expected to settle the mortgages, and that they had called on the judgment creditor and endeavored to purchase his interest, and he had refused to deal with them, stating that they must get an order from the mortgagor for a deed before he could convey to them; that afterwards they represented to such creditor that they were acting for the mortgagor's benefit, and secured a deed on such representation. *Held*, that notice to the mortgagees of the mortgagor's equitable title, arising from the agreement with the judgment creditor for redemption, was sufficiently alleged.

Bill by Mary E. Throckmorton against Hugh O'Reilly and others. On demurrer. Demurrer overruled.

Aaron E. Johnson, for complainant.
Charles J. Roe, for demurrants.

PITNEY, V. C. The object of the bill, briefly stated, is to recover from the defendants a sum of upwards of \$7,000 received by them as part of the surplus money arising from the sale under foreclosure of certain premises belonging to the complainant, or such other relief as the circumstances may justify. The mode in which it is charged the defendants become liable to pay this

money is that the legal title to the equity of redemption of the mortgaged premises was vested in one Van Note, who held it as security for a sum of about \$1,200 due from complainant, and that Van Note held such equity in trust for complainant, subject to his lien for the sum just mentioned, and that the defendants herein procured said Van Note, by false pretenses, to make a conveyance of such equity of redemption to the defendant Patrick J. Reilly, who holds it in trust for the other defendants; that thereupon the property was brought to sale under foreclosure, and produced the sum of \$16,300, amounting to \$8,419.55 over and above the amount due for all prior incumbrances and the costs and expenses of the sale; and that then, by petition presented by said Reilly, and without notice to the complainant, who was a party defendant to foreclosure proceedings, and had appeared therein by solicitor, the defendants procured from the chancellor an order that said Reilly might be excused from paying said surplus money to the sheriff, and that the sheriff should take his receipt for the same.

The facts set out in the bill may be stated more in detail as follows: The title of the complainant to the equity of redemption is set forth with great and unnecessary detail. The property in question comprises three lots adjoining each other, and fronting on Broadway, in the city of Long Branch, and upon it is a valuable building, used as a hotel and boarding house, and known as the "Rockwell Hotel," and, by the allegation of the bill, was worth at one time \$20,000. The complainant and her husband mortgaged the same to the defendants herein, or their predecessors in title, and the same became subject to tax titles held by one Green, which incumbrances and tax titles amounted on the 26th of April, 1901, as computed by the master in the foreclosure suit thereon, in the aggregate, to \$7,615.18. In addition to that indebtedness, the complainant, subsequent to such mortgage, had become indebted to two or three individuals, including the said Van Note, and three small judgments had been recovered against her in and before August, 1899. These judgments amounted in the aggregate to less than \$700, and all became vested in Van Note. He caused the property to be advertised for sale under common-law execution on said judgments on the 30th of July, 1900, and on that day they were sold and stricken off to Van Note by the sheriff for the sum of \$734.28. On the 2d of August, 1900, the sheriff made a deed to Van Note for the premises, which was, of course, subject to the mortgage incumbrances and tax titles previously mentioned. At that time the premises were worth at least \$7,500 above all incumbrances. After the making and recording of this deed to Van Note on the 4th of October, 1900, the defendants O'Reilly and Skelly filed their bill to foreclose their mortgages;

made the defendant and her husband parties defendant, as owners, or otherwise interested in the premises; and also made Van Note a party by reason of his sheriff's deed. The complainant lived in New York City, and was proceeded against therein as an absent defendant, and received no notice whatever of the proceedings until after the time for answering had expired, and then employed a firm of solicitors in Jersey City, who entered an appearance for her, but made no defense, and did not set up her equitable title. A decree pro confesso was taken in the foreclosure suit in March, 1901. An order of reference was made to Master Roe to compute the amount due on the mortgages and the tax titles, and to state the priority of the claims. He made a report on the 26th of April, 1901, showing that the amount due for taxes and interest on the mortgage was, as I have stated, \$7,615.86. Execution was issued in the usual terms, directing the surplus money over and above that amount be paid into court. The property was bid for and purchased by the defendant Patrick J. Reilly for the sum of \$16,300.

Previous to that, and pending the foreclosure proceedings, the complainant applied to Mr. Van Note for relief against his purchase; and, as special objection is made to this part of the bill, I will transcribe its language: "And your oratrix further shows that after the purchase of said premises by said Clarence G. Van Note, under his judgments, as above set forth, on the 30th day of July, 1900, your oratrix endeavored to settle with said Clarence G. Van Note, and to pay him the money due him under his said judgments and for his said costs, and have him convey to your oratrix all his right, title, and interest in the said premises; and she further shows that said Clarence G. Van Note held said premises and claimed them as his own. And your oratrix further shows that on or about the ——— day of July, 1901, and a few days prior to the 3d day of August, 1901, and prior to the 5th day of August, 1901, the day of said foreclosure under said mortgages, the said Clarence G. Van Note had agreed upon a certain sum which he would accept, and convey to your oratrix said premises upon the payment, which sum was, as near as your oratrix can remember, about twelve hundred dollars; and your oratrix shows that thereafter the said Clarence G. Van Note held said premises only as security for said sum of money so agreed upon by him, and only for the purpose of conveying them to your oratrix upon the payment of said sum of money."

It is alleged that this does not show an equitable title in the complainant, for several reasons. First, because it does not show that any writing showing the trust was signed by Mr. Van Note. But this is clearly unnecessary. The statute does not require that a trust of land should be orig-

inally created by writing, but only that it shall be proved by such. So that it is well settled that a statement in writing made by a party long after the original transaction, admitting that he holds land in trust for another, is sufficient proof of the existence of the trust. Here, while the allegation under consideration is couched in inartistic language, yet I think it sufficiently asserts that Van Note had agreed with the complainant to permit her to redeem the premises within a reasonable time upon the payment to him of the sum of \$1,200 or thereabouts. Whether the complainant will be able to prove that allegation in such manner as to satisfy the statute of frauds at the hearing, it is not necessary at this time to consider.

The next objection is that the agreement with Van Note was made long after the title was vested in him, and there was no consideration for such agreement. But the circumstances of the case must be taken into consideration. Here Van Note, a judgment creditor for less than \$800, had purchased an equity of redemption worth \$8,500 for the paltry sum of \$750. Now, in the absence of gross laches on the part of the complainant, which does not here appear, the inadequacy of consideration is so great as to shock the conscience, and to give the complainant, as against Van Note, a clear standing in a court of equity to be relieved upon equitable terms from that sale.

The complainant was, as stated in the bill, straitened for money, and not in a condition to either pay the judgment before the sale, or to immediately tender Mr. Van Note the amount of his debt and costs; but she did see him, and she did agree with him that she would pay him \$1,200, or thereabouts, to be reinstated with her title, and the consciousness on his part that she had that equitable standing to redeem the property upon equitable terms was sufficient consideration, if any was needed, for the contract which Van Note made, to allow her to redeem the premises. Moreover, I am by no means sure that any acknowledgment or promise, either oral or in writing, on the part of Van Note, was necessary in order to establish complainant's equity against him. A strong argument may be advanced in support of the position that such equity arose out of the facts stated in the bill, other than the negotiations between complainant and Van Note for reconveyance.

Another objection made is that no time was fixed between the complainant and Van Note for such redemption. But none was necessary, if it be true that Van Note held the premises in trust for the complainant. The implication would be that she should redeem within a reasonable time or on demand. The allegations of the bill and the result of the final sheriff's sale under foreclosure show that Mr. Van Note was perfectly safe, and in no danger of losing his money, and might well be content, as it is fairly infera-

ble he was, to indulge the complainant in the matter of time, and enable her to make her financial arrangements to satisfy his claim. Besides, the presumption is that Mr. Van Note knew that there were prior incumbrances on the property, and that in case of foreclosure and sale he would be perfectly safe to receive his money. His forbearance does not destroy her equity. I think, then, that the allegation of her equitable title is sufficient.

The bill further alleges that for several days prior to the sheriff's sale under foreclosure, which took place on the 5th of August, 1901, Mr. Duffy, the solicitor of the complainants in the foreclosure suit, who are the defendants herein, and one McK., a member of the bar, and one Hugh O'Reilly, Jr., son of one of the defendants herein, called upon her and endeavored to purchase her interest in the premises, and that complainant refused to settle with them or convey her interest to them, and informed them that she was the owner of the premises, and expected to be able to settle the mortgages and the incumbrances against the same; and she says that at that time she was endeavoring to procure the money to pay all the incumbrances. And the bill further alleges that those persons came to her on behalf and as the agents of the defendants herein.

After failing to purchase the complainant's right in the premises, the bill alleges that the same persons, on the 3d of August, two days before the sale, called upon Van Note and endeavored to purchase his interest in the premises; that they had previously called on Van Note for the same purpose, and that he had refused to deal with them, stating to them that they must get an order from the complainant for such deed before he could make any deed to them, which was the occasion of their visit to complainant; and that on the 3d of August, having failed to agree with the complainant, and having been notified by Van Note that he would not deal with them, except by consent of the complainant, they stated to Van Note that they were acting as representatives of the complainants in said suit, but "for the benefit of and in the interest of your oratrix, and requested him to make a deed for his interest in said premises to such person as they should name, and offered to pay him for making said deed the sum of \$1,200, or thereabouts, which he had agreed to take from your oratrix in settlement of his claim, and they further represented to him that said deed would be for the benefit of your oratrix, and would protect her and secure her interest in said premises, at and after said foreclosure sale, and would secure her the surplus arising from such sale. And your oratrix further shows that said Clarence G. Van Note, believing that the said Joseph A. Duffy, Patrick McKenna, and Hugh O'Reilly, Jr., came from the complainants in said cause, and were acting for the

interest and benefit of your oratrix, and would protect her interest in said premises, and would pay and secure to her the surplus realized at said sale, after paying all the liens and incumbrances against said premises and costs of suit, and the sum of money he should receive, made and executed a deed for said premises to one Patrick Reilly, whom they named, for which deed they paid him the sum of \$1,200, or thereabouts. And your orator shows that the said Clarence G. Van Note executed deed under the promise that the same would operate in the interest and for the benefit of your oratrix."

The bill further states that Patrick J. Reilly, the grantee of said deed, purchased the premises at the foreclosure sale for \$16,300; and on the 14th of August he presented a petition to this court, claiming that, under the deed which he had received a few days before from Van Note, he was the owner of the premises, and entitled to the surplus from the sale thereof after paying the decree and costs, and asking that the sheriff who conducted the sale should be permitted to accept his order or receipt for said balance of surplus; that in that proceeding he was assisted by the lawyer, McK., who assisted the other parties above named in procuring the conveyance from Van Note by pretending to act in the interest of, and for the benefit of, the complainant. And a reference was made on that petition to Master Roe, who reported upon the matter, and by his report showed a balance of the proceeds of the sale after payment of the taxes, liens, and all incumbrances, of \$8,419.55; and on the 20th of August the chancellor made an order, based on the report of Master Roe, which directed the sheriff to accept the receipt or order of Patrick J. Reilly as payment for the balance of the surplus money under the sale.

The bill alleges that no notice of that proceeding before the master was given to the complainant or her solicitor, although their addresses were well known to the defendants and to McK. and Duffy, the solicitors of the complainant in the foreclosure suit. The bill further alleges that Patrick J. Reilly, who took the title from Van Note, was the mere figurehead for the other defendants herein, who were the complainants in the foreclosure suit, and that Duffy and McK., with Reilly, acted for the defendants; that they (the defendants) were the principals, and secured the benefit of the whole transaction; and that the whole surplus money of \$8,419.55, except \$1,200 paid to Van Note, really belonged to the complainant. The bill further charges that the report of Master Roe, providing for the disposition of the surplus money, was procured by a fraud on the practice of the court. The prayer is that the defendants may be declared to be liable to pay that sum to the complainant, and that she may have other relief.

The objection made to this part of the bill

is that it does not sufficiently state notice to the defendants of complainant's equitable title. But it seems to me that the mere reading of the bill shows that that objection has no foundation. It alleges that before defendants purchased from Van Note they were told, not only by Van Note, but also directly by complainant, that she was the equitable owner of the premises, subject to the amount due Van Note, and their application to purchase her rights was itself an admission that she had some rights, and, if so, then she should have had notice of the proceeding before the master to determine the ownership of the surplus money. In short, the statement of the case shows a fraud practiced by the defendants on the complainant by means of false representations to Van Note, and by a fraud upon the practice of the court, in failing to give the complainant notice of the proceedings before the master to dispose of the surplus money.

I will advise an order overruling the demurrer, with costs, with leave to the defendants to answer within 20 days.

(64 N. J. E. 555)

GREY, Atty. Gen., v. MORRIS & CUMMINGS DREDGING CO.

(Court of Chancery of New Jersey. May 16, 1903.)

EQUITY—JURISDICTION—LEASE BY STATE OF LANDS UNDER WATER—SUIT TO ANNUL—OWNERSHIP OF SHORE FRONT—EVIDENCE—ADVERSE POSSESSION—CHANGE OF HIGH-WATER LINE—RESERVATION OF WATER RIGHTS.

1. Equity has jurisdiction of an information by the state to annul a lease of its lands under water on the ground that the lessee was not the owner of the shore front, but, with knowledge of the facts, had suppressed them, and that the lease was conditioned to be void if he was not such owner.

2. Where one at the time of receiving a lease from the state of its land under water was the owner of the shore, and so entitled to the lease, the state cannot avoid it because another afterwards acquired title by adverse possession to the shore.

3. Where one selling land reserves a strip along the shore, above which ordinary high water does not come, his right, as against his vendee, to a lease from the state of the land under water, is not lost by the ordinary high-water line rising above such strip.

4. Evidence in an action by the state to annul a lease of lands under water, on the ground that defendant was not the owner of the shore front, held to show that he was such owner.

5. Where the state makes a lease of lands under water, conditioned to be void if the lessee is not the owner of the shore front, it may be avoided, he not being such owner, though by his deed of the shore front he had reserved the water rights, even if he is entitled to obtain a lease of such lands as against his vendee.

Information by Samuel H. Grey, Attorney General, against the Morris & Cummings Dredging Company. Heard on information, answer, replication, and proofs. Information dismissed.

J. E. Howell, for informant. Lindley M. Garrison, for defendant.

EMERY, V. C. The Attorney General, on behalf of the state, files this information for the purpose of annulling a lease of the state's lands under water in New York Bay, made to the defendant by the riparian commissioners under the riparian acts. The application for the grant or lease made by the defendant, dated April 11, 1881, covered a shore front of about 2,500 feet, the whole of which was alleged to belong to the defendant in fee, and to be in its possession. Upon this application a grant was made by the riparian commissioners on April 30, 1881, for the lands under water in front of the whole lands, of which defendant claimed to be shore owner. The lease was perpetual, for the annual rental of \$4,233.60 for the entire lands, with a purchase price of \$64,080 as compensation for conveyance free from rent. The lease recites defendant's ownership of the shore in front of which the leased lands lay, and the application for a lease to it as shore owner under the riparian acts. It contained covenants on the part of the state not to give any grant or license to any other person or corporation affecting the lands leased. This proviso, however, followed the covenants, and concluded the terms of the lease: "Provided also nevertheless, that if the said party of the second part is not the owner of the lands adjoining the lands under water hereby conveyed, then and in that case this conveyance and lease, so far as the same binds the state and all covenants herein on the part of the state, shall be void." The information alleges that as to a shore front of about 240 feet of shore, in front of which lands under water were included in this grant, the defendant was not the shore owner, but that one Joseph W. Hancox, under whom relator claims, was the shore owner, and that the grant or lease was made to defendant without notice to Hancox as required by the riparian acts. Hancox conveyed the tract claimed to be on the shore front to the relator on September 1, 1882, and this information, on its relation, was filed on October 11, 1899. The information alleges that Hancox was the owner of this portion of the shore in front of which the lands were leased, that the defendant had no right or title or interest therein, that its representation in the application that it was the owner of all the shore lands was not true, and that the defendant, with full knowledge of the facts as to ownership, suppressed them. The grant is alleged to be void, and a cloud upon the title to the lands under water included therein; and the information prays a decree that the lease may be declared null and void, and the cloud on the state's title to the lands therein described may be removed. The information appears to claim the avoidance of the entire grant, and not merely of the portion in front of the lands claimed to belong to relator. No allegation is made in the information as to the payments of rents under the lease. Neither is there any tender or offer to return any

portion of the rents received. The answer denies Hancox's ownership of the shore front, as claimed by the relator, and asserts its own title as shore owner, at the time of the lease, to the entire shore in front of which the lands under water were leased. It sets up also the payment by defendant to the state of over \$78,000 as rentals for the property, and the expenditure by defendant of large sums of money in filling in the lands under water. The knowledge of Hancox and of the relator, for many years, that the riparian lease in front of the lands claimed by relator had been made to defendant, and that defendant was paying the rentals and the expense of filling in the lands, is further set up as an estoppel or bar against questioning the lease. As to the right of Hancox or relator as shore owners, the defendant further sets up that in the deed to Clement D. Hancox, the predecessor of Joseph Hancox in title, conveying to him on July 1, 1863, the tract of land which relator claims to bound on the shore, it was agreed between the grantee, Clement D. Hancox, and his grantor, George W. Howe, who then owned all the shore front subsequently acquired by the defendant, that the grantor reserved to himself and his legal representatives the water rights in front of said lands in New York Bay, and the right to dock out and reclaim the same, as far as they might desire, to their own use, benefit, and behoof, forever. These water rights, it is alleged, have been expressly reserved in all of the subsequent deeds and mortgages of the lands conveyed to Clement D. Hancox, and were reserved in the conveyance to relator. Defendant claims to have succeeded to all of Howe's rights, and that at the time of Howe's conveyance to Hancox, on July 1, 1863, the line of the shore did not reach the tract conveyed.

Three questions were argued at the hearing, and are to be considered: (1) Whether this court has jurisdiction to annul the grant in a proceeding of this character; (2) whether the relator's predecessors in title were the owners of the shore front, as claimed, either in 1863, at the time of the original severance of the title to the riparian lands, by the deed from Howe to Clement D. Hancox, or at the time of the riparian grant in 1881; and (3) the effect of the reservation of water rights to the grantor Howe upon the lease in question. Upon these points I reach the following conclusions:

1. The question of jurisdiction in equity to annul grants of this character, alleged by the state to have been obtained by a person not shore owner, and by a willful suppression of facts or false representation, is discussed and decided by Chancellor Magie in *Attorney General ex rel. City of Elizabeth v. Central R., R. of N. J.* (1901) 61 N. J. Eq. 259, 48 Atl. 347. The jurisdiction is maintained, and the only further observation to be made is that in the present case there is the additional circumstance that by the proviso the lease

is expressly declared to be void, as against the state, if the lessee is not the owner of the lands adjoining the lands under water. This proviso concludes defendant as to the materiality of the representation of ownership, and as to the right of the state to avoid the lease by reason of its falsity. If the method or proceeding selected by the state to carry into effect its right of avoiding the lease is a bill in equity to annul the lease, the state may, under this method, be subject to the application of equitable rules, applicable to private suitors, as to the terms upon which relief may be granted, including repayment of rentals or other disbursements; but these equities, if they exist, are matters for adjustment by final decree, and do not touch the question of jurisdiction. *Attorney General v. Central R. Co.*, supra. A bill or information in equity by the state to annul a grant or patent is a proceeding more favorable to the grantee than an annulment of the grant by the making by the state of a subsequent grant to another, in the exercise of its claim, and is the usual method followed in such cases in the American courts, where the state itself contests in legal proceedings the right to annul the grant. *Stone v. United States*, 2 Wall. 525, 17 L. Ed. 765; *United States v. Budd*, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384; *People v. Colgate*, 67 N. Y. 512; 22 A. & E. Ency. (1st Ed.) 67. In the present case the riparian commissioners, on the application made to them by the relator in March, 1899, for a riparian grant as shore owner of the lands in question, declined to make the grant because of the previous grant to the defendant as shore owner, and declined to decide this disputed question of fact. The evidence submitted at this hearing in relation to the shore line and the ownership of the shore clearly illustrates the propriety of this action of the commissioners in refusing to decide this question. I conclude, therefore, that upon the facts alleged in this information the court has jurisdiction to decide whether the defendant, at the time of the lease of the lands under water, was the riparian owner to whom the commissioners were authorized, under the statute, to make the lease, and whether the representation of ownership, as to the portion of the lands claimed by the relator, was false in fact. If the relator or its predecessor in title was the riparian owner, then, under the riparian act of March 31, 1869, § 8 (Gen. St. p. 2788), it was, as such owner, entitled to six months' notice of the application, and, no notice having been given, the grant would have been ultra vires and void. *Attorney General v. Central R. Co.*, supra. This provision as to six months' notice to the shore owners, under the eighth section of the riparian act, is still in force; and the act of March 27, 1874 (Gen. St. p. 2791), operates only to change the eighth section by changing the number of the officers authorized to make the grant, and the powers of the

commissioners as to fixing compensation. The supplement of March 27, 1874, has full operation, by this construction, and is not to be construed as repealing the provisions of the eighth section, requiring notice to the shore owners before grant to any other applicant. It is admitted that no notice of the defendant's application for a lease was given to relator's predecessor in title, and the next question, therefore, is whether the relator was the shore owner of portion of the lands, as alleged in the information.

2. The dispute as to the shore front covered by defendant's lease extends only to the portion thereof claimed to be the easterly boundary of a lot or tract owned by the relator. This tract was conveyed to Clement D. Hancox, relator's predecessor in title, by George W. Howe, by deed dated July 1, 1863. The tract lies on the southerly side of a public street called "Chapel Avenue," running from the Morris Canal easterly to New York Bay, and at the end of the street there was then a wharf or dock extending into the bay. At the time of the conveyance Howe was, and since November, 1854, had been, the owner of the lands between the Morris Canal and the New York Bay, on both the north and south sides of Chapel avenue.

Howe's deed to Clement D. Hancox of July 1, 1863, conveyed a rectangular lot on the south side of Chapel avenue, 169 feet front by 217½ feet deep. The easterly boundary was, according to the description in the deed, 169 feet from and parallel with the western boundary, with which the description commenced; and the first question on this branch of the case is whether, when properly located according to the description in the deed, the easterly boundary of the lot ran to the edge of a bulkhead then erected on the property, or whether the easterly line was located within the bulkhead, and six feet therefrom. The bulkhead itself, although then in existence and a well-defined monument, was not referred to in the description. There was also in existence at the time of the conveyance a small building on the south side of Chapel avenue, on or near the line of the avenue, and this building is the only monument on the ground expressly referred to in the deed as fixing the location of the westerly line of the lot. The full description was as follows: "All that certain lot, piece, tract or parcel of land and premises situate, lying and being in the township of Greenville, in the county of Hudson and state of New Jersey, butted and bounded as follows: Commencing on the southwesterly side of Chapel avenue at a point where the easterly corner of a small building which adjoins said avenue and lies southeasterly of the Morris Canal and running from thence southwesterly along the southeasterly side of said building a course south fifty-two degrees and eleven minutes west 217 feet 5 inches to the westerly corner of a building standing on

the land hereby conveyed; thence south thirty-eight degrees and twenty-seven minutes east one hundred and sixty-nine feet; thence north fifty-two degrees and eleven minutes east two hundred and seventeen feet five inches to the southwest side of Chapel avenue; thence north along the said avenue thirty-eight degrees and twenty-seven minutes west one hundred and sixty-nine feet to the place of beginning. Being part of the premises which the said parties of the first part purchased from Peter H. Dwyer and easterly of the Morris Canal." This small building fixed for the beginning corner was removed subsequent to the purchase, and shortly after the subsequent purchase by Clement D. Hancox from Howe on December 1, 1863, of the lot of land lying on the west, upon which the building stood. The building referred to as at the end of the first course in the deed has also disappeared, but this building is not referred to as on the line of the lot, or fixing its western boundary at any other point than the end of the first line. Evidence as to the precise location of the small building on Chapel avenue is offered by the production of the transit notes of a surveyor now deceased—Garret I. Van Horne. These notes appear to have been made by him for Capt. Howe, the grantor, on June 25, 1863, a few days before the conveyance. This survey shows a small building very near Chapel avenue, a larger building at or near the southerly and westerly corner of the lot, and the Palisades along the easterly boundary; both the top and the bottom lines of the Palisades being shown. This survey appears on its face to be a survey of the entire tract lying south of Chapel avenue, between the Morris Canal and New York Bay, of which Capt. Howe was then the owner; the line of the bay being shown by a sinuous shore line lying outside of the Palisades, and at no point nearer than 30 feet. Whether this line is at high or low water is not shown. The entire tract extends on Chapel avenue 297.2 feet from the line of the Palisades, and this tract is divided into two lots; the eastern lot, toward the bay, being 175 feet, and the western lot being 122.2 feet. On the line dividing the lots are two buildings; the small building on Chapel avenue, located on the western lot, and the southerly or southeasterly side of which is apparently the dividing line of the two lots, and another larger building, located on the eastern lot, whose westerly side is also apparently on the dividing line. The description lays the western line of the easterly lot along the southeasterly side of the small building, but not along the westerly side of the large building, which is referred to only to fix the end of the lot. The first course in the deed is "south fifty-two degrees and eleven minutes west." In the survey it is "S. 51° 06' W. abt."—a variation of about 1 degree. The location of the eastern corner of the small building is fixed by measurement

to an "offset stake" described in the survey as being "13.1 from E. cor. of house," and apparently on a line with the southeasterly side of the house. By the survey the northerly side of the small building is very near, but does not actually touch, the line of the highway. If the beginning point of the description be fixed as the intersection of the line of the southeasterly side of this building and the side of Chapel avenue, the entire frontage of the eastern lot shown in the survey up to the line of the Palisades is 175 feet, and a lot frontage of 169 would fall within this line, and approximately the easterly boundary of this lot would be a dotted line shown on the survey 6 feet to the west of the Palisades. If this be the true line intended by the deed, Howe, the grantor, retained title for 6 feet west of the Palisades, and remained shore owner, without any question.

- Another survey and map of the property has been offered in evidence by the defendant, made by Soper & Brittin, on May 5, 1865, for Clement D. Hancox, after his purchase of both the eastern and western lots shown on Van Horne's survey. These surveyors (Soper & Brittin) are also deceased, but their transit notes and map have been offered in evidence. The small building on Chapel avenue shown on the Van Horne map of 1863 does not appear on the Soper & Brittin survey or map of 1865. As appears by the evidence, the building had been used as servants' quarters in connection with a hotel once on the lot, sold to Hancox in July, 1863. The hotel had been burned down prior to Hancox's purchase, and he erected a residence on its site, using part or all of its foundation. The Soper & Brittin survey and map indicate, however, two stakes on or near the south side of Chapel avenue, each marked on their map, "Old stake G. I. V. H." One of these stakes is at the line of the Palisades and the other 175 feet westerly therefrom, and approximately near where, by the evidence of witnesses, the small building stood. The latter stake is claimed to be the "offset stake" of the Van Horne survey, and its location is, on the Soper & Brittin survey, fixed by measurements or distances from the walls of the residence erected by Hancox. This residence and the walls are still standing on the same location, and, although the "offset stake" has disappeared, its location can be now accurately fixed on the ground by the measurements on the Soper & Brittin survey. And if the stake designated in their survey as the "Old G. I. V. H. stake" is the offset stake of Van Horne's survey, the easterly side of the building and the westerly line of the lot can now be accurately located. The Soper & Brittin survey also shows that the distance between the old stakes called the "G. I. V. H. stakes" was about 175 feet, and that, if the lot was only 169 feet wide, the easterly boundary fell within the Palisades, and left the ownership

of the shore in Howe. Upon the question of the location of the lot by its description in the deed, I consider the Van Horne and Soper & Brittin surveys to be the most satisfactory, if not the controlling, evidence upon the point that the easterly line of the lot conveyed did not in fact reach to the Palisades. The criticisms of counsel upon the Van Horne survey relate to points which do not, in my judgment, affect their reliability upon the main question now involved, viz., the location of the southeasterly line of the small building which was the westerly line of the lot, and the frontage of the lot on Chapel avenue. This line and this frontage, 169 feet, seem to me to be satisfactorily made out by the Van Horne map, confirmed as it is by the Soper & Brittin map and survey, and to show that the title of Clement D. Hancox, under whom the relator claims, did not reach to the Palisades.

If the survey of Van Horne and Soper & Brittin be rejected, the evidence shows no means of fixing accurately the westerly line of the lot by reference to the side of the small building on Chapel avenue, and both parties have attempted the location of the easterly line of the lot by reference to the Dwyer deed, referred to in Howe's deed to Hancox. At the end of the description it is stated that the lot conveyed to Hancox is part of the property conveyed to Howe by Dwyer. Dwyer's title was derived from one Benjamin H. Broomhead, who in 1849 was the owner of all the lands east of the canal and on both sides of Chapel avenue. At this time a map of the premises, called "Bacot's Map," existed, and the sales to Dwyer were made by reference to this map, which cannot now be found. On this map a block was laid out, bounded on the west by Canal avenue, north by Chapel avenue, south by Marion avenue, and east by an avenue called "Ocean Avenue." Dwyer purchased 14 of these lots (Nos. 16 to 22 and 30 to 36), 7 fronting on Chapel avenue 175 feet, and 7 immediately in the rear and fronting on Marion avenue—together, according to the map and description, a tract 175 feet on Chapel and Marion avenues, and 216 feet deep. Dwyer finally received title to all of these lots by a single deed from B. H. Broomhead, dated November 1, 1852, but he had previously received title to 12 of the lots from Broomhead by deeds dated respectively November 12, 1849, for lots 16 to 21, fronting on Chapel avenue 150 feet; April 24, 1850, for lots 31 to 36, in the rear, fronting on Marion avenue; and July 9, 1850, for the 16-foot strip between the 12 lots. After these three deeds to Dwyer, Benjamin H. Broomhead, by deed dated September 25, 1850, conveyed to John Broomhead the lots immediately west of Dwyer's purchase, Nos. 22 and 30, fronting 25 feet on Chapel avenue, and running through 216 feet to Marion avenue; and by this deed he also conveyed to John Broomhead "all the upland and land under water

between Chapel and Marion avenues on the Bacot map, to the eastward of lots Nos. 16 to 36, conveyed to Dwyer, together with the water rights and privileges in New York Bay." Benjamin Broomhead on March 1, 1851, conveyed to Corwin & Arbuckle, by reference to another map, called a map of Clark & Bacot, filed by him on that day, 8 lots fronting on Canal avenue, and being 110 feet on Chapel avenue, and 80 feet 8 inches on Marion avenue, according to this map. This map shows Canal avenue as a street 40 feet wide, lying directly east of the Morris Canal. On March 4, 1851, John Broomhead reconveyed to Benjamin the lands purchased by him on September 25, 1850, which included lots 22 and 30 on the lost Bacot map, and on March 25, 1851, Dwyer reconveyed to Benjamin Broomhead all the lots conveyed to him (Nos. 16 to 21 and 31 to 36 on the Bacot map), and with the same reference to this map, but with no reference to the Clark & Bacot map filed March 1, 1851. Benjamin Broomhead was thus reinvested with the title to all of the land south of Chapel avenue, except the land conveyed to Corwin & Arbuckle on March 1, 1851; and on November 1, 1852, Broomhead reconveyed to Dwyer, by the same reference and description to the lost Bacot map as was contained in Dwyer's deed to him, the lots he had received from Dwyer (lots 16 to 21 and 31 to 36), and also those conveyed to Dwyer (lots 22 and 30 on the Bacot map), extending from Chapel avenue to Marion avenue, 25 by 216 feet, "and adjoining the east line of the tract heretofore conveyed by Broomhead to Corwin & Arbuckle," etc. This deed of November 1, 1852, therefore, conveyed to Dwyer 175 feet on Chapel avenue east from the Corwin & Arbuckle line, which east line, according to their deed and the Clark & Bacot map, was 110 feet from the corner of Canal avenue and Chapel avenue. On October 26, 1854, and while Dwyer owned the lots east of them, Corwin & Arbuckle conveyed to George W. Howe the tract conveyed to them by Broomhead, and by the same description and reference to the Clark & Bacot map, and refer also to a map of Irvingville lots filed in the clerk's office. This deed conveyed also the lands north of Chapel avenue which had been conveyed to Corwin & Arbuckle by Broomhead, and were also laid out in lots on the Irvingville map. The Irvingville map also showed that the Corwin & Arbuckle tract began at the corner of Canal avenue and Chapel avenue, and extended 110 feet along Chapel avenue. Canal avenue appears on this map to be 40 feet wide, and to extend to the towpath of the Morris Canal. As appears by the evidence, the towpath at this locality was at the foot of a slope. On November 1, 1854, Dwyer conveyed to George W. Howe all the premises conveyed to him by Broomhead's deed of November 1, 1852, and by the same reference and description as contained in his deed, to the lost Bacot

map. On the same day Benjamin H. Broomhead conveyed to Howe all the lands remaining to him between the canal and the bay, and Howe thus became the owner of all the lands east of the canal, and including the adjoining Corwin & Arbuckle and Dwyer lands. Referring to the deed from Dwyer to Howe, it will be seen that the description of the lands in this deed is tied to the intersection of Morris Canal and Chapel avenue, and, taking the three descriptions in this deed together, the westerly line of Dwyer's tract is fixed at a point 150 feet from the crossing of the canal and Chapel avenue. This would allow 40 feet for the width of Canal avenue, 110 feet for the width of the tract conveyed to Howe by Corwin & Arbuckle; and Howe's whole frontage on Chapel avenue from the corner of Canal avenue, as designated in the maps referred to, would be, according to the deeds to him, 285 feet to the easterly line of the Dwyer lots. Canal avenue, although laid out on the maps up to the time of Howe's purchase, does not appear to have been in fact laid out; neither was Marion street or avenue laid out; and after Howe's purchase in 1854 no reference to either Canal avenue or Marion avenue is made in any of the conveyances. The evidence shows that after Howe's purchase, there was a fence along the western boundary of his lands, or lands claimed by him, and, measuring the width of Canal avenue as 40 feet from the towpath at the bottom of the slope, the fence would seem to have been located about 12 feet west of the easterly line of Canal avenue, as laid out on the Clark & Bacot and Irvingville maps.

George W. Howe on December 1, 1863, conveyed to Clement Hancox the remaining lands owned by him south of Chapel avenue, and west of the tract conveyed to Hancox by the first deed of July 1, 1863, but the description in this deed contains no reference to either Canal avenue or Marion avenue. The description in this deed of December 1, 1863, is as follows: "Commencing at a point in the southeasterly side of Chapple street where the northerly corner of the land of the party of the second part [Hancox] strikes said street and intersects with the easterly corner of the lot hereby intended to be conveyed, and running from thence south fifty-two degrees and eleven minutes west 217 feet 6 inches, thence north thirty-eight degrees and twenty-seven minutes west 89 feet 6 inches, thence north forty-three degrees and forty-two minutes east 220 feet to the southeasterly side of said Chapple avenue, thence southwesterly twenty-eight degrees and twenty-seven minutes east 122 feet to the point or place of beginning. Containing 23,000 square feet of ground." By this description 122 feet on Chapel avenue is conveyed, and if the westerly boundary in this description is the easterly line of Canal avenue, as it appears on the Clark & Bacot and Irvingville maps, and this line is 40 feet from the tow-

path of the canal, then by the two deeds of July 1, 1863, and December 1, 1863, George W. Howe has conveyed to Hancox 291 feet (169 plus 122) on Chapel avenue east of the line of Canal avenue. This is, by measurement, the distance to the present line of the Palisades from a point 40 feet from the towpath of the canal, measured along Chapel avenue. And taking the two deeds together as conveying that amount of land (291 feet) east of the easterly line of Canal avenue, as fixed on the old maps, the easterly line of the lot first conveyed to Dwyer by Howe is located 12 feet east of the line fixed by the Van Horne and Soper & Brittin maps, and at the present line of the Palisades, which is, according to some witnesses, about six feet farther out than when first built. But the assumption that Howe, in his second conveyance to Hancox of 122 feet on Chapel avenue, intended to make his western boundary of this 122 feet the easterly line of Canal street, as laid out on the old maps, is, as it seems to me, clearly without evidence to support it. The deed makes no reference to these maps, and the evidence shows that a fence erected on the western boundary of property occupied by Howe was about 12 feet within the lines of Canal avenue, as laid down on the old maps. As the avenue was never opened, and all reference to it has been expressly excluded by him in his conveyance, this combined frontage of the two lots conveyed to Hancox cannot be considered as affording a sufficient basis to fix the easterly boundary of the first lot conveyed to Dwyer, at or beyond the then existing line of the Palisades. And on the contrary, taking the old maps referred to in the Dwyer title, and the distances from the Canal and from Canal avenue as given on these maps, the location of the beginning point of the westerly line of the Dwyer tract first conveyed to Hancox is fixed as being at 150 feet from the towpath of the canal; and the westerly line of this tract, as so fixed, practically coincides with the location of the westerly line as shown on the Van Horne and Soper & Brittin maps. As to the location of this westerly line, I reach the same conclusion, therefore, upon the evidence relating to the monuments fixed by the Dwyer deeds, conveying 175 feet to Howe; and I conclude that the first conveyance to Hancox, of 169 feet on Chapel avenue, reserved to Howe, as part of the Dwyer lot of 175 feet conveyed to Howe, the 6 feet on the easterly boundary of the lot adjoining the shore. Howe therefore continued to be the shore owner after the conveyance in 1863, by reason of this reservation.

Relator shows by its evidence that, after receiving his title under the two deeds, Hancox occupied the land to the line of the Palisades, by laying them out and grading and planting trees, and that this exclusive occupation up to this line has since continued. It is therefore claimed that the line of the Palisades must be taken as the easterly

boundary of the lot, on the principle of practical location of boundaries. The rules relating to the practical location of disputed boundaries are not, in my judgment, applicable to the case. The evidence as to occupation would have a decisive bearing if the question of title by adverse possession up to the line of the Palisades were involved, but in this case the adverse possession began not earlier than 1863, and the lease from the state was made in 1881. If at that time the defendant was the owner of the record title to the shore, as I have found it to be, then the state, having made the lease to it, as such owner, under the statute, cannot set up any subsequent adverse possession in the relator or others for the purpose of avoiding in equity its own lease, valid when made.

Having reached the conclusion that the relator's record title, as against the defendant, did not extend to the line of the Palisades, but was at least 6 feet therefrom, it will be unnecessary to comment at length upon the large amount of evidence taken in the case as to the location of the "shore" line, at the time of the severance in the title by Howe on July 1, 1863. It is settled by the decision of the Court of Errors and Appeals in *Ocean City Association v. Shriver*, 64 N. J. Law, 550, 557, 560, 46 Atl. 690, 51 L. R. A. 425, that, as between vendor and vendee and those who claim under them, the line of ordinary high tide at the time of the conveyance governs upon the question of riparian rights, and that their respective rights as riparian owners, as fixed on the severance of the title, are not affected by subsequent changes in the shore line. Relator claims that ordinary high water came up to the line of the Palisades, except for a small space at the corner adjoining the wharf or dock on Chapel avenue; and many witnesses, including the members of the Hancox family, who lived on the premises from about 1864 to 1877, affirm this to have been the reach of the ordinary tides. On the other hand, the sons of Capt. Howe, the grantor, who lived in his house, north of the avenue, and who were familiar with the property from the time of his purchase (1854) up to 1874, fix the ordinary high-water line from 80 to 50 feet east of the Palisades. They say there was a meadow east of the Palisades, and in front of all of it, except about 20 feet, where a ravine or gully from the shore reached up to the Palisades. On this meadow, salt grass grew, and was at times cut and carted away. There is no question, on the evidence of all the witnesses, that the bay has been filling up and becoming shallower at this locality since 1863, and that heavy storms, which in two cases, at least, tore away part of the bulkhead, have carried away most of the salt meadow or other upland beyond the Palisades, and, except near the corner where the Palisades touches Chapel avenue, the present line of ordinary high water reaches the Palisades for nearly its whole length. The evi-

dence of the witnesses as to the line of ordinary high tide at the location in question is not altogether satisfactory, because its reliability depends altogether on the standard fixed; and the wide variance between the lines of ordinary high tide, as fixed by the different witnesses, shows clearly, I think, that they fix different standards. In my judgment, the existence of solid meadow, which could be driven on, and from which grass was cut, or soil dug, is entitled to very great weight in fixing the line of the shore. Weighing all the evidence in this case upon this point, I reach the conclusion that the relator has established by the weight of evidence that the shore line in 1863 extended east of the then line of the Palisades. It follows, therefore, if this conclusion be justified from the evidence, that, as between Howe and Hancox, the former still continued to be the shore owner after the deed of July 1, 1863, even if this deed be considered as fixing the easterly boundary of the lot at the then line of the Palisades. In reference to the weight of evidence and burden of proof in cases of this character, it should be further observed that in actions brought to enforce forfeitures, where the whole title is sought to be avoided, the wrong from which the forfeiture results should be clearly and fully established. Where the purchase money is also forfeited, this rule as to the proofs is applied. *United States v. Budd*, 144 U. S. 154, 162, 12 Sup. Ct. 575, 36 L. Ed. 384.

3. The remaining question relates to the effect of the reservation of the water rights in the deed from Howe to Hancox. At the time of this reservation (July 1, 1863) the wharf act of 1851 was the only statute in force regulating the rights of shore owners to occupy lands below high-water mark. This statute gave the right to the shore owner (but to no one else) to dock out to low-water line, and, on license from the freeholders of the county, to dock out beyond low water. The riparian act of March 31, 1869, repealed the wharf act, as to lands on New York Bay, and gave the riparian commissioners power to lease lands under water to any applicant, provided that no grant should be made to any other than the riparian owner until after six months' personal notice to him, and a failure of such owner to apply for the grant on the terms fixed by the proprietors. The effect of this section is to give the shore owner a right of pre-emption, which is or may be a valuable privilege. This right of pre-emption is one which appertains to the owner of the shore front, as owner, and is not a right of a character which can, so far as the state is concerned, be separated from the ownership of the riparian lands. Merely as between the vendor and vendee of riparian lands, I am not prepared to say that a reservation of this character might not be enforced in a proper case, by enjoining application to the riparian commissioners or otherwise, in order to make the reservation effective. But

the riparian commissioners, as representing the state, have the undoubted right to make the fact of riparian ownership a material circumstance in considering the propriety of the grant and the price to be paid, and to base their policy as to grants and prices on such ownership. Having done so in this case, and the grant being, as appears on its face, made on the faith of the representation of ownership, and its continuance and effect, as against the state, being made conditional on this ownership, the reservation of water rights in the deed of the grantor cannot prevent the state from enforcing its right to avoid the lease. Whether, if the lease is annulled, the defendant, on another application for a lease for the same premises, but not as shore owner, could enforce the reservation against the relator, and by reason thereof enjoin it from applying for the lease or interfering with defendant's application, is a question which is not considered or decided.

I will advise a decree dismissing the information, with costs to be paid by the relator.

(69 N. J. L. 581)

WOOLLEY v. BELL (two cases).

(Supreme Court of New Jersey. June 8, 1903.)
JURISDICTION—SUIT FOR PENALTY—CERTIORARI.

1. The court for the trial of small causes has jurisdiction of a suit for a penalty under chapter 210 of the Laws of 1902 (P. L. 1902, p. 661), and a writ of certiorari will not lie to remove the proceedings before final judgment.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of William H. Woolley, against Sidney Bell. Dismissed.

Argued February term, 1903, before DIXON, GARRISON, and SWAYZE, JJ.

Aaron E. Johnston, for prosecutor. Luther Shafer, for defendant.

SWAYZE, J. This action was brought before a justice of the peace to recover three penalties for alleged violations of the act to prevent the unlawful use of, and willful injury to, milk cans, approved April 9, 1902 (P. L. p. 661, c. 210). The summons was tested December 29, 1902, and was returnable January 9, 1903. The writ of certiorari was allowed January 7th, and served January 8th. The subject-matter of the suit was within the jurisdiction of the justice. The act provides that the penalty shall be recovered by an action, to be styled "An action in contract for a penalty," in any court of this state having cognizance thereof. The penalties sued for are within the amount to which the jurisdiction given justices of the peace is limited, and the justice's court had cognizance of the suit. The objections made by the prosecutor are directed to the state of demand. If these objections are valid, we must assume that the justice would have proceeded thereon in accordance with law, if the case had been tried

before him. In such a case as this the writ of certiorari is used as a substitute for the writ of error. It is well settled that in cases where the writ of certiorari serves as a substitute for a writ of error, and where the inferior tribunal has jurisdiction, a writ of certiorari will not lie before final judgment below. *Hinchman v. Cook*, 20 N. J. Law, 271. The matter is discussed in *Mowery v. Camden*, 49 N. J. Law, 106, 6 Atl. 438. In that case the writ was sustained because the ordinance required proof by affidavit of the violation of its provisions. The affidavit was the foundation of the magistrate's jurisdiction, and, as it failed to show a violation of the ordinance, the magistrate was without jurisdiction. In *Farrow v. Springer*, 57 N. J. Law, 353, 31 Atl. 215, the earlier cases are collected. In *Potter v. Fritz*, 54 N. J. Law, 436, 24 Atl. 553, a certiorari to a district court before final judgment was dismissed.

The writ in this case, having been issued before final judgment in the court below, must be dismissed, with costs.

The same judgment must be entered in the second suit between the same parties.

(65 N. J. E. 36)

WARREN et al. v. PIM et al.

(Court of Chancery of New Jersey. May 30, 1903.)

CORPORATIONS—VOTING TRUST—STOCKHOLDER'S WRITTEN CONSENT—CONSTRUCTION—RIGHT TO REVOKE—NON-POOLING STOCKHOLDERS—RIGHT TO ENJOIN—TEMPORARY INJUNCTION—MOTION TO DISSOLVE—ADDITION OF PARTIES COMPLAINANT—EFFECT.

1. Notwithstanding an order making new parties complainant provides that the right to a continuance of a temporary injunction shall depend solely on the original complainant's right thereto, the injunction will not be dissolved if the added complainants would have had a right to its issuance, had they been original parties, as the original complainant's want of equity would only affect the question of costs.

2. A shareholder's written consent, on the reorganization of a corporation, to the formation of a voting trust, prepared by the trustees and presented to the shareholders for but 10 days' consideration, accompanied by a threat that, unless signed, the exchange of old stock for new would not be permitted, will be construed most strongly against the doers of the power—the trustees.

3. The reorganization committee of an insolvent corporation, appointed by a majority of the stockholders, who were citizens of Great Britain, sent to such stockholders a circular letter suggesting the formation of a voting trust in the committee and others of its selection. Neither the letter nor the blank consent inclosed for the stockholder's signature suggested that the trust would prevent the stockholder from directing how his stock should be voted, or that the trust might not be revoked at pleasure, nor was the duration thereof specified. The trust agreement was without consideration. On receiving the consents, the committee conveyed their shares, the legal title to which they still held, to a holding corporation, organized by them to act as trustee; the conveyance providing that the trust should endure 50 years, and giving the trustee absolute power to vote the shares as it saw fit, revocable only by three-fourths of the pooling stockholders. Held, that any stockholder had the right to revoke the

trust at any time, and compel a conveyance to him of his shares, and meanwhile, as a lesser remedy, to direct the voting of such shares.

4. Mere acquiescence by a shareholder in the organization and continuance of a voting trust will not impair his right to revoke it, as against trustees who are bare agents, having no interest in its continuance, and who have expended nothing nor entered into any obligation on its account.

5. The American shareholders in a New Jersey corporation agreed to a plan of reorganization, under pledge that they should have an equal footing with those in Great Britain, who constituted the majority. The directors were, and would continue to be, Americans. The foreign shareholders created a voting trust to endure for 50 years, during which the trustee was to have absolute power to vote the stock as it saw fit, subject to revocation of the trust by action of three-fourths of the pooling stockholders. The result was the control of the corporation's affairs by one-seventh of its stock. *Held*, that the American stockholders could enjoin the carrying out of the trust; they having a right to demand the original judgment of all stockholders on the conduct of the company's affairs.

Bill by Lyman E. Warren and others against J. Harold Pim and others. Motion to dissolve injunction, heard on bill and answer, and affidavits and exhibits. Motion denied.

The bill as originally framed and presented to the court was filed by Lyman E. Warren as sole complainant, and an injunction was granted thereon. Warren remained sole complainant until the answer thereto had been prepared and was ready to be filed. Then, and before the motion to dissolve the injunction was actually made, a motion was made on behalf of the complainant to amend the bill by adding the names of several other persons complainants. This was based on affidavits showing that the other persons named were interested in the same manner as was the complainant in the subject-matter of the suit. An order admitting them as complainants was thereupon made, without prejudice, however, to the right of the defendants to file the answer already prepared, and move for a dissolution of the injunction on said answer and the affidavits, with leave to allow the answer to stand as the answer to the amended bill, or to amend the same, or file a supplemental answer, in view of the amendments, at any time within 60 days from the date thereof, and that the right of the complainants to continue the injunction should depend solely upon the right of Warren to such injunction, if a motion to dissolve should be made upon the answer as it already stood before the amendment. But the injunction was not to be dissolved for lack of parties, and nothing in the said order should prejudice the rights of the complainants added by this order to apply for an injunction on the bill and affidavits, and any other affidavits they may present, if the present injunction shall be dissolved.

William I. Lewis, for the motion. William H. Corbin and James M. Gifford, opposed.

PITNEY, V. C. (after stating the facts). The effect of the amendment, by adding additional parties, and of the terms upon which it was made, seems to me to be simply to leave the question of the dissolution of the injunction to be determined upon the situation of the cause and the allegations and proofs as they stand at the time the motion is made; for it seems to me that even if the injunction was wrongfully granted to the complainant Warren upon the bill when first presented to the court, yet if upon the real merits of the case the injunction would have been rightly granted, if the after-named complainants had been named in the bill when first presented, it ought not now to be dissolved. The question should be, and always in fact is, whether, at the time the motion to dissolve is made, the injunction ought, upon all the facts before the court, to be held and continued. The only benefit that the defendants can derive by showing that Warren was not entitled to the original injunction would be the imposition upon him of the costs of preparing the defense as against him.

The complainants and all but one of the defendants are stockholders in a corporation which is one of the defendants, viz., the "Fisheries Company," a corporation of this state. The defendants who move to dissolve the injunction are as follows: J. Harold Pim, Langley Archer West, R. Montgomery Horne-Payne, and the "Association of Foreign Shareholders of the Fisheries Company of New Jersey, Limited." The latter is a corporation formed in London for the purpose of holding shares in the Fisheries Company. The individual defendants named, Pim, West, and Horne-Payne, are registered holders of a large number of shares in the Fisheries Company, constituting a majority of all the shares issued by that company, and have assigned, but have not transferred, the same to the defendant the Association of Foreign Shareholders, etc. The three individual defendants are known throughout the case as the "Pim Committee." As such they hold, as I have said, the legal title to, and are the registered owners of, a large number of shares in the Fisheries Company; but they hold them in trust for a large number of shareholders, themselves among others, and those shareholders are known in the case as the "foreign shareholders"; that is, shareholders residing in England and Ireland. The corporation known as the "Association of Foreign Shareholders" claims the right to vote on the shares so held in trust by the Pim Committee, without regard to the wishes of the equitable owners of said shares. The result of this holding is what is called a "voting trust," and defendants claim that such voting trust is irrevocable, and will endure as long as the "association" by its organization will endure, which is 50 years, and the avowed object of the trust is to retain for

50 years the absolute control of the Fisheries Company in the hands of the foreign stockholders. Further, by the terms of the trust, that right to vote cannot be disturbed, except by the vote of three-fourths of the stockholders whose stock is registered in the name of the Pim Committee. The complainants are each of them the holders of registered stock in the Fisheries Company, and they are also the owners in equity of a large block of shares of stock in the Fisheries Company which they have recently purchased from persons in Ireland who are the equitable owners of the shares of stock standing in the name of the Pim Committee.

The object of the bill is to compel the Pim Committee and the "association" to transfer to them the shares of stock of the equitable title to which they are the admitted owners, which stand registered in the name of the Pim Committee, or to compel the Pim Committee to vote at stockholders' meetings on those shares as the complainants, the equitable owners, shall direct. After the purchase by the complainants of the foreign shares, as just stated, they requested the Pim Committee and the "Association" corporation to cause the shares to be transferred to them on the books of the company, or to give them a proxy to vote the same as they should be advised, both of which requests were refused by the Pim Committee and the "Association." Whereupon the complainant Warren, who held the equitable title to this large block of foreign stock in trust for the other complainants, filed his bill, and an injunction was granted in accordance with his prayer. Defendants have answered. Both bill and answer are voluminous, and are supported by voluminous affidavits and documentary proofs. I shall endeavor, in giving the result of my consideration of the questions raised, to state the substance of these pleadings and exhibits with as much brevity as is practicable.

The complainants claim a double standing, so to speak, in the court. First, they are the holders of divers shares of stock standing in their names on the books of the corporation, upon which they are entitled to vote, and they claim that, as such stockholders, they have a right to challenge the legality of the voting trust created and attempted to be upheld by the defendants. In the second place, they are the holders of the equitable title, manifested in a manner which I shall state presently, of a large block of shares, as we have seen, the legal title to which is held by the Pim Committee and the "Association"; and they claim the right, notwithstanding the voting trust, to have those shares transferred to them on the books of the Fisheries Company, and to exercise their right to vote upon the same. In one aspect of the case, then, it resembles *White v. Thomas Inflatable Tire Company* (1893) 52 N. J. Eq. 178, 28 Atl. 75, and *Kreissl v. Distilling Com-*

pany (1900) 61 N. J. Eq. 5, 47 Atl. 471. In another aspect it resembles *Cone v. Russell* (1891) 48 N. J. Eq. 208, 21 Atl. 847, and *Chapman v. Bates*, 60 N. J. Eq. 17, 46 Atl. 591, on appeal (1900) 61 N. J. Eq. 658, 47 Atl. 638, 6 Am. St. Rep. 459. In the first two cases named the complainants were stockholders who had not united in any voting trust. In the last two cases the complainants were stockholders who had united in a voting trust, and had given proxies or powers of attorney irrevocable for a period of years.

The Fisheries Company is the successor of a corporation known as the "American Fisheries Company" (called in the case the "old company"), which was organized in 1893, and was wound up in insolvency by this court in the spring of 1900. It was composed of a large number of British and American stockholders; the British stockholders being in the majority, quite numerous, and widely scattered. The immediate cause of its insolvency in the beginning of 1900 was that it had been badly managed, and had had a year or two of bad fishing. It had two kinds of stockholders, preferred and common, and by a by-law no mortgage could be put on the property of the company without the consent of every preferred stockholder. Hence it was unable to raise the small sum of \$200,000 which it needed to meet present liabilities, and was obliged to go into insolvency. As soon, however, as receivers were appointed, efforts were made to reorganize the company, and were carried through with great industry, so that it was reorganized some time in June or July the same year, and the Fisheries Company, or, as it is called in the case, the "new company," was formed, with some little additional capital added, and each stockholder of the old company had a fair and full opportunity to come into the new company, and did come in and receive stock for his old stock upon subscribing and paying for an issue of mortgage bonds which were necessary to put the company on its feet. Since that time it has earned more than its expenses and paid one dividend. A part of the process of winding up of the old company was the forming of a plan of reorganization, which was reduced to writing and agreed to by a committee of the creditors and a committee of the stockholders, and made a quasi record of the court, and was faithfully carried out. The British stockholders, having a majority of the stock, were authorized themselves first to carry out the reorganization. If they failed to do it within a certain time, then the American stockholders were given the privilege, and, if neither did, then the assets were to be sold and divided among the original stockholders after paying the debts. That the assets were quite sufficient to pay the debts several times over abundantly appeared.

In order to carry out the reorganization, the foreign stockholders were called together by some of the principal stockholders, and a

meeting was held in Dublin, at which a committee (Messrs. Pim, West, and Horne-Payne) was appointed to carry out the reorganization. They gathered together the certificates of stock held in the old company, got into correspondence with all the stockholders, and procured from them the new subscriptions. For the sake of convenience, when the new company was organized and shares of stock issued, those of the foreign stockholders were issued in a block to the Pim Committee, and by that mode they became the registered holders. The foreign subscribers to the new company never had a single certificate issued to them as such. The American stockholders did the same thing, without the intervention of a committee, and subscribed and became the holders of just a little less than one-half of the new preferred stock, leaving the British stockholders the owners of a trifle more than one-half of it. A large amount of common stock was issued, of little value, costing the subscribers \$5 a share, and of this much the larger portion was taken by the foreign stockholders, so that, counting the common stock, they had a large majority. The reorganization was effected during the months of April, May, and June, 1900. Several circular letters were written by the Pim Committee to the foreign stockholders, stating the plan of reorganization and naming a time within which they must subscribe and pay their money. That time was first fixed for the 1st of June, 1900. The time by the plan of organization given to the foreign stockholders to organize was until the 15th of June, but the Pim Committee were quite justified in fixing the time for the 1st of June, so as to enable them to collect the funds and transmit them to the United States before the 15th.

During the month of May the idea suggested itself to the Pim Committee that the control of the company should be kept by the foreign stockholders, and with that view they conceived the idea of a voting trust, and on the 1st of June, 1900, they sent out a circular letter to the foreign stockholders suggesting that idea. In that letter they stated to the shareholders in the old company and the proposed subscribers to the new the progress which had been made in the United States in taking up preferred and ordinary shares, and then added this clause: "We have come to the conclusion, after long and careful consultations with large shareholders, that the only effective way of securing control of the new company to the shareholders in the United Kingdom is by the establishment of a 'voting trust'; that is to say, the trust shall hold as if it were the absolute owner and holder of shares in the new company belonging to persons resident in the United Kingdom, and these persons shall accept the certificates of the trust, which will carry all rights and benefits except that of voting. By this means a solid controlling vote will be secured upon all important questions at the company's meetings in America, which would not be the case

if the voting was left to the individual shareholders. We propose that the members of the trust should be, in addition to ourselves, four large shareholders, to be hereafter selected by us. By the order of the court, the time for reorganizing will expire on the 15th inst., so that we have very little time for completion of our arrangements. Be good enough, therefore, to sign and return to us at once, but in any case not later than the 11th inst., the inclosed slip approving for the formation of the voting trust. Unless we receive this approval, we shall reserve the right to return the subscription to any dissentient subscriber. This voting trust will, of course, affect the shares only, and not the bonds, which will be delivered to the subscribers in due course. As there now seems to be so good a prospect for the reorganization, the committee are anxious that those shareholders who have not already sent in their applications should have another opportunity of doing so, and they have, therefore, decided to extend the time for making the applications until the 11th inst., but shareholders must distinctly understand that after this date the right to apply will be absolutely lost. Any such applications must be accompanied by the formal assent to the voting trust."

With that letter went a printed authorization in blank, to be signed by the subscriber, in the following language:

"I agree that the shares in the new company to which I may be entitled shall be held by a voting trust, to be constituted as described in your circular letter of the 1st June, 1900, and I request you to procure such a trust to be constituted.

Ordinary Signature.....
Name in full.....
Address in full.....
Description
Date.....1900.

"To Messrs. J. Harold Pim, Langley A. West, and R. M. Horne-Payne, Shareholders' Committee of American Fisheries Company (in Liquidation)."

It will be observed that nothing is said in the letter or consent as to the length of time the voting trust shall last, or as to the right of the person consenting to enter it to revoke his grant, and, further, that it contains a threat that, unless the voting trust was acquiesced in, the subscriber would not get any benefit whatever in the new company, and as a necessary result would lose all his holdings in the old company. Further, the trust was naturally and necessarily confined to the foreign stockholders, for the avowed purpose of perpetuating in them the control of the company.

In the latter part of April and the first part of May, and while this general plan of a voting trust was under consideration, the complainant Warren, who is a member of the New York bar, was in London and Dublin assisting and advising the foreign stockholders and the Pim Committee in promoting the plan of reorganization, and was aware that the formation of a voting trust was contemplated,

and to some extent advised the Pim Committee therein; but then, or later on, he distinctly advised them that it would be bad policy to permit the American stockholders to know of the proposed plan, and, in point of fact, none of them, but Warren, did know of it until long after it was formed. Almost all the foreign shareholders, including those under whom the complainants claim, signed the authorization above set forth and returned it to the Pim Committee, and that is all the authority they ever had for the forming of the voting trust.

The process of collecting in and forwarding to the United States the moneys subscribed by the foreign stockholders occupied several months, and in the meantime the Pim Committee were engaged in devising and putting in shape the proposed voting trust. For that purpose they organized under the British statutes a corporation by the name of the "Association of Foreign Shareholders of the Fisheries Company of New Jersey, Limited," and procured its incorporation on the 5th of November, 1900. The incorporators were the three members of the Pim Committee and four other stockholders in the new company, to wit, Francis Bellingham Jameson, of London, Frederick John Yarrow, of London, and Samuel Smith McCormick and Thomas Falls, of Dublin. The association was absolutely without any capital or any shares of stock. The articles of association mentioned several objects of the corporation, the first of which was this: "(1) To undertake and execute trusts of all kinds, and in particular to concur in the execution of a deed poll constituting a trust of shares in the Fisheries Company of New Jersey, and framed in accordance with the draft which, for the purpose of identification, has been subscribed by the first three subscribers hereto." The membership was limited to 20, but the 7 subscribers were declared to be the first members and the first committee, with power to determine the terms and conditions upon which subsequent members shall from time to time be admitted, and that a party may cease to be a member by resignation or as the effect of a request to resign by a resolution of the committee. The members could vote by proxy, and the committee was composed of the 7 persons signing the articles of association, and each member of the committee was continued in office until he becomes a bankrupt, or suspends payment, or compounds with his creditors, or is found a lunatic and becomes of unsound mind, or when he resigns or is removed by resolution of the committee. There are many other provisions in the articles of association, but they manifest no sort of business which the association propose to pursue, other than that first stated, viz., the general business of being a trustee.

On the 12th of November, 1900, a week after the organization of the association was completed, a sealed instrument, called in the case the "deed poll," was executed by the

association, and by Pim, West, and Horne-Payne, members of the committee. That deed poll refers to the circular letter, hereinbefore mentioned, of June 1, 1900, the assent to the plan of creating a voting trust, signed by members of the shareholders, and that the Pim Committee had become the holders of the majority of the shares in the new company of New Jersey, and recites: "Whereas, the association is the said proposed voting trust, and has been formed pursuant to the said circular, and the said Pim, West, Horne-Payne, and four other shareholders selected by them, viz., Falls, Jameson, McCormick, and Yarrow." It then declares that the persons who brought their shares in the old company to the Pim Committee, and signed the assent to a voting trust, are to be called the "depositors," and the shares brought in are to be called "deposited shares," and the owner of the deposited share means the equitable owner for the time being of a deposited share, in accordance with the provisions therein contained; that the shares in the Fisheries Company now held by the Pim Committee, and any further shares of the company which shall be vested in the association, shall be held by the association, with all rights and powers against third persons as if it were the absolute owner and holder thereof as between the association and the owners of the deposited shares. The certificates of the association issued to such owners shall carry all rights and benefits, except that of voting, subject to the provisions thereof; and such vesting may be, when the association thinks fit, made by a declaration of trust in favor of the association, and when the shares are so vested the association may allow the legal title to remain outstanding so long as the association thinks expedient. Every owner of a deposited share will be entitled to a certificate under the seal of the association, called a "share trust certificate," and stating the number of shares, etc., and giving the form of the certificate to be issued by the association. (And I stop here to say that the title to the shares purchased by the complainants from the foreign shareholders is manifested by a share trust certificate.) Further, the association will recognize the registered owner of any deposited share as the absolute equitable owner thereof, subject to these presents, and every owner of such deposited share entitled to transfer the same by an instrument in the usual form. Afterwards comes a declaration of the trust upon which the shares are held: "The deposited shares shall be held by the association upon trust that they may and shall, according to the best of their discretion, do the things following; that is to say: (1) Exercise all voting rights incident to the ownership of shares as and when the association shall think it expedient to exercise the same. (2) Receive all dividends and bonuses and other moneys receivable in respect of the deposited shares.

(3) Raise or borrow on the security of the deposited shares any money required for the purposes of the execution of the trust. (4) Take all such actions and proceedings as they think expedient from time to time to protect the interests of the owners of the deposited shares." Then further on follows a provision stating the duration of the trust: "The trust shall be closed when one of the events following shall happen; that is to say: (1) When and so soon as the association by deed declare that it is to be closed; or (2) when the owners of three-fourths of the deposited shares of each class, by notice in writing to the association, declare the trust to be closed; or (3) when the last survivor of the now existing descendants of Her Majesty shall have been dead for twenty years; or (4) when fifty years from the execution hereof shall have elapsed." Then follows, among others, a provision giving the association power to make an assessment upon the owners of the shares to pay the expenses of the association.

After the formation of this trust and the execution of the deed poll, which was not, of course, recorded in any public place, copies thereof were printed in handsome style and sent out to some of the larger stockholders, and a circular letter was sent to all the stockholders, calling their attention to the formation of the trust and the deed poll, and that "a copy of the memorandum and articles of the association, and of the trust deed above referred to, may be inspected at the office of Messrs. Stokes Bros. & Pim, above mentioned, or at the office of Messrs. Morley, Shirreff & Co., 53 Gresham House, Old Broad Street, London, or copies of these documents can be obtained on application to them, and on payment of a fee of 1s. for each copy." That circular was the first notice, so far as appears, that any of the foreign shareholders had of the actual terms of the trust, and its terms were not brought to the notice of any of the complainants, except Warren, until some time later.

The result of this instrument, construed, as it must be, in connection with the articles of association of the association, was to vest in the individual defendants the absolute and irrevocable power for 50 years to control and manage the affairs of the Fisheries Company. They thereby have the right to name their own successors, and, by transferring a few shares to mere dummies having the necessary residential qualifications, may fill the board of directors with their mere creatures, destitute of the least pecuniary interest or responsibility in the corporation. This they have already done to the extent of two directors. I will stop here to say that a great part of the answer and affidavits is aimed at the peculiar position occupied by Mr. Warren as having been counsel for the Pim Committee and as having advised them from time to time in regard to the voting trust, and generally having occupied confidential relations

toward them; and it is charged that his conduct in going abroad, as he did, in the fall of 1902, and purchasing these association certificates from the foreign stockholders, and now filing this bill for the purpose of what is called "breaking the trust," is unprofessional and inequitable, and deprives him of any aid from a court of equity. I do not deem it at all necessary to go into the details of the proofs on this subject, and content myself with saying that I do not agree that the case shows anything that places Mr. Warren in the position of having been guilty of unprofessional conduct or a breach of professional confidence. The fact is that he was employed by the other complainants herein, and furnished with money to go abroad, in the fall of 1902, for the purpose of purchasing such a block of foreign stock as would give the American shareholders, if they all combined, a majority of the stock. It does not appear that in the course of such employment he made the least use of any information which he obtained as confidential counsel of the defendants. He performed that task, and took title to the association certificates in his own name, and filed a bill in his own name. That was probably a mistake in practice, which might—I do not say would—have rendered his bill defective for want of parties, on the ground that the real parties in interest should have appeared on the record. But, whether a fatal defect or not, it was cured by the amendment which brought in the real persons, parties in interest, as complainants. Not one of them had any notice of the voting trust until long after it was formed, and not one of them had done any act of even simple acquiescence therein; much less have they done any act upon which any estoppel in favor of the defendants can be based.

This brings us to the merits of the real question in the case, and that is: (1) Have the American stockholders, by virtue of their ownership of stock, to which they originally subscribed, or purchased from original subscribers, standing in their names on the books of the company, a standing in this court to complain of the exercise of the right of the Pim Committee or the association to vote upon the shares held by them in trust, irrespective of the wishes of the cestui que trust? (2) Have the complainants, as owners of the equitable title of a certain number of shares, the title to which stands in the name of the Pim Committee on the books of the corporation, the right, as assignees of the original holders of certificates of deposited shares, to revoke the consent given by those original holders to the Pim Committee to form the voting trust, and to be accorded by this court the right to control the vote on those shares?

In the first place, it is proper to observe that it was quite natural and proper, and entirely lawful, that the foreign stockholders, who were numerous, should combine to en-

able themselves to vote upon their stock at any meeting of stockholders in the far-away state of New Jersey. That combination might be either by a proxy or by the formation of a voting trust. In principle I see little difference between the giving of a proxy to vote and the transfer of shares of stock to a trustee to vote in person or by proxy. The principle is the same. In either case the holder of the stock is exercising his right to have his voice heard in the way provided by law in the management of the corporation in which he is a stockholder. So far, the circular letter of June 1, 1900, addressed to the stockholders by the Pim Committee, suggests nothing illegal or improper. Whether the further object mentioned in that letter, viz., that the foreign stockholders should by combination control the new company, was lawful is another question. And, as before remarked, nothing in that letter suggests that the creating of the voting trust would or could stifle the voice of the equitable owner, and prevent him from directing the legal owner as to how he should vote on his stock. Nor did it suggest that, by consenting to the creating of the voting trust, the equitable owner deprived himself of the right to revoke the trust at his pleasure. The consent paper was, as we have seen, prepared by the committee, and was presented to the stockholder, and his signature demanded within a period so short as to well-nigh preclude proper consideration on his part as to its practical working and effect; and such presentation was accompanied with a threat that, unless immediately signed, the helpless stockholder would lose his all. Under such circumstances, the court should construe it most strongly against the donee of the power, and, so far as possible, avoid drawing any inferences unfavorable to the original and natural rights of the donor.

It is next to be observed that no consideration whatever was paid, directly or indirectly, by the Pim Committee or trustee to the owner for his consent to the voting trust. It was a purely voluntary creation of power. The transaction did not even contain the element of mutual promise, such as has arisen and been dealt with by the courts, where several persons have united, and by agreement have purchased in their joint name, and out of the aggregate of their individual means, a block of shares of stock, upon the agreement and understanding between them that they were to be held as a solid block, and voted as a majority of the pool should determine. There a consideration (whether a sufficient consideration or not has been considered a debatable question) is found in the mutual contribution of funds to the joint purchase, and the mutual promise to act in concert as a majority of the contracting parties should determine. I repeat, there is no such element found in the present case.

Again, it is to be observed that the length

of time the trust was to continue was not mentioned in the circular letter of June 1st, or in the acceptance thereof signed by the depositing stockholder. There was nothing to lead the stockholder to believe or infer that the deputation of the right to vote was to be perpetual, or substantially so; and so the question at once would arise, what would be the reasonable construction to put upon such consent or deputation? By our statute the time to which an ordinary proxy is limited is three years, and even then the proxy is revocable at the pleasure of the donor. That I conceive to be a statutory declaration of policy on that subject. Be that as it may, I find nothing in the documents just mentioned to authorize or warrant the assumption of the power by the members of the Pim Committee, after organizing the corporation in question, which of itself was innocent enough, to convey to that corporation all the shares of stock held by them, and to annex to them a power of voting for 50 years, without regard to the wishes of the individual owners, or even a bare majority of them, and without allowing to them the power of revocation, except by the owners of three-fourths of the shares deposited.

It follows that the signing of the consent to the formation of the voting trust amounts to no more than the appointment of the holder of the legal title as the agent of the equitable owner, with power only to vote upon the stock as he (the equitable owner) should direct, and, in the absence of special direction, as the agent should see fit, and subject to the duty to vest the legal title in the equitable owner whenever demanded. It gave the legal owner no interest whatever in the stock, or any other power over it.

It is, however, alleged, and is a part of the defense, that the certificate holders who transferred their certificates to the complainant had notice and knowledge of the deed poll and the terms thereof, and acquiesced therein, long before they transferred the certificates to the complainants. There is some conflict in the proofs on this subject; but I shall assume that for the present purposes the weight of the evidence is that such certificate holders did acquiesce in the deed poll, in so far that they did not protest against it, and did not take any legal measures to revoke or set the same aside, or otherwise disturb its force and effect. Granting all that, I am unable to see how it varies the position of the parties. Such acquiescence, and failure to protest and take legal measures, cannot injure the equitable standing of the shareholder, unless the defendants have acted thereon in such manner that they cannot be restored to their original position, or, in other words, unless there are some facts raising an estoppel, such as existed in the case of *Chapman v. Bates*, above cited. The defendants have expended no money except what they have been reimbursed. They have entered into no obligations. They will suffer

no loss, directly or indirectly, by what has been called the "breaking of the trust." Hence it does not lie in their mouths to set up acquiescence. They are bare trustees, or agents, without any interest in perpetuating the trust, and cannot complain of its revocation.

And looking at the affair in its general aspect, and without regard to what may be termed the "special views of the law," as applied to transactions of this particular kind, I cannot avoid thinking that it somewhat resembles a voluntary family settlement or deed of gift, without consideration, and not acted upon, so as to render its revocation in any degree inequitable or unjust, but in the framing of which a distinct power of revocation has not been reserved. As to such instruments, it is perfectly well settled that they are revocable at the will of the settler. *Garnsey v. Mundy*, 24 N. J. Eq. 243, is a leader of quite a long line of cases in this state on that subject. I conclude, then, that upon general principles the holders of the certificates who assented to the creation of the voting trust had the right at their pleasure to revoke the same, and to demand from the defendants the transfer to them as individuals on the books of the company of the shares of stock which they had deposited with the defendants, and also, as a lesser remedy, the right to dictate to the defendants how they should vote on those shares before that transfer.

Turning to the law applicable to this case, it seems to be pretty well settled in this state by quite a long line of decisions. Voting trusts are not declared to be necessarily unlawful. They may or may not be lawful, according to the circumstances of the case. The general rule is that *prima facie* they are unlawful, but may be rendered lawful by the circumstances. The leading case is the famous one in the law courts of *Taylor v. Griswold*, 14 N. J. Law, 222, 27 Am. Dec. 33. In this court we have the cases above cited, three of which happen to have been dealt with by me, and in each of which I had the aid of able and distinguished counsel. The last one, *Chapman v. Bates*, was considered by the Court of Errors and Appeals, and that court, in its opinion in affirming the decree below, expressly recognized the correctness of the principles attempted to be laid down in *Cone v. Russell* and *White v. Thomas Tire Co.*, and treats of the principle upon which voting trusts may be maintained, and in what cases a power of attorney to vote, which I assume to be precisely the same thing, may be irrevocable. At the top of page 665, 61 N. J. Eq., page 640, 47 Atl., and 6 Am. St. Rep. 459, Mr. Justice Garretson, speaking for that court, uses the following language: "A power of attorney may become irrevocable whenever the object is to create an interest; and this is so, even if it is not stated in the instrument itself to be irrevocable. While the general rule is that a principal may revoke the

authority of his agent at his mere pleasure, an exception to this rule is when the principal has expressly stipulated that the authority shall be irrevocable and the agent has an interest in its execution. *Story*, Ag. 476. But where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is part of a security, there, unless there is an expressed stipulation that it shall be revocable, it is, from its very nature and character, in contemplation of the law, irrevocable, whether it is expressed to be so upon the face of the instrument conferring the authority or not. *Story*, Ag. 477; *Hunt v. Rousmanier*, 8 Wheat. 174 [5 L. Ed. 589]; *Durbrow v. Eppens* [65 N. J. Law, 10, 46 Atl. 582]. In this last case illustrations of irrevocable powers of attorney can be found."

After *Chapman v. Bates* had been decided in this court, and before its decision on appeal, the whole subject came before Chancellor Magie in the case of *Kreissel v. Distilling Co. of America*, 61 N. J. Eq. 5, 47 Atl. 471, and he there reviews the previous cases and the principles established. In that case the complainant had not pooled his stock, but by his bill asked that the trust or committee should be restrained from exercising the power given it by the stockholders who had pooled their stock. At pages 14 and 15, 61 N. J. Eq., and page 475, 47 Atl., he uses the following language: "The power of revocation is deemed sufficient to protect the rights of other stockholders. If, however, the stockholder undertakes to make irrevocable his grant of power, and to denude himself for a fixed period of the power to judge and determine and vote as to the proper management and control of the affairs of the corporation, then whether the grant of power is good or not must depend on the purposes for which it is given. When the scheme devised does not embrace a grant of irrevocable powers by proxy, but seeks a similar object by the creation of a trust and the appointment of a trustee, to whom the title of the stock is conveyed, a like doctrine must be applied. *If no provision is made for the conduct of the trustee, at least he would be bound to vote on the stock held in trust in accordance with the expressed wishes of the cestui que trust*; but if the transfer of the legal title to the stock is made and accepted under an agreement of the stockholder which deprives him of all power to direct the trustee, and all opportunity to exercise his own judgment in respect to the management of the affairs of the corporation, then *whether the transaction is open to the objection of other stockholders, as depriving them of the right they have to the aid of their co-stockholders, must be dependent upon the purposes for which the trust was created and the powers that were conferred*. If stockholders, upon consideration, determine and adjudge that a certain plan for conducting and managing the affairs of the corporation is judicious and advisable, I have no doubt that they

may, by powers of attorney, or the creation of a trust, or the conveyance to a trustee of their stock, so combine or pool their stock as to provide for the carrying out of the plan so determined upon. *But if stockholders combine by either mode to intrust and confide to others the formulation and execution of a plan for the management of the affairs of the corporation, and exclude themselves, by acts made and attempted to be made irrevocable for a fixed period, from the exercise of judgment thereon, or if they reserve to themselves any benefit to be derived from such a plan to the exclusion of other stockholders who do not come into the combination, then in my judgment such combination and the acts done to effectuate it, are contrary to public policy, and other stockholders have a right to the interposition of a court of equity to prevent its being put into operation.*" The words I have italicized apply to the present case, except that the majority stockholders in this case have not even formulated a plan for the management of the affairs of the corporation, but have left that entirely to others, and have excluded themselves from the management, and have attempted to make their action in that respect irrevocable for a fixed period, and so to exclude themselves from the exercise of their judgment on the affairs of the corporation, or, rather, the defendants the Pim Committee have assumed, without authority of the stockholders, to place the stockholders in that position.

But let us look at the circumstances of the present case from a purely practical point of view. The Fisheries Company is a corporation of the state of New Jersey, doing business wholly upon the coast of the United States. Its nominal headquarters is in New Jersey. The principal location of its business is Tiverton, R. I., where it has a factory for extracting the oil from fish which it catches, and converting the residue into fertilizers. The American stockholders protected their rights in the old company by taking stock in the new company upon the express pledge that they should stand on an equal footing with the foreign stockholders. Such were the terms of the plan of reorganization previously referred to, and under which the new company was actually organized. They knew that the majority of the stock was held abroad, and that the management of the company was subject to the criticism of the foreign stockholders. So far, then, as any questions might arise as to the management of the company, it was of the utmost importance to the American stockholders that the merits of the management should be subjected to the test of the judgment of all the stockholders. The first set of directors, by common consent, were constituted entirely of citizens of the United States, and as a matter of practice that must continue to be so. Hence those directors and the American stockholders who may have voted for them had a peculiar right in

this case to depend upon submitting the propriety of their management to the individual judgments of the foreign stockholders. They had a right to rely upon the law as settled by the courts of this state to protect them therein. They might reach those foreign stockholders, either by personal interview or by circulars discussing the condition and management of the affairs of the corporation, and they had the right by that law to have the judgment thereon of those individual stockholders, freely and fairly exercised in the votes which they might cast for directors at the annual elections. Instead of that, they find all the foreign stock pooled in the hands of seven men, who exercise complete control over the affairs of the company, and have the right to perpetuate themselves for 50 years by their power of reappointment, and they cannot be dislodged from their position without the concurrence of 75 per cent. of that stock which is controlled by the pool. As that amounts to about three-fifths of the whole, it reduces the amount necessary to maintain the Pim Committee and their associates in power to one-quarter of two-fifths, which is about one-seventh of all the stockholders. Now, it seems to me that the American stockholders, who are registered as such, have a right to complain of that state of affairs. It deprives them of the benefit of the judgment of about one-half of the stockholders of the company, and, as before remarked, brings the case far within the ruling and decision of the chancellor in the case of *Kreissl v. Distilling Co. of America*.

I have looked at some of the cases adjudged by the courts of other states and relied upon by the defendants' counsel. Many of them are cited by the Supreme Court of California in *Smith v. San Francisco & North Pacific Railway Company*, 115 Cal. 584, 47 Pac. 582, also reported in 35 L. R. A. 309, 56 Am. St. Rep. 119. In that case the decision of the court below was reversed by the Court of Appeals, with the Chief Justice dissenting, so that the decision is a result of a divided court. So far as it applies here, it was an affirmation of the doctrine that where three men unite, and provide funds to purchase a block of stock, and agree that the stock shall be voted as they, or a majority of them, shall determine, the mutual promise is a consideration for the contract. But a careful consideration of the learned opinion in that case shows that the present case is excepted. At page 317, 35 L. R. A. (first column), the learned judge says this: "The question has been presented in cases of voting trusts, but an examination of these cases will show that the question has arisen either when the authority was expressly given to carry out some illegal purpose, or when, having been given without any consideration, though purporting to be for a definite term, subsequent owners of the stock have sought to revoke it before the

expiration of the term." He thus expressly excepts the present case. Another case relied on by the defendants is *Brightman v. Bates* (1900) 175 Mass. 105, 55 N. E. 809. That was an action by a broker, or person acting as such, for compensation according to contract for services rendered in forming a voting pool of stock in a corporation. The defense was that the pooling contract was on its face unlawful, to the knowledge of the plaintiff, and therefore he was not entitled to compensation. It will be seen that a very clear case of an absolutely unlawful combination was necessary in order to maintain the defense. Besides, I infer from the statement of the case that there was a consideration for the contract as between the several stockholders, who were the defendants, which rendered it binding as between them—following the doctrine laid down in the *California* case just cited. Be that as it may, the pooling contract disclosed no unlawful object, and the length of time it should endure, three years, was quite reasonable. The question whether it was revocable during that period was not involved nor discussed, and the language of *Holmes, C. J.*, who delivered the opinion, and upon whose language the defendants rely, must be construed accordingly. Other cases cited by the defendants are clearly distinguishable from the present.

But whatever judicial expressions or decisions, if any, may be found in other jurisdictions not consonant with the clear line of well-established authority in this state must be disregarded by me, for the simple reason that the parties hereto are stockholders in a New Jersey corporation, governed in their relations and rights, so far as relates to the matters here involved, by the law established by the Legislature and declared by the courts of this state. The complainants, in becoming stockholders in the corporation, were entitled to rely upon that law; and the defendants, and those whom they represent, acquired their stock subject to the same law, and must be content to be bound thereby. *Chancellor Magie*, in the case of *Kreissl v. Distilling Co.*, cited with approval the previous decisions of this court, and formulated the doctrine to be deduced therefrom in the language above quoted, and granted an injunction against a voting pool in that case, depriving the members of the right to vote on the stock held by them, using this language: "While I would entertain no doubt that the gentlemen composing these trustees would not take advantage of withdrawing stockholders, and execute a plan they disapprove of, the fact that they are given express power to do so, and the power to elect the board of directors to co-operate with them, deprives the transaction of any tentative character and justifies its being pronounced contrary to public policy, in that it provides for a possible management of the affairs of the company during a fixed period

of time, by the judgment and determination of others, and not by the judgment and determination of complainant's associates in this corporation." His decision in that case binds me, even if I disagreed with him, which I do not.

The general doctrine stated by him, as derived from the previous cases, as forming the basis of his decision, was expressly approved by the Court of Errors and Appeals in *Chapman v. Bates*. So that, though the result, owing to the circumstances, was different in *Chapman v. Bates*, there is not the least conflict between the final decision in that case and that of *Chancellor Magie* in the case before him. It may not be out of place to say that a copy of *Chancellor Magie's* opinion was promptly forwarded by *Mr. Warren* to the solicitors of the defendants in London.

Upon the whole case, then, I conclude that the complainants are entitled to succeed on both grounds put forward by their counsel, viz.: First. That the creation of the pool, with its ironclad provisions, and without the knowledge or consent of complainants, gave the defendants, as holders of the foreign stock, an unfair and an unjust advantage, in that it deprived the complainants of the right to appeal to and have the benefit of the individual judgments of the foreign stockholders upon any and all matters connected with the policy or management of the corporation. Second. That the equitable owners of the shares (the legal title to which was held by the defendants), from whom the complainants derived equitable title to those shares, had the right by the law of this state to revoke the self-assumed authority of the defendants, and to compel the latter to transfer the legal title to them as equitable owners, and that such right passed with the equitable title to the complainants, who are entitled to enforce the same in this court.

I will advise a decree that the motion to dissolve be denied, but, as the complainants amended after the defendants had prepared their answer, without costs.

(65 N. J. E. 329)

IN RE HODNETT'S WILL.

(Prerogative Court of New Jersey. May 26, 1908.)

WILLS—PROBATE—JURISDICTION OF ORDINARIES—NOTICE—CONTEST.

1. At the time of the instructions to *Lord Cornbury*, the English ecclesiastical courts had jurisdiction to require an executor who had proved a will in common form, i. e., without notice to the persons interested, to prove the will in solemn form, i. e., upon notice to the persons interested.

2. The powers conferred upon *Lord Cornbury* respecting the probate of wills included the power to require an executor to prove his will in solemn form.

3. The powers thus conferred were possessed by the succeeding governors under royal appointment, and by the governors elected under

the Constitution of 1776, and were transferred by the Constitution of 1844 to the chancellors, sitting as ordinaries in the Prerogative Court. The power to require probate in solemn form has never been taken away (if, indeed, it could be) by legislation. Nor does the fact that instances of the use of that power are not discoverable indicate that it has been abandoned so that it cannot be now exercised in a proper case.

4. An executor may, of his own accord, prove his will before the ordinary, upon notice to all parties interested.

5. A widow of a testator, who was a minor at the time the executor proved the will before the ordinary and at the time of applying for relief, upon proof that there is fair ground for contesting the validity of the will in respect to its execution or the testamentary capacity of the deceased, or as to the will being the product of undue influence, presents a proper case for the exercise of the power to require the probate before the ordinary in solemn form on notice to all parties interested.

(Syllabus by the Court.)

In the matter of the will of William T. Hodnett. Petition for probate of will. Order for proceedings on notice to all parties concerned.

Charles H. Hartshorne, for petitioner. R. V. Lindabury, for executor.

MAGIE, Ordinary. On March 25, 1902, a petition, signed by Thomas P. Fay and Emma S. Hodnett, was presented to the ordinary, praying that the last will of William T. Hodnett, deceased, and a codicil thereto, should be proved in the Prerogative Court, and letters testamentary issued thereon to said Fay, who was appointed by said will executor thereof. The petition was sworn to by both of the petitioners on the day it was presented. Accompanying the petition was an affidavit made by said Fay, which, in the mode usual in such cases, made proof that no caveat against the probate of any will of William T. Hodnett, deceased, had been filed in the office of the surrogate of the county of Monmouth, in which county said Hodnett was domiciled, and in which he died. Thereupon two persons, who were the witnesses to both will and codicil, were presented, and, being sworn, made out the execution of both will and codicil by the deceased in the ordinary mode. Probate was thereupon allowed, and letters testamentary were issued to said Fay, named in said will as executor, and he thereupon took the usual and prescribed affidavit. On November 19, 1902, a petition was presented to the ordinary by said Emma S. Hodnett, represented by her father and next friend, Charles A. Anderson. The petition, among other things, asserted that Emma S. Hodnett was a minor, 20 years of age, residing with her said father in this state, and was the widow of said William T. Hodnett, deceased, who died at his residence, in the county of Monmouth, seised of considerable property; that Thomas P. Fay had for a long time been the legal, business, and confidential adviser of said deceased, and continued to be such up to

the time of the death of said deceased; that said Fay drew the said will, and superintended its execution; that at the time it was executed the deceased was, by reason of disease induced by dissipation, incapable of making a testamentary disposition of his property, and that the execution of the will did not conform to the requirements of the statute; that the codicil to said will was afterwards prepared by said Fay, and he also superintended its execution, and that its execution was not in accordance with the statute. The petition further asserted that after the death of petitioner's husband said Fay acted as her confidential adviser, and that she had signed the petition for probate of the will and codicil at his request, and because she inferred from such request that it was her duty to do so. It was also therein charged that by the provisions of said will and codicil the said Fay obtains a large share of the property of the deceased; that said deceased had previously made a will, when fully capable of making a testamentary disposition of his property, in favor of the petitioner; that it was duly executed, and, if not revoked by the later will and codicil, ought to be probated. The prayer of the petition is that the order admitting to probate the will and codicil and granting letters testamentary thereon should be set aside; that petitioner should be permitted to prove the facts asserted in the petition, and to show that the will and codicil were procured by fraud and undue influence; that the earlier will should be admitted to probate, and that said Fay (who, it was charged, had obtained that will from its custodian) should be ordered to deliver it to the court, and that he should be restrained from performing any act as executor under his letters testamentary; and that petitioner should have such other relief as she should be entitled to. Appended to the petition was a copy of the earlier will mentioned therein, with an affidavit of a New York lawyer to the effect that such a will, dated January 14, 1901, had been drawn by him under instructions from the deceased, and had been duly executed by the deceased, and that the copy annexed had been taken from an office copy of the original will, retained by him in accordance with his usual custom, and that the original will had been delivered by him to a person acting under authority from said Fay. There were also appended the affidavits of petitioner, and of a servant residing in the house at the time the will and codicil were executed, supporting and affirming the matters charged in the petition, and the affidavits of physicians respecting the condition of the husband at previous periods of his life.

Upon the filing of the petition an order was made directing said Fay and the persons interested under said will and codicil to show cause before the ordinary on December 9, 1902, why the order admitting the will and

codicil to probate should not be revoked and annulled, and why said Fay should not be ordered to deliver to the court the alleged prior will of January 14, 1901, and why said Fay should not be restrained from performing any act as executor or trustee until the further order of the court. The order to show cause was brought to hearing on December 16, 1902, to which time the matter had been adjourned under a stipulation of counsel.

On December 16, 1902, Fay, the executor, filed an answer to the petition, supported by his own affidavit that the matters therein stated were true. The answer substantially denied many of the allegations of the petition. No replication to the answer was filed, nor was there any request for a direction to take testimony upon the contested questions of fact. The order was brought to hearing upon the petition and answer and the affidavits accompanying each of them.

On behalf of the petitioner, it was first contended that the case disclosed a fraud perpetrated upon the ordinary, which ought to require and compel the vacation of the former action. The fraud charged was in the representation that the widow of the deceased, who was in fact a minor, incapable of acting for herself, had capacity to join in the application for probate. But the jurisdiction of the ordinary to grant probate of the will and codicil did not in any respect depend upon the application of the widow. If she had not joined in the petition, the application of the executor, upon the proofs submitted, would have justified the ordinary, under the practice and legislation presently to be considered, in proceeding to admit the will and codicil to probate. If, upon the petition in which she joined having been presented, it had been disclosed that she was a minor, that circumstance would not have deprived the court of jurisdiction. If, indeed, it had been further disclosed that Fay, who propounded the will and codicil upon an application in which he had procured her to join, knew that she was incapable of acting for herself by reason of nonage, that circumstance might have caused the ordinary to pause, and perhaps institute proper inquiry before allowing probate. But while the affidavits seem to properly make out that petitioner was in fact a minor, it is not made to appear that Fay knew that she was not of full age, and he swears in positive terms that he had no knowledge of the fact. There is, therefore, no conscious, intentional deception of the ordinary shown, and since it was not necessary that the widow should have joined in the application, if the facts now appearing respecting her infancy had been then disclosed to the ordinary, he could, and probably would, have proceeded to allow probate. My conclusion is that this ground will not support the demand for a revocation or annulment of the former action of the ordinary in allowing probate.

But it is next contended that the case dis-

closes fraud of such a character as to justify an immediate vacation of the probate. The fraud on which reliance is placed for this demand consists, it is argued, in procuring a testamentary disposition of property from a man incapable of making it by one who occupied a relation of trust and confidence, and that the disposition thus procured gave to this confidential agent and adviser a large share of the estate of the deceased, and that no sufficient proof appears to rebut the presumption that such disposition was obtained by undue influence arising from the recognized and admitted relation between Fay and the deceased. I do not deem it necessary to discuss this contention at length. It is to me a novel proposition that an order admitting a will to probate, made without objection and without deception of the court, may be vacated under an order to show cause, upon proof of the invalidity of the will because of incapacity, improper execution, or undue influence. If, however, the proposition is well founded, this case is not within it. The allegations of fraud in the respects mentioned, if supported by affidavits, are met by positive denials. The case is not ripe for adjudication upon this claim, if any adjudication could be made.

But another contention made on behalf of petitioner demands consideration. When the order to show cause came on for hearing, it was made to appear that notice had been given of an application by petitioner for an amendment of her petition, so that it might pray for an order or decree requiring the executor to prove the will and codicil, previously admitted to probate, in solemn form. Upon discussion, the application for such amendment was withdrawn, but petitioner's counsel insisted that, if the ordinary found, upon the case presented, that petitioner was entitled to such relief, it should be granted under the general prayer of her petition. Much of the brief submitted for petitioner maintained the proposition that, upon the matter before the court, petitioner should have such relief, and that such relief is within the power of the court. Upon consideration, I have reached the conclusion that if the case presented entitled petitioner to an order or decree requiring probate of this will and codicil in what is known as "solemn form," and if this court can make such an order or decree on a petition for such specific relief, it will be the duty of the court to afford relief upon this petition. That sort of relief is germane to the specific relief prayed for therein, and therefore fairly falls within a general prayer for relief under the ordinary rules of equity pleading and practice.

The distinction between probate of wills in common and in solemn form, well recognized in the practice of the English courts of probate, seems not to have attracted much attention from our courts until the publication of the opinion of Chancellor McGill, sitting as ordinary, in *Straub's Case*, 49 N. J. Eq. 364, 24 Atl. 569. In that case a will had been

admitted to probate by a surrogate without objection. After the time for an appeal from the surrogate's act had expired, the orphans' court, upon a petition presented to it, alleging that the will was the product of fraud and undue influence, and praying that the surrogate's probate should be set aside, allowed an order to show cause why the prayer of the petition should not be granted, and, upon argument, discharged that order. Upon an appeal to this court from the order last named, the ordinary determined that the orphans' court was without jurisdiction to initiate such a proceeding. But he proceeded to express an opinion that, upon an application to the surrogate, although made after the time for an appeal from his act had expired, the surrogate would have jurisdiction to cite the parties interested to appear before the orphans' court, which court would have jurisdiction to require an executor to prove the will in solemn form. The decision of the ordinary in that case was affirmed by the Court of Errors for the reasons given by him. *Scharer v. Schmidt*, 50 N. J. Eq. 795, 27 Atl. 1033. But the approval of the decision was not intended to indicate approval of the opinion of the ordinary respecting the jurisdiction to require probate in solemn form, as was shown in the *per curiam* opinion shortly afterward delivered in *Gordon v. Old*, 52 N. J. Eq. 319, 30 Atl. 19. Afterward, the opinion expressed by the ordinary respecting the jurisdiction of the surrogate and the orphans' court in such cases was put to a judicial test. A will was admitted to probate by the surrogate of Essex county, without objection. The time for appeal had expired. Thereafter parties interested applied to the surrogate for citations to the executors and all parties interested, requiring them to appear before the orphans' court of that county for a probate of the will in solemn form. The orphans' court declined jurisdiction, and upon an appeal to this court the action of that court was approved and affirmed. The court, in reaching that conclusion, felt bound to treat the opinion of the ordinary in the *Straub Case* as not correctly expressing the powers of the surrogate and orphans' court in such matters. It was held that after a will had been admitted to probate by a surrogate, and no appeal had been taken within the time limited by statute, no jurisdiction existed in the surrogate to refer to the orphans' court the question of probate in solemn form, and no jurisdiction existed in the orphans' court to direct such probate. In *re Cartwright's Will* (N. J. Prerog.) 51 Atl. 713. Upon appeal to the Court of Errors and Appeals, the decree of the Prerogative Court was affirmed for the reasons expressed in the opinion delivered in that court.¹ In delivering the opinion in the *Cartwright Case*, I expressly refrained from considering the power of this court in respect to probates, in solemn form, of wills produced and probated before the ordinary. The statutory jurisdiction conferred upon sur-

rogates' and orphans' courts was deemed not to extend thereto after the time for appeal had elapsed. Whether the ordinary might not require a will proved before him to be again proved in solemn form was not decided, and decision upon his power and duty in that respect is now required.

An examination of the practice of the English ecclesiastical courts, and of the courts which have succeeded to their jurisdiction in matters of probate, discloses the distinction made in those courts between probate in common and probate in solemn form. Originally a probate in common form was allowed upon the mere production of the will, accompanied by the affidavit of the executor that he believed it to be the last will of the deceased testator. Thereafter the executor could be required, under certain circumstances, to prove the will in solemn form. In the third edition of *Conset's Practice of the Spiritual or Ecclesiastical Courts*, published in 1708, the practice under the powers of the court is thus stated: "If any will be proved in common form (which is done by the sole oath of the executor), if any person have an interest in the administration of the deceased's goods (being perhaps prevented of his interest by the pretended will), he may force the executor to prove the will by witnesses, which if the executor do not sufficiently prove, sentence is to be given that the deceased died intestate, and that the probate of that will, so granted in common form of law, is to be annulled and revoked." *Conset's Practice*, p. 10. This probate was also called probate *per testes*, because the executor was required to produce evidence of the execution of the will, including the witnesses thereto, if any, upon notice to the parties interested, involving opportunity for them to appear and be heard. But that the distinction between the two forms of probate was not deemed to depend on the fact that the witnesses to the will were required to be examined for a probate in solemn form, which was not necessary to a probate in common form, seems clear. For after the English wills act of 1837 took effect, the allowance of probate on common form was upon an affidavit of one or more of the witnesses to the will, making out its execution in conformity with the requirements of the act. Yet thereafter probate in solemn form was frequently required. This course of practice indicated that probate in solemn form was resorted to, not because the witnesses to the will had not been produced and examined, but because the examination was wholly *ex parte*, no opportunity being given to any party interested to appear and make objection, and interpose with cross-examination and the production of testimony. So we are justified in the view that the real distinction between the two classes of probate consisted in the facts that one was allowed without notice, and the allowance of the other was only upon notice to the par-

¹ *Murray v. Lynch*, 55 Atl. 1123.

ties interested, with opportunity to attend and be heard on the question of probate. It is unquestionable that the jurisdiction in matters of probate and administration which existed in the English ecclesiastical courts at the time of the instructions to Lord Cornbury, in 1702, were by those instructions conferred upon the governors of New Jersey. That jurisdiction was exercised by the successive governors of the province or colony, and of the state, after it was established by the Constitution of 1776 and the successful Revolution of the United States. By the Constitution of 1844, the same jurisdiction was transferred to the chancellor, whose appointment was thereby provided for, to be exercised by him as ordinary sitting in the Prerogative Court. The jurisdiction of the governors over matters of probate was, in 1843, discussed by Pennington, Ordinary, and traced to the instructions to Lord Cornbury. In *re Coursen's Will*, 4 N. J. Eq. 408. The English ecclesiastical courts undoubtedly possessed power to require a will, which had been admitted to probate without notice to the parties interested, to be proved thereafter in solemn form upon notice to such parties. Conset's Prac. 10; Tristram & Coote, Probate Prac. 353; Brown's Prob. Prac. 99, 275; 4 Burn's Ecclesiastical Prac. 196, 199; Powles & Oakley, Prob. Prac. 103. Was that power conferred upon the successive colonial and state governors, and transmitted to the chancellor sitting as ordinary? If the power now resides in the ordinary, in what case should it be exercised?

In his opinion in the *Straub Case*, Chancellor McGill fortified his position by declaring that the exercise of the power to require probate in solemn form, even after the lapse of a long period of time, was not oppressive upon the executor, because he might have proved the will originally in solemn form, with notice to all parties interested. In the opinion delivered in the *Cartwright Case*, I pointed out that such a probate could not have been obtained by an executor of a will which was uncontested and which was offered for probate before a surrogate. But the power of an executor to prove a will before the ordinary in solemn form and with notice, although no caveat has been filed and no contest made thereon, was plainly recognized in the English practice. It is thus stated by Conset: "If an executor who is a stranger to the deceased, (that is) no way related to him, have the greatest part of the deceased's goods bequeathed to him, and is doubtful lest the children or next of kin or widow of the deceased should commence suit against him for the future, he may, by virtue of that will, call the relict and children or next of kin of the deceased in special (if they think themselves any way interested), and all others whatsoever in general, that pretend to have any interest in the last will and testament of the deceased, or in the administration of his goods, to come

and see the will proved by witnesses, and lawful proof being made of this will, and a definite sentence passed for the validity of it, this will can never be made invalid or voidable thereafter (so as there be no nullity in the proceedings), though the testamentary witnesses die in the meantime. And this is frequently practiced." Conset's Prac. 10; 4 Burn's Ecclesiastical Prac. 199. Citations in such cases were said to be mandatory and intimated, because they not only cite parties to appear, but intimate that if they appear not the executor will proceed to prove the will. *Id.* 27. The ancient practice seems still continued, for it is said that an executor may prove the will in solemn form, either of his own motion or in consequence of having been challenged to do so by a party interested adversely, and executors are advised to do so for their own protection. Tristram & Coote, Prob. Prac. 363; Powles & Oakley, Prob. Prac. 103. This provision, in my judgment, has long been recognized in our legislation. Such recognition seems also to involve the inference that, where the executor fails to prove the will thus, the power of the ordinary to require him to do so may in any proper case be exercised. By section 2 of the act entitled "An act respecting the Prerogative Court and the power and authority of the ordinary," approved April 16, 1846 (*Rev. St.* 1847, p. 203), it was enacted that probate of any will should not be granted by the ordinary until proof be made to his satisfaction that no caveat against proving such will had been filed in the office of the surrogate of the county where the testator resided at the time of his death, or that notice to all persons concerned had been given of the application to the ordinary for such probate. This provision is included in section 16 of the act entitled "An act respecting the orphans' court and relating to the powers and duties of the ordinary and the orphans' court and surrogates," approved March 27, 1874 (2 *Gen. St.* p. 2359), and is now included in the act of the same title approved June 14, 1898. *Laws* 1898, p. 718. In my judgment, this legislation has always permitted an executor who propounds his will before the ordinary to adopt one of two alternatives, viz.: (1) To submit the will upon mere proof that no caveat has been filed in the county in which the testator had his residence at the time of his death, or (2) to give notice to all persons concerned of the application for probate. If he adopts the former alternative and satisfies the ordinary that no caveat has been filed, he may then propound the will and obtain his probate without having given any notice. If, however, a caveat has been filed, the ordinary would not proceed to allow probate except upon notice. But the alternative provision is so general as to indicate plainly that it was intended to permit the executor to proceed for probate upon such notice whether a caveat had been filed or not. Upon this construction of the act, it

follows, in my judgment, that any person noticed to attend the probate must be admitted to cross-examine the testamentary witnesses and to produce evidence on the matter of the will, and a contest against the will could be maintained by him. It also follows that any person who has been noticed to attend and has refrained from attending, or who has attended and made no contest, would be thereafter estopped, by the order admitting the will to probate, from any further contest, at least on matters then apparent or discoverable. If any party concerned, and noticed to attend, was an infant, there can be no doubt, I think, that the incidental powers of the ordinary would extend to the appointment of a guardian ad litem, by whom the infant might appear, pursuant to the usual practice of courts having equitable and ecclesiastical jurisdiction. The notice would seem to be necessarily personal, there being no provision, as there is in some states, for substituted or constructive notice by publication, etc. *Am. & Eng. Enc. (1st Ed.)* 180. This sort of probate on notice, in cases where no contest was made over the will, as has already been stated, was recognized practice of the English ecclesiastical courts, and is also a practice of the present probate courts. Executors might prove a will in solemn form, either of their own motion, or in consequence of having been challenged to do so by a party interested adversely. Executors are advised to thus prove their will for their own protection. *Tristram & Coote, Prob. Prac.* 363. The present requirements of the probate court for obtaining a decree for probate in solemn form, in an uncontested action, are set out in the same book, at page 352 et seq., and it is therein declared that the recognized difference between a probate which has been granted in common form and a probate which has been granted in solemn form is that the former is revocable, and the latter, provided proper precautions have been taken, is, subject to one exception, irrevocable. The one exception seems to be the after discovery of a will later in date than that admitted to probate. *Id.* 355. Another exception is said to be where the decree has been obtained by fraud or collusion. *Powles & Oakley, Prob. Prac.* 103.

Whether or not the ordinary did not possess power to permit probate of an uncontested will on notice before the act of 1846, above cited, need not be determined. But as it was a practice of the ecclesiastical courts of England, whose powers were conferred on the governors of the colony and state, it would seem probable that such legislation, adopted shortly after the period when the chancellor became ordinary under the Constitution of 1844, was rather a regulation of a practice recognized as existing.

At the June term, Chancellor Halsted had under consideration a case presenting the following features: A will of a nonresident of this state had been admitted to probate

by him, sitting as ordinary, and without notice. Afterward a petition was presented to him praying for the vacation of the probate thus granted. An order upon the executor, to whom letters testamentary had been issued thereon, to show cause why the order admitting the will to probate should not be vacated, was made, and brought to hearing upon the petition and affidavits made in opposition. The ordinary reached the conclusion that the probate should be vacated, upon a consideration of the terms of section 2 of the act of 1846, above cited. As it appeared that the testator was not a resident of this state at the time of his decease, and it was obvious that the proponent of the will could not have been entitled to probate under the first alternative proof, viz., that no caveat had been filed with the surrogate of the county where the testator resided at the time of his death, the ordinary held that it was essential for the proponent to have made proof under the second alternative, viz., that notice had been given to all persons concerned of the application for probate. As it further appeared that no such notice had been given, the conclusion was that the probate had been improperly granted, and it was vacated. *In re Lawrence*, 7 N. J. Eq. 215. I have examined the record of the order made by the ordinary in that cause, and find that, in addition to vacating the probate previously granted, it was further ordered that, if application for probate of the will should be afterwards made, it should be upon notice.

I have been unable to discover any other case involving the construction of the legislation above referred to in these respects, or throwing any light on the question now under consideration, until the opinion expressed in the *Straub Case*. This examination seems to indicate that the power to order a will which has been admitted to probate without notice, to be afterwards proved with notice, has either not been exercised, or has been exercised in rare instances, which have not been contested and have escaped notice. But I am unable to draw therefrom the inference that such power has never existed in the ordinary, or that it has been so abandoned as to prohibit its exercise in a proper case. That such power existed in the English ecclesiastical courts, and was among those powers conferred upon the ordinary of the colony and state, I deem to be entirely beyond dispute. That it has not been (if, indeed, it could be) taken away from the ordinary by legislation, I deem equally clear. Its disuse does not show abandonment, if it could thus be abandoned. For these reasons, I deem myself possessed of authority to require an executor who has proved a will before me without notice, to prove the same will with notice to all the parties, whenever a proper case for such action is presented.

The remaining question is, what is a prop-

er case requiring such action? This question, if thoroughly considered and completely answered, would involve much that would be entirely unnecessary to the decision of this case. It would require me to trace the limits and fix the bounds of my jurisdiction in this regard. For example, Chancellor McGill, in the Straub Case, declared that the demand for probate in solemn form might be made at any time within 30 years. It is said, as to the present English practice, that any party whose interest is adversely affected by a probate granted in common form may, without any limitation of time, call it in and put the party who obtained it, or his representative, upon proof of the will in solemn form. *Tristram & Coote, Prob. Prac.* 353. But there is legislation in England protecting an executor against payments, etc., made before the revocation of the probate under that practice. The ancient practice seems to have considered a time to be limited; according to Swinburne, to 10 years, but, according to Dr. Godolphin, to 30 years. 4 *Burn's Ecc. Prac.* 199. Obviously, I ought not to determine in this case the extent of time within which such relief may be sought. For if a party seeking relief comes without laches, as the petitioner does, the question of the extent of the limitation of time is of no consequence.

Nor is it necessary in this case to definitely determine what kind or what amount of proof is requisite to move the court to grant such relief. Under the English practice, it would seem that the court exercised its power to require probate in solemn form almost as a matter of course. When the probate was granted upon the mere affidavit of the executor that he believed the instrument propounded was the last will of the decedent, there would seem to be a reason for such a practice, which would not apply where probate, though without notice, is only granted upon proof of the instrument as a will. Yet, in many cases, ground was shown for the exercise of the power. Under our practice, pursuant to which a contest may be raised by any one interested by caveat or appeal, I think probate in solemn form ought not to be compelled except upon some good ground shown. It is manifestly unnecessary to prove that the probate previously granted had been improperly granted, by showing that testator did not, in fact, possess testamentary capacity, or that the will was in fact the product of undue influence. It will be sufficient to justify the ordinary in requiring probate on notice if there is made to appear to him a fair ground for contesting the validity of the will in respect to its execution, or the testamentary capacity of the testator, or as to the will being the product of undue influence.

It is equally unnecessary to decide in this case who may apply for probate in solemn form. If any person who is *sui juris* has

knowledge of the death of the testator and of grounds for contesting his will, or might by due diligence have discovered such grounds, and has neglected to caveat against probate being granted, it could hardly be conceded that he could afterward be heard to demand that an executor should be required to reprove the will on any such grounds.

Applying these views to the case in hand, I think the power to require probate in solemn form ought to be exercised. Petitioner, the widow of the deceased, appears to be a minor. If the executor had elected to prove the will on notice to all persons concerned, he would have been obliged to give notice to her, and, unless some person appeared for her, to procure the appointment of a guardian *ad litem* for her, who would have represented her in the proceeding. She is therefore a person concerned who may now apply for this relief by a next friend, and it cannot be denied that the application has been made within a reasonable time.

The facts asserted and admitted, in my judgment, justify the conclusion that a case for relief of this nature is presented. The will and codicil were admittedly drawn by the legal adviser and confidential agent of the deceased. Testator is admitted to have been addicted to the excessive use of intoxicating liquors, as a result of which he suffered many attacks of delirium tremens, and from time to time was treated in sanatoriums. There is evidence of his condition, at or about the time the will and codicil were executed, sufficient to justify inquiry as to his capacity. There is further evidence respecting the mode of execution of the will and codicil sufficient to justify the examination of the persons present at the execution, and particularly the persons who signed as testamentary witnesses.

It is not improper to add that these considerations are re-enforced by the admitted fact that petitioner under a previous will was given a much larger share of her husband's estate, and under the will and codicil here in question her share is much diminished, and a large share of the estate is given to testator's friend and adviser who drew and superintended the execution of these papers.

My conclusion, therefore, is that the executor in this case should be required to prove this will and codicil in solemn form, upon notice to all parties concerned. A convenient practice in that regard is that now in use in the English probate courts, whereby the executor is cited to bring in his probate and to show cause why it should not be revoked and the will pronounced invalid. *Tristram & Coote, Prob. Prac.* 367.

An order will be made continuing the restraint upon the executor, and directing him to bring in his probate on a day fixed, of which he shall give notice to all parties concerned, and on that day to proceed to prove the will as if propounded upon notice.

(65 N. J. E. 123)

**SWEDESBORO LOAN & BUILDING
ASS'N v. GANS et al.**

(Court of Chancery of New Jersey. June 5,
1903.)

**CANCELLATION OF MORTGAGE—MISTAKE OF
LAW—RELIEF IN EQUITY.**

1. On the death of a mortgagor, complainant, the mortgagee, secured a release of the widow's right of dower in the premises, and also a deed from the mortgagor's father, under the belief that the property descended to the latter, and canceled the mortgage. No consideration was paid for such cancellation. *Held* that, as against the heirs of the mortgagor, complainant was entitled to a decree for the re-establishment and foreclosure of the mortgage.

Suit by the Swedesboro Loan & Building Association against James Gans and others. Decree for complainant.

Norman Grey and W. B. Wolcott, for complainant. Thomas E. French and Samuel Richards, for defendants.

REED, V. C. This suit is brought to have a mortgage, which has been canceled upon the record, re-established and foreclosed. The facts, as I gather them from the pleadings, from the meager testimony, and from the position taken by counsel, are as follows: One Charles Gans, of Gloucester county, made a mortgage dated March 11, 1892, to the Swedesboro Loan & Building Association, to secure the sum of \$1,100, payable in one year. Charles Gans, the mortgagor, died June 9, 1894, intestate, leaving him surviving, his widow, Kate P. Gans, and as his heirs two brothers, James and John, and three sisters, Jennie, Phebe, and Mary. On April 1, 1895, the widow released to the complainant her right of dower in the mortgaged premises. The complainant accepted a deed from one Sebastian Gans, the father of Charles, the deceased mortgagor, under the belief that on the death of Charles the property descended to his father. After the execution of this deed the loan and building association, believing that it held the legal title to the premises, on August 5, 1895, canceled its mortgage. The procurement of the deed from Sebastian Gans seems to have been accomplished by one Benjamin McAllister, who was a scrivener, and was at one time a director of the building association and did writing for them, and who seems also to have been mixed up in the settlement of the estate of Charles Gans. He apparently acted as intermediary between the building association and the Ganses, and got the deed, which the complainant accepted, upon his word, as a conveyance of the equity of redemption in the mortgaged premises. Upon the execution of this deed the complainant went into possession, and has since received the rents and profits therefrom. There can be no doubt that the cancellation of the mortgage was induced by the belief that by force of the deed of Sebastian Gans the loan association owned a complete title to the property.

It is thus manifest that the equity of the situation is entirely with the complainant. The defendants, as heirs of Charles Gans, received the property subject to the lien of this mortgage. The cancellation of the mortgage was a pure gift to the defendants of the mortgagee's interest in the property. The heirs had not paid one cent to bring about this change in the respective position of mortgagee and heirs. Neither has any purchaser, bona fide or otherwise, come into existence upon the faith of the cancellation of the mortgage. It is clear, therefore, that, unless some inexorable rule compels otherwise, the complainant should be relieved from the predicament into which it was misled by its belief in its ownership of a complete title to the mortgaged property.

The substantial ground upon which the heirs resist the granting of this relief is that, while the cancellation was caused by a mistake of the complainant, it was a mistake of law, and not of fact. The maxim, "*Ignorantia juris excusat non*," is invoked by the defendants. This maxim is subject to so many exceptions that it is quite as often inapplicable as applicable to suppose mistakes of law.

That the present case, involving the release of private rights under a mistaken notion as to private ownership of property, is one in which the English courts of chancery would afford prompt relief, cannot be doubted. The line of cases granting relief where a man purchased his own property through mistake (*Bingham v. Bingham*, 1 Vesey, 127), or where a release was made so broad in its terms as to release rights of property of which the party was ignorant (*Chalmondley v. Clinton*, 2 Mer. 171), or where a party, under the misapprehension that he had no title, surrendered to the supposed owner (*Pusey v. Desbouvie*, 3 P. Wm. 315), exhibit the degree in which courts of equity granted relief from such mistakes. In *Livesey v. Livesey*, 3 Rus. 287, an executrix who, under a mistaken construction of a will, had overpaid an annuity, was permitted to deduct the amount overpaid from subsequent payments. In *McCarthy v. Decaix*, 2 Rus. & My. 614, a person was relieved where he had renounced a claim of property made under a mistake respecting the validity of a marriage; the Lord Chancellor saying, "What he has done was in ignorance of the law, possibly of fact; but in a case of this kind this would be one and the same thing." In *Cooper v. Philbbs Lr.*, 2 H. L. 142-172, s. c. Eng. Rul. Cas. 870, an agreement was canceled because it had been entered into through a mistake as to the ownership of a fishery. In this case Lord Westbury expressed the much-discussed sentiment that the word "*jus*" in the maxim is used to denote a general law, and has no application to private rights. The result of this decision of the House of Lords was that an act caused through a mistake as to own-

ership of property would be remedied in equity. In *Beauchamp v. Winn*, 6 H. L. 223-264, s. c. 22 Eng. Rul. Cas. 889, a mutual mistake in an agreement as to the rights of the parties resulted in a correction of the agreement.

The result of the English cases is summed up by Mr. Kerr in the remark "that if a man, through misapprehension or mistake of the law, parts with or gives up private rights to property, or assumes obligations, upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief, if, under the general consideration of the case, it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired." Kerr on F. & M. p. —. This statement of the equitable rule was cited with apparent approval by Chancellor Runyon in *Macknet v. Macknet*, 29 N. J. Eq. 54-59, and in *Martin v. N. Y. S. & W. R. R.*, 36 N. J. Eq. 109-112.

The equity cases in this country, more particularly the earlier cases, exhibit a less liberal spirit in granting relief for mistakes in law. This resulted mainly, I think, from the great influence which the early reported cases decided by Chancellor Kent had in shaping the early equity jurisprudence of this country. The case of *Lyon v. Richmond*, 2 Johns. Ch. 60, was an application to set aside an agreement because it was entered into under the influence of a supposed condition of the law, and afterwards the Court of Errors rendered a decision which changed the law as it was supposed to exist when the agreement was made. In deciding that the court could grant no relief, Chancellor Kent, having in mind, of course, the particular facts of that case, made some general remarks in respect to the impolicy of a court of equity attempting to relieve against mistakes of law. These remarks appear again and again in the earlier cases, being used as a general authority against the granting of relief in all cases of mistakes of law. These remarks appear in the opinion in the decision in the case of *Garwood v. A. Dr. of Eldridge*, 2 N. J. Eq. 145, 34 Am. Dec. 195, which case is invoked as conclusive against the restoration of this mortgage. In that case Chancellor Pennington declined to establish certain mortgages which had been canceled by a mortgagee who purchased the equity of redemption, and by the cancellation a judgment, of the existence of which the mortgagee was ignorant, became a superior lien upon the property. The chancellor stated the rule to be that relief would not be granted to the complainant if his mistake was as to the legal effects of the cancellation in advancing the lien of the judgment. The remarks of the chancellor were uncalled for, because he found that there was no mistake of law at all. The mistake was in the mortgagee's failure to search the record, the result of his negligence being that he was unaware of the existence of the judg-

ment. His mistake was one of fact, and the negligence of the complainant was the real ground for his defeat. This case and *Lyon v. Richmond*, supra, are cited in the case of *Bentley v. Whittemore*, 18 N. J. Eq. 368-374, in which case Chancellor Zabriske stated that certain mortgages which had been canceled upon the faith of an assignment, which assignment he held to be void, could not be restored because the cancellation was induced by a mistake at law. This case was reversed (19 N. J. Eq. 462, 97 Am. Dec. 671), the Court of Appeals holding that the assignment was valid. The assignment, therefore, being valid, the question of the establishment of the canceled mortgages was eliminated from the case, and the chancellor's remarks became dicta.

The remarks of Chancellor Kent appear in *Executors of Wintermute v. Ex. of Snyder et al.*, 3 N. J. Eq. 489, where there was an assignment of the interest of certain parties under a will, and their ignorance of their rights under that instrument misled them to the execution of the assignment. Chancellor Vroom refused to grant relief, upon the ground that the mistake was one of law. The learned chancellor, however, was careful to exclude the inference that in his judgment there could be no instance where equity could relieve against mistakes of law. The case itself holds that this dispositive instrument, the execution of which had been induced by mistake of law, would not be rectified. This was the doctrine announced by Chancellor Runyon in *Hampton v. Nicholson*, 23 N. J. Eq. 423. The chancellor said that where a purchaser accepts a deed by which no title is conveyed when there is no misapprehension as to the facts and no fraud and no warranty of title, he has no redress in law or equity. But in that case a mortgage had been canceled, and the chancellor proceeded to remark: "If the mortgage had been canceled without actual payment on the mistaken supposition that the deed merged and satisfied it, and the debt of three hundred dollars due from the testator to the complainant had been given up and discharged on the belief that it was satisfied by the amount due for the conveyance, this canceling and satisfaction, being entirely without consideration, could in equity be set aside, and the debts be declared to be subsisting." In *Skillman et ux. v. Teeple*, 1 N. J. Eq. 232, the holder of notes released a mortgagee from his liability upon the notes under a misapprehension as to her legal rights at the time. Drake, Master, said: "In this case there can be no doubt that the complainant and Teeple acted under a mistake or misapprehension of her rights. Under such a mistake she signed a parol agreement without any consideration, and highly prejudicial to her interests. I am of the opinion that the agreement should be set aside."

Our later cases display a desire to dis-

cover some ground to rectify an inequitable result flowing from mistakes of all kinds. *Chilver v. Weston*, 27 N. J. Eq. 435; *Macknet v. Macknet*, supra; *Martin v. N. Y. S. & W. R. R.*, supra; *Young v. Hill*, 31 N. J. Eq. 429. The ability of courts of equity to rectify mistakes arising from ignorance of the law is everywhere acknowledged to exist in certain instances. The propriety of exercising this power must depend upon the circumstances which surround each case. It will depend upon whether a party who asks relief has been negligent; whether he has been led into his belief by the other party; whether other innocent parties will be injured by a rectification of the mistake; or whether the mistake can be regarded as one of fact, although indirectly resulting from a mistaken notion of the law. All these and other features are to be considered in deciding whether it is equitable and politic to put the mistaken party in statu quo. The cases in which the power has been exercised are collected and classified in 20th Enc. of Law (2d Ed.) p. 16. In my judgment, the power should be exercised in the present case. The mistake was in respect to the ownership of the property upon which the canceled mortgage was an incumbrance, and the English cases treat such a mistake as one of fact.

Again, the annulment of the mortgage was without any consideration whatever. Nothing was received by the mortgagee and nothing was paid by the heirs. The language of the Supreme Court of Maine (*Freeman v. Curtis*, 51 Me. 140-145, 81 Am. Dec. 564) in respect to the execution of a release induced by a mistaken notion of the rights of the releasor is pertinent. The court said: "There was nothing between the parties as a basis for any negotiation, and there was no claim of the one against the other, valid or invalid. It was an isolated act—the obtaining of a release of five-sixths of a valuable estate without any pretense of any consideration, through the ignorance of the parties giving it. Whether the defendant was ignorant or not, it would be a reproach to the law if he should now be permitted to retain the fruits of such a proceeding." In my judgment, the heirs cannot, in the present case, equitably retain the advantage which the mistaken act of cancellation gave them.

It is said, however, that the complainant was negligent in not applying earlier for relief. It does not so appear. Nothing appears to show when it obtained its knowledge of the true condition of affairs. The complainant has been in possession since 1895. If negligence rested anywhere, it would seem to be upon the parties who permitted the complainant to receive the rents and profits from the property up to the present time.

There should be the usual decree of foreclosure, with reference to a master to take

an account of the rents and profits as a basis for ascertaining the amount due upon the mortgage.

(65 N. J. EL 5)

HAYES et al. v. UNITED STATES PHONOGRAPH CO. et al.

(Court of Chancery of New Jersey. May 28, 1903.)

JUDGMENT—RELIEF IN EQUITY—BILL—SUFFICIENCY—NEW TRIAL.

1. A bill seeking relief against a judgment at law on the ground that the complainants had a valid legal defense to that action, which they were prevented from presenting because the evidence on which such defense could be made was not discovered until after the trial and judgment, must not only show the relevancy or materiality of such evidence, but must also show that proper diligence had been used in the preparation for such trial, or that no diligence would have discovered such evidence, and it is demurrable if it fails to make such averments.

2. Since the passage of the amendment to the practice act, which permits application for a new trial at law after the term (2 Gen. St. p. 2589, § 328), a court of equity will decline to exercise its jurisdiction in respect to new trials when the relief sought may be obtained by an application to the court of law.

(Syllabus by the Court.)

Bill by Howard W. Hayes and Simon S. Ott against the United States Phonograph Company and others. Demurrer to bill sustained.

Joseph L. Munn, for complainants. Edward Q. Keasby, for defendants.

MAGIE, Ch. The United States Phonograph Company and J. Stogdell Stokes, two of the defendants, demurred to the bill in this cause. The prayer of the bill is that the said company and Charles H. Burr, Robert C. Banes, and J. Stogdell Stokes may be decreed to refund and pay back to the complainants, as executors of George W. Tewksbury, deceased, the amount, with interest, of a judgment recovered against complainants as such executors, and paid by them. The facts upon which this prayer is predicated are stated in the bill as follows: That the complainants are the executors of George W. Tewksbury, deceased, holding letters testamentary from the surrogate of the county of Essex, in which the testator died; that an action was brought against them, as executors, for the recovery of money alleged to be due from the testator to the United States Phonograph Company; that the action was brought in the circuit court of Essex county, and came to trial before that court upon the plea of the general issue interposed by complainants; that the trial resulted in a verdict in favor of the company for \$2,197.05, upon which verdict a judgment was entered, and the amount of the judgment was afterwards paid to the said company by the complainants; that the complainants have since learned that at the time the action was

¶ 1. See Judgment, vol. 30, Cent. Dig. § 834.

brought the sum above mentioned was no longer due from the testator or his estate, but had been assumed and agreed to be paid by one Challenger; that said Challenger had, before the institution of said suit, executed and delivered to said company his written obligation to pay said sum, and assigned to said company certain collateral securities for its payment, which obligation and securities said company had accepted in settlement and satisfaction of its claim; and that complainants had no knowledge or information at the time of the trial as to the assumption of the debt by Challenger, or of the acceptance by the company of the obligation and security given by Challenger to the company. The bill charges that the obligation of Challenger, with the collateral security, was in the possession of the company at the time of the pending of the suit and its trial, and was known to the officers of the company, who concealed the same from the complainants.

The specific relief prayed for in the bill is a decree for the refunding of the money paid by complainants upon a judgment obtained against complainants, and yet remaining upon the record of the court in which it was rendered. While that judgment remains open and unreversed, it presents an absolute bar against the recovery by complainants, in an action at law, of the money which they have paid thereon. An appeal to a court of equity for relief against a judgment voluntarily paid must be supported by charges of facts justifying such relief. In the case made by the bill, it is not sought to interfere with the judgment in question because complainants had an equitable defense which could not be interposed in the action at law. The ground of interference claimed is that complainants, being defendants in the action in which the judgment was rendered, had a valid legal defense on the merits, which they were prevented from maintaining by fraud, mistake, or accident; there having been no negligence or laches in respect to such defense. 3 Pom. Eq. Jur. § 1364. When such a case for interference is made out, and the judgment has not been paid, relief is granted by enjoining the enforcement of the judgment until the plaintiff has consented to a new trial, or a new trial will be otherwise had. 2 Pom. Eq. Jur. § 836; *Cairo & Fulton R. R. v. Titus*, 32 N. J. Eq. 397. When such a case for interference with the judgment has been made out, and the judgment has been enforced, equity will require repayment or restoration of money or property inequitably received upon the judgment. *Williamson v. Johnson*, 5 N. J. Eq. 537; *Herbert v. Herbert*, 47 N. J. Eq. 17, 20 Atl. 290; *Id.*, 49 N. J. Eq. 70, 22 Atl. 789. In the case last cited, a plaintiff in attachment, who had purchased lands under a sale made upon his judgment in the attachment proceedings, was decreed to reconvey the lands, upon proof that the judgment had been inequitably obtained. The Court of Errors, on appeal,

affirmed the decree, with the addition that the plaintiff in attachment should be forever enjoined from enforcing his judgment, unless he should, within a specific time, open the same, and let in the defendant to defend the suit. *Herbert v. Herbert*, 49 N. J. Eq. 565, 25 Atl. 368.

Whether, upon such a bill, the appropriate decree would enjoin the enforcement of the judgment, or require restoration of something obtained by its enforcement, is immaterial to the present inquiry. For the bill, in either aspect, is a bill for a new trial on the ground of newly discovered evidence. It is well settled that such a bill must disclose the character of the evidence alleged to have been discovered, so as to show its relevancy and materiality, and that it should further make known that there had been proper diligence used in the preparation for the trial of which complaint is made, or that no diligence would have succeeded in bringing the evidence to light in time. Failure in these particulars is held by the Court of Errors to render such a bill demurrable. *Hannon v. Maxwell*, 31 N. J. Eq. 318.

It may be open to question whether this bill discloses evidence material to the defense of the action at law. There was admittedly an obligation of the testator to the company. The bill does not assert that it was released, but only that another obligation was substituted therefor. Whether a case of novation is stated is doubtful. Addison on Contracts, 372. But there is no attempt made in the bill to show that complainants used such diligence as was required of them to discover evidence for the trial at law, or any diligence at all. On the face of the charges of the bill, it would seem that due diligence would have disclosed the present alleged defense. But if that is not a justifiable inference, the rules of equity pleading at least require a statement of the diligence in fact used. For this fault, the demurrer must be sustained.

The bill is also faulty in another respect. Bills of this character are not entertained by a court of equity if relief on the case made can be obtained by resort to the court of law. When courts of law refused to consider application for new trials, courts of equity exercised jurisdiction in relieving against judgments which had been obtained when relevant material evidence had not been produced in defense, because the defendant, although diligent in preparation, had not discovered it. But as courts of law came to listen to applications for new trials on the ground of newly discovered evidence, courts of equity withdrew from the exercise of the jurisdiction. *Hannon v. Maxwell*, *ubi supra*. While the jurisdiction of the courts of law in allowing new trials was restricted to applications made during the term at which the judgment had been entered, courts of equity exercised their jurisdiction to afford relief in such cases when the newly discov-

ered evidence had come to light too late to permit an application to the law court. As the Legislature has extended the jurisdiction of the law courts to grant new trials after the expiration of the terms, this court has further withdrawn from the exercise of its jurisdiction in that regard. *Wolcott v. Jackson*, 52 N. J. Eq. 387, 28 Atl. 1045; 2 Gen. St. p. 2589, § 328.

There are statements in the bill to the effect that the defendant company has voluntarily dissolved, and the other defendants are made parties as being the stockholders and officers of the company at its dissolution. These statements led to some question whether there was not an equity shown which might require the bill to be held in this court, notwithstanding the extended jurisdiction of the law courts. For if the newly discovered evidence proves sufficient to defeat the action and require restoration of the amount paid, this court might conveniently follow the assets into the hands of the defendants. But on examination of the corporation act of 1896, I find that if the judgment be opened, and upon a new trial a verdict and judgment pass for the defendant in the action, an action will lie against the directors, in the name of the corporation or in their own names, for debts owing by the corporation, and they are made jointly and severally responsible therefor to the amount of moneys of the corporation which came to their hands.

For both reasons, the demurrer must be sustained.

(69 N. J. L. 559)

ASBURY PARK v. LAYTON.

SAME v. MARINER.

(Supreme Court of New Jersey. June 8, 1903.)
SUMMARY PROCEEDINGS—RECORD OF CONVICTION.

1. In summary proceedings, the record of conviction must show with precision of what offense the accused was convicted.

(Syllabus by the Court.)

Thomas Layton was convicted of violating an ordinance of the town of Asbury Park, and Josiah W. Mariner was convicted of the same offense, and both bring certiorari. Convictions set aside.

Argued February term, 1903, before GARRISON, SWAYZE, and DIXON, JJ.

R. V. Lawrence, for prosecutor. John H. Hawkins, for defendants.

DIXON, J. On a complaint made before the police justice of Asbury Park that the defendant engaged in the business of carrying passengers for hire, with a stage drawn by two horses, within the limits of Asbury Park, without having first obtained a license for that purpose, in violation of section 1 of a certain ordinance set out in the complaint, the police justice "adjudged the defendant guilty of the violation of section 1, subd. 'h,'

of the said ordinance," and thereupon gave judgment that the defendant forfeit and pay to the city of Asbury Park the sum of \$15 penalty for said violation.

An examination of the ordinance, as set out in the complaint, shows that section 1, subd. "h," of the ordinance, could be violated otherwise than by engaging in the business of carrying passengers for hire, with a stage drawn by two horses, without a license, and consequently the adjudication of the justice fails to show that the defendant was found guilty of the specific charge made against him. The proceedings before the police justice were summary, and hence the record of conviction, to be legal, must show with precision of what offense the defendant was convicted. *Keeler v. Milledge*, 24 N. J. Law, 142; *Hoeborg v. Newton*, 49 N. J. Law, 617, 9 Atl. 751.

The conviction is set aside, with costs.

In the case of *Asbury Park v. Josiah W. Mariner*, the complaint and conviction are in the same form as in *Layton's* case, above, and for the same reason the conviction must be set aside, with costs.

(69 N. J. L. 557)

DRUM v. DRUM et al.

(Supreme Court of New Jersey. June 8, 1903.)

MARRIED WOMAN—ACTION AGAINST HUSBAND.

1. A married woman living apart from her husband under a decree of divorce a mensa et thoro is not enabled by our statutes to maintain an action at law against her husband.

(Syllabus by the Court.)

Appeal from District Court of Elizabeth City.

Action by Mary Ann Drum against Terence Drum and Thomas Drum. Judgment for plaintiff, and defendants appeal. Reversed.

Argued February term, 1903, before GARRISON, SWAYZE, and DIXON, JJ.

John F. Brown, for appellants. P. H. Gilhooly, for respondent.

DIXON, J. In February, 1891, the court of chancery decreed a divorce a mensa et thoro between the plaintiff and her husband, and directed the husband to pay alimony to the plaintiff. The husband failing to do so, an attachment was issued out of the court of chancery, directing the sheriff of Union county to have the husband before the court on October 7, 1902, to answer for the contempt involved in his disobedience, and authorizing the sheriff to take a bond in the sum of \$300, conditioned that the husband would appear on that day, and would abide the further order of the court. The husband, having been arrested under the writ, gave the required bond, with a surety, but failed to appear on the day designated. Thereupon the sheriff assigned the bond to the wife, and she

¶ 1. See *Divorce*, vol. 17, Cent. Dig. § 819

brought suit upon it in the district court of Elizabeth. That court rendered judgment in her favor for \$248.48, the amount of alimony due to the plaintiff under the order of February, 1891. This appeal is taken to reverse that judgment.

The difficulty in the way of supporting the judgment is the fact that a wife is incapable of maintaining an action at law against her husband. Our statute enlarging the legal rights of married women (Gen. St. p. 2012) expressly saves the common-law inability of husband and wife to sue each other. Section 14. The decree of divorce a mensa et thoro between these parties did not affect their status of marriage. It merely justified their separation. *American Legion of Honor v. Smith*, 45 N. J. Eq. 466, 17 Atl. 770. While we have several statutes giving increased privileges to married women living apart from their husbands, none confers the right to sue their spouses at law.

The appellants urge, also, that, this being a bail bond, the suit upon it should be brought in the court wherein the original action was pending, in order that the court might exercise its equitable jurisdiction for the relief of the bail. Such is the prevailing rule with regard to bail bonds given in suits at law. *Florence v. Shumar*, 34 N. J. Law, 455. But the rule does not obtain in the court of chancery, because that court has not jurisdiction of an ordinary right of action arising upon such a contract. On bonds given for appearance in the court of chancery (see Chancery Rules, p. 13), an action at law is maintainable, and the bail may obtain relief in proper cases by application to the chancellor for an order restraining the prosecution of the bond. *Bedaall v. Page*, 2 Simons, 224; 1 *Daniell's Chancery Practice*, 461. In the present case, the wife being the holder of the bond, she cannot sue upon it at law, and the remedy which she is entitled to must be sought in equity.

The judgment should be reversed, and judgment for the defendants be entered.

(90 N. J. L. 474)

BROWN v. PATERSON PARCHMENT PAPER CO.

(Supreme Court of New Jersey. June 8, 1903.)
NEW TRIAL—SECOND VERDICT—INSUFFICIENCY OF EVIDENCE.

1. In this state there is no statute, or rule established by decisions, limiting the number of times the court may set aside a verdict and grant a new trial because the verdict is against the weight of the evidence, yet a second concurring verdict upon the same state of facts or slightly varying evidence should cause the court to hesitate before granting a third trial.

2. When a second verdict may be set aside and a new trial granted.

(Syllabus by the Court.)

Action by Lawrence Brown, by his next friend, against the Paterson Parchment Pa-

per Company. Rule to show cause. Discharged.

Argued February term, 1902, before the CHIEF JUSTICE and PITNEY and FORT, JJ.

William W. Watson, for plaintiff. John B. Humphreys, for defendant.

FORT, J. The plaintiff recovered a verdict in the above-entitled cause for personal injuries. The character of the injuries was not controverted, nor is there any contention here that the damages awarded were excessive. There are no errors found in the charge or the refusals to charge of the learned trial justice.

The only remaining question is whether the verdict should be set aside because against the weight of the evidence. This is a second trial of the issue in this cause, a former verdict in the cause having been set aside because against the weight of the evidence. *Brown v. Parchment Paper Co.*, 65 N. J. Law, 111, 46 Atl. 756. While in this state there is no statute, or rule established by decisions, limiting the number of times the court may set aside a verdict and grant a new trial because it is against the weight of the evidence, still a second concurring verdict upon the same state of facts or on slightly varying evidence should cause the court to hesitate before granting a third trial. The verdict upon a second trial should not be set aside because against the weight of evidence unless the court is satisfied from the evidence in the cause that it must have been the result of (1) the disregarding of the force of the whole range of the unimpeached testimony; or (2) the palpable failure to give proper force to the unimpeached evidence in the cause offered by the party against whom the verdict is found; or (3) the giving to the testimony of the prevailing party a force to which, under the law and the facts, it was not entitled; or (4) the verdict must have been controlled by prejudice, partiality, or passion, and not based upon the weighing of the conflicting testimony in the cause.

Judge Allen, speaking for the Supreme Court of Massachusetts, declares that: "In this commonwealth there is no rule of law limiting the number of times that a judge may set aside a verdict as against the evidence. On the other hand, it has been recognized that in an extraordinary case the court may set aside any number of verdicts that might be returned." *Clark v. Jenkins*, 162 Mass. 397, 38 N. E. 974. We would adopt the same rule, but think a second verdict, to be set aside, should have in it some one, at least, of the objectionable elements above indicated. In some of the states there are statutes limiting the right of the court to set aside a second concurring verdict. In others, such limitation is imposed by a well-settled line of decisions. These cases are gathered and discussed in *Ency. Plead. & Prac.* vol. 14, p. 993.

¶ 1. See *New Trial*, vol. 37, Cent. Dig. §§ 162, 163.

In the case before us there are facts from which the jury could reasonably find for the plaintiff, a boy of 14 years of age, who was placed to work at a machine, the danger in operating which, if he was told to sprinkle the rollers, as he says he was, should have been pointed out to him. That they were not, the jury have found, and they have also found that such dangers were not obvious to a boy of his years and experience. There is evidence from which the jury might have found both these facts the other way, but, as upon both trials in this cause the jury have found these facts in favor of the plaintiff, we think, under the circumstances of the case, the rule to show cause should be discharged.

KEENEY v. HENNING.

(Court of Chancery of New Jersey. May 30, 1903.)

COSTS—COUNSEL FEES—ALLOWANCE IN SUIT FOR PARTITION—CHANCERY ACT.

1. Under the revision of the chancery act (P. L. 1902, p. 540, § 91), which provides that "in all causes it shall be lawful to include in the complainant's taxable costs, to be collected as a part thereof, a counsel fee, to be fixed by the chancellor on final decree," the chancellor could allow a counsel fee to complainant, suing for partition and for an account of rents and profits, to be recovered against the defendant in personam.

Bill by Mary Keeney against Theresa Henning for partition and account of rents. On motion of complainant for an allowance of counsel fees. Allowance advised.

For former opinions, see 58 N. J. Eq. 74, 42 Atl. 807, 53 Atl. 460.

R. S. Hudspeth, for the motion. C. L. Corbin, opposed.

PITNEY, V. C. Application for counsel fee is based, first, upon the revision of the partition act (P. L. 1898, p. 663, § 53); and, second, upon the revision of the chancery act (P. L. 1902, p. 540, § 91).

When the suit was commenced there was an infant defendant, George Henning, entitled to the same share of the premises as the complainant, namely, a one-seventh interest. After arriving at maturity he sided with the complainant, and was represented by her counsel.

The defendant, Mrs. Henning, was entitled as dowress in the whole premises, and was also entitled in fee by conveyance from five of the seven heirs at law. At or after the filing of the bill she conveyed her interest (five-sevenths) in the premises, without consideration, to her son-in-law. He seems to have promoted the defense, which was almost wholly without merit. Defendant had been administratrix of her husband, and also orphans' court guardian of the complainant; and in these capacities she had received full commissions on his personal estate, and double

commissions on the share therein of the complainant. She was also allowed, first and last, full commissions on all the rents and profits collected by her. Her counsel was also allowed \$100 for making up for the master her account of rents received.

Counsel for complainant contends, and cites authorities in favor of his contention, that the word "expenses," found in the forty-fourth section of the partition act, includes counsel fee, and urges that it would be fair to allow counsel fee in this case out of the proceeds of all the land, whereby one-seventh would fall upon George Henning, the one-time infant defendant, who obtains substantial benefit from the proceedings. Without considering the merit of that position, I think the case comes clearly within the ninety-first section of the chancery act, and think the complainant in this case should be allowed a counsel fee, to be recovered against the defendant, Theresa, in personam. I fix the counsel fee at \$250.

The complainants are entitled to recover against the defendant, Theresa, in person, the costs of the cause, including the counsel fee, up to the decree for sale. The costs of the decree for sale and of the sale will come out of the proceeds of the sale. Such is the character of the decree I advised in Thorp v. Smith, 63 N. J. Eq., at page 93, 51 Atl. 437, and that decree was affirmed by the Court of Errors and Appeals. 54 Atl. 412. With regard to the counsel fee, the amount thereof will be left blank in the decree which I shall advise, and this memorandum will be sent to the chancellor, and either party may move him, on notice to the other, to vary the amount, if he shall be so advised.

(69 N. J. L. 487)

J. C. SMITH & WALLACE CO. v. LAMBERT.

(Supreme Court of New Jersey. June 8, 1903.)
BANKRUPTCY—DISCHARGE—DEBTS CONTRACTED BY FRAUD.

1. Where a plea sets up as a defense to a suit to recover upon a book account a discharge in bankruptcy under the United States bankruptcy act of July 1, 1898, c. 541 (30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), a replication that the cause of action sued on is excepted from the operation of the discharge, in this, that the cause of action was created by the fraud of the defendant, is not good on general demurrer. Such debts, although created by fraud, are not within section 17 of the bankruptcy act (30 Stat. 550, 551 [U. S. Comp. St. 1901, p. 3428]), which excepts certain debts from the operation of a discharge thereunder.

(Syllabus by the Court.)

Action by J. C. Smith & Wallace Company against Isaac Lambert. Demurrer to replication. Sustained.

Argued February term 1903, before GUMMERE, C. J., and FORT, PITNEY, and HENDRICKSON, JJ.

Robert H. McCarter, for plaintiff. Charles H. Angleman and W. S. Angleman, for defendant.

¶ 1. See Partition, vol. 34, Cent. Dig. § 447.

HENDRICKSON, J. This is a suit brought upon the common counts to recover the amount due upon a book account. In addition to the plea of the general issue, the defendant pleaded a discharge in bankruptcy by the District Court of the United States, District of New Jersey, on the 9th day of September, 1901, which, as the defendant alleges, was granted after the plaintiff's cause of action, if any, had accrued, and before the commencement of the suit. He further averred that the cause of action set forth in the declaration was not excepted from the operation of the discharge in bankruptcy. The plaintiff, in his replication, replied that the cause of action was excepted from the operation of the discharge in bankruptcy, in this: that the cause of action was created by the fraud of the defendant. To this replication the defendant filed a general demurrer. One of the causes of demurrer specified is that a cause of action on the common counts is not excepted from the operation of a discharge in bankruptcy. The demurrer cites in support of his contention *Barnes Mfg. Co. v. Norden*, 87 N. J. Law, 493, 51 Atl. 454. In that case the defendant was seeking relief from a judgment and execution in favor of the plaintiff on the ground that the judgment was obtained on a debt from which the defendant was relieved by his discharge in bankruptcy. The company insisted that its judgment was for a debt that had been contracted by means of false representations, and hence, under section 17 of the bankruptcy act of July 1, 1898, c. 541 (30 Stat. 550, 551 [U. S. Comp. St. 1901, p. 3423]), was excepted from the operation of the discharge, as being a judgment for fraud, within subdivision 2 of the section, to wit, judgments in actions for fraud. This court held that judgments, to come within that class, must be such as have been obtained upon proceedings where the ground of the action was the fraud of the defendant. And since the judgment then in question was rendered in contract on the common counts, without any suggestion of fraud, it was held that the defendant was discharged from the judgment. It was very properly contended on behalf of the defendant that the case last cited had no application upon the point now raised, because in that case the debt in question was a judgment, while here the debt was one not yet reduced to judgment. We think, however, that under section 17 of the bankrupt law, to which reference has been made, there is no provision that would except from the discharge the debt upon which the present suit is brought. Clause 2 would not include it, for the reason that it applies to judgments alone, and not to simple-contract debts. Clause 3 will not include it, for there the debts excepted are such as were created by the fraud, etc., of the bankrupt while acting as an officer or in any fiduciary capacity. There is no allegation in the plea

that would bring the debt in question within this class. It was contended for the plaintiff that the debt in question was, as the plea alleges, created by the fraud of the defendant, and, as such, comes within section 17, cl. 2, of the bankruptcy act, as a debt incurred in obtaining property by false pretenses or false representations. But, as before stated, we think this clause, which reads, "(2) Judgments in actions for fraud, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another," refers to judgments, exclusively, and not to mere debts. It could hardly mean debts incurred by or for willful and malicious injuries. This is the construction that has been placed upon clause 2 by the courts. In *re Rhutassel* (D. C.) 96 Fed. 597; In *re Lewensohn* (D. C.) 99 Fed. 73; In *re Freche* (D. C.) 109 Fed. 620; In *re Cole* (D. C.) 106 Fed. 537. As was noted in *Barnes Mfg. Co. v. Norden*, *ubi supra*, and as appears in *Leggett v. Barton*, 40 N. J. Law, 83, the bankrupt law of 1867 (Act March 2, 1867, c. 176, 14 Stat. 533, § 33) did except from the discharge "debts created by the fraud or embezzlement of the bankrupt," but that clause was left out of the bankrupt law of 1898 (30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]).

We conclude that the replication to the second plea is not good in law. The demurrer is therefore sustained, with costs.

(65 N. J. E. 125)

NEWCOMB v. LUBRASKY et al.

(Court of Chancery of New Jersey. May 25, 1903.)

MORTGAGES—FORECLOSURE—REDEMPTION —RIGHTS OF ASSIGNEE—EFFECT OF DECREE.

1. Where one who had acquired the equity of redemption to property covered by three separate mortgages paid the amount of the first mortgage on the filing of a bill to foreclose that mortgage, and obtained a decree, by consent of the mortgagee, that the bond and mortgage be assigned to him, he thereby became subrogated to the rights of the mortgagee, and the mortgage was not satisfied.

2. One who had acquired the equity of redemption to property covered by three separate mortgages redeemed the property on the filing of a bill to foreclose by the first mortgagee, and obtained a decree that the mortgage be assigned to him. Afterwards the second mortgagee brought foreclosure proceedings, making the first mortgagee and the assignee, as owner of the equity of redemption, defendants, and alleging that the first mortgage was paid, though uncanceled of record, and obtained a decree by default that the property be sold, and that the foreclosed mortgage and the subsequent one be paid, and the surplus brought into court. *Held* that, as this decree did not adjudicate that the first mortgage was paid, it did not conclude the assignee of that mortgage from bringing a subsequent suit to foreclose it.

Bill by Leveritt Newcomb against Samuel J. Lubrasky and others. Decree for complainant.

¶ 1. See *Mortgages*, vol. 35, Cent. Dig. §§ 704, 705.

L. Newcomb, pro se. I. O. Acton, for defendants.

REED, V. C. This bill is filed to foreclose a mortgage given July 31, 1888, by Samuel J. Lubrasky to the Alliance Land Trust to secure the sum of \$180. Lubrasky and wife on April 25, 1893, executed a second mortgage upon the same property, and including other lands, to the Franklin Land & Building Association of Salem to secure \$1,600. He also made a third. Redemption in the premises covered in these mortgages was acquired by the complainant, Leveritt Newcomb. The present contest is between the complainant and the second mortgagee, the Franklin Land & Building Association, which is made a party defendant to the present foreclosure suit.

It appears that the Alliance Land Trust, on January 29, 1897, then owning the first mortgage now sought to be foreclosed by Mr. Newcomb, filed a bill for that purpose, whereupon Mr. Newcomb, as owner of the equity of redemption, filed an answer asking to redeem, and paid into court the amount due upon the mortgage, with costs, which moneys were taken out by the complainant. Subsequently, the complainant assented to a decree that the bond and mortgage should be assigned to Mr. Newcomb. The payment by Newcomb of the amount due upon the mortgage under these conditions was not a satisfaction of the mortgage, but a redemption. It put Mr. Newcomb in the position of an equitable assignee of that mortgage. Without the assignment he had the right to have the mortgage delivered to him uncanceled, and this in equity is a complete assignment. Such redemption put him in the place of the mortgagee, giving him all the mortgagee's rights against the mortgagor. He thereupon became entitled to hold it as an existing mortgage until the owner of the equity of redemption redeems it or he himself forecloses it. Jones on Mortgages, § 1086; Hamilton v. Dobbs, 19 N. J. Eq. 227.

The important question is whether Mr. Newcomb lost his right to foreclose that mortgage by reason of the effect to be given to a decree made in a subsequent foreclosure suit brought by the second mortgagee, the Franklin Land & Building Association of Salem. This suit was begun October 5, 1901. The bill sets out the subsequent incumbrances upon the property, and also contained an allegation as follows: "That on or about July 31, 1888, Samuel Lubrasky and wife made a mortgage upon the said tract to the Alliance Land Trust, a corporation of the state of New York, to secure the sum of \$180, which said mortgage was duly recorded and so forth, and still remains open upon said record. But your orator expressly charges that said mortgage, although uncanceled of record, has in point of fact been duly paid and satisfied, and is no longer a lien upon said mortgaged premises, or any part thereof."

The mortgage thus attacked is the same mortgage now sought to be foreclosed.

At the time the bill was filed in the suit by the second mortgagee, Mr. Newcomb was the owner of the first mortgage, and was also the owner of the equity of redemption. Both the Alliance Land Trust and Mr. Newcomb were made parties in that suit—the latter because he claimed some right or interest in the said premises by reason of the conveyance to him of the equity of redemption. The service of the subpoena upon the Alliance Land Trust appears thus: "Service acknowledged, this fifteenth day of November, 1901, the Alliance Land Trust, William W. Banthall, solicitor." Whether this was an adequate service upon the Alliance Land Trust need not be decided. Actual service upon Mr. Newcomb is returned. No appearance or answer was filed by either of these parties. The usual decree pro confesso was taken, followed by a reference and report and final decree. The final decree directs the payment of \$684 and costs to the Franklin Land & Building Association out of the proceeds of the sale to be made of the mortgaged premises, and any surplus to be applied to the payment of the subsequent mortgage, and then, if any surplus remain, it was to be brought into court. The mortgage to the Alliance Land Trust is not mentioned in the decree.

The question is whether, by force of this decree, the complainant is now estopped from insisting that his mortgage is still unpaid. This estoppel is set up by the Franklin Land & Building Association in its answer in the present case. The answer upon the trial made to this insistence was that the first mortgagee was not bound to take notice of the suit to foreclose brought by the second mortgagee. The equitable owner of the first mortgage relied upon the doctrine that a second mortgagee cannot foreclose the equity of the first mortgagee. This familiar doctrine is applicable whenever a subsequent mortgagee recognizes the existence of a prior mortgage. Such subsequent mortgagee cannot compel the prior mortgagee to submit to a foreclosure of his mortgage. Such prior mortgagee need take no notice of the existence of such a suit, and unless he does come in and assent to the sale of the premises free of his incumbrance, and that his mortgage be paid out of the proceeds, any sale made otherwise of the property is made subject to the lien of such preceding mortgage. But the suit brought by the Franklin Land & Building Association did not recognize the existence of the recorded prior mortgage. On the contrary, it attacked its existence by charging that it has been paid. The bill therefore was not to foreclose the first mortgage, but to have it decreed to have been paid and canceled of record. In *Gihon v. Belleville White Lead Co.*, 17 N. J. Eq. 536, it was said: "A man holding a second mortgage may file a bill stating that a prior mort-

gage has been given, and setting up that it is fraudulent and void, or has been paid, and ask to have it so decreed, or make a person so holding it a party, and ask to have the premises sold to pay the mortgage." This practice is recognized by Mr. Justice Van Syckel in *Bigelow v. Cassidy*, 26 N. J. Eq. 561. He says: "Even if the bill charges the prior mortgage to be void or paid, and it turns out to be a valid subsisting incumbrance, the mortgaged premises will not be sold to pay the prior mortgage without the consent of the prior mortgagee." The charge in the bill, therefore, that the first mortgage was paid, was entirely proper, and if Mr. Newcomb had been brought into the suit because of his interest in such mortgage, and there had been a decree that this mortgage was paid, there can be no doubt that he would have been estopped from now setting up the existence of his mortgage. And although he was brought into the suit as the owner of the equity of redemption, yet, he having knowledge of his unrecorded equitable assignment of the mortgage, I think he was bound to defend against the attack made upon the mortgage. But conceding all this, I do not see how the decree, as framed, can be regarded as concluding Mr. Newcomb upon the question whether this mortgage was paid. There was no prayer in the bill for such a decree, and no decretal order was made adjudging that the mortgage to the Alliance Land Trust was paid and should be canceled of record.

The decree, so far as it directed the payments of the money to be realized from the sale of the mortgaged premises, is in no way significant respecting the existence or nonexistence of the first mortgage. There would have been no payment to the first mortgagee under the bill as framed in any event. The distribution of the money raised would have been exactly the same whether the property was sold free from or subject to the lien of a prior mortgage. Now, with the exception of the direction as to the distribution of the money raised upon this foreclosure sale, the decree contains nothing but the ordinary order that the defendants stand foreclosed from all equity of redemption in so much of the mortgaged premises as shall be sold. The first mortgagee had no right of redemption of which he could be foreclosed. He held a superior interest, which, as already remarked, could not be foreclosed in that suit. The decree, therefore, applied to those defendants only who held subsequent incumbrances or interests.

There should be a decree for the complainant.

(66 N. J. L. 606)

MOORE v. SEYMOUR.

(Supreme Court of New Jersey. June 8, 1903.)

PUBLIC OFFICES—LEGAL EXISTENCE—QUO WARRANTO.

1. The act under which defendant was elected a member and also president of the common

council of a city was declared unconstitutional. Relator applied for leave to file an information in the nature of a writ of quo warranto against defendant, and in the proceeding proposed to attack not only defendant's title to the office, but also the legal existence of the office itself. *Held*, that whether the office had a legal existence could be determined only at the instance of the Attorney General, acting in his public capacity.

Application for a writ of quo warranto by the state, on the relation of Russell W. Moore, against John Seymour. Application denied.

Argued February term, 1903, before VAN SYCKEL and GARRETSON, JJ.

Benjamin F. Jones, for relator. Arthur B. Seymour, for defendant.

PER CURIAM. This is an application for leave to file an information in the nature of a writ of quo warranto directed to John Seymour, directing him to show by what authority he claims to have and enjoy the office of a member of the common council of the city of Orange, and of president of said common council. The act under which Seymour was elected was declared unconstitutional in *Christie v. Bayonne*, 64 N. J. Law, 191, 44 Atl. 887. In this proceeding the relator proposes to attack not only the title of Seymour to the office, but also the legal existence of the office itself. In the case of *Holloway v. Dickinson et al.*, 54 Atl. 529, the opinion of Mr. Justice Pitney, in the Supreme Court, at the last February term, holds that members of a de facto board of education, organized under the general school law (Laws 1902, p. 69, c. 36), cannot be ousted at the instance of a private relator in quo warranto on the ground that such board of education has no legal corporate existence. Whether the office which Seymour is claiming to hold has a legal existence can be determined only at the instance of the Attorney General, acting in his public capacity as the representative of the people of the state.

The application, therefore, of Russell W. Moore for leave to file an information, is denied, with costs.

(66 N. J. L. 592)

STATE v. YOUNG et al.

(Supreme Court of New Jersey. June 8, 1903.)

CRIMINAL LAW—JURISDICTION OF SUPREME COURT—STRUCK JURY.

1. Under Gen. St. p. 2570, § 229, providing that every issue joined in the Supreme Court or brought to the Supreme Court for trial shall be tried in the county where the cause of action or offense has arisen or been committed, or shall arise or be committed, unless the Supreme Court, on motion in behalf of the state, if the state be interested, shall order trial at the bar of that court, defendants charged with manslaughter were not entitled, on their application, to a trial at the bar of the Supreme Court.

2. Cr. Proc. Act (P. L. 1898, p. 895) § 76, provides that struck juries shall be selected from the persons qualified to serve as jurors

in and for the county in which the indictment was found. Section 79 requires that a foreign jury shall be selected in the same manner as the general panel is selected, which Gen. St. p. 1854, § 50, requires to be selected by the sheriff. *Held*, that defendants charged with manslaughter were not entitled to a struck jury, to be selected by the court from a county other than that in which the indictment was found.

Edward F. C. Young and others were charged with manslaughter. On motions for trial at the bar of the Supreme Court and for a struck jury. Motions denied.

Argued June term, 1903, before GARRISON, GARRETTSON, and SWAYZE, JJ.

James B. Vredenburg, George T. Werts, and Richard V. Lindabury, for the motions. Chandler W. Riker, opposed.

PER CURIAM. The defendants were indicted at the Essex oyer and terminer for manslaughter. The indictment has been removed by certiorari into this court. The defendants now move for a trial at the bar of this court, and for a struck jury to be selected from a county other than Essex.

We think we are without power, under existing statutes, to grant either motion. The right to a trial at bar as it originally existed has been limited in this state by a statute passed in 1799, and now printed as section 229 of the practice act (Gen. St. p. 2570). This section was originally section 3 of "An act relative to the Supreme and Circuit Courts." Paterson's Laws, p. 393. It requires every issue joined in the Supreme Court or any other court, and brought into the Supreme Court for trial, to be tried in the county where the lands are situate, "or the cause of action or offense hath arisen or been committed or shall arise or be committed, unless the Supreme Court, upon motion in behalf of the state, if the state be interested, or upon motion of either party in the action, shall think proper to order the trial to be at the bar of the said Supreme Court, which shall only be done when the matter or property in dispute shall be of the value of three thousand dollars."

The Supreme Court had in 1799, as now, cognizance of criminal cases (see the Ordinance of 1751, 1 Halsted, Appendix, vi), and there can be no doubt that when the act of 1799 referred to an "offense," and required a trial in the county where it was "committed," it referred to criminal cases. In such cases the state is interested, and the motion for a trial at bar must be made in behalf of the state. It cannot be made by the defendants. It is not necessary now to decide whether the clause providing that the order for trial at bar shall be made only when the matter in dispute is of the value of \$3,000 indicates a legislative intention to limit trials at bar to civil actions. The motion for a trial at bar must therefore be denied.

The defendants also move for a struck jury from a county other than Essex. Sec-

tions 75 and 76 of the criminal procedure act (P. L. 1898, pp. 894, 895) provide for struck juries. Sections 78 and 79 provide for foreign juries. By section 78 struck juries are required to be selected from the persons qualified to serve as jurors in and for the county in which the indictment was found. This excludes the selection of a struck jury from another county. Section 79 requires that a foreign jury shall be selected in the same manner as the general panel of jurors is selected. This method is prescribed by the supplement to the act concerning juries (Gen. St. p. 1854, § 50). This statute imposes the duty of selecting the general panel of jurors upon the sheriff.

There may be, under the Criminal Procedure Act, a jury selected by the court from the county in which the indictment is found, or there may be a jury selected by the sheriff from another county. There is no provision for a jury to be selected by the court from another county. Inasmuch as the motion made in this case is neither for the struck jury nor for the foreign jury authorized by the statute, but for a kind of jury for which there is no statutory authority, the motion must be denied.

Both motions are denied, with costs.

(85 N. J. B. 119)

TRENTON TRUST & SAFE DEPOSIT CO.
v. DONNELLY et al.

(Court of Chancery of New Jersey. May 25, 1903.)

WILLS — BEQUESTS — LIFE TENANTS AND REMAINDERMEN — DIMINUTION OF CORPUS — HEIRS — NEXT OF KIN.

1. Money was bequeathed in trust to pay the interest to one for life, the corpus to go to others on her death. The corpus was diminished by unfortunate investments, and thereafter interest on the reduced corpus alone was paid the life tenant. *Held*, that the loss should be apportioned by paying the reduced corpus to the remaindermen and the personal representative of the life tenant in the proportion that the original corpus bears to the unpaid interest on the part of the corpus which was lost.

2. Money was bequeathed in trust to pay the interest, less the taxes, to one for life, and after her death the corpus to others. The trustees loaned it on a mortgage, which, in consideration of a low rate of interest, bound the borrower to pay the taxes. The trustees were obliged to foreclose, and bought in the property, selling it for less than the corpus of the bequest, after paying taxes which were a lien on it when they bought it. *Held*, that such payment of taxes was not to be charged to the life tenant's interest.

3. The word "heirs" in a will giving personal property to a person, or, in case of his death, to his heirs, means next of kin.

4. Where testator bequeathed money in trust to pay the interest to his wife for life, and at her death bequeathed part of the principal to his sister, or, if she should die before receiving her share, then to her heirs, and the remainder of the principal to the heirs of his deceased brother, the next of kin of the sister are to be ascertained as of the date of her death, she dying before receiving her share, and those of the brother as of the date of testator's death.

Bill by the Trenton Trust & Safe Deposit Company, trustee under Theodore Blackwell's will, against Bessie Blackwell Donnelly and others, for construction of the will. Will construed.

James Buchanan, for complainant. William M. Lanning, for defendants Florence Blackwell and Emily Blackwell. Alfred M. Lafetra, for defendant Bessie Blackwell Donnelly. Dungan & Reger, for defendant Jacob Kline, Jr. Frederic M. Pierce, for defendant Morgan.

REED, V. C. Theodore Blackwell made a will on October 12, 1872. The fourth, fifth, and sixth clauses are as follows:

"Fourth. I give, devise and bequeath to my said Executors and the survivor of them the sum of Twenty Thousand dollars, in Trust, nevertheless, to invest and keep the same invested, and the interest which shall accrue thereon less taxes and necessary expenses to pay semi-annually to my beloved wife Sarah I. Blackwell for and during the term of her natural life, or during the term she remains my widow which shall be in lieu of her right of dower in my estate.

"Fifth. All the rest and residue of my estate I give devise and bequeath as follows to wit, one third thereof to each one of my two sisters Rebecca Weart and Elizabeth Rockwell share and share alike and to their heirs forever, and the remaining one third thereof to the heirs of my deceased brother Philemon Blackwell.

"Sixth. At the decease of my said wife or at her marriage, the said sum of Twenty Thousand dollars invested for her use as hereinbefore directed I also give, devise and bequeath as follows, to wit, one third thereof to each of my said sisters Rebecca Weart and Elizabeth Rockwell, share and share alike, and if either one or both of my said sisters should die before receiving the share or shares to them given in this my will, then the lawful heir or heirs of such deceased sister shall have and take the share of such deceased ancestor, and the remaining one third thereof I give, devise and bequeath to the heirs of my deceased brother Philemon Blackwell."

Testator died without issue November 4, 1872. He left, surviving him, his widow, Sarah I. Blackwell, a sister Rebecca Weart, a sister Elizabeth Rockwell, and two children Jacob Blackwell and Ephraim W. Blackwell, the children of a deceased brother, Philemon Blackwell. Sarah I. Blackwell, the widow, died July 21, 1902.

The questions propounded are in respect to the course which the remainder of the legacy of \$20,000 shall take, the life tenant being dead. Rebecca, one of the sisters, married John A. Weart. She died July 13, 1888, leaving a child, John A. Weart, Jr. By her will she left her property to John A. Weart, Jr., and her granddaughter, Bessie B. Weart.

The wife of John A. Weart, Jr., died intestate, leaving Bessie B. Donnelly (née Weart) her only next of kin. Elizabeth Rockwell, having married one Charles Morgan, who predeceased her, died intestate in February, 1885, leaving a number of children by this marriage surviving, three of whom are now dead. Philemon Blackwell died intestate August 2, 1844, leaving two children, one of whom (Jacob) died April 1, 1863, before the death of the testator. The other son (Ephraim) died August 10, 1888, after the death of the testator.

The first question arises between the personal representative of the life tenant and the remaindermen, and it arises because of the fact that the corpus of the estate of \$20,000, devised in the clauses already displayed, has become diminished by unfortunate investments, so that the trustees, instead of having in hand the sum of \$20,000, have only the sum of \$14,232.51. The corpus of the estate was secured by a mortgage, which was foreclosed, and the mortgaged property was bought in by the trustees, who afterwards sold the same for the sum of \$16,000, which sum, after paying the expenses of reducing the same to money, the taxes, and commissions, was, as already remarked, reduced to the sum of \$14,232.51. The property was bought in by the trustees at foreclosure sale on October 4, 1899, and was sold by them 15 days later. The life tenant was paid interest in full upon the \$20,000, less expenses, down to October 1, 1898. Thereafter the trustees paid interest upon the reduced amount that came to their hands down to the death of the widow, with the exception of \$225.06.

The question propounded is whether the executors of the widow are entitled not only to this sum of \$225.06, but also to the amount of interest which should have been paid had the corpus of the estate remained unimpaired down to the date when the security held by the trustees was turned into money. The amount of this unpaid interest is admitted to have been \$1,144.03. The rule which has been laid down in a number of cases respecting the apportionment of a loss occurring under conditions like the present is that the loss shall be apportioned between the life tenant and the remaindermen in the proportion that the debt due the first bears to the amount which should come to the second, namely, the amount of the corpus of the estate; or, conversely, the amount realized shall be set apart to the remaindermen and the life tenant in the proportion that the corpus bears to the unpaid interest due the life tenant. By force of this rule the \$14,232.51 should be divided in the proportion that \$20,000 bears to \$1,144.03.

But it is insisted that the taxes paid by the complainant should be deducted from the life tenant's share thus ascertained. In my judgment this position is not tenable. I am aware that Chancellor Magill, sitting as ordinary,

did so order in Tuttle's Case, 49 N. J. Eq. 260, 24 Atl. 1, where the trustee had paid taxes which had been assessed upon real estate intervening the time of the trustee's acquisition of the land and the time of the sale made of the same by the trustees. Under the conditions presented in that case, the ordinary thought it equitable to deduct these taxes from the life tenant's share after it had been apportioned according to the rule already mentioned. In the present case the tax paid, so far as appears, was not assessed upon the property during the time it was held by the trustees under the title got by them at the foreclosure sale. The taxes were paid as a lien upon the property when it came to the hands of the trustees. The property could have been sold subject to this lien, but the trustees thought it advisable to discharge this lien so as to give an unincumbered title. The payment of the tax was therefore in reality one of the expenses incurred in transmuting the realty into cash to the best advantage.

Nor was the tenant for life bound to pay taxes upon this property specifically, either before or after the right of the trustees to enter for breach of condition in the mortgage accrued. The life tenant was obliged to pay the tax upon the corpus, and she was entitled, not to the income of this real estate, but to the income which \$20,000, less the taxes, would produce. Now, if the 5 per cent. upon this amount, upon the basis of which the debt due the life tenant is computed, is more than the \$20,000 would produce, less taxes, it would follow that the debt of \$1,144.08 is too much. This follows because she was only entitled to the production of the corpus, less the taxes which she was bound to pay. By the provision in the mortgage, these taxes were so paid by fixing the interest to be paid by the borrower at a lower rate and binding him to pay the taxes. There is nothing to show that the corpus would not have produced the 5 per cent. as well as the amount of the tax up to the time the security was realized. By reducing the annual income to 5 per cent. the taxes were in fact deducted from the income of the life tenant. In my judgment, the representatives of the life tenant are entitled to share in the corpus in the proportion already indicated, and her share is not to be diminished by any reduction on account of these taxes.

Another question propounded is whether the testator, in the use of the word "heirs" in the fifth and sixth clauses of his will, is to be regarded as intending by that term "the next of kin of the legatees." The testator was dealing with property which he had peremptorily directed to be transmuted by his executors from realty into personalty. It may be regarded as settled in this state that the word "heirs" is interpreted in reference to the kind of property, whether real or personal, which is the subject of testamentary disposition; and, when those words are used

in respect to personal property, they will be construed to mean "next of kin." *Scudder v. Vanarsdale*, 13 N. J. Eq. 109; *Leavitt v. Dunn*, 56 N. J. Law, 311, 28 Atl. 590, 44 Am. St. Rep. 402.

In respect to the time when the next of kin are to be ascertained, I am of the opinion that the gift to Mrs. Rockwell, or in the event of her dying before receiving the share given to her, she having died before receiving her share, this share goes to her next of kin ascertained as of the date of her death, in February, 1885. *Gundry v. Pinniger*, 14 Beav. 94, 98; *Jacobs v. Jacobs*, 16 Beav. 557.

In respect to the gift to the "heirs of my deceased brother Philemon Blackwell," his next of kin is to be ascertained as of the date of the death of the testator, October 12, 1872. *Wharton v. Barker, K. & J.* 483-488; *Phelps v. Evans*, 4 De G. & S. 188.

These answers dispose of all the mooted queries propounded in the bill.

(69 N. J. L. 464)

STATE v. CHAPMAN.

(Supreme Court of New Jersey. June 8, 1903.)

CONSTITUTIONAL LAW—VESTED RIGHTS—EX POST FACTO LAW—REGULATING PRACTICE OF DENTISTRY—POLICE POWER.

1. The act entitled "An act to regulate the practice of dentistry in the state of New Jersey, and to repeal certain acts now relating to the same," approved March 17, 1898, P. L. 1898, p. 119, coupled with the previous legislation on the subject, is not unconstitutional.

2. The act does not impair vested rights, nor is it in its criminal provisions an ex post facto law.

3. A calling, business, or profession chosen and followed is property. The Legislature cannot destroy it by statute without providing for compensation, any more than it can authorize the taking of real estate for a public use except upon compensation.

4. The act of March 17, 1898, is not an act taking or destroying property, but is a reasonable regulation of the practice of dentistry in this state.

5. It is within the power of the state, under the police power, to impose by statute reasonable restrictions as to registration and the obtaining of a certificate of authority to engage in the practice of dentistry, and to make it a misdemeanor for a person to practice without first obtaining such certificate.

(Syllabus by the Court.)

Error to Court of Quarter Sessions, Cumberland County.

Martin V. Chapman was convicted of practicing dentistry without a license, and brings error. Affirmed.

Argued November term, 1902, before the CHIEF JUSTICE, and VAN SYCKEL, PITNEY, and FORT, JJ.

Wheaton Berault and Howard Carrow, for plaintiff in error. J. Hampton Pithian and Halsey M. Barrett, for the State.

FORT, J. The defendant was convicted in the Cumberland county quarter sessions

¶ 5. See *Physicians and Surgeons*, vol. 39, Cent. Dig. §§ 1, 2.

for practicing dentistry without being legally licensed to so practice in this state.

That the defendant did not have a license to practice dentistry in this state from the State Dental Board was proven at the trial by independent evidence, as well as by the defendant's own admission. The defense was that the defendant was a practicing dentist in this state in 1872, and has been since that date, and that any statute which attempts to impose upon him a condition not existent at the time he entered upon such practice is unconstitutional, because it (1) impairs his vested rights and (2) is *ex post facto*.

It is conceded that there is no justification for the indictment in this case except under section 12 of the act of 1898, entitled "An act to regulate the practice of dentistry in the state of New Jersey, and to repeal certain acts now relating to the same," approved March 17, 1898. P. L. 1898; p. 119. Prior to the passage of the act of 1898 there had been statutes regulating registration for and the practice of dentistry, but none of these were in force when the indictment upon which the defendant was convicted was found, nor at the date alleged in the indictment as the time when the offense was committed. The act of 1898 expressly repealed all previous acts on this subject. P. L. 1898, p. 128, § 17. If, therefore, the act of 1898 is unconstitutional in the respects alleged, the conviction cannot stand. The laws regulating dentistry are of later enactment than those regulating the practice of medicine, but the principles underlying their legality are the same. A statute of West Virginia similar in import to the New Jersey act of 1898, except that it regulated the practice of medicine, was sustained, as a valid exercise of the police power of the state, by the Supreme Court of the United States. *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; *State v. Creditor* (Kan.) 24 Pac. 346, 21 Am. St. Rep. 306; *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201.

Nor is such legislation *ex post facto*. *Hawker v. New York*, 170 U. S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002. See, generally, text and notes in Am. & Eng. Ency. of Law (2d Ed.) vol. 22, pp. 781, 782, and the cases cited. The Constitution of New Jersey in no wise prohibits such legislation in any respect in which it would not be equally interdicted by the Constitution of the United States, unless it can be said that such legislation interferes with the natural and unalienable right of "acquiring, possessing and protecting property" guaranteed by article 1, par. 1, of our state Constitution.

A calling, business, or profession chosen and followed is property. *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 112, 30 Atl. 881; *Slaughter House Cases*, 16 Wall. 36, 21 L. Ed. 394. The Legislature can no more destroy a business by statute without providing for compensation, than it can authorize a

corporation to take a piece of real estate for public use except upon compensation. But does the act of 1898 take the defendant's property or calling from him? We do not so construe it or its effect. It is simply a regulation of the use of one's property rights or business, controlling the conditions under which it may be enjoyed or pursued. It is within the power of the state to place reasonable regulations upon the business or calling of any person. The court, in *State v. Creditor*, supra, says: "The power of the Legislature to regulate the practice of medicine, dentistry, or surgery is undoubted; it is an exercise of the police power of the state for the protection of the health and the promotion of the comfort and welfare of the people. It may provide that only those possessing skill and learned in these professions shall be permitted to practice; may prescribe the nature and extent of the qualifications required, and the rules for ascertaining and determining whether those proposing to practice come up to the statutory standard. If the regulations and conditions are adopted in good faith, and they operate equally upon all who may desire to practice and who possess the required qualifications, and if they are adapted to the legislative purpose of promoting the health and welfare of the people by excluding from the practice those who are ignorant and incapable, then the fact that the conditions may be rigorous, impolitic, and unjust will not render the legislation invalid." The following cases sustain the rule here declared: *State v. State Med. Ex. Board*, 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; *Hewitt v. Charlier*, 16 Pick. 353; *Eastman v. State*, 109 Ind. 278, 10 N. E. 97, 58 Am. Rep. 400; *Hedderich v. State*, 51 Am. Rep. 768. For 80 years New York has had such a statute, and her courts held it valid. *Sheldon v. Clark*, 1 Johns. 513. Arkansas has sustained a statute for the regulation of dentistry. *Gosnell v. State*, 52 Ark. 228, 12 S. W. 392.

The defendant, conceding for that purpose that the act of 1898 was valid, contends that he was practicing dentistry in the state in 1873, and he was by the act entitled "An act to regulate the practice of dentistry and protect the people against empiricism in relation thereto in the state of New Jersey," approved March 14, 1873 (P. L. 1873, p. 52), licensed by the state to practice dentistry by section 9 of that act. This act created a board of examiners, and provided that after its passage it should be unlawful for any person to engage in the practice of dentistry within the state unless such person be graduated and receive a diploma from the faculty of a college, chartered as in the act provided; and by section 9 it was provided as follows: "Nothing in this act shall apply to persons who shall be engaged in the practice of dentistry in this state at the time of the passage of this act." P. L. 1873, p. 53.

Two supplements were passed to the act of March 14, 1873, one in 1880 and the other in 1884, but neither of these supplements affected the rights of the defendant here to practice his profession under the authority of section 9 of the act of March 14, 1873. The supplements of 1880 and 1884 are each amendments to section 1 of the act of 1873, and neither can be said to repeal, by implication, section 9 of that act. Laws 1880, p. 31; Laws 1884, p. 102.

On April 7, 1890, a general law was enacted entitled "An act to regulate the practice of dentistry in the state of New Jersey." P. L. 1890, p. 227. By section 11 of this act the acts of 1873 and its two supplements of 1880 and 1884 were expressly repealed, together with all acts and parts of acts inconsistent with the act of April 7, 1890. The act of 1890 created the State Board of Registration and Examination in Dentistry. It made the board, then existing under the act of 1873, the first board under the act of 1890. By section 3 of the act of 1890 it was provided "that it shall be the duty of every person lawfully practicing, or entitled to practice dentistry in this state, at the time of the passage of this act, to apply to said board, before the first day of January, 1891, to cause his name, residence and place of business to be registered in a book to be kept for that purpose by the secretary of said board; and the said board shall issue to each person registered by it, a certificate under its seal and the hand of its president and secretary, setting forth that such person was, at the time of the passage of this act, lawfully entitled, by the laws of this state, to practice dentistry and is duly registered; the said board, for good cause shown, may register and issue its certificate thereof to any person applying therefor after said first day of January anno domini, one thousand eight hundred and ninety-one; provided, it shall appear to the satisfaction of said board that the person so applying was lawfully practicing or entitled to practice dentistry at the time of the passage of this act, and that the refusal to issue such certificate will work hardship to said person so applying; the said board may demand from any person applying for registration and certificate, proof of his right to the same under this act, and may refuse to grant registration and certificate thereof to any person not lawfully entitled thereto." By section 4 any person refused registration might apply to the Supreme Court to compel the board to register him and issue a certificate. By section 9 of the act it is made unlawful under a penalty for "any person now [then] lawfully practicing or entitled to practice dentistry under the laws of this state, to practice dentistry after January 1, 1891, without having first obtained the certificate of registration under the act." The effect of the act was to require all persons entitled to practice, or practicing at that time, April 7, 1890, to register and take out a

certificate of that fact before January 1, 1891. This gave parties entitled to so do about nine months within which to so do or forfeit their right, except the board for good cause should grant the certificate after January 1, 1891. This seems an entirely reasonable exercise of legislative powers, and to give a reasonable time for compliance with the act to those then engaged in dentistry in New Jersey. A similar act which gave but three months for the registration of dentists engaged in the profession at the time of its passage was sustained by the Supreme Court of Rhode Island. *Battles v. Board of Dentistry* (R. I.) 17 Atl. 131. The defendant, admittedly, never registered or applied for registration and certificate prior to January 1, 1891.

On March 17, 1898, the act under which the indictment in this case was found was passed. That act may be considered a complete revision of the whole subject, and to supersede and take the place of the act of April 7, 1890. By section 17 of the act of 1898, the act of April 7, 1890, is expressly repealed.

By section 1 of the act of 1898 it is enacted: "1. The following persons only shall be deemed licensed to practice dentistry in this state: (a) Those who are now duly licensed and registered as dentists pursuant to law, and (b) those who may hereafter be duly licensed and registered as dentists pursuant to the provisions of this act."

Section 12 of the act reads as follows: "12. Any person, company or association, practicing or holding himself or itself out to the public as practicing dentistry, not being at the time of said practice or holding out legally licensed to practice as such in this state, shall be guilty of a misdemeanor and punishable upon conviction of a first offense by a fine of not less than fifty dollars, and upon conviction of a subsequent offense, by a fine of not less than one hundred dollars, or by imprisonment of not less than two months, or by both fine and imprisonment."

The defendant failed to register and take out his certificate from April 7, 1890, to March 14, 1898, and he was not entitled to practice dentistry in this state, under section 1 of the act of 1898, when the indictment upon which he was convicted was found in May, 1902.

There were some exceptions to testimony offered in this case, and the rulings of the trial court thereon, but we have found no errors therein.

The judgment of the Cumberland county quarter sessions is affirmed.

(69 N. J. L. 541)

ZELIFF v. NORTH JERSEY ST. RY. CO.
(Supreme Court of New Jersey. June 8, 1903.)
STREET RAILROADS—INJURY TO PASSENGER
—EVIDENCE—NONSUIT.

1. A motion to nonsuit having been based solely upon the ground of contributory negli-

gence, the question of the absence of evidence of negligence on the part of the defendant is not open for consideration upon error.

2. Plaintiff, while seated in a street car with his arm resting upon the frame of an open window, was injured in a collision between the car and a part of the load of a passing wagon which overhung the side of the wagon and struck the plaintiff's arm. The trial judge instructed the jury, in substance, that, if any part of the plaintiff's arm protruded beyond the line of the car, and but for this fact he would not have been injured, then the plaintiff had failed to establish negligence on the part of the defendant company, and the verdict must be in favor of the defendant. Held unnecessary for the judge to go further, and charge the jury that the position suggested for the plaintiff's arm evidenced negligence on his part.

(Syllabus by the Court.)

Error to Circuit Court, Essex County.

Action by James Zeliff against the North Jersey Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued February Term, 1903, before GUMMERE, C. J., and HENDRICKSON and PITNEY, JJ.

Chauncy H. Beasley, for plaintiff in error.
Samuel Kalisch, for defendant in error.

PITNEY, J. Plaintiff was a passenger upon a street car operated by defendant company, and alleged that while the car was proceeding rapidly the motorman negligently permitted it to come into collision with a wagon loaded with empty barrels. His insistence was that the barrels overhung the side of the wagon, and that in the collision the barrels grazed the side of the car; that he was sitting with his elbow resting upon the frame of one of the windows of the car, the window being open; that one of the barrels was crowded into the open space of the window, caught the plaintiff's sleeve, and, by driving his elbow forcibly against the side of the window frame, broke the arm. For the personal injuries thus received plaintiff recovered a verdict and judgment below. Defendant asks reversal for alleged trial errors, evidenced by bills of exceptions.

Counsel for the plaintiff below was permitted, against objection, to illustrate his opening remarks to the jury by showing to them an object said to be a model of the window at which the plaintiff was sitting at the time he was injured. The use of such an object for purposes of illustration was fairly permitted by the trial judge as a part of the plaintiff's opening, although the object had not yet been proved to be a faithful representation of the car window. The court, upon overruling the objection, offered to instruct the jury in such a manner as to prevent wrong from being done to the defendant from the use of the so-called model, but no request for such instruction seems to have been afterwards preferred.

The trial court properly refused the motion to nonsuit, and the motion to direct a verdict in favor of the defendant. These motions

were based solely upon the ground that the plaintiff, being a passenger upon the street car, voluntarily placed himself in a position of danger—a matter that was fairly in dispute upon the evidence. The motion did not raise the question of the absence of evidence of negligence on the part of the defendant's motorman, and that question, therefore, is not open for consideration here. *Trade Ins. Co. v. Barracliff*, 45 N. J. Law, 543, 46 Am. Rep. 792; *Garretson v. Appleton*, 58 N. J. Law, 386, 37 Atl. 150; *Ottawa Tribe v. Munter*, 60 N. J. Law, 459, 38 Atl. 696.

One of the plaintiff's witnesses—Minnie Krauss—who was a passenger upon the car with the plaintiff and his wife, upon her direct examination testified solely with respect to what she saw of the occurrence at and before the time when the plaintiff was injured, and with respect to a scraping sound that she said was heard by her as the car passed by the wagon and barrels. She mentioned no conversation had by her with the plaintiff and his wife, nor anything said in the plaintiff's hearing by any one. Upon cross-examination she said that she had held no conversation with the Zeliffs. Later she was asked in cross-examination whether, after the occurrence, the plaintiff's wife, or somebody else who was there present, did not say to the plaintiff that he ought not to have put his arm out of the window, and would not have been hurt if he had not done so. Objection being made, the question was excluded by the trial court on the ground that the supposed statement, having been made after the occurrence, was not a part of the res gestæ, and, although admissible on the ground that a statement made in the presence of the plaintiff, and not contradicted by him, would amount to an admission against his interest, the question was not to be permitted upon cross-examination, but should be offered by the defendant as a part of its own case. This ruling, we, think, was correct. The question excluded was not admissible as cross-examination of this witness.

The remaining exceptions relate to the refusal of certain of the defendant's requests to charge. Of the requests so refused the only ones that were well founded in law, and that were at all pertinent under the evidence in the case, were sufficiently covered by the instruction given to the jury, to the effect that the motorman had the right to assume that no part of the person of the passenger would protrude beyond the lines of the car; and that, if the evidence satisfied the jury that the plaintiff's elbow, or any part of his arm, protruded beyond the line of the car, and that but for this fact the accident would not have happened, then the plaintiff had failed to establish negligence upon the part of the defendant company and the verdict must be in favor of the defendant. This was sufficiently favorable to the defendant. As the judge charged the jury that the position suggested for the plaintiff's arm absolutely

negatived the existence of actionable negligence on the part of the defendant's employes, it was unnecessary for him to go further, and say that it evidenced negligence on the part of the plaintiff; for, if there was no negligence on the part of the defendant, the question of contributory negligence was not raised.

No error appearing in the record, the judgment is affirmed.

(69 N. J. L. 505)

RYERSON v. MORRIS CANAL & BANKING CO.

(Supreme Court of New Jersey. June 16, 1903.)

HIGHWAYS—OBSTRUCTION—ACTION FOR DAMAGES—PLEADING PRIVATE ACTION.

1. The declaration avers that, by reason of plaintiff's occupancy of three farms situate at different places upon a certain public highway, it was necessary for him from time to time to cart farm produce and other things used in husbandry back and forth from farm to farm; that the highway formed the only feasible means of travel for the purpose, except a long, steep, and circuitous passage, the use of which was so expensive as to be impracticable; that the defendant company by its charter was bound to keep and maintain in repair a bridge in the road between farm No. 1 and the other two farms; and that the defendant failed and neglected to keep the bridge in repair, and permitted it to be so much out of repair as to become unsafe and unavailable for use, whereby the plaintiff was hindered from passage along the highway from farm No. 1 to the other two farms, and was put to actual pecuniary expense in carting farm products, etc., from farm to farm over the long, steep, and circuitous passage aforesaid.

2. On demurrer, *held* (following *Mehrhof v. D. L. & W. R. R. Co.*, 16 Atl. 12, 51 N. J. Law, 56) that the declaration shows such a special and particular damage to the plaintiff as to sustain his private action.

(Syllabus by the Court.)

Action by Thomas D. Ryerson against the Morris Canal & Banking Company. Demurrer to the declaration. Overruled.

Argued February term, 1903, before GUMMERE, C. J., and FORT, HENDRICKSON, and PITNEY, JJ.

John B. Humphreys and De Witt C. Bolton, for plaintiff. Corbin & Corbin, for defendant.

PITNEY, J. The declaration avers that the plaintiff was lawfully possessed of three farms situate in Wayne township, in the county of Passaic; farm No. 1 contains a dwelling house, barn, and outhouses; farm No. 2 is distant about 300 yards westerly from farm No. 1, and contains no buildings; farm No. 3 is distant about three-quarters of a mile westerly from farm No. 2, and contains no buildings; that the three farms are contiguous to a certain public road or highway that forms the only feasible means of travel from farm No. 1 to each of the other two farms, except a long, steep, and circuitous passage, the use of which is so ex-

pensive as to be impracticable; that the three farms were cultivated by the plaintiff, and that it was necessary for him from time to time to cart the farm products from farms Nos. 2 and 3 to the buildings upon farm No. 1, and to cart manure from farm No. 1 to the other two farms; that the Morris Canal intersects the highway between farm No. 1 and farm No. 2, and that under its charter the defendant company was bound to keep and maintain in proper repair a bridge across the canal so as to prevent any inconvenience to the plaintiff in the use of the highway. The declaration then avers that the defendant failed and neglected to keep the bridge in proper repair, and permitted it to be so much out of repair as to become unsafe and unavailable for use, whereby the plaintiff was hindered from passage along the highway over and across the canal, and was put to expense in carting farm products from farms Nos. 2 and 3 to farm No. 1, and in carting manure from farm No. 1 to the other farms, over the long, steep, and circuitous passage aforesaid.

It will be observed that the default with which the defendant is charged amounts to a common nuisance. The demurrer raises the question whether the plaintiff is entitled to maintain a private action to recover the damage accruing to him therefrom. In order to maintain an action for obstructing a public way, the plaintiff must have sustained some special damage peculiar to himself beyond that suffered by the rest of the public who are entitled to use the way. It is sometimes said to be necessary that the plaintiff's injury should be not only greater in amount, but different in kind, from that suffered by citizens in general. Where there is a ditch in the road or an obstruction across it, and a traveler suffers an injury to himself or to his horse by falling into the ditch or striking the obstruction, it is clear that there is such a particular damage as to sustain a private action. *Temperance Hall Association v. Gilles*, 83 N. J. Law, 260; *Driscoll v. Carlin*, 50 N. J. Law, 28, 11 Atl. 482; *Hart v. Freeholders of Union*, 57 N. J. Law, 90, 29 Atl. 490. And where the defendant dug a ditch in and along a lane that formed a public highway, the ditch extending around and about the plaintiff's lot and in front of his house and barn, so that access to them with the plaintiff's horses and wagons became very inconvenient and hazardous, to his damage, this court held that this was such a special injury as to entitle him to maintain an action. *Runyon v. Bordine*, 14 N. J. Law, 472. There the damage accrued to the plaintiff, chiefly, if not wholly, by reason of his ownership of property abutting upon that portion of the highway where the public nuisance existed. Viewing the present plaintiff simply as a property owner, it would seem that his possession of each of the three farms must be treated as separate and distinct from his possession of the others. Dealing with either

farm alone, the damage to the plaintiff is perhaps too remote to form the basis of a private action.

In *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281, where the plaintiff, who had a shop by the side of a public thoroughfare, suffered a loss of business in consequence of passengers having been diverted from the thoroughfare by the unauthorized continuance of an obstruction across it, it was held that this was a damage sufficiently of a private nature to form the subject of an action. But this case was substantially overruled by the decision of the House of Lords in *Ricket v. Metropolitan Ry. Co.* (1867) L. R. 2 H. L. 175, 1 Eng. Rul. Cas. 573, 587, affirming *a. c.*, 5 B. & S. 156, 34 L. J. Q. B. 237, since which case the English courts have adhered to a limitation of the rule with respect to landowners that confines the right to maintain a private action practically to the owners of property adjacent to the nuisance. *Benjamin v. Storr*, L. R. 9 C. P. 400, 19 Eng. Rul. Cas. 263. But the present declaration exhibits the plaintiff in the capacity of a member of the public entitled to use the obstructed highway, who by reason of special circumstances had need to use it more frequently than others, and who sustained actual pecuniary loss because of being compelled to take a roundabout route in order to avoid the obstruction. This court has sustained the right of private action in a case legally indistinguishable from the present. *Mehrhof v. Del., Lack. & Western R. R. Co.*, 51 N. J. Law, 56, 16 Atl. 12. There the plaintiffs were operating a brickyard upon the bank of a navigable river, and the defendant unlawfully obstructed the river, whereby the boats of the plaintiffs, provided for transporting their bricks to market, were prevented for a long period of time from passing down the river, during which time the plaintiffs bore the expense of their keep, together with the loss of the sale of a large quantity of their bricks. This court upheld the right of recovery, not at all upon the ground of any injury done to the brickyard, or to the plaintiffs as owners thereof, but solely because their right to dispose of their bricks had been impaired, and because the plaintiffs were specially damaged by the loss of the use of their boats, which were shut off from the channels of trade, their expense in victualing them, and the loss of trade and profit. This decision was rested upon the English cases of *Iveson v. Moore*, 1 Ld. Raym. 486; *Rose v. Miles*, 4 Mau. & Sel. 101; *Hart v. Basset*, T. Jones, 156; and *Chichester v. Lethbridge*, Willes, 71. These and some other decisions in the English courts (*Maynell v. Saltmarsh*, 1 Keb. 847; *Greasley v. Codling*, 2 Bing. 263; etc.) fully sustain the present action, and are not overruled by *Ricket v. Metropolitan Ry. Co.*, *ubi supra*, as will appear from *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316, a case involving the rights of a mere traveler, decided shortly after the *Rick-*

et Case. In *Winterbottom v. Lord Derby* the authority of *Iveson v. Moore* and other cases of the same class was fully recognized, but liability was denied on the ground that the plaintiff had shown no pecuniary damage, but only personal inconvenience arising from the obstruction of the highway. The decision in *Mehrhof v. Del., Lack. & Western R. R. Co.*, being deemed a controlling authority, it is unnecessary to discuss the cases cited by demurrant from the courts of Massachusetts and other states.

The case having been submitted upon printed arguments, and counsel for demurrant having addressed themselves solely to the question whether the declaration shows such a special and peculiar damage to the plaintiff as to entitle him to maintain a private action, we have considered no other question. We therefore pass no judgment upon the question whether the declaration shows a legal duty on the part of the defendant to erect, maintain, and repair the bridge in question.

The demurrer will be overruled.

(69 N. J. L. 588)

VERDON v. UNITED ELECTRIC CO. OF NEW JERSEY.

(Supreme Court of New Jersey. June 8, 1903.)

PROPERTY DESTROYED BY FIRE—VALUE—
EVIDENCE—AMOUNT OF INSURANCE.

1. In an action for damages to property by fire, the fact that the property was insured for a certain amount is not conclusive evidence that it is not worth more than that amount.

Action by William P. Verdon against United Electric Company of New Jersey. On rule to show cause. Rule discharged.

Argued February term, 1903, before GUMMERE, C. J., and FORT, PITNEY, and HENDRICKSON, JJ.

Edward A. & W. T. Day, for plaintiff.
Bedle, Edwards & Lawrence, for defendant.

PER CURIAM. The facts of this case as they appear in a previous trial, and the legal questions then raised, will be found reported in the opinion in *Schutte et al. v. United Electric Co. of N. J.* (N. J. Sup.) 53 Atl. 204. The record here presents the result of a retrial of that cause, so far as the present plaintiff was a party thereto. From a perusal of that opinion it will appear that the only questions left to be considered here on this motion for a new trial are: (1) Was there sufficient evidence of negligence to go to the jury? and (2) are the damages excessive? As to the first question, it must be answered in the affirmative. As to the second, our answer is that we find ourselves unable to disturb the verdict on the ground of excessive damages. To justify such interference, the verdict must be clearly excessive. The suit is brought by plaintiff for the recovery of damages for losses caused by fire, and is prosecuted to the use of the

insurance company to the amount of \$960, paid by it to the plaintiff in settlement of his loss. The balance of damages, if any, are to be recovered by the plaintiff in his own behalf. On the previous trial the jury awarded to the plaintiff \$2,000. The present jury has awarded the sum of \$2,000. The bars of the saloon were of mahogany, and were shown to be very valuable, and there was evidence tending to show that the damage to them was much greater than that allowed by the insurance company. There was also the question of the amount of the loss of profits from the interruption of the business to be considered by the jury; and there was some property destroyed not included in the settlement by the company. And, as the judge charged at the trial, the amount of \$960 received from the company was some evidence of value, but it did not conclude the plaintiff. We do not think the amount of the verdict, which includes interest for a considerable period, is so far excessive as to warrant us in setting it aside.

The rule to show cause is discharged.

(69 N. J. L. 601)

DWAJAKOWSKI v. CENTRAL R. CO. OF NEW JERSEY.

(Supreme Court of New Jersey. June 12, 1903.)

RAILROADS—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

1. One failing to see an engine approaching because he did not look as he stepped on the railway track is negligent, precluding a recovery for the injuries sustained by being struck by the engine.

Action by Antoni Dwajkowski against the Central Railroad Company of New Jersey. On rule to show cause. Rule absolute.

Argued February term, 1903, before GUMMERE, C. J., and FORT, HENDRICKSON, and PITNEY, JJ.

Cowles & Carey, for plaintiff. George Holmes and W. D. Edwards, for defendant.

PER CURIAM. The plaintiff, desiring to take a train of the defendant company at its station at Greenville for the purpose of going to Plainfield, approached the station on the side of the east-bound track. There was an overhead passageway provided for passengers desiring to cross over the tracks for the purpose of taking west-bound trains. This, the plaintiff says, he failed to observe. The east-bound and west-bound tracks were separated by a fence, in one portion of which there was a gate, put there for the purpose of transporting baggage from one side of the road to the other. The plaintiff's story is that this gate was open, and that, supposing it was for the purpose of enabling passengers to pass through from one side of the tracks to the other, he attempted to cross by that way. He says that before crossing he

looked to see if the road was clear, and, observing that a freight train was approaching, with several cars attached to it, he waited until it had passed, and then, seeing nothing else which threatened danger, stepped upon the track, and was immediately struck down by a caboose, which was running wild, and following the freight train. He excuses himself from having failed to observe the approach of the caboose by saying that his vision was obscured by the presence of a heavy fog, and by the smoke thrown out by the engine which had just passed him.

It is claimed on the part of the defendant company that, on the plaintiff's own story, he should have been nonsuited, because it affirmatively appears that he was negligent in failing to observe the approach of this caboose. Whether, under the peculiar circumstances detailed by the plaintiff, he can be said to have been negligent, we do not find it necessary to determine; for, on the whole case, it has been clearly shown that the plaintiff was not struck down by a caboose running wild, and following closely behind a freight train which had passed him; that in fact no freight train at all passed Greenville station at or about the time of the accident; and that he was injured by stepping in front of an engine which was running backward, and drawing a caboose after it. If he failed to see this engine approaching, it was because he failed to look before stepping upon the track, and such failure was clearly negligence on his part. If he did see it, and took the risk of attempting to cross in front of it, he has no one but himself to blame for the injury which resulted.

The rule to show cause should be made absolute.

(69 N. J. L. 453)

YOUNG v. HAIGHT et al.

(Supreme Court of New Jersey. June 12, 1903.)

MECHANICS' LIENS—MORTGAGES—PRIORITY.

1. Under Mechanic's Lien Law (P. L. 1898, p. 538), providing that, on a sheriff's sale under a judgment on a mechanic's lien, the purchaser shall acquire the estate which the owner had in the lands at the commencement of the building, subject to mortgages recorded prior to that event, and subject to mortgages recorded before the filing of the lien claim, to the extent of the money actually advanced by the mortgagee and applied to the erection of the building on the premises, the lien of a mortgage for moneys advanced and actually used for the erection of the building is superior to a mechanic's lien filed subsequently to the recording of the mortgage, whether the mortgage was executed to secure future advances, or money already advanced, and while the building was in the course of erection.

Case Certified from Circuit Court, Bergen County.

Action to enforce a mechanic's lien by Frank Young against John W. Haight and others, as owners, and Christopher Schultz, mortgagee. Case certified. Decree advised.

¶ 1. See *Railroads*, vol. 41, Cent. Dig. § 1305.

Argued February term, 1903, before GUMMERE, C. J., and FORT, HENDRICKSON, and PITNEY, JJ.

R. M. Hart, for plaintiff. John S. Mackay, for defendants.

GUMMERE, C. J. This is an action brought under the mechanics' lien law. By contract dated March 17, 1902, but never filed, Haight and the Messigs, the owners above named, contracted with the builder that he should erect a house on their property, and about the same time also contracted orally with Schultz, the mortgagee above named, that he should advance \$2,000, to be applied to the erection of the said building. Subsequently the said builder erected the house, purchasing certain materials from Young, the plaintiff, who began to supply the same on May 15th, and completed the supply on July 21, 1902. The amount of the plaintiff's bill for materials is \$255, for which he filed a lien claim on July 21, 1902, in the Bergen county clerk's office, against the builder, the owners, and the mortgagee. Schultz, the mortgagee, in pursuance of his agreement, advanced \$1,650, which was applied to the erection of the building as agreed upon, but did not actually receive the mortgage therefor until the 15th day of July, 1902, on which day the mortgage was executed to him by the owners, and was also placed on record in the Bergen county clerk's office. On these facts, the question whether the plaintiff, or the mortgagee, is entitled to a prior lien upon the property, is certified to this court for its advisory opinion.

By the sixth section of a supplement to the mechanics' lien law passed March 14, 1895 (P. L. 1895, p. 316), "Every mortgage given or to be given upon lands in this state, shall have priority over every claim that may be filed in pursuance of this act, to the extent of the money actually advanced and paid by the mortgagee, and applied to the erection of any new building upon the mortgaged land, or any alterations, repairs or additions to any building on such lands: provided such mortgage be registered or recorded before the filing of any such claim." The effect of this provision seems plain. The only reason why any uncertainty has arisen with relation to its scope appears to be that after the passage of the supplement of 1895, and at the February term, 1896, of this court, in the case of *Erdman v. Moore*, 58 N. J. Law, 445, 33 Atl. 958, it was held that the lien of a materialman for materials furnished in the construction of a building was superior to that of a holder of a mortgage made and executed while the building was in course of construction, notwithstanding the fact that the mortgage was recorded prior to the filing of the lien claim. This conclusion was considered to result necessarily from the twenty-third section of the mechanics' lien law (Revision, p. 673), which provided that, upon a sheriff's sale under a judgment

upon a lien claim, the purchaser shall acquire the estate which the owner had in the lands at the commencement of the building, and subject only to such mortgages as had been created and recorded prior to that event. But a reference to the case of *Erdman v. Moore*, 58 N. J. Law, 456, 457, 33 Atl. 958, will disclose that the materials for which the lien was there filed were furnished in August, 1893, and that the mortgage was executed and recorded in June of that year. The relative rights of the parties to that suit, therefore, had become fixed before the passage of the supplement of 1895, and were not affected by it.

The rights of the parties to this litigation sprang into existence in 1902. At that time there had been a complete revision of the mechanics' lien law, in which not only was the sixth section of the supplement of 1895 retained (Mechanics' Lien Law; P. L. 1898, p. 543, § 15), but section 23 of the original act was modified so as to provide that, upon a sheriff's sale under a judgment upon a lien claim, the purchaser shall acquire the estate which the owner had in the lands at the commencement of the building, subject to such mortgages as had been created and recorded prior to that event, and also subject to the lien of any mortgage given and recorded, or registered, under the circumstances contemplated by, and in conformity with the provisions of, section 15 of the act. The manifest object of these changes in the statute was to make the lien of a mortgage given for moneys advanced for the erection of a building, and actually used for that purpose, superior to a mechanic's lien filed upon the property subsequent to the recording of the mortgage, notwithstanding the fact that the moneys had been advanced and the mortgage had been executed while the building was in course of erection. And this priority is given whether the mortgage be made to secure future advances, or money already advanced. The only test is whether the money has been loaned for the erection of, or alteration, repair, or addition to, the building, and has been actually applied to that purpose. When such is the case, the mortgage has priority over a mechanic's lien filed subsequent to the date of its recording.

The Bergen circuit is advised that the mortgagee, Schultz, is entitled to the prior lien upon the property of Haight and the Messigs.

(59 N. J. L. 553)

CANFIELD et al. v. BROWNING et al.
BROWNING v. BROWNING.

(Supreme Court of New Jersey. June 8, 1903.)

EXECUTION—PRIORITY—LEVY.

1. The plaintiff in a junior judgment by suing out execution and levying upon land acquires priority over an older judgment upon which execution is subsequently issued.

¶ 1. See Execution, vol. 21, Cent. Dig. §§ 229, 230.

2. An insufficient levy cannot be fortified or perfected by a levy made after the return of the execution.

3. A description in the levy made, by which the land intended to be levied upon can be fully distinguished and identified, is sufficient.

(Syllabus by the Court.)

Action by George G. Browning against Maurice Browning and by Beulah B. Canfield and Gertrude T. Browning against Maurice Browning and George G. Browning. Judgment for plaintiffs. Rule to show cause why levy of an execution on the earlier judgment should not be set aside. Denied.

Argued June term, 1903, before VAN SYCKEL and GARRETSON, JJ.

D. J. Pancoast, for the rule. E. A. Armstrong, opposed.

VAN SYCKEL, J. The two above-stated judgments were recovered in May, 1902. In 1900 George Browning recovered a judgment against Maurice and George G. Browning, and in 1901 he recovered a judgment against Maurice Browning. George Browning is not a party to either of the judgments recovered in May, 1902. Executions were issued upon all these judgments, and placed in the hands of the sheriff of Camden county. The executions in favor of George Browning were issued to the sheriff prior to the issuing of the executions on the later judgments. After the sheriff received the George Browning writs, and before the return day thereof, he levied upon the real property of the defendants by the following description:

"Maurice Browning: 428 and 432 Market street, Camden. Stable rear of Middleton's property. Farm at corner of Browning road and Marlton Turnpike. Mill property at Cooper's creek and Pine street."

"George G. Browning: Mill property, Cooper's creek and Pine. Property S. E. Cor. 2nd and Market. Property 125 and 127 Market street. Property Market, below Front. Farm Cooper's creek and Kaighn's Ave. Stable property, Front, below Market."

After the return day of the executions he attached to the writs a more full and precise description of the several parcels of the real estate levied upon, and advertised them for sale by these particular descriptions under all four of the executions in his hands. Thereupon the plaintiffs in the subsequent judgments obtained a rule to show cause why the levy made under the executions issued on the earlier judgments should not be set aside.

Waiving the objection that George Browning is not properly made a party to this proceeding by the form of the rule to show cause, the merits of the controversy will be considered. It must be conceded that the plaintiff in a junior judgment, by suing out and levying the first execution upon land, acquired the prior lien; and also that an insufficient levy cannot be fortified or perfected by a levy made after the return day of the execution. *Kemble v. Harris*, 36 N. J.

Law, 526; *Wills v. McKinney*, 41 N. J. *Law*, 120; *Bogert v. Lydecker*, 45 N. J. *Law*, 314; *Clement v. Kaighn*, 15 N. J. *Eq.* 47. The only question is whether the description of the property in the levy made by the sheriff before the return day of the writs was sufficiently specific to identify the lands and fasten the lien of the executions upon them. In *Wills v. McKinney*, supra, the Supreme Court said: "The rule for determining the meaning of a levy made on lands under execution, and returned in writing with the writ, is not different from that which is applied in the construction of other instruments in writing. Any description sufficient to fix the bounds of the land is sufficient, or where it can be fully identified and distinguished by the terms used; and it may refer for a proper description to the deed of the debtor's grantor, or to a recorded will, or in any other way where there is sufficient given from the whole description to ascertain or identify the premises; but extrinsic evidence will not be admissible to show what land was intended to be levied on." By the exclusion of extrinsic evidence the court intended such evidence as might be produced to show that the sheriff intended to levy on more land or other land than that which was covered by the description in the levy as returned. That it was not intended to exclude all parol evidence appears by the case of *Chappell v. Hunt*, 8 Gray, 427, which was cited with approval. In that case the Massachusetts Supreme Court said: "In many cases the location of land could be determined accurately without naming the town in which it was situated. If, for example, it was described as being bounded by a particular pond or stream of water, its location would be readily ascertained. The name of the town would not fix its identity more precisely. Nor can we say, as a matter of law, that the description in the appraiser's certificate of the premises on which the levy was made is so defective and uncertain as to render it invalid. This is a question of fact to be settled by a jury. If a lot of land could be proved to exist in the county, containing the exact quantity, and with boundaries, courses, distances, and monuments exactly corresponding with those named and set out in the appraiser's certificate, it would make out a case of very strong identity, sufficient to sustain the levy; or, if the description was found very nearly to resemble an actually existing lot or parcel of land, it would probably be adequate proof of identity to satisfy a jury." In my judgment, the description is sufficiently accurate if a person guided by it could go to the property and identify it. This rule should be applied to determine whether the several levies, or any of them, are sufficiently descriptive of the property to sustain them.

The correct practice will be to let the several properties be sold separately under all the executions attempted to be levied upon them, and upon the payment of the proceeds

of sale into court the rights of the execution creditors will be settled. The parties should have leave to take further testimony to show whether, from the levies as made, the properties levied upon, or any of them, can be sufficiently identified.

(39 N. J. L. 589.)

BANCROFT et al. v. MAGILL, Collector.
(Supreme Court of New Jersey. June 8, 1903.)
TAXES—EXEMPTIONS—PRIVILEGED CORPORATIONS.

1. Under General Tax Act, § 200 (Gen. St. p. 3320), exempting from taxation the buildings used by certain incorporated educational, religious and charitable institutions, together with a curtilage not exceeding five acres, unless the owner of the land receives rent therefor, land used for the purposes of such an institution, without the payment of rent by the corporation, is exempt from taxation, regardless of its ownership.

Certiorari by Margaret Bancroft and others against Charles E. Magill, collector, to review an assessment for taxes. Assessment modified.

Argued February term, 1903, before DIXON, GARRISON, and SWAYZE, JJ.

F. D. Weaver, for prosecutors. Henry S. Scovel, for defendant.

GARRISON, J. Section 200 of the general tax act (Gen. St. p. 3320) exempts from taxation the buildings used by incorporated institutions for certain stated purposes, together with a curtilage not exceeding five acres, if necessary to the fair use and enjoyment thereof, unless the owner of the land receives rent therefor. That is to say, land used for the purposes stated without the payment of rent by the incorporated body is exempt from taxation, regardless of its ownership.

The prosecutors are entitled to exemption to the extent specified in the statute, with costs.

(64 N. J. E. 375)

ELLIS v. ELLIS et al.

(Court of Errors and Appeals of New Jersey.
March Term, 1902.)

WILLS—CONSTRUCTION—CHARGE ON DEVISE—ENFORCEMENT.

1. Testator died seized and possessed of a considerable estate, leaving a grandson, his sole descendant, and the only child of a son by his first wife, and also leaving a widow, to whom by his will he left his entire estate, with this provision for his grandson:

"Item. My son having departed this life leaving an only child of tender years, I have made provisions for the care, support and education of the said child until his arrival at twenty-one years of age, leaving the entire charge and disposition of that matter, however, in the good judgment and discretion of my said wife, Catherine Ellis."

No other provision had been made by the testator for the grandson.

Held: First. That the estate of the testator in the hands of the widow was charged with the care, support, and education of the infant until he attained 21 years of age.

Second. That the court will enforce this charge, and fix the amount to be appropriated for that purpose.

Third. That the widow shall have the right to see to the proper expenditure of the sum fixed by the court, and such rights will be in satisfaction of that part of the provision giving her the charge and disposition of that matter.

Dixon and Vroom, JJ., dissenting.

(Syllabus by the Court.)

Appeal from Court of Chancery.

Action by William H. Ellis, an infant, by Hannah Gallagher, his next friend, against Catherine Ellis and others. Decree for plaintiff, and defendants appeal. Affirmed.

The following is the opinion of the court below (Pitney, V. C.):

"The facts are that the testator, William H. Ellis, Sr., had an only child, William H. Ellis, 2d, who married a Miss Gallagher, and had by her one child, William H. Ellis, 3d, the infant complainant herein. The father of the complainant was the only child of the testator, and seems to have been a person of irregular habits, and did not long cohabit with his wife; but the result of the marriage was the birth of the complainant on March 7, 1897, and at the time of the hearing he was four years old. The child, from its birth, was taken care of by its maternal grandmother, the guardian ad litem, and also guardian of the person and property of the infant complainant, appointed by the orphans' court of Hudson county; and, as the result of some proceedings by the overseer of the poor, a weekly payment of two dollars and a half was made to the overseer for the support of the child, and that money was paid to the maternal grandmother, Mrs. Gallagher, and such payments continued to the death of the son, the father of the infant, which occurred on March 30, 1898. The grandfather died three weeks later, to wit, on April 18, 1898, testate of a will as follows:

"'In the name of God, amen. I, William H. Ellis, of the city of Hoboken, county of Hudson, and state of New Jersey, being of sane mind and memory and conscious of the uncertainty of this life, do make, publish and declare this to be my last will and testament in the manner following, to wit:

"'Item. I order and direct that all my just debts and funeral expenses be paid as soon as conveniently can be done after my decease.

"'Item. I give, devise and bequeath all my estate of every nature wheresoever situated unto my beloved wife Catherine Ellis, to her, her heirs and assigns forever.

"'Item. My son having departed this life leaving an only child of tender years, I have made provisions for the care, support and education of the said child until his arrival at twenty-one years of age, leaving the entire charge and disposition of that matter, however, in the good judgment and discretion of my said wife, Catherine Ellis.

"'Item. I hereby make, nominate and appoint my said wife Catherine Ellis the execu-

trix of this my last will directing that she give no bonds for the performance of her trust, and I hereby revoke any and all former wills by me made.

"In witness whereof, I have hereunto set my hand and seal this fourteenth day of April, in the year of our Lord, eighteen hundred and ninety-eight.

"William H. Ellis."

"One payment was made by the testator after the death of the son, and received by Mrs. Gallagher. No payments were made after the death of the testator. He left a widow, who is his sole legatee and devisee. She was his second wife, and not the grandmother of the infant complainant. Demand was made upon her for the support of the child, and she offered the interest of a thousand dollars a year, which was declined. A suit was brought by the late Senator Daly, which slept until his death, when the present bill was filed by Mr. Besson. The mother of the infant has married again, and he has been taken care of and supported by his maternal grandmother. The estate left was admitted by the defendant at the hearing to be worth at least \$9,600. Complainant's counsel contended that it was much more than that, but that amount was finally adopted.

"Very little contest was made at the hearing over the construction of the will. It was proven and conceded that no provision whatever for the support of his only offspring had been made by the testator, except the devise to his wife, the defendant; and the duty of the defendant, under the will, to provide for the support of the child was substantially admitted by her counsel. The only question was as to the amount of the support, and the mode of its application.

"The maternal grandmother and the child were both in court, and were seen by me. The grandmother was a neat, wholesome-looking woman, manifestly of good habits; and the child was its own witness to its having been well taken care of, and its attachment to its grandmother was evident. No question was made as to the propriety of leaving the child with the grandmother. The defendant offered to take personal charge of the child and its rearing. But the whole matter, both of the amount of the allowance, and the proper person to have charge of the infant, was left by defendant's counsel to the court. Defendant's counsel offered two dollars a week. I thought that two dollars and a half was a moderate sum, and I was decidedly of the opinion that the grandmother Gallagher should have the personal care and charge of the infant, with the right of supervision by the defendant, and dictated the provisions of the decree at the moment, and for the arrears of about three years I allowed only \$150.

"I have said that little or no contest was made at the hearing over the construction of the will. The fact that the estate devised

to the defendant was charged with the support of the child was hardly disputed. Nevertheless, I have given it consideration, without, however, an examination of any of the authorities. The will itself contains a declaration that the testator had made a provision for the care, support, and education of his grandchild until his arrival at twenty-one years of age. It appears with sufficient certainty that he made none in his lifetime which would answer this declaration in the will, and by the will he gave the whole of his estate to his widow. It seems to me, then, that it follows that the provision for the child was included in the devise to the widow, and this view is strengthened by the fact that its application was confided to the widow. The result is a trust in favor of the child. The only question is whether or not this court has a right to interfere by reason of its general jurisdiction over the administration of trusts, and I am of the opinion that it has. I think that the case falls within the principle upon which the late chancellor dealt with the Bentley will, and his action in that matter was approved by the Court of Errors and Appeals. *Bentley v. Bentley* (Ch.) 38 Atl. 286; *Bentley v. Dixon* (Err. & App.) 46 Atl. 689. I am unwilling to admit that it is within the power of this widow to say how much should be expended in the support of this child, without any supervision in that regard by this court. Granting that power, she might be satisfied with a wholly insufficient amount; and I think her disposition to do so was illustrated in this case by offering the pitiable sum of the interest on a thousand dollars—say, \$50 a year—for the support and maintenance of the child. I think that part of the will which leaves the entire charge and disposition of the care, support, and education of the child to the good judgment and discretion of his wife is satisfied if she shall have the opportunity to see that the money paid by direction of the court is actually used for the care, support, and education of the child. Provision in that regard was made in the decree."

Lewis, Besson & Stevens, for appellants.
James F. Minturn, for respondent.

PER CURIAM. Affirmed on opinion of court below.

DIXON and VROOM, JJ., dissenting.

(39 N. J. L. 551)

HARDCASTLE v. STILES & McCLAY.

(Supreme Court of New Jersey. June 8, 1903.)

CHattel Mortgage—Validity—Recording—Possession.

1. Unless a mortgagee of chattels takes immediate possession of the chattels, or records his mortgage immediately, his mortgage will be postponed to the claims of creditors.

Immediate possession or recording means with reasonable dispatch.

¶ 1. See *Chattel Mortgages*, vol. 2, Cent. Dig. § 161.

2. Whether the mortgage is recorded with reasonable dispatch is a question of fact under the circumstances of the case, and the finding in the court below will not be reviewed in this court where it has evidence to support it.

(Syllabus by the Court.)

Appeal from District Court of Atlantic City.

Action by J. Walter Hardcastle against Stiles & McClay. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued February term, 1903, before VAN SYCKEL and GARRETSON, JJ.

E. H. Chandler, for appellants. Francis Lavery and Wm. M. Clevenger, for appellee.

VAN SYCKEL, J. This is an action of tort, brought in the district court of Atlantic City by Hardcastle to recover the value of certain goods levied upon by the plaintiff by virtue of an execution in his hands against Sheppard & Hackney. Stiles & McClay held a chattel mortgage on the goods, given to them by Sheppard & Hackney on the 1st day of June, 1901. The mortgage was recorded June 6, 1901, but the goods remained in the possession of the mortgagors. The debt upon which the judgment was rendered and the execution issued was contracted before the chattel mortgage was given, but the judgment was rendered after the mortgage was recorded. The fourth section of the chattel mortgage act (2 Gen. St. p. 2113) provides that, unless the mortgagee takes possession of the chattels or records his mortgage immediately, his mortgage is postponed to all creditors, whether they become such before or after the mortgage is recorded or possession taken, and that immediate possession or immediate recording means as soon as may be by reasonable diligence and dispatch under the circumstances of the case. *Roe v. Meding*, 53 N. J. Eq. 350, 33 Atl. 394. The date of the mortgage being June 1, 1901, and no evidence having been offered to show when it was delivered, it will be presumed to have been delivered on the day of its date. The time when the affidavit to the mortgage required by statute was taken cannot affect the question whether it was recorded with reasonable dispatch, otherwise the mortgagee might withhold it indefinitely from record without subjecting his claim to be superseded. The trial court found that the mortgage was not recorded with reasonable dispatch under the circumstances of the case. The finding of facts in the court below will not be reviewed here. No explanation appears in the case why the mortgagees withheld the mortgage from record for five days, nor does it appear how far the mortgagees were from the recording office when the mortgage was delivered, nor what time was necessary to reach the recording office. Under the facts which appear, the finding of the trial court cannot be held to be erroneous. Section 205 of the act of 1898, p. 630, provides that the determination of the judge of the district court shall be final and conclusive between

the parties upon questions of fact. The act of 1902, p. 565, under which this appeal was taken, provides that the Supreme Court may either order a new trial or may order judgment to be entered for either party. The district court gave judgment for the plaintiff for the sum of \$276.45, and \$20.77 of costs, December 11, 1902. Judgment should be entered in this court for the same amounts, with interest from December 11, 1902, besides costs of suit in this court.

(99 N. J. L. 603)

BARTON v. HARKER.

(Supreme Court of New Jersey. June 8, 1903.)

JUDGMENT—SETTING ASIDE—FAILURE TO MAKE DEFENSE.

1. Defendant's counsel on cross-examination referred to the defense to be offered, but defendant's claims were not admitted, and credits claimed by him were not produced by way of evidence, and after the close of plaintiff's case a day was fixed to go on with defendant's case. The case was put off a number of times at the request of defendant's counsel, and on the last day fixed defendant's counsel telegraphed him not to attend, so that he did not do so and the case was closed without his defense being considered. *Held*, that defendant was entitled to have the judgment set aside and be given an opportunity to make his defense, on the ground that he had been misled by his counsel.

Action by Charles Barton against Story R. Harker, in which there was judgment for plaintiff. On rule to show cause why the judgment should not be set aside. Rule made absolute.

Argued February term, 1903, before VAN SYCKEL and GARRETSON, JJ.

H. H. Wainwright, for plaintiff. Scott Scammell, for defendant.

PER CURIAM. This is a rule to show cause, obtained by the defendant, why a judgment entered upon the report of a referee should not be set aside upon the ground that the defendant was prevented from presenting his defense.

It appeared in the evidence taken on the rule that several hearings of the case were had, and the defendant's counsel in his cross-examination of witnesses by his questions referred to the defense to be offered, but his claims were not admitted, and the credits of the defendant were not produced in the way of evidence. After the plaintiff's case closed a day was fixed to go on with the defendant's case. The case was put off a number of times at the request of the counsel of the defendant, and upon the last day fixed, and of which the defendant had notice when the referee closed the case, the defendant's counsel telegraphed his client not to attend, and in obedience to that telegram the defendant did not attend, and the case was closed and the report made without the defense being considered. As the defendant seems to have been misled by his counsel, he should have an opportunity to put in his defense.

The rule to show cause will be made abso-

lute; the costs, however, to be paid by the defendant, and the judgment to stand as security to the plaintiff until the final determination of the cause.

(69 N. J. L. 607)

LEE v. ELIZABETH, P. & C. J. RY. CO.
(Supreme Court of New Jersey. June 8, 1903.)
CARRIERS—STREET CAR COMPANY—INJURIES TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

1. Evidence in action by a street car passenger for injuries examined, and *held* to show that the accident was occasioned by plaintiff alighting from the car after it had started, and without notifying the conductor of her intention, and hence not to sustain a verdict for her.

Action by Mary Lee against the Elizabeth, Plainfield & Central Jersey Railway Company. On a rule to show cause. Rule dismissed. New trial granted.

Argued February term, 1908, before GUMMERE, C. J., and FORT, PITNEY, and HENDRICKSON, JJ.

J. A. Kiernan, for plaintiff. Frank Bergen, for defendant.

PER CURIAM. A new trial is sought mainly upon the ground that the verdict is against the clear weight of the evidence. Plaintiff testified as follows: "Q. When the car stopped at Chestnut street, what did you do? A. I went to go out, and I had one foot on the step to go down, and before I had the other foot on the conductor pulled the bell, and the— I went on the street. Before I had the other foot on the step—the right foot was not on the step when he pulled the bell—and I went on the street." The step mentioned was the running board. Two boys, aged 11 and 14 years, respectively, who were upon the street at the time, were called to corroborate her. Their testimony will be referred to later.

To meet the plaintiff's case, three passengers who occupied the next seat in the rear of plaintiff testified, in substance, that the train stopped, and some passengers in the rear got off; that just as the car started to move again the plaintiff turned to one of their party, and asked if this was Chestnut street, Roselle, and, being answered in the affirmative, she, without notifying the conductor, stepped off the car and fell. Another witness testified that he and two ladies, who were his guests, from a distance, alighted from this car after it had stopped, and that then the car started on, and had only just started when he saw the car moving, and the plaintiff stepping off, and then saw her down in the street at the side of the car. He further testified that there was plenty of opportunity to get off the car while it stopped. The conductor's testimony was to the like effect as that of these four disinterested witnesses. The plaintiff herself admitted on cross-examination that when

the car had gotten to Chestnut street she did ask the girls behind her if that was Chestnut street. She was not asked to explain whether, as she was stepping her foot upon the running board, she had hold of the car, and whether she had released her hold when the car started. She was not recalled for rebuttal, and there was a singular absence of detail in her account of the accident. The same may be said of the testimony of the two boys called in her behalf. The testimony of one was that he saw the woman get hurt, and then as follows: "Q. What did the car do when it came there? A. Stopped, and Mrs. Lee went to get off, and it was standing still when she went to get off, and as soon as she got on the footboard the car started, and she fell." The second boy testified to the stopping of the car, and to the plaintiff getting down, from where she was sitting, on the running board, and then as follows: "Q. What happened then, while she was on the running board? A. The car started up, and she went to get off, and the motion of the car made her fall." The fair inference from this answer would seem to be that the plaintiff "went to get off" after the car started.

We think the verdict is against the clear weight of the evidence. The rule to show cause will be made absolute, and a new trial granted.

(65 N. J. E. 104)

MOORE v. BAKER.

(Court of Chancery of New Jersey. May 23, 1903.)

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—MARRIED WOMAN—CANCELLATION OF CONTRACT—FALSE REPRESENTATIONS—BURDEN OF PROOF.

1. The burden of proving that an agreement was induced by false representation is on the person who seeks a cancellation thereof.

2. Under Gen. St. p. 2017, § 1, giving married women the right to contract as though unmarried, and declaring such contracts enforceable in law or equity, a married woman may be compelled to perform, as vendee, a contract for the conveyance of land, although under Id. p. 2015, § 14, she is declared not authorized to convey her real estate, and could not be compelled to perform as vendor.

On bill for specific performance by Arthur W. Moore against Ida R. Baker, and cross-bill for cancellation by the latter against the former. Decree for complainant, and cross-bill dismissed.

Chas. H. S. Thorne and W. J. Kearns, for complainant. Edwd. Duffield, for defendant.

EMERY, V. C. Complainant and defendant (a married woman) entered into a written agreement dated November 15, 1899, for exchange of lands. Complainant was to convey his lands to defendant on or before September 1, 1900, and to pay \$1,700 to defendant on or before November 20, 1899, on which

¶ 1. See Cancellation of Instruments, vol. 3, Cent. Dig. § 100.

last-mentioned date defendant was to convey her lands to complainant. Defendant was further to pay to complainant \$200 by note, payable January 15, 1900, and to pay \$1,500 to complainant on September 1, 1900, with interest from November 20, 1899, on which date complainant was to enter into possession of defendant's lands. He did so enter. The lands were subsequently conveyed to him. Defendant's note for \$200 has been paid, and complainant has paid the \$1,700. Nothing remains to be performed of the agreement except defendant's taking the deed of complainant's lands and paying the balance of the purchase money on her part, \$1,500. She refuses to accept the deed or complete the contract, alleging that it was procured by false representations, and also files a cross-bill to have the agreement delivered up and canceled. Complainant has sold the property conveyed to him under the agreement.

On reading over and further considering the evidence in the case, I am confirmed in the impression made upon me by the evidence at the hearing that the defendant has failed to support the claim of her answer and cross-bill that the agreement was made in reliance on any false representations by complainant as to the property owned by him. The burden of proof was upon her to make out this case, and, not only has she failed to do this, but the fact that, after her husband (who acted as her agent) was familiar with all the facts as to the situation, location, and character of the property, which are now set up, he gave her note for \$200 in part performance of the contract, and that she afterwards paid this note points strongly to the conclusion that the objection to the contract and the defense is an after-thought. I find, therefore, that the defense set up in the answer is not made out, nor is there any sufficient evidence of such inequality of values in the properties exchanged as would justify the court in refusing to carry out the contract as an inequitable one. The further objection is made that under the decision in *Corby v. Drew*, 55 N. J. Eq. 387, 391, 36 Atl. 827 (*Stevens, V. C.*, 1897), the specific performance of the contract cannot be decreed against the defendant, who is a married woman. The case would be applicable if the defendant were here as the vendor resisting performance. But she has performed the contract of exchange so far as she is vendor by conveying her land to the complainant, and she is now simply the vendee, and the question is whether a married woman as vendee can be required to perform a contract for the purchase of lands, which can be carried out without requiring her to convey lands. The statute in force when the contract was made controls the case on this point, and makes the contract for purchase enforceable in equity. Act June 13, 1895 (P. L. 821; Gen. St. p. 2017, § 1). "Any married woman shall after the passing of this act

have the right to bind herself by contract with any person in the same manner and to the same extent as though she were unmarried, which contracts shall be legal and obligatory, and may be enforced at law or in equity, by or against such married woman in her own name, apart from her husband." The fourteenth section of the married woman's act (Gen. St. p. 2015) prevents this section from authorizing her to convey her real estate, and therefore, as Vice Chancellor Stevens held, relieves her from being obliged to specifically perform a contract to convey lands. But it does not affect her contract to purchase lands, and such contract may, therefore, be carried into effect by decree for specific performance, where the further performance of the contract on her part does not require a conveyance of lands by her.

I will advise a decree for complainant, and that the cross-bill be dismissed.

IN RE LEE.

(Court of Chancery of New Jersey. May 21, 1903.)

INSANE PERSONS—EVIDENCE—SUFFICIENCY.

1. On hearing of habeas corpus to secure the release of one confined in a lunatic asylum, evidence considered, and held to show that the petitioner had not recovered his sanity.

Petition by William J. Lee for writ of habeas corpus to secure his release from the New Jersey State Hospital for the Insane. Writ denied.

John T. Bird, for petitioner. E. R. Walker, for respondents.

REED, V. C. This inquest is, in my judgment, confined to the inquiry whether Mr. Lee, the petitioner, has recovered his sanity. I remark that this is the only serious inquisition, for I have no doubt whatever that at the date of Mr. Lee's reception into the State Hospital he was suffering from mental disorder. The petitioner had been the subject of an attack of typhoid fever, followed by erysipelas, in the early part of the year 1902. In the summer of 1902 he conceived that there was in existence a conspiracy organized for the purpose of accomplishing his business ruin. As conspirators, he fixed upon gentlemen distinguished in the community for rectitude and probity. He believed that some or all of these gentlemen had ruined his credit with the Pennsylvania Railroad Company and with his bank; that they had defeated his efforts to secure contracts for heating a school building, as well as contracts for heating the Statehouse; and that they had stripped him of his property in the Phoenix Ironworks. On August 9, 1902, the petitioner sent the following letter to Robert W. Smith, treasurer of the Pennsylvania Railroad Company: "I have reason to believe that State Treasurer Briggs is responsible for my removal from your weekly accom-

modation list. This is to tell you, that if Briggs succeeds in ruining me, I will, deliberately, with malice aforethought and in cold blood murder the cowardly cur." Subsequently, on a Monday in August, Mr. Lee broke nine panes of glass in a paneled door of Mr. Harry Hill. Mr. Lee had some dealings with Mr. E. C. Hill concerning an exchange of property, and on July 5, 1902, wrote him a letter from which the following is extracted: "If you don't produce a receipt for the taxes, I will have you arrested without a warrant, then I'll break a window in my wife's house and swear that you did it." On a Sunday in August he broke two large panes of glass in the window of Mr. Edmund C. Hill's house. In August he became angry because the Trenton Trust & Safe Deposit Company had refused to make a loan to him, and remarked that the next time he was arrested for throwing stones through a window it would be for throwing them through the window of the trust company. Mr. Lee left the bank, and rode for an hour back and forth round the two sides of the trust company building. He afterwards sent to the officers of the trust company a copy of the letter written to Mr. Smith, already displayed. Later he broke the window of the trust company building, for which he was arrested. Just previous to this, Mr. Lee, who was building a house adjacent to the residence of Prof. Mumper, became agrieved at the disappearance of some of his building material, and visited the professor to tell him that his (the professor's) boy had taken it. He became violent and profane, and, after being excluded from the professor's house, he got upon his bicycle and rode up and down in front of the house, and then wrote a postal and brought it to the front door, when the police, who had been telephoned for, came up and ordered him away. The next afternoon the petitioner came around the house and discharged a revolver, then looked up at the professor's house, shot again, and again directed his gaze towards the house. On the night of July 3d the windows of the professor's house were broken by stones which broke the glass, went across the room, and smashed the glass front of a china closet. On August 12th Mr. Lee was admitted to the asylum. On August 18th, while exercising in the yard, he broke 18 panes of glass by gathering up and throwing small stones. Upon his first entrance into the institution, he had been very friendly with Dr. Cort, one of the physicians in charge of the institution. He suddenly charged him with being a party to the conspiracy against him; Mr. Cort's part being, as he asserted, in holding him in the institution. On November 10th the petitioner escaped from the institution, and was absent until November 21st. On December 10th he was permitted to attend his father's funeral, and escaped again, and did not return to the institution until March 14, 1903. During his last ab-

sence, he sent to Dr. Cort a series of letters, scurrilous, incoherent, and irrational. The first of these letters was written from Fortress Monroe, under date of December 14, 1902. It is as follows:

"Paul Cort, M. D.,

"Before God, I swear that you shall not escape this time. I go to influential relatives and friends in Richmond now, and the next time I open my campaign there will be no half way measures. Your doom is sealed. Before A'pl. 1st, 1902, you will die insane and I will gloat over you.

"For the prevision is allied,
Unto the thing so signified,
Or say, the foresight that waits,
Is the same genius that creates."

"Your Nemesis,

"Nerves out of order."

After that date he wrote letters telling Dr. Cort that the 1st of April was less than 10 weeks away; that there was no use of his resisting, "for the Devil, me [Lee], assisting. I will bring my prophecy to pass." On December 12, 1902; he sent a postal to Dr. Cort upon which was written by the petitioner: "I have graven it within the hills; and my vengeance upon the dust within the rock. Before April 1st, 1903, you will die insane; after that your soul will be in Hell. For the prevision is allied," and so forth—signed, "Nerves out of order." Another postal was addressed to Dr. Cort on December 23, 1902; others on December 26th, 28th, 30th, on January 4th, 7th, and 13th. On February 12th he tells Dr. Cort that he has changed the date from April 1st to February 15th. He said: "When you read this, I will be in Trenton, disguised; because you see I'm a legal lunatic, one of whose crazy ideas is that he can bring his own prophecies to pass. I will try d—d hard anyway and if I don't get a chance before Feb. 15th, that don't end it. I know the country in that vicinity a d—d better than you do. You won't escape me and ha! ha! I'm 'bug house' and can't be punished for it. This will be the 'day of the dog' with a slight variation." On February 13th, he writes to him: "Trapped at last; Read your knife lie in the New York World, Sunday Feb. 15,

"Oh! The Devil he has you, no use resisting.
For you see the Devil has me assisting."

On January 22d, 1903, the petitioner had addressed to Dr. Cort a blue print upon which Mr. Lee had had photographed a letter written by the counsel of the Carr estate, the owner of the Phoenix Ironworks, to the counsel of Mr. Lee, and a letter from the latter gentleman to Mrs. Lee, inclosing the first-mentioned letter. Mr. Lee had had these letters, with another, photographed upon this blue print, one copy of which he sent, as already remarked, to Dr. Cort, and had written upon the blue print the words, "Not connected with Tom Thropp, Bug-house Cort, or other New Jersey Grafters, state Capitols

a Specialty." The letters and postals, the contents of which are not detailed, vary somewhat; many containing a repetition of the prophecies concerning Dr. Cort, similar in language to that already detailed. A copy of this same blue print was sent to Judge Vroom by Mr. Lee, and upon it was written by Mr. Lee words too offensive for reproduction. He also sent to Judge Vroom a letter on December 12, 1902, charging him with trying to ruin him, and telling him that "Hell was his doom"; and another letter, December 23, 1902, telling him that his (Lee's) picture undisofigured and Judge Vroom's name branded with infamy would be in the New York Herald on December 24th.

Dr. Ward who was investigating the question of the petitioner's sanity, after his admission to the hospital, asked Mr. Lee to give him a written statement of his side of the question. Mr. Lee did this on August 25th. In this statement he detailed his business, history, and circumstances which led him to believe in the existence of a conspiracy, and he closed by saying: "I personally handed to the Chief of Police at the Central Police Station on Saturday, August 9th, a copy of the alleged threats to kill Mr. Briggs, and at 8 a. m. on the morning of Monday August 11th, I walked in and around the Central Police Station whistling, 'There will be a hot time in the old town to night.' Why was it necessary for me to go out and smash more windows before I could succeed in getting arrested at about 11 a. m. Monday, August 11th?"

While the petitioner was absent from the hospital, during the period already mentioned, he wrote to Dr. Ward, repeatedly, in the most abusive and absurd language. On December 15th he wrote him a letter, of which the following is the conclusion: "I have friends more powerful than anyone has ever dreamed of. They are already at work. Know this. I despise a snob. I have often been much amused by the boasting of some people in Trenton about their ancestry. This is the first time I have mentioned what follows—you may easily verify it—My son Linwood, 8 years of age, now in Trenton, is far and away ahead of any one in the State of New Jersey in the matter of lineage. He is the last oldest son of an unbroken line of oldest sons extending back in England, Century after century. Not one has ever died before perpetuating his line. Not one but who has possessed marvelous vitality. My great grand-father was a noted Dissenting Minister in England, His Fore-father fought with Cromwell. Back after that it goes, not a shadow of a break as far as the history of England. And the strangest thing is that the oldest son only inherits the trait. From where did I get my fair hair, and cold steel blue eyes? From where did I get the courage you simply could not shake? Oh! you damned fool!"

On January 4th he writes: "Good morning

Perjurer! your day of reckoning is close at hand."

On January 7th he wrote:

"Wasn't it strange that your print was mailed at the same time the Gazette's print was mailed, only the Gazette's print had a lot of information written on it and was sent by special delivery so you could read it in the Gazette at the same time. Oh! you're up against it good and hard, Perjurer—The True American hits you next, and next Sunday's Herald—well it wont do a thing. W. J. L. "You are the buggiest bugger in the bug house."

On February 1, 1903, he wrote, and upon the envelope was written: "Not connected with Briggs, Thropp, Vroom, Cort, Ward or other Grafters. State Capitols and Bug-house Grafts a specialty."

These are only parts of the series of letters and postal cards written to Dr. Cort and Dr. Ward.

The explanation made by the petitioner to Dr. Ward and others of his reasons for this window breaking was that he wished to be arrested and have a trial, so that he could introduce evidence to show the existence of this conspiracy. His explanation of the abusive letters sent to the different persons from New York was that he desired them to attempt to arrest him in New York, so that he could prove his sanity. He twice accosted Mr. Leslie C. Pierson on the street by the epithet of "Thief," and explained it by saying that he suspected Mr. Pierson of preventing his getting the contract for heating the schoolhouse, and said that he knew that he had put in bids for a portion of the same work, while an officer connected with the school department. On the street he also accosted State Treasurer Briggs with the words, "What did you meet, whom did you meet, and how did you meet them?" In giving an account of this, he said Mr. Briggs became very much excited, and whirled around and ran over to a policeman standing over at the corner. He suspected Mr. Briggs of interfering with his obtaining a contract for heating the Statehouse, and also with destroying his credit with the Pennsylvania Railroad Company. The State Treasurer had no connection whatever with the railroad company, and the suspicion only arose, as petitioner says, because he was an important political boss. While in the hospital the petitioner broke window panes, the window guards of his room, and the sleeping bunk, with which he barricaded his door.

These are only portions of the many incidents and earmarks of conduct which occurred during the period immediately preceding his sequestration in the asylum and since. In addition to these facts, the petitioner unfortunately has behind him a family history of an insane father and sister. Now, putting aside his conduct in the hospital, except his breaking the window panes, the testimony is convincing that Mr. Lee was af-

afflicted with mental disorder. I do not need the testimony of an expert in mental diseases to instruct me in this phase of the case. It is true that Dr. Pierce Clark, an expert who testified for Mr. Lee, upon being asked whether detached acts indicated insanity, said "that they did not, and that they were not incompatible with sanity." This expert said further "that all these acts were not incompatible with sanity." Dr. Clark had sat through the first two days of the taking of testimony, and had heard the witnesses tell of the acts of Mr. Lee, and had heard the letters read, and upon being asked, upon cross-examination, "Do you say after this that your belief in his sanity is not shaken?" his answer was "that, in view of the explanation given to him (Dr. Clark), they would not prove that he was insane." Now, of course, it is obvious that a sane man may conclude that he is the subject of a conspiracy, upon facts which would fail to convince another man of the existence of such a condition of affairs. A man may break windows, and yet be sane. He may do it wantonly, mischievously, or maliciously. A man may write threatening letters or letters full of foul, obscene, and foolish matter, and yet be sane. But when a man of excellent business judgment and mental poise suddenly conceives that he is the subject of a malicious combination to ruin him, and the facts relied upon, and the men suspected as conspirators, are such that no sane man would believe in the existence of such a combination; when the same person suddenly enters upon a crusade against the windows of certain suspected persons, admittedly not for a malicious design, but for an entirely irrational purpose; when the same person, always theretofore decorous in habit and decent in language, suddenly takes to writing indecent and threatening letters—such changes in such a man's conduct means mental disease. How any one listening to the testimony which established this condition of affairs in this case, with the hundred other earmarks of irrational conduct, could say that such deportment was that of a sane man, I am utterly unable to conceive.

The only question, in my judgment, is whether this mental condition has vanished—whether the petitioner has been cured. That the petitioner is a man of great mental acuteness is apparent from his examination. The responsible position which he held for so many years with the New Jersey Steel & Iron Works exhibits his original possession of mental endowment of a high order. But intellectual activity is no shield against mental disease. It, indeed, often invites the terrible affliction. Upon this branch of the case, which involves the permanency of the type of insanity with which Mr. Lee was afflicted, its curability, and the question of the petitioner's recovery, the testimony of the experts should be very instructive. Dr.

Ward and Dr. Cort, officers of the hospital, both assert that the petitioner is still uncured. Dr. Clark says that, in his opinion, Mr. Lee is not now insane. The value of the testimony of Dr. Clark upon this point is destroyed, in my estimation, by his equally confident deposition that Mr. Lee never was insane. Dr. Williams, also brought to testify for the petitioner, swears that, in his opinion, Mr. Lee is now sane. This witness refused to give an opinion upon the past sanity of Mr. Lee, and his refusal was put upon the ground that he had not had an opportunity until quite recently to give Mr. Lee a physical examination. Upon the acts and letters of the petitioner introduced in evidence, he refuses to say that Mr. Lee was sane or insane. Now, it is to be observed that the type of insanity with which Mr. Lee was suffering, if insane at all, was mainly a type known as "paranoia." It consists in a delusion existing in the mind of a person that he is the subject of persecution. Dr. Williams was asked: "Q. You know of the mental disease called 'paranoia'? A. Yes. Q. Do you say that Mr. Lee is not suffering from that disease? A. In my opinion, he is not. Q. Do you know whether he has ever suffered from that disease? A. He would be still suffering from that disease, if he ever had suffered from it. Q. It is a progressive disease? A. It is very likely to be. * * * Q. Your judgment is that paranoia is incurable? A. In my judgment, and I believe in every one else's that are alienists, it is incurable." Now, as already observed, if Mr. Lee was insane, the prominent feature of his insanity was a delusion classed as "paranoia." The logical conclusion from Dr. Williams' assertion that he would be now suffering from this disease, if he ever had suffered from it, coupled with his assertion that he is not now suffering from it, is that, in Dr. Williams' judgment, he never has suffered from it. This puts him upon a footing with Dr. Clark. In respect to the curability of this phase of mental disorder there is practically a consensus of opinion among alienists. That opinion is that it is extremely persistent and progressive. Dr. Ward will not say that it is incurable, and I believe that a delusion of this nature, arising from physical disease, may, with returning health, be dissipated. But whatever the possibility of a cure, which it is hoped may exist, I am persuaded that the delusion under which Mr. Lee has labored has not been dislodged. The erratic letters written by Mr. Lee continued during the period of his absence from the hospital, up to nearly the time of his return, on March 14th last. His own examination as a witness on this hearing appears to me to exhibit the presence of an existing irrational notion that a conspiracy did exist, directed against him. In his testimony, he, with remarkable acuteness and ingenuity, explained the facts upon which he rested his notion

that the various gentlemen whose names had been brought into the case had persecuted him. Now, it is true that he says that he has modified his views as to two of these gentlemen, but it is to be observed that in no other respects has he changed his mental attitude. He gives his reason why he broke the windows of Mr. Harry Hill and Mr. Edmund C. Hill and of the bank, and in the bowling alley of the asylum; why he called "Thief" to one, and insulted another in the streets; why he thought State Treasurer Briggs had ruined his credit with the Pennsylvania Railroad Company, and defeated his bid for work at the Statehouse; and why the school superintendent had helped to wrong him out of his contract for heating a schoolhouse. But his purpose in making these explanations seems to have been merely to vindicate the rationality of his conduct. There is not an expression in his testimony that indicates that he had changed his views respecting the existence of a scheme to ruin him. It is true that he admits that his letter to Mr. Smith, announcing his conditional intention to murder the State Treasurer, was a mistake. But he does not even now admit that the facts then within his knowledge were an insufficient foundation for his belief that that officer was conspiring against him. So of all the rest of his conceptions—he does not say that he is now satisfied that his former belief in the existence of a conspiracy had no rational foundation to support it. He does not admit that his reasoning was false and irrational. On the other hand, what he says is that it was correct and rational; and he gives the facts within his knowledge at that time, as vindicating his belief, and he gives the purpose which induced his acts, as proof of the rationality of his conduct. Now, if his belief and his acts indicated mental disease then, and if he presently sees no irrationality in such belief and conduct, his standpoint respecting his own conduct has in no degree changed. It follows that under the same conditions he would be likely to reenact the same performances. This exhibits the persistence of an irrational mental condition. Therefore I am driven to the conclusion that the petitioner is not yet cured of his mental disorder.

Considerable testimony was introduced respecting his treatment while at the hospital. The petitioner asserts that he was cruelly punished; that he was confined in an ill-smelling room; that he was further confined by a camisole, which restrained the movements of his arms; and that he was assaulted by the keepers. This testimony was admitted upon the ground that it tended to exhibit a provocation for his acts while in the hospital, which acts were relied upon to prove insane conduct. Now, it appears that he was confined in a room with an offensive odor, resulting from defective plumbing. The defective condition was rectified upon his

complaint, but the correction seems to have been dilatory. In respect to the assault, the testimony is contradictory; the keepers insisting that, at the time when the petitioner alleges he was assaulted, they were trying to reduce him to obedience, after he had barred the door of his room with his bunk. The restraint by the use of the camisole was obviously punitive as well as restrictive, but whether this was necessary, in an institution like the hospital, to preserve discipline, is a question not relevant. In an institution containing over 1,000 patients, necessarily under the immediate control of keepers, whose acts it is impossible for the officers to keep constantly in sight, there is, I have no doubt, cruelty practiced, in a small way. It requires a man of great intelligence and great mental poise and self-restraint to appreciate that insulting acts are the product of irresponsible minds, and to be able to restrain his anger when his authority is defied. The fret of mind caused by restraint upon one of Mr. Lee's temperament, under the conditions indicated, may not be calculated to allay the nervous excitement which is involved in many phases of mental disease. These conditions, however, do not, in my judgment, account for the conduct of the petitioner. That can alone be accounted for upon the ground of the existence of mental disease.

Having arrived at this conclusion, my functions cease. I would be glad to restore the petitioner to his family if it could be done with safety to himself and to others. Perhaps, under other surroundings, his recovery, if he is curable at all, would be speedier. If I was clear upon this point, which I am not, I would possess no power to act upon my convictions. My only duty, under the statute, after arriving at the conclusions which I have announced, is to remand the petitioner to the State Hospital.

(55 N. J. B. 33)

POWER v. POWER.

(Court of Chancery of New Jersey. May 18, 1903.)

DIVORCE—DESERTION—SEPARATION AGREEMENT—CHILDREN—CUSTODY—COURTS—JURISDICTION—PERSONAL PRESENCE—DISPOSITION OF CHILD.

1. Where a husband and wife separated and lived apart in pursuance of a written agreement for separation, the wife was not entitled to a divorce for the husband's alleged desertion during such separation.

2. Where a wife was denied a divorce on her application by reason of the fact that her husband's alleged desertion was in pursuance of a written agreement for separation, such denial did not preclude the court from entering a decree relating to the custody of the children, which the wife demanded as a part of the relief prayed in her bill.

3. Where, in a suit for divorce, the husband answered the bill, and made no objection on the ground that it was multifarious, the wife was not subsequently entitled, on the court's

¶ 2. See Divorce, vol. 17, Cent. Dig. § 777.

denying her a divorce, to object to an order affecting the custody of the children, on the ground that the bill, in so far as it purported to give the court jurisdiction of the children, was multifarious.

4. It is not necessary, in an action for divorce, to entitle the court to award the custody of the children of the parties, that such children should be brought personally into court by writ of habeas corpus or otherwise.

5. Where a separation agreement between a husband and wife, residing in New Jersey, provided that the wife should have the custody of a child until he should arrive at the age of seven years, and until such time as the instrument should be altered, and, if an agreement for alteration could not be made, the parties would answer in any court having jurisdiction on any issue relating to the future control of such child, and the wife thereafter took the child into another state, and there resided until she voluntarily brought suit in New Jersey for a divorce, in which she prayed to be adjudged the custody of the child, the child's domicile in New Jersey was not changed, and the court had jurisdiction to award its custody to the husband on its appearing that such disposition would be for the child's benefit.

Action by Mary M. Power against Henry Power for divorce. Counter petition by husband for custody of child. Judgment for counter petitioner on terms.

R. V. Lindabury and W. R. Barricklo, for petitioner. C. E. Hendrickson, Jr., and J. H. Adams, for defendant.

PITNEY, V. C. I think this case should be disposed of at once. It comes before the court in a peculiar manner, and it is better that I should state it over again, so that there shall be no mistake about it:

The wife, Mrs. Power, filed a petition in this court on the 8th of November against her husband, praying for divorce on the ground of desertion for two years; alleging the desertion to have taken place in the fall of the year 1890. She therein states that she has two children, giving their ages. The first one was born on the 15th of May, 1894, and is consequently now nine years old. The prayer is this: "Your petitioner therefore prays that she may be divorced from her said husband, the said defendant, and have the custody of said John Alsop Power (that is, the oldest boy) and Alan Merewether Power (that is, the youngest child), and for other relief." The defendant answered, and denied the desertion, and set up a contract of separation made on the 15th of November, 1890. At the hearing, desiring to have affirmative relief with regard to one of the children, he filed a counter petition praying for the custody of John Alsop Power, the oldest boy. That petition was served on the day of the hearing, and the counsel for the wife said he did not care for any order to show cause to be made on it, but would waive those formalities and appear to it. An order to show cause was, I believe, made returnable to-day.

Proofs were taken both as to the desertion and as to the custody of the children. At the end of the proofs the court heard coun-

sel, and denied the prayer of the petitioner, the wife, for decree on the ground of desertion; and, so far as the wife's petition for the custody of the children went, it denied that on the merits. I intimated a strong opinion that I thought the boy could go with his father, but did not utter a final opinion, and laid the matter over until to-day to enable the wife to be heard in answer to this counter petition. That came on to-day, and counsel for the wife expressed no further desire to add any further evidence, but made a written protest, supported by a powerful argument, against the jurisdiction of the court to determine this question at all, on the ground that the infant child whose custody is sought by the husband is not a domiciled resident of the state of New Jersey. That is the foundation of the protest, and, as ancillary to that position, the ground is taken that the petition of the wife for divorce and the custody of the children does not give this court jurisdiction to hear the counter petition of the husband, because the one is not germane to the other, but they are in fact separate matters. Now, at the hearing of the original cause, it turned out that the parties were living separate by reason of an agreement of separation which was entered into between them on the 15th of November, 1890. There was no dispute but that that agreement had been entered into, and the court held distinctly that, upon the evidence, it was entered into by the wife advisedly, with the aid of counsel; that no fraud was practiced on her, nor was anything of that kind set up. There was no contention on behalf of the wife that the agreement was not entered into by her with her eyes open, and with the very best legal and friendly advice. I will merely say that much now, because I enlarged on it somewhat, if I recollect right, in my oral opinion delivered at that time.

Now, when we open that agreement we find this clause: "That the party of the second part shall have the care, custody, and control of the two infant children of the parties of the first and second part hereto, to wit, John Alsop Power, now in his sixth year, and Alan Merewether Power, now in his first year, until they shall respectively attain the age of seven years, or until such time as this instrument is altered in accordance with the following provisions: that when the said John Alsop Power shall have attained the age of seven years or at any time thereafter, upon the request of either party, the parties hereto of the first and second parts [that is, the husband and wife] shall enter into a further agreement, if possible, which said agreement shall be considered only as a modification or change of this special provision of this instrument, and which shall provide for the care, custody, control, maintenance, and welfare of the said John Alsop Power from and after the execution of said new agreement; that if after reasonable con-

sideration the said parties hereto are not then able to agree upon mutually satisfactory terms of such new agreement, then and in that event the said parties shall respectively hold themselves at all times thereafter in readiness to answer any process of any court having jurisdiction which may issue at the suit of either of the said parties for the purpose of obtaining a decree providing for the future care, custody, control, maintenance, and welfare of the said John Alsop Power." And a like clause is inserted, to apply when Alan Merewether Power, the youngest child, comes of age. Then, in addition, it appeared that the parties were, before the date of that agreement, domiciled residents of the town of Montclair, in this state; that the father continues to be a domiciled resident of this state and of that town. It further appeared that the separation agreement contained the usual clause that the parties might live separate and apart, etc., which clause, of course, was instantly and perfectly fatal to the complainant's suit for divorce; and I expressed my surprise as to why it should have been brought—not why a petition might not have been filed to have the custody of the children settled, in pursuance of this very clause in this agreement, but because it was perfectly impossible for the petitioner to set up that the defendant, her husband, had deserted her, when she had been living separate and apart by his consent, and he had been living separate and apart by her consent. Now, the wife, taking advantage of this separation agreement, made her home in the city of New York, and took those children there, by the consent of her husband, and subject to the terms of this agreement, by which, as I interpret it, the husband did not lose control of his children, or any of them, but they were subject still to his control after a certain time. After the time had elapsed with regard to John, the oldest one, the wife comes into this court and appeals to this court for the power to have that child awarded to her. Now, if that is not submitting to this court the question what should be done with that child, I don't understand what is; and I said at the hearing, and I am still of the opinion, notwithstanding what has been argued with so much power by Mr. Lindabury, that it was competent for this court in the wife's suit to have awarded to her the custody of that child, John Alsop Power, and refused her the decree for divorce. I see no incongruity whatever between the two results in such a case, where a husband and wife are living separately, for one of them to sue the other for divorce, and also for the custody of the children, and to fail to get the divorce and to recover the children in that petition. The claims are not incongruous. They do not render the bill or petition multifarious. But grant now the whole extent of the argument of my learned friend that that petition was multifarious, yet the defendant, the husband, did not set it up,

but answered it, and it does not lie in the mouth of this wife to say, "I must not be bound by my own petition, because I made it multifarious." The husband came in and joined issue. He said, "I am ready to meet you on both issues, and I make the issue a double one," so to speak—"not only whether you shall have the boy. I will make it on the other side. I will ask for the positive relief that I am to have him. Here is our contract." Now, she has come here, and, in my judgment—I will repeat: There was no incongruity in the two claims, for, suppose, as I say, that she had proven beyond all peradventure before me that this man was entirely unfit to have this child, that he was vicious, that he was altogether unfit to have that child; I cannot say why I should not have awarded her the custody of that child, to prevent this man from going and stealing it or taking it, or taking any measures to attempt to get it from her by force, making her custody lawful and sanctioned by a decree of this court. He might have deserted her for only a year or a year and 8 months, or 20 months, or 23 months, and she would have failed in her suit for divorce, but not necessarily failed in her suit to recover possession of the child. For it must be understood that it is altogether a mistake to suppose that the winning party in a suit for divorce is entitled to the child. Ordinarily and often they are. If a woman is an adulteress, this court will generally take the children away from her, but not always—not always. I have myself, in a divorce case, decreed that the infant child should remain with the adulteress mother, and the father should support him until it arrived at such an age to be taken away from her; and so with the husband. I might adjudge a husband guilty of adultery, and still say that he was entitled to the custody of his infant child of a certain age. It all depends upon the circumstances. It is not the guilt or innocence of the parties which controls. It is the welfare of that child. That is the question that this court has to determine. So I entirely repudiate the notion that necessarily, or even naturally, as goes the main suit so goes the custody of the infants. That goes according to the welfare of the child. The other goes according to the strict rights of the parties.

But it is said here that this child is not domiciled in New Jersey, and that this is an appeal to the court of chancery, sitting *parens patriæ*, and that the court of chancery has no business to bother its head about the welfare of children whose domicile is not in this state; and that is a very strong, and, under ordinary circumstances, perhaps, a prevailing, argument. A great many cases have been cited that the counsel has not had time and opportunity to bring into court, and enable the court to examine them.

But I stop here, and go a little outside of the line of my discussion, to remark that

my examination of the subject heretofore has led me to the conclusion that an erroneous notion of the practice and power of the court in these questions of the custody of infants has prevailed in this and other states. The notion has been that you could not adjudicate upon the custody of a child without having it brought into court by habeas corpus, just as you would adjudicate upon the liberty of a person; the old common-law notion being that, if a man is in jail, the jailer must bring him right into the presence of the court by the writ of habeas corpus before the court will pay any attention to him whatever. In other words, that the presence of the party before the judge is necessary in order to give the judge jurisdiction. Now, that is one of the strict rules of the common law of writ of habeas corpus *ad subjiciendum*. But I have made an examination of the authorities on that subject pretty carefully within a year, in conjunction with my Brother Stevenson, and we have both concluded, after examining the authorities in England, that the original jurisdiction of the court of chancery over the custody of infants was not based on the presence of the infant in court by the use of the writ of habeas corpus; that it was not based on that at all, but on an application to the court, not by English bill and subpoena, but by petition to the chancellor, as *parens patriæ*, in a summary manner to determine the custody of the infant between the parents or other persons claiming them, and that a writ of habeas corpus was entirely out of place in any such practice. That writ is, strictly speaking, applicable only to the case of actual confinement or physical restraint exercised by some public officer, and the like. I do not say it may not be useful in some cases of infants, but it is not necessary to the jurisdiction of the court over infants that they should be present in court. Lord Eldon even went so far as to say— I don't follow him. I don't think he was quite accurate. But he went so far, by way of illustration, in one case, as to say that if he was applied to, as a magistrate, to bring an infant before him on habeas corpus, he would not consider the question of the contending rights; he would not determine, he would not act, as *parens patriæ*; he would act as magistrate; and all he could do would be to relieve the infant from illegal restraint, which is all the office of the writ of habeas corpus. I am satisfied that there is generally no occasion for the use of the writ of habeas corpus in infant cases, and that its use in this and other states has led to the notion that there would be no jurisdiction unless you had the child in the judicial presence.

Now, I do not mean to say that this opinion determines the present question, but it does account for the trend of opinion—for the reasons that judges have given for their

opinions that they have no jurisdiction unless the child is within the presence of the court.

Now, I am unable to see, though I do not consider it necessary for the decision of this case to determine— I am unable to see why, if the question arises between the husband and wife over the custody of a child, if the party proceeded against, occupying the position of defendant, is served with process within a jurisdiction, and a decree is made on the merits between those two, why that decree should not bind, wherever it may be set up, under the same circumstances. Bear in mind that all these decrees are temporary in their nature. None of them are permanent. This court absolutely declines in such cases, so far as I am concerned—and I think I speak for every one—to bind itself to the future. Show me changing circumstances, and I will change the decree. Show me that the parent to whom the custody of the child has been committed, for any reason, ought not longer to have it, but that it should go to somebody else—to the other parent—and the order will be changed. It is common practice to insert in the decree "until the further order of the court."

Take the case which has given me a great deal of trouble—the White Case (N. J. Ch.) 53 Atl. 23. There was a boy seven years old. Neither the father nor mother was fit to have it—both convicted of adultery, and both denied relief on that ground. But there was the mother. There were particular reasons in that case which made her offense a little excusable, because, as I held, the husband denied her those marital rights to which she was entitled; and she was led away, and fell in love with a boy, and had sexual intercourse with him. There was not the least proof she had ever done it with anybody else. I gave her that child until he gets a little older—no longer.

So that, I repeat, these decrees are not final; they are temporary, necessarily, in their nature; and the question is, what is now best? And I say I see no reason why another court should not respect the decision of this court.

But here the objection is taken, and the wife says: "I object to the jurisdiction of this court because the child is a domiciled resident of the state of New York. I do not want to submit myself to the jurisdiction of this court." But the difficulty is that she has submitted herself to the jurisdiction of this court by her petition for divorce. And further than that comes in the question of actual domicile. Is this child domiciled in New York because the wife went to New York to live under this contract? The *prima facie* rule is that the domicile follows the husband. The husband by this agreement allowed his wife to make a new domicile, but did he allow her to, or agree that she should, make a new domicile for those child-

ren? It seems to me not. It seems to me that by the very terms of that agreement he reserved his right over his children, and the wife agreed he should reserve his right over those children. He never did consent that the children's domicile should be that of his wife's.

Take, then, those two points together—the fact that the wife has come here and submitted herself to the jurisdiction of the court, asking for the custody of those children, and, so to speak, provoked the very counter petition which is filed here by the husband—that a counter petition is filed in that very suit which I think it is germane to. I disagree with my friend Mr. Lindabury that it is a different suit, and that it was not proper for the husband to present it. I think, under the practice of New Jersey adopted in these cases, that it was perfectly germane to that petition of the wife for the husband to set up this counter petition, so as to get affirmative relief against her negative relief. Without that he would only have got negative relief, but with that cross-petition he is entitled to affirmative relief. It is germane to the suit—just as germane, and much more so, as a cross-petition for divorce on the ground of adultery would be, and that has been held by all our courts, and, I believe, by the Court of Errors and Appeals; but it has been held over and over again by the Court of Chancery that that is perfectly germane, and may be entitled in the same suit. Then, when you come to take the terms of the separation agreement, and the fact that their original domicile (their matrimonial domicile) was in the state of New Jersey (and, in my judgment, that domicile of the child was not changed by going to New York), I shall assume the jurisdiction to decide the custody of this boy.

The defendant has not desired to put in any further evidence. I merely repeat what I said the other day—that I thought the interest of the boy would be advanced by giving him over to the custody of the father. There was elaborate evidence on that subject taken—where the father was living, and what his prospects were, and what attention the boy would get, as contradistinguished to the attention he would get in the city of New York, living in a crowded apartment house or flat-house with his mother; she working somewhat for a living, and having very little opportunity, however well meaning she may be, to give him that care which a boy nine years old needs. He is getting too big for his mother's management. I have not seen the boy, but I take that for granted. I am satisfied he will have a first-class home with his father and grandparents.

Now, with regard to access: Of course, I am very far from desiring to estrange these children from either of their parents, and the mother must have access; and it is very difficult now—I want to say, it is very difficult to define just how that part of the de-

cree shall be worded, so as to work well in practice, and reasonable access be assured to her; but what the court wants it understood is that, whatever is said in the decree, the father and grandparents shall give, and shall exert themselves to give, that mother a fair opportunity to see that boy. They must do it in good faith. They must not stand on little technicalities, and put little obstructions in the way, such as you cannot put your finger on. They must do it heartily. If they do not, they may hear from this court; and I do not want to be troubled with applications to enforce a decree which it is very difficult, as I said before, to express in precise terms. I hope I am dealing with people that are not going to stand on mere close, technical descriptions in the decree. What I want is that they shall give that mother a fair chance to maintain and retain her affection for that child. That is of just as much importance for that child, so far as the case appears to me now, as it is that he shall be well cared for by his father and grandparents. I will therefore advise a decree in favor of the counter petitioner in those terms.

There is just one thing that I ought to have said something about. The contract provides that at the end of seven years there shall be an attempt to agree on a new establishment. There is no proof here that any such attempt is made, but it is perfectly apparent from the whole case—

Mr. Adams: I beg pardon. That is in the record. We did make an attempt, and they refused.

The Court: I mean to say this: That, whatever there may have been of proof about that, it had passed out of my mind. It is perfectly apparent that such a preliminary attempt would be futile. The wife brings this suit for divorce. That is unfriendly, of itself, at once. And I think it is one of those things, like the request of a board of directors to bring a suit against themselves, you know, that is denied before it is made. If they can agree now, they can do it. This decree will not prevent them from agreeing. The litigation was not started by the husband. It was started by the wife, and she came to the court first—a court of proper jurisdiction.

(S. N. J. R. 776)

McMULLEN v. DOUGHTY.

(Court of Chancery of New Jersey. June 8, 1903.)

PARTITION—COUNSEL FEE—ALLOWANCE TO PLAINTIFF'S ATTORNEY.

1. Where, in partition, it was discovered, after the report of commissioners, that several tracts of land had been awarded to defendant by mistake which did not belong to the estate, and the matter was sent back to the commissioners, who made a new division, the happening of the error, while not ground to deprive complainant's counsel of any right to a counsel

fee, should affect the amount allowed him for his services.

2. Where, in partition, 13,000 acres of land were involved, and the difficulties of division had been very considerable, and owing to a mistake, in which counsel for plaintiff and defendant both participated, several tracts of land were awarded to defendant which did not belong to the estate, and a second reference was necessary, and defendant was entitled to four-fifths of the estate, a counsel fee would be allowed complainant's counsel in the sum of \$400.

3. Under Chancery Act 1902 (P. L. p. 540) § 91, providing that it shall be lawful to include in complainant's costs in partition a counsel fee, in cases where plaintiff is entitled to a decree for costs the vice chancellor should hear parties on the question of allowance of a counsel fee, and should advise the same in his report to the chancellor, and, if either party is dissatisfied with the allowance, he may apply to the chancellor to fix a proper sum.

Bill for partition by Martha A. McMullen against Sarah N. Doughty. On application for counsel fee. Amount of fee advised.

John D. McMullen, for complainant. Herbert A. Drake, for defendant.

GREY, V. C. (orally). This cause, after litigation extending over more than three years, is about coming to a conclusion. All the matters in litigation appear to have been presented and decided except the allowance of a counsel fee. The complainant moves for the allowance of such a fee. It is opposed by counsel for the defendant on several grounds. Argument has been twice heard on the question.

The suit is for the partition of about 13,000 acres of land lying in Atlantic county, consisting of one main tract and a number of smaller ones. The complainant is the owner of one undivided fifth, and the defendant of four undivided fifths. Actual partition was sought by the complainant. No question has been raised in the cause disputing the complainant's interest, in either quantity or quality, nor has the defendant in any way denied the necessity and propriety of an actual partition.

The defendant's resistance to the allowance of a fee in this partition suit to the counsel for the complainant is that the suit was litigated, that the defendant had employed her own counsel, and that the complainant's counsel had not in the conduct of the suit done anything which was beneficial to the defendant. The object and result of the suit was, as stated, the obtaining of an actual partition of a large landed estate. The proceedings necessary to bring this result were conducted by the complainant's solicitor. The management of the cause was burdened with the difficulties which attend upon an effort to state with precise description the boundaries of extensive tracts of wild land, which had been acquired over a long period of time, from various sources, by inexact conveyancing, and to some extent without recording deeds. The muniments of the title to these lands were largely, if not entirely, in the hands of the defendant, who was in

possession of the family mansion. Her attitude in this cause to the complainant was extremely hostile, and gave rise to many contentions. These disputes did not relate to any differences touching the main object of the suit—the securing to each party an estate in severalty by an actual partition in proportion to her holding. There was no litigation on this point. The accomplishment of this result was all-important to the defendant, more valuable to her than to the complainant, for the reason that the defendant had an interest four times that of the complainant, the value of which was most unfavorably affected by the fact that it was held in common with the complainant, with whom the defendant was upon terms of hostility. The benefits to be derived from the steps taken by the complainant looking to the obtaining an actual partition to be made were accepted all through the proceedings by the defendant. The real point of contention between the parties was at all times the effect to each to obtain the largest possible allowance for her share, and in the most favorable location, and not a disputation concerning the main object of the suit, the obtaining for each of an estate in severalty. On this last-named phase of the case the defendant's counsel rendered no service. What was done was done by complainant's counsel, and the defendant accepted the benefit of it, save in the one incident, which I will presently notice.

As the cause proceeded, it was disclosed by both parties that the extent of the lands was so great, and the documentary evidences of title in such a confused condition, that accuracy of description was almost impossible. The difficulties of the procedure became so great as to threaten the accuracy of the partition. At this point, at the invitation of this court, an agreement upon a description of the lands was made, and on this the first order for partition was sent to the commissioners. They heard the parties, who each sharply contended for her full share. The report, when it came in, was challenged by the defendant, because of alleged misconduct of the commissioners, collusion with the complainant to the defendant's disadvantage, and unfairness and partiality in the division of the estate. All of these objections were overruled (see *McMullen v. Doughty*, 82 N. J. Eq. 252, 49 Atl. 914), and this disposition of them was affirmed on appeal. After the objections taken had been heard and overruled, it was for the first time discovered that in the first return of the commissioners there had been set off and valued to the defendant, as part of her share, several large tracts of land which did not belong to the estate, and which, if the defendant had been compelled to accept them, would have done her a great wrong. The inclusion of these outside tracts and their setting off to the defendant as part of her share was a mistake in which the defendant and her counsel participated up to

the point that it was made part of the commissioners' first report. No objections were made to that report on that ground (see opinion above cited). The mistake was discovered after the argument on the objections to that report had been heard, and it was corrected immediately, with the assent of the complainant. There was no fraud or contrivance about it. But as it was a serious injury to the defendant, the matter was sent back to the commissioners, and they were ordered to make a new division, correcting the error. This they have done by their second return, which is not disputed by either party. The happening of this error is, however, a ground which, while it should not deprive the complainant's counsel of all right to a counsel fee, should, I think, affect the amount which should be allowed him for his services. The estate in this case is large and valuable. The difficulties of division have been considerable. The fee should recognize the amount of labor required in the conduct of the suit. The error above referred to was participated in by both parties, but it was the duty of the complainant's counsel to have detected it as he was conducting the suit. His omission to do so has delayed the cause, and made necessary another return by the commissioners. In this one incident of the direct proceedings to the creation of an estate in severalty, the complainant's counsel was at fault, and his omission was disadvantageous to the defendant. In substantially all the other steps in the cause she received four-fifths benefit, while the complainant got but one-fifth. I am not willing, under these circumstances, to allow such counsel fee as the value and importance of the estate divided would otherwise have justified.

Some question has been raised as to the practice in allowing a counsel fee to the solicitor of the complainant out of the whole estate in cases where the defendant is represented by counsel. The decision of the chancellor in the recent case of *Kellar v. Kellar* (no opinion filed) is cited, where he refused to allow a counsel fee to the complainant's counsel in a partition suit in which the defendant had employed counsel and the case had been litigated. That decision was made before the chancery act of 1902 (P. L. p. 540) § 91, provided that it should be lawful to include in the complainant's costs a counsel fee to be fixed by the chancellor on final decree. The chancellor, since the passage of the act of 1902, has indicated that the practice should recognize the change made by that statute, and that, in cases in which the complainant is equitably entitled to a decree for costs, the vice-chancellor to whom the cause has been referred should hear the parties on the question of the allowance of a counsel fee to the complainant, and, in advising the final decree, should report to the chancellor what is a reasonable fee to be allowed. If either party is dissatisfied with the vice-chancellor's allowance, he

may on notice to the other party apply to the chancellor to fix a proper sum.

The circumstances of this case entitle the complainant to a decree for costs, and the allowance of a counsel fee of \$400 to the complainant, to be taxed with this costs, will be advised.

CLEVELAND v. BERGEN BLDG. & IMP. CO. et al.

(Court of Chancery of New Jersey. May 15, 1903.)

CONTRACT FOR SALE OF LAND—RESCISSION—STREETS SHOWN ON MAP—REPRESENTATION OF DEDICATION—WHAT CONSTITUTES DEDICATION—GOOD FAITH OF PURCHASER—LIEN FOR PURCHASE PRICE PAID.

1. Where a contract for the sale of lots refers to a map on which streets are shown, it amounts to an assurance by the vendor that the streets are actual public thoroughfares, or at least have been dedicated to public use.

2. Where the owners of land adjacent to a municipality lay it out into lots, and make and file a map showing a street on a strip in which appears the word "reserved," an intent not to dedicate the strip is shown.

3. Evidence, in an action by a vendee to rescind the contract for the purchase of lots, examined, and held to show that at the time of making the contract the vendee was justified in believing that a street adjacent to the lots, and laid down on a map made by the vendor, had been dedicated to public use in such manner that the owner could not object to its opening by the public, and that the only remaining step was the acceptance thereof by the borough authorities.

4. Conveyances by the owners of lots, referring to two maps in one of which a street is laid out, and in the other of which a strip therein is marked "reserved," do not amount to a dedication of the strip to public use.

5. Evidence, in an action by a vendee to rescind a contract for the purchase of lots, examined, and held to show that his objection to the carrying out of the contract—that the street bordering the lots had not been dedicated to the public use, as he supposed—was made in good faith.

6. A vendee made a contract for the purchase of lots, referring to a map on which an adjacent street appeared. Another map showed that a strip in the street had not been dedicated to public use, and the owner thereof refused to make such dedication except on a payment of money, which the vendor refused to make. The borough authorities refused to open the street. Held, that a decree of specific performance against the vendee would be refused.

7. A clause in a contract for the purchase of lots, providing that, if the vendors fail or are unable to convey a good title to any lot or lots, then the amount of consideration shall abate proportionately, and the contract shall be deemed a severable one for that purpose only, does not apply to a defect consisting in the want of dedication of an adjacent street to public use.

8. Where a specific performance will not be decreed on account of the vendor's inability to comply with the contract, the purchase money paid by the vendee will be decreed a lien on the property, notwithstanding mortgages have been foreclosed which the vendee was to have paid, the vendee having given reasonable notice of the defect to the vendor, which would have enabled the latter to protect himself against foreclosure.

Bill by Charlotte A. Cleveland against the Bergen Building & Improvement Company

and others. Final hearing on bill, answer and cross-bill, and replication and proofs, Decree for complainant.

Charles L. Corbin and George S. Hobart, for complainant. Samuel O. Mount, for defendants.

PITNEY, V. O. This bill is filed by Mrs. Charlotte A. Cleveland against the Bergen Building & Improvement Company and others, having for its object to relieve the complainant from the binding effect of a contract in writing entered into between the parties on or about the 14th of August, 1899. The answer of defendant resists this claim, and by a cross-bill seeks to enforce the specific performance of the contract. The contract was made between the defendant the Bergen Building & Improvement Company of the first part, Reta R. Quackenbush of the second part, and the complainant of the third part. By its terms the defendant corporation agreed to convey to the complainant, and the complainant agreed to purchase and pay for, certain building lots situate in the borough of Hasbrouck Heights, county of Bergen, at Euclid. It seems that Euclid was originally the name of the section of country afterwards incorporated as a municipality and called "Hasbrouck Heights." The descriptions found in the contract read in this wise: "In section A as shown on the map of Euclid filed in the Bergen County Clerk's office December 13, 1893, lots Nos. 38, etc.; in section C, block 1, as shown on the map of Euclid filed in the County Clerk's office September 27th, 1894; lots Nos. 5, 6, 7, 8, 9, etc.; in section C, block 2, as shown on the last mentioned map, lots 1, 2, 3, 4, etc.; in section C, block 2, as shown on the map of Euclid, not filed, lots 30, 31, 32, 33, 34, etc.; in section C, block 3, as shown on the map of Euclid, not filed, lots Nos. 2 to 32, both inclusive," etc. Then Mrs. Quackenbush on her part agreed to convey to the complainant, and complainant agreed to purchase and pay for, certain other blocks of building lots, all referring to one or the other of the maps above mentioned. The price of the whole was \$17,000, and that price was, by a subsequent clause in the contract, divided between the corporation and Mrs. Quackenbush, in the proportion of \$12,000 to the corporation and \$5,000 to Mrs. Quackenbush. All of the lots agreed to be conveyed by Mrs. Quackenbush were heavily mortgaged, and also a large portion of those agreed to be conveyed by the defendant corporation, and the agreement provided that the complainant should pay the interest to accrue on the mortgages and assessments after a certain date, and a time was fixed for the payments and delivery of the conveyances, which at present I deem it not worth while to set out in full. Suffice it to say that, shortly after entering into the contract, Mrs. Quackenbush became embarrassed, and conveyed to the corporation de-

fendant, by the consent of the complainant, the various lots which she had agreed to convey to the complainant, and received, directly or indirectly, from the complainant, in cash, all the purchase money coming to her under the contract, so that she may be laid out of the case, and the contest is entirely between the complainant and the defendant corporation, the land company.

The claim put forward by the complainant is that the defendant was never able to convey to her according to the contract, and she claims as a result that not only is she not bound to complete the transaction, but that she is entitled in equity to a lien upon the interests of the defendant in the premises for the amount of money—\$4,800—which she has paid under the contract on account of the purchase money. The principal ground upon which the complainant bases her equity is this, namely, that the contract was made with reference to the maps mentioned in the contract as above stated, and that those maps all showed certain streets laid out, and the lots to be conveyed facing on them, and that as to one of these streets, to wit, Cleveland avenue, shown on those maps, there has been no dedication by the owner of the soil, at least over that part of it west of a street called "Summit Avenue," so that it was impossible for the complainant to get access to a considerable number of lots lying west of Summit avenue and facing on Cleveland avenue; that the title of the land company included only a small strip, varying from 2 to 15 feet wide, on the northerly side of that avenue, as laid down on the maps in question. It is admitted that the title of the land company was confined to such narrow strip, and that a large number of the lots to be conveyed, to wit, about 60, faced on Cleveland street, west of Summit avenue. The tract comprising the lots in question lies on the westerly side of the improved portion of the borough of Hasbrouck Heights, and extends to the western boundary of the borough, and the maps referred to show all the land up to the western boundary. Divers streets and avenues cross it, laid down parallel to each other, and on a course of northwest and southeast, and two avenues cross those streets diagonally west of Summit street, which latter crosses them at right angles. Those two are named respectively "Grand Boulevard" and "Wood Street." It is admitted that the borough authorities have never in any wise accepted or recognized Cleveland avenue, west of Summit street, but have refused so to do.

In order to maintain her case the complainant must show that by the terms of the contract she was warranted in supposing that the streets mentioned on the map to which reference is made were either dedicated streets, or that they had been acquired by proceedings on the part of the municipal authorities for that purpose. On this proposition it was substantially conceded by

counsel for the defendant, and I think that it is not open to doubt, that, under the circumstances and the terms of the contract in question, the complainant was justified in believing that the streets were dedicated streets and open to the public. The maps in question, or copies of them, were shown to complainant's husband in connection with the preliminary negotiation which he conducted on her behalf, and in the actual compilation of the contract. The reference to the maps in the contract, which on their face do show all these streets, amounted to an assurance by the vendor that they were what they appeared to be, either actual public thoroughfares open to the travel by the public, or at least streets which the owners of the title to the land comprised within their limits had dedicated to the public use. It is shown and admitted that the part of the land lying west of the Grand Boulevard is entirely unimproved, and particularly that part lying northwest of Wood street is simply woods, which have never been cut off or any street marked on it; between Wood street and Grand Boulevard avenue the streets, I believe, have been marked on the ground. At the time in question the property southwest of Cleveland avenue was owned by Messrs. Bentzen and Hill, who had taken title to it on or about the 1st of March, 1897. Their land extended from the extreme westerly boundary of the tract, and of the borough, nearly to Summit street. They laid it out in lots, and made and filed at that time a map showing Cleveland avenue and the line of their title, which line corresponded with the line of defendant's land, and marked on it next to the northeasterly side thereof and northeast of the center of Cleveland avenue, a strip about 10 feet wide, with the word "reserved." This, of course, shows that they did not by that map intend to dedicate that strip 10 feet wide on the northerly part of their tract. Parallel with Cleveland avenue, and further southwest, there is a street called "Harrison Avenue," also shown on the land company's map, which does not appear to have been opened. These streets are traversed, as we have seen, west of Summit street, by the boulevard and by Wood street, neither of which seem to have been opened south of Harrison street, and both of which are marked on Bentzen & Hill's map as "reserved" south of Harrison street. So that, so far as the action of Bentzen & Hill goes, they positively refused to do anything to dedicate that small strip of land confessedly belonging to them, and lying immediately southwest of the land of the land company, and occupying a strip about 10 feet through the whole length of Cleveland avenue from near Summit street across the boulevard and Wood street to the westerly end of the tract and the westerly boundary of the borough crossing the woods before mentioned. There is not a particle of evidence that any

of the grantors of Bentzen & Hill ever did any act which can be properly construed as dedicating or tending to dedicate any of the lands covered by the Bentzen & Hill conveyance. The deed to Bentzen & Hill was made by Mr. and Mrs. Gee on the 1st day of March, 1897. It mentions no streets whatever.

The land company, in order to sustain the dedication, relies upon what is called an "assessment map" of the borough of Hasbrouck Heights, which includes all these lands, and shows streets laid out over them substantially the same as those on the map of the land company and that of Bentzen & Hill. That map seems to have been filed in the Bergen county clerk's office in 1895, and to have been made by Mr. Dunham, civil engineer, of Plainfield. A copy was hung up in one of the offices of the borough, and is called the "assessment map." Who employed Mr. Dunham to make it, and why he extended the map and streets over the land here in question, does not appear. But it may be inferred that, as is often done in such cases, he, being employed by owners of lands lying to the northeast of the land here in question to lay them out in streets and lots, extended his work over these lands to the borough line of his own motion.

But reliance is placed by both parties on what occurred at the time of the negotiation of the contract. The complainant was represented entirely by her husband, Arthur J. Cleveland, who made the bargain. She knew nothing about it, except to sign the contract. He was not present at the hearing, being detained by illness in London, so that the complainant was obliged to rely upon his evidence taken by commission. Mrs. Quackenbush was represented by a Judge Laird, who during the trial was in Vermont, and his evidence was also taken by deposition. The defendant the land company was represented by Mr. Will H. Van Guilder, who was once the owner of the property, and was at the time of the contract the president of the corporation, but afterwards gave place to his wife, who was the principal stockholder; in fact, the whole stock was owned by the Van Guilder family. The map which was shown to the complainant's husband, acting as her agent, was entitled "Euclid. The property of Wm. H. Van Guilder & Co., Bergen County, N. J.," and was gotten up by that gentleman before it was conveyed to the defendant corporation, and, as before remarked, that map shows the boulevard and Wood street running substantially parallel with each other on a course a little east of north, and intersected by Passaic avenue, Springfield avenue, Columbus avenue, Cleveland avenue, and Harrison avenue, at acute angles, the latter streets being laid on a course of about northwest and southeast. Summit street, which seems to be nearly or quite the western limit of

actual improvement, cuts the last-mentioned avenues at right angles, and is laid on a course just about northeast and southwest.

Now, Mr. Van Gulder, who was examined in open court, swears that he went out with Mr. Cleveland, looked the property over with a map before them, and on the ground, and says: "I made one little explanation to him, that is, that the streets looked rough; I said to him, 'When you go out there' I says, 'those streets are not in very good condition; we have got no buildings, no improvements in there, with the exception of the streets, and they are in rough form.' I said, 'They have only been accepted as far as Summit street here; the rest of them have not been accepted; although they are on the borough map, they look rough.' I made that little excuse because they did look a little rough." And he swears that the southern boundary of his tract, running diagonally through the northerly side of Cleveland avenue, was marked on the ground by an old hedgerow of cedar trees.

Mr. Cleveland swears that when the contract was made he was given to understand that Cleveland avenue was a dedicated street, as shown on the map which was presented to him and had been prepared by the company.

Judge Laird swears that there was some talk about the streets. "Q. What streets? A. The streets shown on the map; all those pink maps, the Van Gulder maps. Mr. Winans or Mr. Van Gulder said the streets were dedicated up to one of the streets called 'Summit Street,' and that the others were only marked on this map. I think you [Mr. Van Gulder] said he could have all the streets the company owned in this deed free with the other property as far as your line extended."

Mr. Winans, the gentleman who drew the contract and attended to its execution, swears that there was talk about the streets west of Summit street not being dedicated, but he thinks it was some time after the contract was signed, and the other evidence in the case shows conclusively that such was the fact.

Taking the evidence of the three witnesses who speak on this subject, Mr. Van Gulder, Mr. Laird, and Mr. Cleveland, I am entirely satisfied that the verbal representations made to Mr. Cleveland were that, while the streets west of Summit street were dedicated, they had not been accepted by the city. It is probable that some of the parties did not clearly distinguish in their minds the different steps requisite in such case to make a public street, namely, first, the dedication by the owner, and, second, the acceptance by the public. In fact, afterward, a strong effort was made by Mr. Van Gulder to induce the town to take measures to open these streets. At his request Mr. Cleveland saw Messrs. Bentzen & Hill, or one of them, and obtained from them a price

at which they would join in the dedication of Cleveland avenue, and induced them to offer to take \$600 for that purpose, and reported that to Mr. Van Gulder, who refused to pay it, and said that he would compel the city to open it at their own expense. In this connection there is the fact that the Bentzen & Hill map was got out at or about the 1st of March, 1897, and printed by the hundred, and it is quite likely, although there is no proof on the subject, that Mr. Van Gulder, who was in the business of dealing in these building lots, saw it, and, if he did see it, he must have observed that a strip was reserved directly through the center of Cleveland avenue. There is no pretense that Mr. Cleveland, or any one who represented him, ever saw the Bentzen & Hill map until long after the contract was signed. My conclusion, then, is that, from an inspection of the Van Gulder map, shown to Cleveland at the time he was negotiating the contract on behalf of his wife, and while going on the ground, he was justified in believing that all the streets, including Cleveland avenue, laid down on the Van Gulder map, were dedicated streets—dedicated in such manner that the owner could not object to the opening of that by the public—and that the only step remaining in order to make them public streets was the acceptance and adoption of them by the borough authorities, and this had not been done up to the time of the hearing of the cause.

It is further perfectly clear, as before observed, that the owner of the principal part of the bed of Cleveland avenue had never dedicated it west of Summit street, and that Bentzen & Hill were entirely justified in reserving a part of it from dedication on their map.

Against that result, however, defendant sets up several conveyances made by Bentzen & Hill at or about the time their map was made. They took their title, as we have seen, on the 1st of March, 1897, and had their map made about the same time, and filed March 8, 1897; but it is fairly to be inferred that a contract of purchase had been made by them some time prior to that, for immediately after the perfection of their legal title they made several conveyances of lots, and those conveyances are relied upon as a dedication by them of the whole of Cleveland avenue. There are several of them, and without exception they cover lots lying east of the boulevard, and between it and Summit street, and just to the west of the improved portion of the town. In these conveyances the lots are spoken of as "Situate at Euclid shown on a certain map entitled Bentzen & Hill's section of Euclid No. 1, Hasbrouck Heights, N. J., 1897, filed in the Bergen County Clerk's office March 8th, 1897, and also on the street and assessment map of said borough," designated as lots numbers so and so. I find none which refer to the borough map alone, but all include

a reference to the Bentzen & Hill map. Hence the persons taking title from Bentzen & Hill had direct notice, by the map to which the deeds refer, that the grantors reserved a strip throughout the center of Cleveland avenue, and I am of the opinion that the effect of such notice is not overcome by their reference to the borough assessment map. The fact is that Bentzen & Hill thought, and justly, that, as they owned the greater portion of Cleveland avenue, the party which would have the benefit of the opening of that street should pay for so much of their land as lay north of the center of the street, and such claim, in my judgment, was just.

The case, then, presents no elements from which an inference can be drawn that Bentzen & Hill have ever waived their reservation of the strip in question, and, on the proofs as shown, I must hold that the complainant, by any conveyance given by the defendant corporation, would not get the benefit of Cleveland avenue as a dedicated street west of Summit street, or, at least, that her right in that behalf is too doubtful to warrant this court in decreeing specific performance on the strength of its existence. I am further of the opinion that under the contract she was clearly entitled to have such benefit. The reference to the maps contained in the contract raised a clear implication that the streets marked on those maps were at least dedicated streets. This want of right to use Cleveland avenue as a dedicated street came to the knowledge of Mr. Cleveland before the time for finally performing the contract had elapsed (in fact, the time had been extended by the defendant corporation), and he demanded that such want of dedication should be remedied. The complainant, through her husband, paid \$4,300 on account of the purchase, so that, up to a certain time, at least, her position was one of perfectly good faith. The defendants allege that she became disgusted with her purchase, and that the complaint in regard to the right of Bentzen & Hill to close Cleveland street was a mere excuse to enable her to get rid of carrying out the contract. There is some evidence to sustain that view. Mrs. Cleveland had no money of her own; her husband was to furnish the funds to make this purchase, and was undoubtedly disappointed in receiving moneys, and was short financially during the running of the contract. His business carried him away to Europe a good part of the time, and he became broken in health. Undoubtedly, in giving his evidence in London, he fell into some errors of fact, but I think they were innocent, and due to the circumstance that he had not the papers in the matter before him, and was embarrassed thereby in giving his evidence, and he did not have the benefit of being present at the hearing and correcting his errors, or of answering the evidence of the defendant. He clearly fell into an error as to the place where the contract of August

14, 1899, was executed by him, when he says that it was executed on board ship; he clearly confused that occasion with an occasion in the latter part of November, 1899, when he did hurriedly execute some papers on the eve of his leaving a second time for Europe.

The contract provided that complainant was to pay the interest on the mortgage from a certain time. The interest accrued and was unpaid before the arrival of the time upon which the complainant agreed to pay it, and foreclosure proceedings were commenced on a mortgage, and went to a sale. Besides this, the mother of Mr. Van Gulder, a Mrs. Fay, sued the corporation and got a judgment, levied on all the property included within the contract, and proceeded to sell the same. But the perfection of the sheriff's sale was arrested by an order of this court. Before she obtained her judgment the contract in question was recorded, so she took her judgment with notice of the complainant's equity. I have said that the mortgage was foreclosed, and the property sold under that. All of the lots were not covered by mortgage, but were covered by Mrs. Fay's levy, and the precise contest presented by the complainant is whether she shall have a lien for the amount of \$4,800, the purchase money paid by her, on so many of the lots as were not covered by the mortgage.

But to return to the defense of want of good faith on complainant's part. In order to thoroughly understand the force of this point made by the defendant, it is necessary to consider the occurrences between the date of the contract of August 14, 1899, and the 1st of October, 1900. The purchase price was \$17,000, to be divided between the land company and Mrs. Quackenbush, in the proportion of \$12,000 to the land company and \$5,000 to Mrs. Quackenbush, but the incumbrances on the several properties were not in that proportion. Of this \$17,000, \$2,000 was to be paid or provided for at the date of the contract, \$3,000 more paid in cash within three months after the date, which would be the 14th of November, and the balance of \$12,000 in six months, which would be the 14th of February, 1900. The first \$2,000 were paid, but how it was divided between the land company and Mrs. Quackenbush does not appear. The complainant went to London the next day, August 15th, and returned in the course of two months, just when does not appear. Between that and November 28, 1899, he paid the land company enough money, in addition to the previous payment, to make it up to \$4,300, and took the receipt of its president for that amount. Whether that receipt included the whole of the \$2,000 paid on the 14th of August does not appear, but the presumption is that it did not, but that Mrs. Quackenbush had a share of that first payment. Then about that time Mr. Cleveland made provision by which Mrs. Quackenbush was entire-

ly paid, the last payment being a little less than \$200, and she conveyed her whole interest to the defendant; but out of her payment was taken, of course, the mortgages on her premises—just how much those were does not appear. Those mortgages were afterwards foreclosed, and the lots which Mrs. Quackenbush agreed to convey were sold and purchased by other parties. It would seem then that the \$4,300 which the land company acknowledged to have received up to November 28, 1899, would include all its share, as against Mrs. Quackenbush, of the first two payments of \$2,000 and \$3,000 each provided for in the contract. The next payment due to the land company would be on the 15th of February, 1900, when the conveyance was to be made. Mr. Van Gulder was anxious to realize on such payment in advance of the time fixed for the delivery of the deed, and an arrangement was made on or about the 28th of November, quite hurriedly, just as Mr. Cleveland was about to sail for England, between Van Gulder and Cleveland, by which Cleveland agreed to accept the title at once and give back a mortgage to secure so much money as would be coming to the land company over and above the mortgages and other incumbrances on the lots which the defendant agreed to convey. For this purpose the amounts of the several liens were collected, and a statement of the total was made up. A mortgage was executed by Mr. Cleveland covering all the lots to Mrs. Van Gulder, with the amount to be secured in blank, and left by him with Mr. Winans, who was the conveyancing counsel for both parties, and had been the standing counsel for the land company. Mr. Cleveland took a statement, showing the incumbrances and payments, and the balance of cash that would be due the land company, on board ship with him for his second trip to London on business, with the understanding that he should examine the statement at his leisure on the voyage, and, when he had arrived in London and was satisfied of the accuracy of it, he was to write a letter instructing Mr. Winans to have his wife join in the mortgage, with the proper amount inserted, and deliver it and accept the conveyance. The time for the payment of that mortgage was the 30th of September, 1900. The effect of this arrangement, if it had been carried out, would have been that the land company would obtain a mortgage for the balance due it nearly three months sooner than it would receive the cash by the terms of the contract, and the complainant would have obtained time until the 1st of September to pay that balance. In the meantime, the understanding was that Mr. Winans was to look at the incumbrances, and satisfy himself, in the complainant's interest, that it was safe for her to take the title and deliver the mortgage. Mr. Winans did look into the matter, and on the 15th of December, 1899, wrote Mr. Cleveland a long letter, giving the

result of his examination, and advising him not to close the transaction in the present condition of the title and incumbrances; and the arrangement accordingly fell through. In the meantime, however, the land company obtained present pecuniary relief by putting mortgages on the premises, and thus anticipating payment. Mr. Cleveland returned from England, just when does not appear, and spent the summer of 1900 in and about New York, and in fact made his home with the complainant at Hasbrouck Heights. During this period he began to look about with a view of improving the property, and, among other things, of building a house which would occupy several of the lots. This led him to inquire into the matter of the final dedication and acceptance of the various streets, which existed only on paper, and he then discovered that Cleveland avenue had not been dedicated by the owners of the principal part of the bed of the street. He brought forward this objection to Mr. Van Gulder, and it became a subject of contention between them. At Mr. Van Gulder's request he attempted to negotiate with Bentzen & Hill for proper proceedings on their part to dedicate the street. They offered to do so for \$600. Mr. Cleveland reported the offer to Mr. Van Gulder, who declined to pay it—said he would compel the borough to open the street. This the borough declined to do.

A further subject of contention arose between them as to the exact number of lots to be conveyed, and the fact that some of those which were mentioned in the contract could not be conveyed. In September, 1900, Mr. Van Gulder was pressing for closing the affair, and Mr. Cleveland finally suggested that he prepare his deed and let him see what he proposed to convey. Mr. Winans declares expressly that Cleveland told him that he (Winans), who was the conveyancer, might prepare the deed, so that he (Cleveland) could see what he would get by it. With regard to the time when the objection of the nondedication of Cleveland avenue arose, Mr. Winans says it was some time before the preparation of this deed. A deed was accordingly prepared and tendered to Mr. Cleveland, first on the 30th of September, and again on the 10th of October, and declined by him on various grounds, the principal of which was that Cleveland avenue was not dedicated. There was also contention as to the lots which were included in it, and, strange to say, this deed was not produced by the defendants, nor were any of the letters which Mr. Cleveland swears that he wrote Van Gulder from time to time, containing his objections to the title proposed to be made. There is no doubt, as before observed, that Mr. Cleveland was short of money at times during the summer of 1900, but I am unable to find that the objection to the lack of dedication of Cleveland avenue was a mere excuse to get rid of the contract. The ob-

jection was and is a serious one; it affects the value of a large number of the lots which he agreed to purchase, and I am unable to conclude that it was not made in good faith.

Now, upon these facts, the first question is: Could the defendant at any time have compelled the complainant to specifically perform the contract by accepting the conveyance of the premises and paying therefor? I think there can be but one answer to that question. The court would not compel the complainant to accept the title and pay therefor, and that disposes of the defendants' cross-bill, which prays specific performance. No offer was made at any time before suit commenced, nor was any made by the defendants' cross-bill or at the hearing, to apply to the matter of those lots fronting on Cleveland avenue a clause in the contract which provides that, in case either party shall fail or be unable to convey a good title to any lot or lots, then the amount of the consideration to be paid for said premises shall abate in proportion to the value that said portion shall compare to the whole property, and the contract shall not be deemed to be an entire contract, but severable for that purpose only. And I am of the opinion that such clause does not apply to the defect set up.

If, then, the land company could not in equity compel the complainant to complete the contract, does it not follow that the complainant may have relief for the money which she has already paid? And this seems to follow naturally from the other proposition, unless the complainant is for some reason estopped by reason of the defendants' having changed their position irretrievably. I find nothing of that kind in the case, except the foreclosure of the mortgages by reason of the complainant failing to pay the same according to her contract; but, if the complainant was never under any equitable obligation to pay the mortgages, her failure to do so cannot be set up as an estoppel by the defendant. It appears from the evidence of Mr. Cleveland, and that of Mr. Winans, that he gave notice to the defendant as soon as he discovered this defect, and the defendant should have protected itself in the matter of the payment of these mortgages. No evidence was given on the subject, but it is not at all unlikely that the property was bought in at foreclosure, so far as it was worth it, in the interest of the defendant.

The authorities on this interesting subject are quite in point. Professor Pomeroy, 3 Pomeroy's Equity Jur. § 1263, is clear and explicit, and the authorities he cites are quite in point. I refer especially to the case of *Rose v. Watson*, decided by the House of Lords on the 17th of March, 1864, reported in 10 House of Lords Cases, 672. The case is singularly like the one under consideration. There a gentleman by the name of Potter was seised of land in the county of Chester, and contracted to sell a portion of

it to Watson for the considerable sum of £8,295, payable in installments, with interest. He also sold other portions to a man by the name of Dobbs in like manner, and Watson purchased that contract from Dobbs. After this sale Potter mortgaged the whole to the complainant, a life assurance society, for £40,000, and notice of the mortgage was given to the Watsons by the society. Potter, the owner, went into insolvency, and assignees of his estate were appointed. Watson also gave notice to the society of his contract to purchase, and that he had bought Dobbs' contract, and "that the said several contracts had been entered into with Potter upon a representation by the agent of Potter that a plan produced by him, and which contemplated the laying out of the whole of the estate, and the building of a church in the center, immediately contiguous to the lots so purchased, should be carried into execution; that this had not been done, and thereby the value of the land had been materially affected; and that the Watsons were entitled to treat the agreement as void on account of such unfulfilled representations; and they claimed to have a conveyance of the land they had purchased from Dobbs, in satisfaction pro tanto of the purchase money they had paid him." This claim was denied, and the assignees in bankruptcy filed a bill against the Watsons for specific performance of the two contracts—that of Watson and that of Dobbs. It was heard before Lord Cranworth as vice chancellor, who, on the ground of the representations, which he deemed material in the matter of the contract, dismissed the bill. 1 Simons, N. S. 523. That report shows that the two contracts were there, as here, entered into on the strength of a map, exhibited by the vendor to the vendees at and before the signing of the contracts, showing the whole tract, of which the pieces conveyed by the contracts were a part, laid out into streets and squares, which were to constitute an addition to or suburb of the city of Birkenhead, and that the vendor promised the vendees verbally that he would proceed at his own expense to open and improve the streets and make other improvements, which he had not done. This suit was followed by a foreclosure of the mortgage of the assurance society, represented by Sir George Rose, the trustee, and therein the defendant Watson set up a prior lien for the sum of £1,575, which he had paid on account of the contracts. That cause was heard before Vice Chancellor Kindersley, who pronounced a decree in favor of Watson and against the mortgagee and assignee in bankruptcy, giving him (Watson) a first lien on the premises for the amount of money he had advanced. That case came on for hearing before the House of Lords, composed of Lord Westbury and Lord Cranworth, and they affirmed the decree below.

Another case is *Turner v. Marriott*, L. R. 3 Equity Cases, p. 744 (1866). Still another

is *Aberaman Iron Works v. Wiggins*, L. R. 4 Ch. App. (1869) p. 101. There a Mr. Bailey was the owner of the Aberaman estate in Wales, on which were iron works and colliery, which he agreed to sell—estate, plant, and business—to Wiggins for £250,000, representing that the estate contained 1,530 acres. Wiggins organized a corporation called the "Aberaman Iron Works" to take the estate and work it, and entered into a contract with the corporation to convey the title to it. He was to receive £350,000, payable in installments, etc., and he represented the estate to the corporation as containing 1,530 acres. In point of fact, it only contained between 1,100 and 1,200 acres. After receiving £75,000 in cash and a batch of bonds from the company, the latter had a survey made and discovered the deficiency, and called on Wiggins for reparation. Wiggins then sued Bailey, the original owner, and his vendor, for damages for misrepresentation of acreage, and settled with him for the sum of £50,000, part in cash and part in bills of exchange on time. The company went into the hands of an official liquidator. The official liquidator brought this suit against Wiggins, and certain other persons interested with him in the transaction, to be relieved from its contract on the ground of the deficiency in the amount of the land, and to recover from Wiggins the amount advanced to him on its contract with him, and for a lien on the bills of exchange still held by Wiggins as part of the consideration received by him in his settlement with Bailey. The defense was there set up that the real reason why the company did not take the property was that it had not the money. It was set up there, as here, that the land consisted in the works, plant, and the mines already opened to the view, and that the lack of acreage was of no consequence, and was put forward as a mere excuse. Lord Cairnes, who heard the case, said (page 107): "The argument that the company would have bought the estate with equal readiness had they known it to consist of less than 1,100 acres, and that their real reason for rescinding was want of money to complete, appears to me hardly to require an answer. If the deficiency is one which entitles them to rescind (and no one disputes that it is), they are entitled to rescind, even although they might have been willing to pay an equal sum for the smaller quantity, and even although rescission may, in a financial point of view, have been convenient to them." And it was held that the corporation was entitled to rescind, and could recover from Wiggins and his associates. And a lien was given the complainant on the unpaid bills of Bailey received by Wiggins in settlement of Wiggins' claim against him.

Another instructive case is *Torrance v. Bolton*, L. R. Equity Cases, vol. 14, 1872. There a property was sold at auction, and the particulars of sale were read by the auction-

eer. The property was purchased by a Dr. Torrance, who was deaf and did not hear the particulars, and made a bid and paid deposit money. It appeared that he misunderstood the particulars, and he sued to recover back his deposit money and have it declared a lien upon the premises, and he was granted that relief.

For these reasons I will advise a decree for the complainant. The defendants may be heard upon the precise amount due complainant.

(55 N. J. E. 439)

COLLINS v. TOPPIN.

(Court of Chancery of New Jersey. May 13, 1903.)

INSANE PERSONS—CONVEYANCES—CAPACITY TO MAKE—EVIDENCE—SUFFICIENCY.

1. In a suit to set aside a deed made without consideration by complainant to one occupying confidential and intimate relations towards her, evidence examined, and held to show that complainant, at the time she made the deed, did not have sufficient mental capacity to know and judge of those things which enter into a proper disposition of property.

Bill to set aside a deed, by Mary Collins, by John Kenny, her next friend and brother, against Annie Toppin. Decree setting aside conveyance.

Charles L. Corbin, for complainant.
George T. Werts, for defendant.

PITNEY, V. C. The bill is filed for Mary Collins, a complete and incurable lunatic, by her brother, John Kenny, her next friend, against Annie Toppin. The complainant and defendant are residents of Jersey City. The cause, in its primary stage, has previously been before the court, as reported in 51 Atl. 933, and 63 N. J. Eq. 381.

The bill states that the complainant is the widow of Martin Collins, deceased, of Jersey City, who died on the 11th of October, 1900, at which time the complainant was seised jointly with her husband of certain valuable real estate in Jersey City, consisting of a large flat-house, known as the "Florida Flats," worth about \$80,000, and subject to a mortgage of \$45,000, and with a rental value of \$8,000 or upwards, and which, after paying the current charges of interest, insurance, and repairs, produced a comfortable income, and of which by the death of her husband she became seised in fee simple; that the complainant became insane, and was confined, at the instance of her husband, in the State Hospital at Morris Plains in the latter part of July, 1899, and that after several months she was taken from the hospital at the request of her husband, and that she was afterwards again, in the latter part of September, 1900, committed to the insane asylum as insane; that she has no children; that in December, 1900, her brother applied to the court of chancery to have the complainant adjudged a lunatic,

in order that a guardian might be appointed of her estate; that an inquest was taken, and that although the physician in charge of the hospital and her family physician, Dr. McGill, and others, testified to her insanity, yet that two other physicians, officeholders in the county of Hudson, had testified to the contrary, and the jury found her to be of sound mind, and she was released from the asylum the latter part of January, 1901, and went to live with the defendant, Annie Toppin, and her sister Lottie Toppin, at their house, in Jersey City; that in the summer of 1901 she was sent by persons unknown to the complainant or her brother to the Hudson County Lunatic Asylum for paupers, under the charge of Dr. King (one of the witnesses who had testified at the inquest in the previous January that she was sane), and that up to the filing of the bill she had remained in the county hospital for paupers, under the charge of Dr. King, without the comforts and care to which she is entitled, and which could be secured by the proper use for her benefit of her estate; that the defendant, Annie Toppin, with whom the complainant was living in the summer of 1901, claims to be the owner of all of the real estate of which the complainant became the owner by the death of her husband, and that one Robert Davis, of Jersey City, claims to own all her personal property under an assignment; that there appears of record, in the office of the register of Hudson county, a deed purporting to be made by the complainant to Annie Toppin, dated June 4, 1901, recorded June 11, 1901, whereby, in consideration of \$1, complainant conveys to the defendant, Annie Toppin, in fee simple, all the lands above mentioned. The bill then alleges. "At the time of the making of said deed your oratrix was not competent to make the same, nor has she been competent at any time since, and the same was fraudulently procured from her, and is without consideration and null and void." The prayer is that the deed be set aside, and that the defendant may be decreed to account for and pay over to the complainant the rents and profits that she has received.

The defendant, by her answer, admits the ownership of the premises by the complainant, but denies that the complainant was at any time insane, or that she was committed to the State Hospital because of her insanity; and she says that any confinement that the complainant has undergone in the State Hospital was voluntary on her part, and for the sole purpose of enabling her to be treated for, and recuperate and recover from the effects of, her indulgence in intoxicating liquors and other stimulants, to which she was at times addicted. She further admits the lunacy proceedings and the finding of the inquisition, and alleges that the finding of the inquisition is conclusive, and denies again that the complain-

ant was at any time a lunatic, and alleges that at the time of the making and delivery of the deed to the defendant the complainant was in full possession of her faculties, and capable and competent to transact any and all business, and that if the complainant became insane afterward, which the defendant denies, such insanity must be from a very recent date. She admits that the complainant lived at the house of the defendant and her sister during the time stated in the bill, but that it was a mere natural continuation of a previous intimacy and great attachment existing between the parties, and alleges that the complainant has been for a long time, and still is, estranged from her brother and next friend, and had declined to have any communication or relations with him. She denies that in the summer or fall of 1901 the complainant was sent or committed to or confined in the Hudson County Asylum, or that she was at any time in the insane ward of said asylum, and without the comforts and care to which she was entitled. But she alleges that complainant was a friend of Dr. King, who was aware of her disposition to use liquors and stimulants, and endeavored to overcome the same, and that for that purpose in September, 1901, she voluntarily placed herself for a short time under the charge of Dr. King at his private residence or quarters at said Hudson County Asylum, and while there had her freedom, her own private room, attendants, and all proper care and attention. The answer further says that the complainant was not at the date of the filing of the bill, nor has she since been, at the said Hudson County Asylum, or at the residence or quarters of said Dr. King, but does not state where she was at the time of filing the bill or the filing of the answer. The defendant admits that she holds the deed in question, but knows nothing about the assignment by the complainant to Robert Davis. She explicitly denies that at the time of the making of the deed complainant was in any wise incompetent to make the same, or that it was fraudulently procured from her, or that it was without sufficient consideration. She says at the time of the making of it complainant was in all respects competent to make and execute the same, and that she understood and comprehended the nature of the transaction, and freely and voluntarily made, executed, and delivered the deed, without any fraud practiced on her by the defendant or any other person in her behalf, and entirely without restraint or influence by the defendant or anybody else. The answer does not state any consideration for the deed, nor does it hint at or declare any trust upon which it was held by the defendant.

The proofs show, or tend to show, the following facts:

The complainant and her brother, the next of kin, were the children of respectable Irish

parents, living in the city of New York, and were born and reared there. The brother seems to be a simple-minded hard-working, sober, and industrious mechanic, working for a weekly wage, living with his wife and family of children in an ordinary flat in the city of New York, having little or no experience in business affairs, and to have accumulated little or no means. The complainant was intelligent, but illiterate. She could read, but could write no more than her name. She was bred to the arranging of artificial flowers, and became an expert, so that she earned quite large wages. Her husband, Martin Collins, was a cattle drover, dealer, and slaughterer, with headquarters at Jersey City. He was an enterprising and thrifty man. They married some 30 years before the transaction in question. Her husband was a drinking man, and occasionally drank to excess and went on sprees, so as to render himself incompetent for several days at a time. The complainant also was in the habit of drinking beer and light beverages, but not to excess. The evidence of the physicians is clear that her mental disturbance was not due to drinking, nor was there any lesion of the brain due to that cause; in short, it was not a case of alcoholic insanity, although drinking may have at times been the immediate occasion of a fresh eruption of mental disturbance. It clearly appears that she had no craving for drink, such as besets habitual drunkards. The evidence by defendant in support of the drink theory was much exaggerated.

The complainant appears to have been born in the year 1850. In her early married life she assisted her husband in making money by working at her trade, and with the accumulations of their joint earnings they acquired by joint conveyance the land upon which the Florida Flats are situate, and borrowed money and erected the flats. The investment was a success, and at the time covered by the transaction here brought in question the flats were in the hands of a very respectable and efficient real estate agent in Jersey City, who had them fully rented, attended to the repairs, and the payment of taxes, insurance, and interest, promptly; and there was left upwards of \$2,000 per annum in income therefrom. Besides, when Martin Collins was actively engaged in business, it must have produced a considerable income, for they lived in a comfortable, if not handsome, house, in a respectable neighborhood, with a stable, and kept horses and carriages and four servants. They had been on friendly, if not intimate, terms with her brother John Kenny and his wife and children. One of the latter frequently visited her aunt, and spent considerable time at her house. In the early summer of 1899 the complainant began to develop symptoms of insanity, and in July of that year she was committed to the lunatic asylum at Morris Plains on the regular certifi-

cate of Dr. John D. McGill and of Dr. Law, both of Jersey City, to the effect that the attack began on the 4th of July, was rapid in its onset, and was a general mental perversion, and a complete reversal of her usual demeanor. She remained in the asylum until the latter part of September, 1899, when she was taken away by her husband as improved, but not cured. They took as an attendant one of the hospital nurses. Her husband took her on a visit to Virginia, and afterwards on a journey of several months to the South and West, returning to Jersey City February 12, 1900. In the summer of that year (1900) she again became insane, and nominally on her husband's application, but really on that of his foreman, was on the 26th of September, 1900, committed again to the Morris Plains Asylum. There is little evidence as to her condition from February 12th to September, 1900. On October 11, 1900, her husband died, and the funeral occurred on October 13th. Her brother and his wife visited her on several occasions at the Morris Plains Asylum.

The effect of her confinement and the regimen of the asylum was to ameliorate the violence of her mania, and to render her entirely conscious, and extremely desirous of being removed. Her brother was quite willing she should be removed, but the physicians at the asylum advised against it, and would not permit it. They stated that she was not in a fit mental state for removal, whereupon her brother, taking the advice of counsel, applied to this court for a writ de lunatico inquirendo; the object being to determine her condition of mind, and, if found insane, to have a guardian appointed, and then remove her and put her under the care of a proper care taker in a private house, where she would be comfortable. The petition for the writ was supported by the affidavit of Dr. Evans, of the asylum, and of Dr. Schultes and Dr. Bauer, of New York. The writ was issued, and a hearing was fixed for January 8th, which was postponed to January 12th. The return recites a hearing of January 12th and 16th, and a finding that Mary Collins at the time of the taking of the inquisition is of sound mind. The inquisition sat in Jersey City, and the complainant was brought to Jersey City by an attendant of the asylum, and was seen by Dr. Converse, the county physician of Hudson county, and Dr. King, the superintendent of the county pauper lunatic asylum. Dr. McGill and Dr. Evans both testified—the latter quite positively and strongly—that she was not yet recovered. The contrary was testified to by Dr. Converse and Dr. King, and the jury found as I have stated.

The return of the inquisition was confirmed, and on January 23, 1901, the complainant was delivered to Mr. N., as her counsel, who signed a receipt for her, and brought her immediately to Jersey City, and delivered her to the defendant, Miss Toppin, where she re-

mained until about the 15th day of July following. In the meantime the rents of the Florida Flats had been collected by the same real estate agent in whose charge it had been put by Martin Collins in his lifetime. Letters of administration had also been taken out on his estate soon after his decease by Robert O. Babbitt, who placed the affairs of the estate in the hands of Mr. McCrea, of the Hudson county bar. On the 31st of January, a week after her return from the asylum, she executed in the presence of the defendant and a Mr. Holden, one of the masters of this court, a most comprehensive and sweeping power of attorney to Mr. Robert Davis, of Jersey City, commonly called Sheriff Davis, then city collector, in which she placed under his control, as her agent and attorney, all her real estate, with power to rent and deal with it in all respects as she could herself; to mortgage it for the purpose of paying off the present mortgage, and, at his discretion, grant, bargain, and sell and convey the same for such price and at such terms as to him may seem fit; and to make delivery of such conveyance in her name; also to look after her share of her husband's estate, and the large arrears of rent of her share of the real estate taken by his administrator; also other rent moneys accruing due prior to the rents mentioned; also a claim against her husband's estate for \$3,000 for money loaned; to collect and receive her share, for her, of her rent moneys, and her rent, and to bring suit or suits therefor, to give a quitclaim and discharge therefor, and to prepare an inventory of her husband's estate; and to invest the proceeds of those proceedings on bond and mortgage on real estate, and such other bonds as he may think best—and then proceeds: "After paying over to me out of such rents, issues and profits and said other moneys from time to time, not oftener than once a month, such sums as I may need and request for my own purposes and uses, I absolutely assign to him my said share of the rent moneys and claim in consideration of one dollar and other valuable and sufficient consideration, and make him my attorney irrevocable to sue in his name therefor." On the 4th of June she executed the deed here in question, which was prepared by Mr. N., her counsel, and delivered to the defendant. At no time was any consideration in money paid therefor. She had several interviews with Mr. N. with regard to the execution of the deed prior thereto—always with, I believe, one exception, in the presence of the defendant, Annie Toppin, and who was also present at the time of its execution.

She continued to reside with the defendant until about the 15th of July, 1901, when she was taken by the defendant to a hotel or boarding house in Rockaway, on Long Island, and left there alone, without attendance. Without now stating what occurred between that time and about the 19th of August, a period which covers events of considerable

importance, and will be hereafter referred to, she was found on that day, August 19th, by the police, wandering about the city of Brooklyn, alone, in a pitiable condition, and was placed in the station house, and there kept over night. She had sufficient consciousness to ask the police to telephone to Mr. Robert Davis, at the city hall, Jersey City, which they did, with the result that Miss Lottie Toppin, sister of the defendant, went to Brooklyn, and brought her in a carriage, and placed her in a private sanitarium for persons laboring under the effect of excessive stimulants, somewhere on the Hill in Jersey City. Just what happened there does not clearly appear, except that she was suffering from mania. The proprietors of the sanitarium were unable to confine her, and she escaped and came to the house of the defendant in her absence; and her sister Lottie immediately took proceedings to have her committed, August 26, 1901, to the county pauper asylum, as a paying patient, at \$5 a week. She sometimes was fed from the table of Dr. King, but the undoubted facts are that she was confined in a room usually occupied by pauper patients, without special attendance, and received little, if any, more attention than that of an ordinary pauper. Later on her brother learned of her condition and location, and went to see her on more than one occasion, and she begged to be taken away. He employed counsel, ascertained the conveyance to be of record, and heard of her assignment to Davis, which was not recorded, with the result that the bill in this cause was filed on the 6th of January, 1902. It was supposed by counsel that at that time she was still in the county asylum, and, as before stated, the answer in the case gives the complainant no information on that subject, except to deny that she was there. The result of the last visit of her brother to her at that place was to excite Dr. King to write to Mr. Davis that she should be taken away, and she was removed December 30, 1901, to a respectable and comfortable private asylum in the city of Paterson, where she has remained ever since, and is undoubtedly a hopeless lunatic—in fact, quite demented.

This brings us to the first important matter to be considered, namely, the mental capacity of the complainant at the time the deed in question was executed. In considering this, we start out with the glaring fact that the complainant had been afflicted with mental disorder commencing as early, at least, as July 1, 1890, and continuing indefinitely in that year. She was, as we have seen, committed to the asylum on the 22d of July, 1899, and was taken out under the care of a nurse, and went with her husband to Virginia in the latter part of September in that year, and from Virginia went with him to Kansas City, arriving home on February 12, 1900. There is no evidence as to her condition during all the time she was absent from the state. The nurse who accompanied her was

not called, and there is very little evidence as to her condition from February 12th, the day of her return, until she was recommitted to the asylum on the 28th of September, 1900. Some little time—how long, it does not appear—before she was so committed a second time to the asylum, her husband went on a spree, and she was taken to the hospital by his clerk, Cahill, and the defendant. The application bears the signature of M. Collins, but that was probably written by the clerk. The affidavit to this commitment made by Dr. McGill states that the present attack commenced on September 1st, was gradual, and was caused by "mental worry," and, as to the use of intoxicants, says, "Moderate use of liquor. Lately uses none." All this information was, of course, obtained by Dr. McGill secondhand. She was at all times entirely conscious, knew her friends and her location, and had memory, etc., but was mentally unbalanced and subject to several delusions. She soon improved under proper treatment and quiet. Her delusions began to fade, and by the beginning of 1901 had all, or nearly all, vanished, and her mind became calm and apparently sensible. This condition continued until August, 1901, when she relapsed; and on this third occasion the relapse was permanent, and her condition soon reached the stage of dementia.

This final result compels us to look with great care at her condition during the period when it is alleged she was enjoying what is called a "lucid interval," namely, from February 1 to August 1, 1901. It was during the early part of this period that the conveyance here in question was devised and completed. In examining her mental capacity during that period, we naturally expect, after what she had suffered, to find her mind more or less enfeebled in all directions, but especially in the exercise of the higher mental function of reason and judgment. And we must bear in mind that a person may be quite capable of transacting the ordinary routine business affairs of life with accuracy and safety, and yet not quite capable of taking care of himself or herself in more important and weighty matters, requiring careful examination and discernment, judicious consideration, and sound judgment. Hence we may very well believe that the complainant was quite capable of receiving her rents from the real estate agents in charge of her property, and disbursing it with safety in the supply of her own needs and the gratification of her benevolent and friendly feelings, and yet conclude that she was incapable of making a complete and final disposition of her property, such as is here in question. This distinction was well understood by some of the learned physicians who assisted me with their opinions. Commencing with Dr. Evans, of the asylum, who is expert, of course, in these matters, and who had seen very much more of the complainant than any of the others; he testi-

fied that on her second commitment in 1900 her condition was more pronounced and her insanity more fully developed than on her first. And I here mention a rather important symptom, stated by the doctor, namely, her great generosity to all those around her who humored her and obeyed her behests, and great aversion to those who in any way opposed her wishes. As to her mental condition on January 12, 1901, when he testified before the inquisition at Jersey City, and on January 23, 1901, when she was delivered by him to Mr. N., he swears that she was not, in his opinion, competent to transact important business. He swears she had no lucid intervals while under his care; that she might have periods, as she did while in the institution, when she was clearer, calmer, and better able to understand the situation, but he had never seen her when she was in the possession of her faculties. He swears: "She was thoroughly unstable and unreliable in anything that pertained to important business transactions, the last time I saw her. Q. You didn't think it was a hopeful case? A. I didn't look upon it as a hopeful case. I looked upon it as one of those cases that might improve, but she would never have perfect mental stability. * * * Q. When she took a fancy, she would give anything? A. And it didn't take long to take a fancy, either. Q. In your opinion, was she safe custodian of her own property? A. In my opinion, she was not—one of the most unsafe persons that has ever come under my care." And he declares that such was her condition when she was before the commission in Jersey City, and when she left the asylum. At the same time he swears that a casual observer or an inexperienced physician might, upon a single examination, have pronounced her sane. Pressed on cross-examination, he said: "Alcohol might have been the immediate cause of an outbreak, but the foundation, the basis, the predisposing cause of it all, was an unstable and diseased balance of the central nervous system."

I now come to the evidence of Dr. John D. McGill, a well-known physician of high standing in Jersey City, who had been a sort of family physician for the complainant and her husband. He was first called in and saw her several times in July, 1899, before she was first taken to the asylum, and considered her unsafe, and advised that she be sent to the asylum. He did not see her from that time until a little over a year later, to wit, September 28, 1900. He then found her in the same condition she previously was—suffering from mania, with delusions. He next saw her in January, 1901, at the time she was at the Washington Hotel in Jersey City, and the lunacy commission was in session. He said that she then appeared much improved over what he had seen before, and apparently in possession of her normal faculties; that she answered his questions coherently and rationally; and

that his conclusion as to her condition was that "she had a lucid interval in the course of her disease, mania, which I regarded as more or less chronic, with periods of where the disease would be in abeyance, in which she would be apparently in normal condition." He says: "She was apparently in such normal condition, and, to a person absolutely ignorant of her history, and to a person absolutely ignorant of morbid psychology, she would be apparently sane. Q. As a matter of fact, what did you think about her condition? A. She was apparently at that time sane. My opinion was that, while apparently sane, her mind was not competent for the purpose, we will say, of testamentary capacity—anything of that kind; that is, she hadn't a truly psychological mind. Q. Wasn't fit to attend to business? A. She would not have a rational understanding or knowledge of her affairs, or a rational conception of their disposal." On cross-examination, asked in regard to the effect of alcohol, he says he recollects that on the second occasion alcohol was somewhat of a factor, and that worry over her husband's condition was also a factor. "I think very possibly that both of these were factors in causing this outburst." But further pressed, he says: "I would say emphatically here that I didn't then, nor don't now, consider that that was a case of alcoholism or alcoholia. I considered that that was a case, pure and simple, of mania; that the use of alcohol and mental anxiety over her husband's condition may have been factors, but the disease itself produced her mania, accompanied with delusions, showing that it was true aberration of the mind." And he said he could not say truthfully that he considered this lady had a stable mind at any time. And further on he says "that, while she might have enjoyed lucid intervals, she was not fit to transact important business." Further he states that her condition was such at the time he saw her at the Washington Hotel, in January, 1901, that her becoming insane afterwards was what he might expect—"She might have been insane a half hour after I left her," and he swears that it was his opinion that he could not believe that she was competent for testamentary capacity. And he gives his conception of what testamentary capacity is, and that, in his opinion, from the first time he committed her to the asylum she never had testamentary capacity; and he said this: "A person, to comprehend the nature of a will, or anything of that kind, must have what might be called 'psychic logic.' A person like Mrs. Collins, after she developed mania, never had the necessary psychic logic to comprehend a will. There is a difference between the nerve centers and the brain—between the ordinary effect of so-called memorizing centers, where memory plays an important part in the action of the individual. That is one thing, and re-

quires a lower rate of mental power. Now, the higher rate of mental power, using judgment located in the higher intellectual centers, in a condition of this kind, would be blunted and impossible to use normally, as it would in a perfectly sane person. That is my idea of it." And asked this question: "Q. Do you mean to say that on this day, when you talked with her at the Washington Hotel, if she had intended to draw a will on that day, that she could not have comprehended the nature of a will? A. I think not. That is my opinion. Q. Nor the persons upon whom she wished to bestow her bounty? A. I would distrust it. Q. What would lead you to distrust it? A. Simply my experience in the study of the disease, and her history in connection with that disease. Her condition was one of recurring attack of active mania, and then apparently lucid intervals."

Afterwards Dr. McGill was recalled, and I put to him the categorical question found in the opinion of Justice Kirkpatrick in *Den v. Vancleve*, 5 N. J. Law, *661, *662, *663, which since, as I understand it, has been, in substance, adopted by the Court of Errors and Appeals in the recent case of *Thorp v. Smith*, 63 N. J. Eq. -70, 51 Atl. 437. The question I put was, did she, the last time he saw her, have a "mind capable clearly to discern and discreetly to judge of all those things and all those circumstances which enter into the nature of a rational, fair, and just testament?" And he answered in the negative, and said, "She could not clearly discern or discreetly judge." The same question was afterwards put to Dr. Evans, and produced a similar answer; and he was asked particularly as to whether he distinguished between the ordinary faculties of memory and perception, and the higher faculty of judgment, which includes balancing and weighing, and he said he did; and then he was asked "whether, from her previous history, and nature of the disease with which she was afflicted, it was probable that she could ever attain a degree of judgment that would enable her to transact important business, including the value of her property, and to know what was best to do with it." And his answer was that he did not believe it then, and he has no reason to change his opinion, that "her mind was of such an uncertain character—her equilibrium was seriously disturbed by the disease, such mental disease known as insanity, unsound mind, mental derangement, and so on—was so unbalanced, and so uncertain in its character and its movements, and its manner of approaching a subject in its various parts, and coming to a conclusion and judgment, that she was incapable of arriving at a logical and clear judgment upon any subject of great importance, such as entering into a large business transaction that is out of the ordinary, trifling character, such as becomes routine in a person's life, and even a person,

a senile dement, may carry on in a mechanical way."

We come now to the evidence of Dr. Converse, county physician, and Dr. King, superintendent of the county lunatic asylum, which is relied upon to sustain the complainant's mental balance.

Dr. Converse swears that he had an interview with her at the Hotel Washington, Jersey City, on the occasion of the lunacy inquisition, and that he had a list of the delusions under which she had labored while in the asylum, furnished by Dr. Evans to Mr. N., and found that her delusions, so far as they were contained in the list, had vanished, and he thought that she conducted herself in a perfectly natural manner, and he saw no evidence of insanity at that time. Then asked by counsel of defendant: "Then the opinion that you formed was what? A. Was that she was in a condition that was normal of health at that time. Q. And as to engaging in any business transaction, and understanding the nature of that? A. That is not a medical question, I should think. Q. by the Court: Did you occupy yourself with that thought at all? A. No, sir; I did not. Q. by the Court: You didn't examine her with a view to see whether she could transact important business? A. No, sir; I examined her to see whether she was insane, in the sense that she ought to be kept in an asylum, or not. Q. And the conclusion you came to— A. Was that she was as well able to be out at that time as she ever was, probably." He next saw her at the Snake Hill Pauper Asylum on August 28, 1901. He does not attempt to account for the change in her between the time he saw her in January at the Hotel Washington and the next August at the Snake Hill Hospital. In answer to a pointed question, he says: "I don't account for it at all. I don't try to account for it. It was an observed fact. I saw there was a change. Q. Whether it was the natural growth of the disease? A. I think it was due to natural development of the disease." The inference I draw from the evidence of this witness is that she was, at the time he saw her at the Hotel Washington, still afflicted with mental disease, which finally developed into settled insanity, and, further, that his avoiding the question of business capacity is significant, to say the least.

Dr. King, superintendent of the pauper insane asylum, swears that he went with Mr. N. and Ex-Sheriff Heintze to Morris Plains to see the complainant some time early in January, 1901, a short time before the sitting of the inquisition; that he had a list of her delusions, and questioned her about them, and found she had every appearance of a person who was at that time restored to mental soundness, but at the same time recollected that the delusions did exist at one time. She was conscious that her mind at one time was not right, but she thought then that she was better. Next he saw her

at the Hotel Washington on the occasion of the inquisition, and said that he again examined her on her delusions, and found that they had vanished, and that she had every appearance at that time of a person who was of sound mental health. This question was put to him: "In your opinion, was she capable of transacting business and understanding business transactions? A. I thought so; yes, sir." Then the next time he saw her was when she was brought to the Snake Hill Asylum. He says, in answer to a question put by the court on the subject of the effect of drink, viz.: "If her mental disorder was due to too much drink, you would expect she would get well, wouldn't you, after the drink was taken away? A. Yes, sir. Q. by the Court: But she has not? A. She has not. Q. by the Court: The evidence here to-day satisfies my mind, up to date, subject to what may be said, that it is progressing and running into dementia. Now, what effect does that have on your diagnosis of the original cause? A. The only effect was she has had two previous attacks of this disease, and, of course, any person going through any state of mental excitement like that, they are more or less injured. One attack is going to hurt anybody, and, if they have two attacks or three attacks, then there will be a brain lesion, superinduced by that condition. Q. by the Court: Now, your notion is that there was a brain lesion, already due to the two attacks she had before you saw her at the Washington Hotel—more or less brain lesions, there must have been? A. I think there is a brain lesion now. Q. by the Court: No; but at that time there was a brain lesion? A. When I examined her at the inquisition." But afterwards he declined to admit that he thought there was a brain lesion at the time he saw her at the Washington Hotel. However, the force and effect of this witness' evidence, so far as it goes, is much affected by what I am satisfied he afterwards stated about the case.

Mr. Kenny, the complainant's brother, did not hear of his sister's confinement in the Snake Hill sanitarium until several weeks after she had been there, and then only by accident. As soon as practicable after learning her whereabouts, he called there with a friend—a Mr. Frank—and saw his sister. She knew him, was delighted to see him, put her arms around his neck and kissed him, and begged to be taken away. He had not then heard of the conveyance here in question, but immediately sought Mr. McCrea, whom he had met in connection with the administration of Martin Collins' estate, and with him concerted measures for the relief of his sister. Of course, the money question was important in that connection, and the record of the conveyance was found. Mr. Kenny then again visited the asylum with his friend Mr. Frank, and again had an interview with his sister in her room. After he came therefrom, he, in the presence of Mr. Frank, fell

into conversation with Dr. King about his sister's condition, and the deed of conveyance of which he had learned since his previous visit. Dr. King said to Kenny with regard to his sister's mental condition, as both Kenny and Frank testified, "I thought you were wrong, but I see you were right." And with regard to the deed he said, "I don't see how the verdict can stand. It is impossible." Dr. King denies this conversation, but I see no reason to doubt its truth. Mr. Frank seemed to be a decent artisan, and I think neither Kenny nor he were capable of manufacturing such a story.

Dr. King was not examined as to her testamentary capacity, and it does not appear that when he saw her at Morris Plains, or at the Hotel Washington, Jersey City, that he arrived at the conclusion that she had attained any more than that degree of mental calmness which rendered it proper that she should be at large.

This review of the medical evidence tends clearly to establish the position, in connection with the admitted facts of the case, that the complainant did not have, when she was discharged from the asylum the last time, that degree of mental capacity which is sufficient to sustain a transaction like that here in question. And right here, in confirmation of that view, and as evidencing a self-consciousness on her part that she was not fit to attend to business, we have the remarkable power of attorney and assignment, of which I have already spoken, executed within a week after her return from the asylum the last time. It was well remarked by counsel for the complainant that the power which she gave by this instrument to Mr. Davis over her property was greater than that of a guardian appointed by the court after an inquisition finding her not of sound mind. But it is said that her mental condition improved after the date of that instrument, and that by the time this deed was executed she was of complete mental soundness. Evidence to that effect is given by Mr. N. and other expert witnesses, and is entitled to weight on the main question.

With regard to the theory of the defendant that the complainant's insanity was due to drink, there is a piece of evidence in the case that is quite significant. It appears that Mr. Cahill, Collins' superintendent at the abattoir, had a draft for \$500 drawn on the concern by Mr. Collins at Kansas City early in February, 1900, and became convinced that Mr. Collins was on one of his sprees there, and immediately took the responsibility of going out to Kansas City and looking after him. He swears that he found him and his wife there, both drunk; that he by strategy managed to get them on the train, and to get them to Jersey City; that they both drank all the time on the two-days, or more, journey, and were continuously drunk. Now, it appears from the evidence of the Misses Toppin that the complainant was en-

tirely in her right mind the evening after her arrival, and the next day, when she went shopping with Lottie Toppin in New York, and bought certain furs which figure in the case. Although no direct evidence upon the subject is given, if the intimacy which is claimed by the defendant and her sister existed with the complainant, they must have had an opportunity to observe and know if this severe spree which she had with her husband in any wise affected her mind, and, if such has been the case, it seems fair to presume that evidence would have been given on that subject; but, so far as the evidence shows, it had no such effect, and she remained at home until her husband got on a spree the next September, and while he was off from home on this spree she was taken to the asylum by Mr. Cahill and the defendant.

The naturalness of the disposition which she made of her property by the two instruments is attempted to be sustained by proof that at the time the deed was made she had a violent dislike and distrust of her brother, and had declared that he should not have one cent of her property. And I think it worth while to deal with that subject at this stage of the discussion. The fact is that, although by the prosperity of herself and her husband she had attained to a style of living quite superior to that of her brother, yet her natural affection for him, and the usual intimacy between brother and sister, seems not to have abated. It is quite clear that they were on intimate terms, and that she had the kindest feeling toward him and his wife and children. But when her husband finally was advised by Dr. McGill, in July, 1899, that she must be confined in a hospital, her husband called on his brother-in-law, Kenny, and asked him to assist him in that matter, and Kenny did so. He first sent his wife over to Collins' house in the morning of a Wednesday, and he followed after he had finished his day's work, and left his wife there and returned to his home, and then the next Saturday went with his sister and his wife and Mr. Collins to the asylum at Morris Plains. Collins afterwards told Kenny (so Kenny swears) that his wife was displeased with her brother because he (Collins) had laid the blame of taking her to the asylum on Kenny, in order to shift it from his own shoulders; and here is the first start of any feeling on the part of the complainant against her brother. He went once or twice while she was at the asylum on this first occasion to visit her, and his wife also went there. She was anxious to be removed, and Kenny sympathized with her and requested her husband to remove her, which he promised to do, but hesitated and postponed action. Kenny persisted in urging her removal, and finally succeeded in procuring Collins to take her home and go on the visit to Virginia and the journey in the Southwest and West. It does not ap-

pear that either Kenny or his wife saw her after she came back from the South; nor did he know of her being taken to the asylum on the 26th of September, 1900, until he learned it 15 days later, at the side of her husband's deathbed. He and his family were summoned to come to Collins' house the day before he died. He (Kenny) went on the afternoon of the 10th, as Collins died early on the morning of the 11th. His wife and two of his children came the afternoon of the 11th, and all stayed at the house until after the funeral. There seems to have been a continual wake from the time the corpse was prepared for burial until the funeral took place. The house was full of people most of the time, and was left in a state of decided disorder. Sheriff Davis, who was a friend of Collins, took the precaution to have the chief of police send a couple of policemen to the house to take charge of it as the funeral cortège left the house, and no person was permitted to enter it afterwards until it was taken charge of by the administrator of Martin Collins. The result was that Mr. Collins' nieces, the daughters of his sister Mrs. Burger, were prevented from getting possession of some outside wraps which they had left in the house when they started for the funeral. I mention this at this time because it has considerable importance on the question which I am now considering.

Among those who were at the house during the period—that is, from the death to the burial of Martin Collins—were both the Misses Toppin and other intimate friends and employés of Mr. Collins. On that occasion Mr. Kenny learned, as we have seen, that his sister was again in the asylum, and as soon thereafter as he could afford to leave his work he went to see her at Morris Plains. His wife also visited her there from time to time. She knew them all, and was extremely anxious to be discharged from her present confinement; but in the opinion of everybody at that time—the month of November—she was unfit to come out. Miss Toppin, the defendant, also visited her from time to time. Her brother promised to do what he could to get her out, and it appears by the affidavits annexed to the petition for the inquisition of lunacy that he sent two New York experts out there to see her, and they, as well as Dr. Evans, the physician in charge, agreed that she was unfit to be removed. He then consulted Mr. McCrea, who was acting as administrator of her husband. Mr. McCrea went to see her, and the plan was devised of having an inquisition of lunacy sit upon her, and, if found insane, have a guardian appointed, who would have power to remove her, which it is hardly necessary to say her brother or any other person had not. I find that the inspection of the two New York doctors was made on October 25th, only 13 days after the death of Mr. Collins; that the affidavit of Dr. Evans, annexed to the petition, was

made on the 10th of December, and that of Mr. Kenny on the 15th of December; that the petition was filed and an order for a commission made on the 17th of December. The commission was issued on the 19th. The warrant by the commissioners to the sheriff was dated on the 21st of December, returnable on the 8th of January, and afterwards postponed to January 12th, and on December 26th notice of the commission was served on the lunatic, and the commission sat on the 12th and 16th. During all this time, of course, the result of the treatment and regimen at the asylum had the effect of ameliorating the symptoms of her disease.

Now, it is impossible for anybody to imagine any kinder and more rational proceeding to be taken by the brother, under those circumstances, than what he did take. If she was found sane by the commission, then she would be entitled to be released. If, on the contrary, she was found, as all the doctors supposed her to be, insane, then a guardian would be appointed, who would have power not only to take her out of the asylum, but to use the income of the estate in supporting her comfortably in a proper manner. The defendant, Miss Toppin, was visiting the asylum frequently, and she came there after the service of the notice on the complainant, and took that notice to Jersey City and handed it to Sheriff Davis, who immediately employed Mr. N. to defend the complainant before the commission. Mr. N. visited the asylum with Dr. King and Ex-Sheriff Heintze, with the result before stated. Mr. N. and Miss Toppin both swear that the complainant was very bitter against her brother, and charged him with being the cause of her being detained in the asylum. And Mr. N. says that he reasoned with her somewhat on the subject, and said that she ought not to be too sure of that, etc.; but it does not appear that he used those arguments which it is to be presumed, if she was in her right mind, would have convinced her of her error, namely, that the proceeding taken by her brother was a proper and kind proceeding, and one that would result in her release, and in fact was the only mode of releasing her, except a habeas corpus. And the fact that she retained that dislike of her brother in the face of whatever attempts Mr. N. made to rectify her on that subject seems to me to be an indication of an unsound mind, however natural it may be for a person whose mind was slightly disturbed. Her brother was at the inquisition only one day, but she did not see him, as she was not taken before the jury. At the finish of the inquest she was, as I have said, taken back to Morris Plains, and then brought down again on the 23d of January, and went immediately to live with the defendant, Miss Toppin, in her house, with her family, composed of her mother and herself and one or two sisters.

Now comes the most painful part of the case. On the 26th of January Mr. Kenny received at his house, in New York City, a letter dated on the 25th of January, written in lead pencil, in a female handwriting, and evidently that of a person somewhat skilled with the pen, but not in the use of English. It is in these words:

"Jersey City, Jan. 25, 1901.

"Mr. Kenny.

"Your sister Mrs. Martin Collins is home since Tuesday. I have been to my dear husband's grave and my dear good friends picket a beautiful spot for him which gladdened my heart and to think they thought of me when I was in that terrible place I went to my house to get my furs that was hanging on the gas jet in my close room and my muff was in the box in the closet and they are no more to be found and you having charge of the house I ask you if you know anything about them if you do let me know. I have three witnes to prove they saw them there.

"If you don't let me know I will see further I won one case and I will win this no more from
Mrs. Martin Collins.

"Send answer to Mrs. Martin Collins, 124 Sussex street, Jersey City, N. J."

This letter is not in the handwriting of Mrs. Collins, nor is it in the handwriting of the defendant; but that it was written at the defendant's house, and that either Mrs. Collins, or some one who knew all the circumstances, was the author of it, there can be no doubt. The defendant disclaims all knowledge of it. Her sister Lottie was not inquired of on the subject.

The allusion to the furs opens up quite a subject. It is testified to by Miss Lottie Toppin that on the day after the complainant's return with her husband from Kansas City, at the end of the journey which succeeded her first incarceration, to wit, on the 13th day of February, 1900, she had been stopping overnight with the complainant at the complainant's house; that her husband gave her \$100 to go shopping with, and that she and Miss Lottie went to New York shopping, and, among other things, bought a fur muff and a fur tippet, and that the complainant wore them home; that, when the season came for storing her furs, she stored only her fur jacket—kept at home this tippet and the muff; and that they were in the house at the time of the death and funeral of Martin Collins. No other person except the defendant saw them on that occasion. The defendant swears that the muff was in a muff box, with the lid off, standing on a trunk or box in a room called a "closet," which was not a closet, but an extension of an upper bedroom, communicating with it by an arch passageway without a door, and that the neck fur or tippet was hanging on a gas jet in that storeroom; that she saw it there during the wake and on the day of the funeral. Both Mr. N. and Miss Toppin, the

defendant, swore that on the day after the complainant's return from the asylum, which would make it the 24th of January, and the day before the offensive letter just recited was written, they visited the house, and found a man there in charge, who had been put there by Mr. McCrea, acting for the administrator (and upon reasons which he explains with perfect satisfaction to the court, namely, that it was supposed none of the furniture in the house belonged to Martin Collins, and that the complainant being at that time incapacitated, with no one representing her, he felt it his duty to place a man in charge, which he did). When Mr. N. and the complainant and the defendant arrived at the house, they found this man in charge; and complainant immediately charged that he had on a pair of her husband's trousers, which, in the light of all the evidence, seems to have been absurd. They found the house in the same terrible condition as it was found by Mr. McCrea when he took possession. It looked as if it had been robbed and ransacked from top to bottom. And it is proper to say here, upon such appearance, and the report that things had been stolen therefrom, Mr. McCrea had, immediately after he took possession for the administrator, instituted an investigation, first on his own account, and afterwards by the police of Jersey City, to see if they could get on track of the person who had looted the house, and all without any success.

But returning to the 24th of January, when the complainant and Mr. N. and the defendant reached the room or closet where the fur was supposed to be hanging on the gas jet, the complainant asked for her fur, and immediately exclaimed that the Kennys had stolen it. (I have said that it was looked for on the gas jet, where it was said to have been hanging, but, as I interpret Mr. Noonan's evidence, he understood it was looked for in a closet which was locked—a receptacle not at all corresponding with the evidence of the defendant.) Now, considerable evidence was gone into on that subject, with the result that there is not the least reason to suspect that they had taken it. They all deny having seen anything of it at the time, and, as before remarked, the defendant is the only person who testified to having seen it, and the Kennys were not able to enter the house after the funeral. But the defendant testifies that at one of her visits at Morris Plains the furs in question were the subject of conversation between her and the complainant. Now, the question arises, what suggested to the mind of the complainant that her brother's children had stolen that tippet? I have given all the foundation there is for the notion that the Kennys had stolen her furs, which led to the ridiculous and at the same time offensive charge in the letter above set out, written the next day. That letter, and the information that the Kenny family received that the complainant was

living with the Toppins, discouraged any efforts on the part of the brother to make friends with his sister; and, as before remarked, he knew little or nothing of her movements until he heard that she was in the Snake Hill Lunatic Asylum. Now, the conclusion I draw from the matter of the furs is that either her mind had been poisoned against her brother and his wife and family by a suggestion made by some one to her that they had stolen her furs, or her mind was still unbalanced, and the notion was a pure insane delusion. These notions (first, that her brother was responsible for her continuance in the asylum, and her entire misconception of his conduct in the matter of the lunacy proceedings; and, second, her notion that, he or some of his family, had stolen her furs) are put forward as the foundation of her dislike to her brother. She was, however, as we shall see further on, entirely disabused of them when he visited her at the Snake Hill Asylum, a considerable time after that.

I come now to the deed itself, and the circumstances attending its execution. Mr. N., though employed originally by Sheriff Davis, seems to have been accepted by the complainant as her counsel. He nevertheless especially provided, in the power of attorney which he prepared and had executed, for his compensation in the matter of the lunacy proceedings and the other incidental services up to date. He swears that, on his way down in the train from the asylum with the complainant, she spoke to him about making her will, and asked what the expense would be, and he stated that if it was a simple will it would not be much, but if there were any trusts in it it might cost a good deal of money—as high as perhaps \$200. It will thus be seen that the idea of writing out a provision for a trust was accompanied in the mind of the complainant with a large item of expense. She objected to that, and expressed her objection to him. He further testifies—and he gave his evidence, called by the defendant, with great elaborateness and precision—that she was a frequent visitor at his office in the spring of 1901. That she early broached the subject of making some settlement of her property; that she wished to provide against a recurrence of her previous attack, and she wished Miss Toppin, in such case, to take care of her, and talked with him as to how she could effect her desire. She visited the office frequently, always with Miss Toppin, except on one occasion, when he particularly requested, over the phone, that she should come alone. That she never seemed to have in her mind any precise and definite idea of just what provisions she did wish to make, but she did wish the property put in trust, so that in case she was taken ill the defendant could take care of her, and she expressed a desire that the defendant should be her beneficiary after her death,

and that her brother should have none of her property. Mr. N. at one time attempted to commit her wishes to writing, and to prepare a paper expressing the nature of the trust which she wished. The writing was lost, and not produced, and none was ever signed. He also wrote a long letter on the subject to Mr. Davis, besides talking with him about it, because he says he knew Mr. Davis was her particular friend and confidant, and she had put all her affairs in his hands. That letter was not put in evidence, but a copy was used as a memorandum, from which he testified as to what her wishes were; and I infer from it that he wished to acquaint Sheriff Davis with the state of affairs, so that Sheriff Davis could advise her as to what she should do in the premises. His preliminary consultations and conferences went on for a considerable length of time, and finally she ordered him to make a simple deed from her to Miss Toppin. He says that he told her what the effect of it would be; that, in case anything happened to her (the complainant), the effect of a deed would be that Annie Toppin would get all the property. He is quite sure that he made that quite clear to her. He says that she had talked, and did then talk, about some benevolent associations which were named, which she wished to have a share of her property after she died, but the precise amount, and just what the ultimate disposition was, according to Mr. N.'s evidence, he was never able to precisely determine. Finally the deed was prepared, and she came there with the defendant on the 4th of June, and it was executed and acknowledged in the presence of Mr. Gordon, who had his office in the same building; and it is due to Mr. Gordon to say that he took all the pains in performing that duty that any lawyer could be expected to take under the circumstances. Now, Mr. N. says that he told her on that occasion that the trust that she wished the property held upon should be put in writing, and that, if it was not put in writing, it could not be enforced; and he says that she said it mattered not, that she and Annie (the defendant) could arrange that, and she knew that Annie would do whatever she wished with it. Taking the evidence altogether, I am satisfied that she had not at that time, in her mind, fixed a definite plan or trust for the disposition of her property, and that she expected that she would do it in the future, and have it reduced to writing. In fact, both N. and defendant so distinctly swear. And in this connection a suggestion of the counsel for the complainant has force. This was on the 4th of June. In July or August Mr. N. went off on his vacation, and only visited his office occasionally. But his clerk swears that some time in the month of August, in Mr. N.'s absence, the complainant came there, inquiring for Mr. N. in considerable of excitement, and asked how he

was getting along with her business. Mr. N. at that time had no business to do for her, except to write out this declaration of trust. Miss Toppin, the defendant, swears that some time after the date of the deed the terms of the trust were entirely agreed upon between her and the complainant, namely, that the property was to be for the use of the complainant during her lifetime, and at her death one half was to go to her (Annie Toppin), and the other half was to go to four benevolent institutions in Jersey City which she named.

It is worth mentioning here that until the case came to a hearing, and Mr. N. and Miss Toppin were put upon the stand, the idea that this property was held subject to any trust found no place either in the pleadings or the evidence. And from evidence to which I shall shortly refer, the trust stated by defendant seems to have rested very lightly on her shoulders.

Now, in support of the conveyance, it may be said that she did have independent advice, and that the effect of the conveyance was fully explained to her by Mr. N. But the fact remains that Mr. N., having the responsibility of his client on his shoulders, did permit her to make an absolute deed, without any trust expressed either in it, or signed by the grantee on a separate piece of paper; and I am entirely satisfied, I am sorry to say, that it was in the power of Mr. N. to have prevented that transaction in that shape, so far as he was concerned. I do not say that the complainant might not have gone to other counsel, and procured the deed to have been prepared and executed; but I do say that Mr. N. could have declined to perform that task himself, or to have it done in his office.

But the great question is, did Mr. N. explain to her all the effects and consequences of that conveyance, in all its aspects and all its bearings, and in all directions? For I conceive that it is necessary that he should have done so, in order to support the deed. Now, he has stated all that he can remember of what passed, with great elaborateness and precision, and we cannot presume that he made any other explanation to her than that which he has testified to; and that, as I have said, was confined to saying to her that she could enforce nothing against Annie without a writing, and that, in case anything should happen to her (the complainant), Annie would get all the property. Now, that leaves two important matters which he did not explain to her, and they were these: First, that, in case of the marriage of the defendant in the lifetime of the complainant, she (the defendant) would possibly and probably be incapacitated from carrying out her verbally expressed intentions in favor of the complainant; and, second, in case of Miss Toppin's death in the lifetime of complainant, the complainant would be entirely without any redress against the heirs or devisees of the defendant. She would not have even the

good intentions of Miss Toppin to rely upon. Now, I have said that, according to the evidence, the terms of the trust were not agreed upon at the time the deed was executed, but remained for further consideration. We have then the fact that the deed was executed upon an indefinite trust, and without what I conceive to be one of the requisites, under the circumstances, for its validity, namely, that the complainant should have been advised of the effect of Miss Toppin's marriage or death in her lifetime. The effect of the application of the principles of equity to this state of things will be considered later on.

It is due, however, to Mr. N., to say that he took the precaution to converse with Mr. Robert Davis with regard to this desire of the complainant to convey her property to the defendant, and also to write him what appears to have been an elaborate letter on the subject, setting forth the situation of the affair, with the expectation that Mr. Davis would intervene, and consult with and advise the complainant as to what she should do. According to his evidence and that of the defendant, the complainant placed the utmost reliance upon Mr. Davis as a friend and counselor. She had placed her whole affairs in his hands as attorney in fact, and substantially as her guardian, so that in a sense, and to a certain degree, Mr. N. was justified in relying upon Mr. Davis to take care of the complainant's interest in the premises. He was called as a witness by the defendant, but was not asked what action he took, if any, with regard to the matter of this conveyance. So far as the evidence shows, he permitted the complainant to make the conveyance without a word of caution or advice upon the subject. He swears that she told him that she was going to transfer her property to the defendant, "so as to protect her [the complainant] for the balance of her life," and also stated what she wished done with it after her death, and he referred her to Mr. N. He swears he told her, "I can take care of whatever is coming in, but I am not going to bother about what you are going to do with your property or anything."

I stop now to consider another aspect of the case, and that is the subsequent conduct of the parties. I said that the trust seemed to rest lightly on Miss Toppin's shoulders. I think the evidence warrants me in that statement. The complainant seems to have continued to live with the Toppin family on amicable terms and with entire seclusion until the 15th of July. On or about that day, according to defendant's testimony, she took the complainant to a boarding house or hotel at Rockaway, on Long Island, and left her there. She did not herself stay with her, nor did she furnish any maid or attendant for her. She knew that she was there exposed to drink. She visited her, so she said, several times, and found her indulging in drinking. She says she warned her against it,

but contented herself with a simple warning. The evidence gives us no information about the complainant, except that just mentioned, during her stay at Rockaway, which ended, as I think it clearly appears, about the 14th of August. The history of the complainant between August 14th and 19th, as furnished by the defendant and her sister Miss Lottie, and Mr. Miggins, who attended as deputy to Mr. Davis' duties as city collector at the city hall, is this: That the defendant went to spend a fortnight at a place called "Acra," about three miles from a railway station called "Cairo," on a railway that runs north-west through the northern part of the Catskills from Catskill Landing on the Hudson, where she stayed until September 1st, in company with several Jersey City people, including Mr. Davis. She left home for this place on the morning of Tuesday or Wednesday, the 13th or 14th of August, 1901; and on the same morning, and after she had left, the complainant came to the Toppin house, in Sussex street, and saw Miss Lottie Toppin, who describes the visit thus: "The next I saw of Mrs. Collins was that she came to the house the very morning that Annie left, and she was looking for Bob, as she called Mr. Davis. She came from Rockaway to the house, and I told her that she [defendant] was gone up to the country. 'Well,' she said 'if I can't see Annie, then I must see Bob.' I says, 'He has gone away, too;' and she said, 'Then Tom Miggins will do. Of course, he has a whole drawer full of money up there, and I must have money.' She was looking for money, and she had just gotten a hundred dollars shortly before that from Mr. Davis," etc. And after some description how she was spending her time down at Far Rockaway, the witness, Miss Lottie Toppin, proceeds: "Q. Then did you see her at another time? A. No, sir; I didn't see her again until I got a telephone message that she was in Brooklyn. Q. by the Court: How long after that was it? A. I just couldn't say how long it was after. It seemed quite a while. Q. by the Court: A few days? A. No; it was more than a few days. It probably was a few weeks. Q. by the Court: Well, that was about the 15th of August that she was up there. You said that your sister went up about the 12th or 13th of August, and it was that day after that that she came out? A. Yes; it probably was ten days or a week after that, I got this telephone message that she was in Brooklyn. Q. Who was the telephone from? A. From Mr. Miggins. Q. What did the message tell you? A. It said that Mrs. Collins—that he had gotten word from a Brooklyn police station that a woman was arrested for being drunk and disorderly in Brooklyn, and that I was to go there, and he gave the number of the precinct," etc. She swears she went over in a carriage, and found the complainant at a police station, and learned from the officer in charge that she had been picked up

the night before in a sort of stupor, and that they had kept her overnight, and that that morning she had phoned to Mr. Miggins, at the city hall. Mr. Miggins' account of it was that he understood that she had come up from Far Rockaway to Brooklyn, and had there got drunk, and was there locked up in a police cell. The defendant swore that after she had made her last visit to the complainant, at Far Rockaway, she went to Acra, and then heard of the incident at the police station in Brooklyn through a slip in the newspaper. The question was not put to her, directly, if she had heard anything about the movements of the defendant in the meantime, but the impression left by her evidence was to the effect that she had not, and upon that state of affairs the case was rested on both sides; the proof being that Miss Lottie Toppin took her from Brooklyn directly to an inebriate sanitarium on the Hill in Jersey City. She stayed two or three days, but, as we have seen, escaped, came to the Toppin house, and was from there taken to Snake Hill by Miss Toppin and Mr. Miggins.

Now, after the cause had been rested, complainant asked to have it opened upon newly discovered evidence, which was granted. And I may say here that complainant's brother, being a mechanic confined to his business in the city of New York, had little opportunity to trace the history of his sister during this period. When the evidence was opened again, the further testimony given was to this effect: That on Friday afternoon, August 16th, two days after her visit to the defendant's house in search of Mr. Davis for the purpose of getting money, as testified to by Miss Lottie Toppin, Mr. Spratt, a member of the New York bar, who lived with his wife in a house not far from the Toppins, and who had been on friendly terms with Mr. and Mrs. Collins and knew the Toppins, came home late in the evening from his business, and learned from his wife that the complainant was there at the house in a pitiable condition, in bed, sleeping or resting. He did not see her that night, but had an interview with her next morning, and she said she had come from Rockaway, but he does not state that she said when she had left Rockaway. She said she wanted to go up to the Catskills for the purpose of seeing Mr. Robert Davis. The witness went to his business in New York in the morning (Saturday), and came home about 1 o'clock, and found her still there. He took her, at her request, to New York City, put her on the boat for Catskill, paid her fare through to Cairo, and gave her \$5. She had no baggage but a paper bundle, and no money. This witness swears that she was excited, manifested symptoms of mania, but none of having been drinking, and that his wife purchased some clothing which she seemed to need in order to make her decent for traveling, and, further, that she stated that Mr. Miggins, at the City Hall, had told her "Go

up to Spratt's and stay until over Labor Day" (when, as the evidence shows, Davis and defendant were expected home). Mr. Spratt swears that he afterwards spoke to Miggins about having sent her up there to his house, but did not give Miggins' answer. It is inferable from Mr. Spratt's evidence that Mr. Miggins did not deny it. He did, however, come on the stand subsequently and deny that he had sent her there, or that he had any interview with Mr. Spratt on the subject.

Turning now to the following movements of the complainant, the proof shows that the boat she took would arrive at Catskill in the morning (Sunday), and trains ran out to Cairo frequently on week days, but what their runs were on Sunday does not appear; but on Sunday night, about half past 10 o'clock, she arrived at the hotel—Hillcrest—at Acra, and that a Mr. Fallon, who called himself a broker of Jersey City, and who is a friend of Mr. Davis, was at the gate or entrance to the hotel grounds when she arrived; that she spoke to him, and asked him where Bob was (meaning Mr. Davis); that he answered that he was not there, and that she also asked for the defendant, and he answered that she was not there, and that he called for his daughter, Miss Fallon, and she took the complainant into the parlor of the hotel, and that then he immediately called upon a Miss McNamara, of Jersey City, who was also stopping at the house, and rooming in an annex or bedroom building a short distance away; that she asked what he wanted, and he said, "Mrs. Collins is here," and Miss McNamara answered, "For God's sake! what is she doing here?" Witness said, "I don't know, but she wants to stay here to-night." Miss McNamara asked, "Where are you going to put her?" Witness says, "I don't know;" and he brought Miss McNamara to the parlor of the hotel, and she took charge of the complainant—saw that she was properly lodged. The evidence of Fallon and his daughter and Miss McNamara is that when she failed to find Mr. Davis she immediately expressed her intention to return the next morning, and arranged with Mr. Fallon to have his horse and carriage ready early in the morning to take her back to Cairo, on the way to New York. It is evident that the three witnesses mentioned (Mr. Fallon and his daughter and Miss McNamara) were unfriendly witnesses, and the complainant was compelled, so to speak, to go into the enemy's camp for this evidence. The inference I draw from the evidence of Mr. Fallon and Miss McNamara was that none of them gave the complainant information as to where Mr. Davis and the defendant were. In fact, as they all swear, Davis and defendant were out on a late Sunday night drive with a large party from the hotel, and did not return until 12 or 1 o'clock.

Mr. Fallon prepared his horse and wagon

in the morning, and took the complainant to the station at Cairo, paid her fare to New York, and gave her \$10. This was Monday morning, the 19th of August, and it is impossible to escape the belief that they all desired to speed the departing guest. She saw neither Mr. Davis nor the defendant, and the defendant took no pains whatever to inquire into her further movements, although she did not deny that she knew that she had been at the hotel, and, when examined on the subject, expressed entire indifference as to her welfare, and said that she was under no obligations to follow her up or to look after her.

Complainant arrived at New York that afternoon, whether by boat or train does not appear, and between 5 and 6 o'clock came out of the ferry house at the foot of Exchange Place, Jersey City, followed by a parcel of street hoodlums. She accosted a cab driver named Frank Dunn, who had a stand there, and entered his cab. By her direction, she was driven to the city hall. That was found closed. Thence was driven to the corner of Third and Jersey Avenue, where there was a dressmaking establishment. She entered the shop, stopped a short time and came out. From there she was driven to the abattoir, the headquarters of her late husband's business. Then the cabman swears he began to think she must be Martin Collins' widow. She found the abattoir closed, as the cabman seemed to infer, and from there she was driven to 124 Sussex street, the home of the Toppins. When they arrived at the curb in front of the Toppin house, according to the evidence of the cabman, Miss Lottie Toppin came out with another lady and says: "Don't fetch her in here. My mother is sick. Don't fetch her in here. Drive her up to Mr. Spratt's house, 309 York street." He drove her up to Mr. Spratt's house, and Mrs. Collins got out, walked upstairs to the stoop, and the cabman waited there for his fare. Pretty soon Spratt came out and called him up—asked him who sent the woman there. "I told him Miss Toppin sent her there, and he says, 'What the hell business has she got sending you up here with this woman, when she is getting pay for taking care of this woman, and Bob Davis has got the money?'" Mr. Spratt asked the cabman what his bill was. He told him it was \$3, and Mr. Spratt did not pay it, but told him to drive her back to Toppins, but gave him no money, but intimated to him that he had told the complainant that she was to go to the Hoffman Bath, in New York City; that he would see Mr. Davis, and get him paid; and the cabman asked Mr. Spratt how he would manage if she would not get out when he got to the Toppin house, as he was unwilling to be driving her farther about the city on mere promise of pay, and Mr. Spratt says, "You get her out." The cabman then drove her to the Toppin house,

got down off the cab and went upstairs to the door, and saw the mother of the Toppin sisters, and she said, "Don't fetch her in here." The cabman told Mrs. Toppin what Mr. Spratt had said, and told her he was not going to be hauling complainant around. Then he came down the steps from the house, and went to the door of the cab and said, "Mrs. Collins, you better get out and go in here and go inside. They want to see you inside;" and in that way he got her out of the cab, but she says, "I won't go in there. They are robbing me. I won't go in there." And the cabman says, "I won't drive you over to any Hoffman Baths, because you aint got no money." She says, "I won't go in there." She got out of the cab and walked down the street, and took a trolley that was going towards the ferry, and he followed there to observe whether she took any other cab, etc.; and, as far as he could observe, she went to the ferry, but he did not see her there. He swears that the woman was not drunk. "She acted like a crazy woman. She walked along crazy, and acted crazy. She had no baggage, but her clothes had been cleaned up." (That very night, be it observed, she was picked up by the police in Brooklyn.) The account of the cabman which I have just given is corroborated so far as relates to the interview at the house of Mr. Spratt. Spratt did get her out of the house by leading her to suppose she was going to the Hoffman Baths, and he says he induced the cabman to drive her to the Toppins. He says in one place that he promised the cabman an extra dollar, and in another place that he gave him the dollar. The cabman says that he did not get the dollar. But on the whole their stories agree.

Now, Miss Lottie Toppin called to the stand by the defendant, in answer to this evidence, swears that the complainant did come to her house that evening in the cab, and that she got out as the cabman describes it, only she says that she, and not her mother, was present when she got out, and walked down the street, and that she did speak of being robbed, not by the Toppins, but by the cabman. She says that Mrs. Collins opened the door of the cab, "and I said, 'Hello, Collins,' and she said, 'Hello,' and I said, 'Where have you been?' She said, 'Why, I have just come from Spratts.' I said, 'What were you doing there?' She said, 'Well, I drove up from the ferry there.' I said, 'I thought you were in Rockaway.' She said, 'No; I have been up in the country.'" She asked her where she came from. She said she came from up in the country—from Acra. "I asked her if she saw Davis. She said, 'No.'" She says she asked her to come in in the house, and she refused to come in, and said she was going down to Rockaway to pack up her clothes and come home, and that she owed them money, and didn't want to stay in Rockaway any longer. And then she says she walked away, and that the next morning

she heard of her being locked up in Brooklyn.

She was also examined as to why she did not tell of this incident when she was on the stand before, and failed to make any satisfactory explanation of it. She excused herself on the ground that she was not asked the question, but I have already cited her evidence in that respect. So far as her evidence conflicts with that of the cabman, I believe the latter. He is impartial and uncontradicted, while Miss Lottie distinctly falsified.

It is, of course, natural that the defendant should wish to conceal this bit of newly discovered evidence. That these occurrences took place on the dates I have given is fixed by the fact that she was brought back from Brooklyn on Tuesday, the 20th of August, was lodged in the sanitarium, kept there, on and off, for a few days, and lodged in the Snake Hill Pauper Asylum on the 26th of August. Mr. Davis was not called to explain his part, whatever it was, in this affair.

Mr. Miggins swears that she did come to him on or about the 14th or 15th of August for money, and that he declined to let her have any, but denies, as I have already stated, that he sent her to Spratts.

Sheriff Davis and the defendant returned from the Catskills about September 1st, but took no measures to remove complainant from her quarters in a pauper's room, or relieve her altogether from confinement, until nearly four months had elapsed, and after her brother had ascertained her whereabouts and had visited her twice, although they well knew that such confinement was most disagreeable to her.

Bearing in mind that, according to the evidence of Mr. N., the great purpose and object which she had in making the conveyance to the defendant was that the defendant should look after her and take care of her if she should have a recurrence of insanity, we can well see that, though half demented, while wandering penniless and homeless during the last days of August, she keenly realized the treatment she was receiving from these stanch friends; and I am satisfied that at that time she would, so far as she had capacity, have approved the bringing of this suit to recover from the defendant her estate.

My conclusion from the whole case is this: That at the time of the conception of the idea of this conveyance and its execution the complainant was not in the possession of her complete normal faculties. She was calm, and had her memory, and was competent to transact the ordinary affairs of life, such as the collection of her moneys, and possibly the disbursement thereof in the ordinary way for the ordinary purposes of every day life; yet, owing to mental disease, she was not possessed of those higher faculties involving the contemplation and weighing of different considerations, and the exercise of

judgment thereon, and she had not mental power "clearly to discern and discreetly to judge of all those matters and things which enter into a proper disposition of her property."

The conveyance in question was wholly without consideration, and was intended to be testamentary in its character, but it took immediate effect and was irrevocable, and, in connection with the transfer of her personalty to Mr. Davis, denuded her of all her property, without a scratch of a pen to show for it. Such a transaction, under the circumstances, no matter how honest and well intentioned the defendant may have been, was highly improvident and quite unnecessary, and such as no experienced lawyer or faithful business friend of sound judgment should be willing that a person situated as was the complainant should execute. The parties who surrounded complainant at that time, to wit, Mr. Davis, and the defendant and family, occupied confidential relations toward her. She was subjected to the constant and uninterrupted influence of the chief beneficiary, the defendant, and her near relatives. What passed between them on the subject we know not, except what comes from the lips of the interested party, the defendant, and her sister. The complainant was laboring under a wholly unfounded and unreasonable belief as to the conduct of her only brother and natural protector and his family, and there is reason to believe that the defendant was in part responsible for that unfounded belief.

I must assume that the complainant was warned by the party who was acting as her counsel of the importance of having at least her life right in the property thoroughly assured to her by a written declaration of trust executed by the grantee. She was permitted to make the conveyance without having that declaration of trust executed, and, while it is fairly inferable from the evidence that counsel did say to her that it should be signed and executed at or before the execution of the conveyance, yet I cannot avoid believing that the complainant entertained the idea that she could have it done afterwards quite as well as then. The evidence indicates that she entertained the intention of having a declaration of trust executed at a later day.

Finally, quite as important as any of these is this: She was not informed by counsel that the marriage or death of the defendant in her (the complainant's) lifetime would in the one case probably embarrass her, and in the other case absolutely debar her from the benefit of any confidence she might repose in the disposition of the defendant to fulfill and perform the verbal trust which the parties understood was attached to the conveyance.

Under these circumstances, I think the law is quite clear that the deed must be set

aside. There is a well considered line of cases in this state which lead, I think, to that result. I refer to *Garnsey v. Mundy*, 24 N. J. Eq. 243; *Mulock v. Mulock*, 81 N. J. Eq. 594; *Martling v. Martling*, 47 N. J. Eq. 122, at page 132, 20 Atl. 41; *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907; *Lovett v. Taylor*, 54 N. J. Eq. 311, at page 325, 34 Atl. 896; and *White v. White*, 60 N. J. Eq. 104, at page 115, 45 Atl. 767. And last, and perhaps most important of all, because affirmed by the Court of Errors and Appeals, the very recent case of *Thorp v. Smith*, 63 N. J. Eq. 70, 51 Atl. 437. The last clause of the opinion, at the bottom of page 92 and top of page 93, 63 N. J. Eq., and page 446, 51 Atl., was adopted by the Court of Errors and Appeals in its opinion. 54 Atl. 412.

In *Mulock v. Mulock*, Vice Chancellor Van Fleet distinctly holds that where a voluntary conveyance in the nature of a family settlement is made, which it clearly appears does not contain all the terms of the settlement, the deed cannot be reformed, but must be wholly set aside. Here the proof of the precise terms of the trust rests wholly in the evidence of the defendant, upon which alone I would be unwilling to rely if it were proper for me to attempt the task of establishing it. I am, however, not at liberty, nor am I disposed, to attempt it.

The result is that there should be a decree setting aside the conveyance, with costs, and also for an accounting of the rents and profits.

VARICK v. HITT.

(Court of Chancery of New Jersey. Jan. 29, 1903.)

ADMINISTRATOR—CLAIMS AGAINST ESTATE—GIFT CAUSA MORTIS—NEGOTIABLE INSTRUMENTS—TRANSFER BY DELIVERY—PRESUMPTIONS—SUFFICIENCY OF EVIDENCE.

1. Where, on a bill in equity by an administrator against a claimant to determine whether a note payable to the deceased in defendant's possession was received by him from the deceased as a gift causa mortis, both parties consented to the filing of a bill of interpleader by the representative of the deceased maker of the note and the payment into court by him of the amount due thereon, the court's jurisdiction to try the question of ownership to the note became unquestionable.

2. Evidence examined in a suit by an administrator to determine the status of certain claims against the estate, and held to show that a note given by the deceased to defendant did not represent a valid indebtedness.

3. A negotiable instrument can be transferred as a gift causa mortis by mere delivery.

4. Where, in a suit involving the question whether a negotiable note transferred by a deceased without indorsement was a gift causa mortis, it appears that both the deceased and the donee had knowledge of the importance of a written assignment of the note, and an opportunity to make such assignment at the time of delivery, a strong presumption is raised against considering the transfer as a gift.

¶ 2. See *Gifts*, vol. 24, Cent. Dig. § 140.

5. In a suit by the administrator to determine the status of certain claims against the estate, the evidence examined, and *held* not sufficient to establish that a note in defendant's possession, and transferred to him by the deceased without assignment, was a gift causa mortis.

Bill by William W. Varick, administrator of the estate of Augusta A. Thompson, deceased, against Adrian Hitt, to determine the status of certain claims against the estate. Decree advised for complainant.

Isaac S. Taylor and James B. Vredenburg, for complainant. Andrew Gilhooly and R. L. Lawrence, for defendant.

STEVENSON, V. C. (orally). After the oral argument of this case, which occupied three days, I carefully examined and studied the voluminous briefs which counsel put in, and also went over the entire mass of testimony, some 2,000 pages, also examined the pleadings, and reached the conclusion which I mean now to announce; but at this date I may not be able to give a satisfactory, connected statement of all the reasons which underlie my conclusions. I shall only try, in a general way, to apprise counsel of the way in which I have dealt with this case as a whole, reserving for a written opinion the more detailed discussion of the testimony, in the event of an appeal being taken, which is to be expected in this case.

The bill, in its present form, was filed by Dr. Varick, as administrator with the will annexed of Augusta A. Thompson, deceased, and presents for investigation two entirely distinct matters. No objection has been taken, if any could be taken, to the trial and determination of these two distinct matters in one suit, and there is no embarrassment on the part of the court in dealing with them *seriatim*.

The first matter, in order of time, is this: Augusta A. Thompson was a widow, who resided for many years in Jersey City. In the year 1885 she was about 55 or 58 years of age. She was living alone in her own house, and she owned other houses near by, which she let to tenants. She was in comfortable circumstances, having an ample support for herself, the extent of her income, as indicated, being about, as I recollect, \$1,200 to \$1,800 a year. She was a woman of pleasing address, youthful in appearance, in view of her age; a warm-blooded, perhaps somewhat impulsive, vigorous woman. She attended to her own affairs, and she seems to have been fully competent to take care of her own affairs. She had had two children by her deceased husband, who had died many years before, and I think the testimony indicates that she had lived for a number of years very much alone. Her relatives in 1885 consisted of a sister, I think two brothers; and quite a number of nephews and nieces. At this time the defendant, Adrian Hitt, appeared on the scene. He came from the West. His antecedents, his character,

his various employments, will be referred to later on. He became acquainted with Mrs. Thompson in 1885, and from that time until November 7, 1887, he boarded at her house, or lived in her house at various intervals from time to time, but not continuously. He was a carpenter by trade at that time, and was endeavoring to maintain himself by running a carpenter shop, I think in a small way, in Jersey City. From November 7, 1887, until Mrs. Thompson's death on July 15, 1900, Mr. Hitt lived continuously in her house and boarded with her; that is to say, he lodged and had his meals with her. There was a brief period, in 1888 and 1889, I think, when he went back to the West, but he soon returned, and it seems quite plain that his going to the West was only a temporary interruption of this permanent residence that he had with Mrs. Thompson during these 13 or 14 years.

After Mrs. Thompson's death, Mr. Hitt made two claims against her estate in regard to the two matters on trial in this case. He produced what purports to be a promissory note, the body of which is in his handwriting, purporting to be signed by Mrs. Thompson, by which Mrs. Thompson promised to pay to his order, on demand, the sum of \$32,000; and he claimed that this note represented an honest debt that was due to him. This note bears date September 5, 1899. The other claim which he made against the estate was a claim to the ownership of a promissory note given by one Thomson Kingsford to the order of Mrs. Thompson, bearing date, I think, September 9, 1899; and the note is for \$10,000. It is made payable, I think, four or five years after date, but is payable, at the option of the maker, at any time. Mr. Hitt, after Mrs. Thompson's death, claimed that she gave him this \$10,000 note as a gift. In the first of three successive answers which he filed in this cause, the second and third answers being brought about by exceptions filed to the prior answer in each case, Mr. Hitt states merely that Mrs. Thompson gave him this \$10,000 note in her lifetime and failed to indorse it, not alleging that she gave it when she was in contemplation of death, as a gift causa mortis, leaving the inference that the gift was an ordinary gift *inter vivos*.

Without undertaking to recall or state the various proceedings that were had with reference to these two claims of Mr. Hitt, the final result was the filing of this bill on the part of the administrator, much in its present form, and with the last answer of the defendant in the form in which it now stands, presenting these two issues to the court: First, whether the note for \$32,000 is a valid obligation of Mrs. Thompson's, or, in other words, whether any money is due to Mr. Hitt on that note; and, second, whether Mr. Hitt or the administrator is the lawful owner of the Thomson Kingsford note for \$10,000. The answer at first objected to the

jurisdiction of the court—set up that the matters in this litigation were cognizable in a court of law. Subsequently, during the progress of the trial, the defendant moved to amend his answer by striking out this separate defense, which, as I recall it, was pleaded in the usual way, the defendant asking that he might have the same benefit of this defense as if he had presented it by a demurrer. Counsel for the defendant made this motion, and announced to this court that it was the desire of the defendant to have all the matters finally and conclusively determined in this cause. I shall not, therefore, spend much time in dealing with the question of the jurisdiction of the court in respect of either of these two controversies, although some questions might have been discussed, if the answer had stood in its original form, in regard to the jurisdiction of the court in reference to the \$32,000 note.

As to the controversy over the Thomson Kingsford note of \$10,000, there could be no question about the jurisdiction of the court. It was not only claimed to be a gift *causa mortis* by the defendant, but, if objection might be made to the filing of a bill to determine a controversy over a gift or an alleged gift *causa mortis* by the administrator, all doubt about the jurisdiction of the court was removed, as I have heretofore explained, when, by consent of both parties to the suit—and all parties to the suit as it then stood—the executor of Thomson Kingsford came into court in the cause, by a petition, and took an order, by consent of all parties, to the effect that he should deposit the full amount of the note in court, and take the note. This was done. The proceeding was practically an interpleader proceeding, and the order that was made was, in effect, a decree of interpleader. The remaining parties in the cause (because the bill, by consent, was dismissed as to the estate of Thomson Kingsford), the complainant and the defendant Hitt, by their pleadings have set up amply their contentions in regard to this note and the money which it represented. The jurisdiction of the court, therefore, to try the ownership of the note, is beyond all doubt. The fund is in court. Nobody can get this fund without the order or decree of this court; and therefore, for that reason, there can be no question as to the court's jurisdiction.

In regard to the note for \$32,000, the case is different. The bill prays that the note be surrendered for cancellation. It may be that some of the main questions with regard to that note can properly and completely be tried in an action at law, and might have been tried in the action brought by Mr. Hitt against the estate on the note, which was enjoined, if I remember right, when this bill was filed. Was it not enjoined, Mr. Taylor?

Mr. Taylor: Yes, sir.

THE COURT: It may be that the principal questions might be tried in such a suit.

But, as a matter of fact, there are a number of very important issues in regard to that note, in reference to its status, which involve necessarily a question of fraud. If the note is not a valid note, then it is a gross fraud, and the conduct of Mr. Hitt in undertaking to collect it is dishonest and fraudulent in a high degree. I think there are very many circumstances about this case which would probably sustain the jurisdiction of the court, and justify the court in trying the whole question—all the questions relating to that note—whether it is a forgery or not, whether there was any consideration for it, whether it was obtained by undue influence, and all the other controversies which have been litigated in this cause. But I shall not deal with the matter. I have not undertaken to examine the authorities which have been cited. I shall respect the wishes of the parties. I shall exercise the jurisdiction which both parties in this cause admit the court has in regard to this \$32,000 note, and, if there is any error made in assuming such jurisdiction, the matter can be examined in the court above.

Now then, taking up these two questions of fact in order, the first matter to be determined is the status of the \$32,000 note. That comes first in point of time, and the discussion of it comes first logically. I cannot see how any court could satisfactorily deal with the status of the alleged gift *causa mortis* without first establishing the honesty or the fraudulent character of this \$32,000 note. It makes a great deal of difference, in endeavoring to ascertain whether Mrs. Thompson gave Mr. Hitt this \$10,000 note, which was just as good as a government bond, whether the court believes that Mrs. Thompson at the time owed Mr. Hitt \$32,000, which was more money than could be realized from her entire estate probably, including the \$10,000 note. It seems to me that the determination of the status of this note necessarily precedes the consideration, the proper consideration, of the status of the alleged gift *causa mortis*.

I may say here that whether either one of these claims of Mr. Hitt's is an honest, just claim, is to my mind a much more difficult question than whether or not both of them are honest and just or not. It is very much easier to believe that either one of these claims is well founded than it is to suppose that both of them are. The note which is produced as the foundation of this claim for \$32,000, as I said, is in the handwriting of Mr. Hitt. He claims that on September 5, 1899, Mrs. Thompson owed him \$32,000. Of course, if she did not owe him \$32,000, or any substantial sum at that time, then the note is of no value. The force of this piece of paper alleged to be signed by Mrs. Thompson lies altogether in the evidence which it affords that Mrs. Thompson owed Mr. Hitt \$32,000 on September 5, 1899. It is true that Mr. Hitt produces a witness, one George M. Culver, who

testifies that he was present on September 5, 1899, and saw this note written out by Mr. Hitt, and saw Mrs. Thompson sign it, and that after it was thus executed he, the witness Culver, read it. He testifies to that. If his testimony is true it does not necessarily follow that Mrs. Thompson owed Mr. Hitt \$32,000 at that time. There are a great many ways, a number of which are strongly suggested by the testimony in this cause in regard to the relationship of these two parties—their relations to each other—I say that there are a great many ways that can be suggested in which the note might have been executed without there being an indebtedness of \$32,000 at the time. I have read and re-read Mr. Culver's testimony, both on his direct and on his cross examination, with great care, to see how far he narrates any facts which indicate the existence of an indebtedness, as distinguished from the mere execution of this note. There is very little in Mr. Culver's testimony on that subject. His testimony leaves upon the mind very largely this impression: that he went to Mrs. Thompson's house, and waited until Mr. Hitt appeared, being, as he says, invited there by Mrs. Thompson; a prior note for \$30,000, similar to the one in question, was then produced; a new note for \$32,000 was made as its successor and substitute; the note was executed; it was handed to the witness to peruse; he evidently understood that he was there as a witness to a very important transaction; Mr. Hitt took possession of the note; the witness went away. And one very singular thing to my mind is that almost the same transaction is described by the witness as having occurred in his presence three years before, in 1896, when the prior note for \$30,000 is alleged to have been made. The witness comes in, watches this ceremony, the witness goes away. What it means he knows very little about, and he tells us very little.

I do not lose sight of the conversation which Mr. Culver would have us believe took place between himself and Mrs. Thompson on one of these occasions, when Mrs. Thompson, as the witness said, with tears in her eyes, spoke of Mr. Hitt's generosity to her, and even stated that all her property would be barely sufficient to pay what was owing to Mr. Hitt. I must say that I do not believe that Mrs. Thompson ever said anything of that kind to Mr. Culver.

Now we have the note for \$32,000 speaking for itself, and proved to have been executed and delivered to Mr. Hitt, by this one witness, who swears point-blank to the fact. But still, the underlying question is, did Mrs. Thompson owe Mr. Hitt \$32,000 at the time this note was made? I reach the conclusion, without doubt in my own mind, that Mrs. Thompson did not owe Mr. Hitt \$32,000, or any substantial sum, and that, if she executed this note in the presence of Mr. Culver and delivered it to Mr. Hitt, there is some

explanation of the fact that we have not received in this case, and probably never will receive, inasmuch as the one person who could tell the truth, if I am correct in my conclusion, is silent in death. The improbability of this indebtedness of \$32,000 existing from Mrs. Thompson to Mr. Hitt is so great that it would have to be removed by testimony which would almost amount to a demonstration of the existence of the debt.

I said that Mr. Hitt came from the West in 1885, and he, within two years after, attached himself to Mrs. Thompson, and lived with her during the balance of her life. Now it has seemed to me from the very opening of this cause, in which there is such a vast amount of testimony and so much contradiction, that it is idle to undertake to grope one's way through the maze of this testimony without ascertaining what, in fact, were the relations existing between Mrs. Thompson and Mr. Hitt. That is a subject that cannot be passed by and left in any uncertainty. Mr. Hitt claims that after he had, at various intervals, had his lodging and board at Mrs. Thompson's house, he established himself permanently there in November, 1887. He claims that he and Mrs. Thompson at that time became united in relations which he describes as a common-law marriage. In other words, the relations of this man and woman became intimate on November 7, 1887, and they lived together practically as man and wife from that time on until her death. That is Mr. Hitt's claim. I am strongly inclined to believe that this claim is well-founded. I may say I reach that conclusion. Certainly, if there is any error in that conclusion, Mr. Hitt cannot complain of it. I find, in accordance with his insistence, that this man and this woman did live together in intimate relations during this long period of time, and I think the whole testimony on both sides of this cause is consistent with that theory, and is not consistent with any other. Why, of course, they misrepresented about it. Mrs. Thompson had to explain to her relatives and friends why it was that she had this man Hitt, this carpenter, living in her house. He was not, plainly, a man who was exactly Mrs. Thompson's social equal. Mrs. Thompson had a number of friends who were people of wealth and refinement, who took an interest in her. She might very well hesitate to contract marriage with this man, who had come strolling to her door from the West—a man whose antecedents she knew nothing of. But she had to account for his presence in her house. And how did she account for it when her friends inquired? Why, in the most natural way possible. She said that she paid Mr. Hitt for all that he did for her; that she had been frightened by a burglar who had in 1887 or thereabouts endeavored to break in to her neighbor's house, and she didn't like to live alone. And there might have been some truth in that; and Mr. Hitt was a very

useful man. Mr. Hitt stated to various persons that he paid his board, and that he got \$3 a day for every day that he worked for Mrs. Thompson. And I think the testimony indicates that both Mr. Hitt and Mrs. Thompson naturally exaggerated the usefulness of Mr. Hitt to Mrs. Thompson in respect to the care of her property. Mrs. Thompson did not need a mechanic to live with her for the purpose of taking care of her houses and making repairs. She took care of her own houses, for the most part—the business connected with them; collected her own rents; and she was abundantly able to do so. Occasionally Mr. Hitt would mend a door, or do something of that kind around the house. But I am very strongly impressed with the idea that in the large number of conversations that are testified to between Mrs. Thompson and various parties, including her relatives, and between Mr. Hitt and various other parties, what was said was in a measure untrue—contained an element of misrepresentation which one would naturally expect to find in such a case. Mrs. Thompson had difficulty in vindicating her right before her relatives to keep this man in her house. She addressed Mr. Hitt always in their presence as "Mr. Hitt." I think that almost all the witnesses were questioned on this point. The sister, Mrs. Langwith, and Mrs. McCarty, a friend, each of whom spent very many months in Mrs. Thompson's house while Mr. Hitt was there, say that Mrs. Thompson always called him "Mr. Hitt," and Mr. Hitt always addressed her as "Mrs. Thompson"; and these witnesses also say that there were no familiarities indulged—allowed—between them. Their demeanor toward each other was such as to indicate that their relations might have been ordinary business relations, and that Mr. Hitt was in Mrs. Thompson's house in the capacity of a workman, or an employé, if not a servant. A good deal of testimony was given by Mrs. Thompson's relatives to the effect that they regarded Mr. Hitt, and subsequently his niece Clara Longquist, as being in the house in the capacity of a servant. It was quite natural that they should have that impression, and that was the impression that naturally Mrs. Thompson would seek to make upon them. But when, as they did occasionally, break out with the question direct to Mrs. Thompson in what capacity this man Hitt was there, the testimony shows that on several occasions Mrs. Thompson's replies were very unsatisfactory.

Now, while these people were living together and conducting themselves in the way I have indicated, so as to make it possible for them to live together without scandal, we find abundant proof that they took a very different interest in each other from that which such an employer would take in such an employé. The most significant and trustworthy piece of evidence of that character that I recall consists of two letters

written by Mrs. Thompson to Mr. Hitt in June, 1900, when he was temporarily in the Adirondacks. They are very affectionate letters. They indicate a very high degree of personal regard. They do not begin "Dear Mr. Hitt"; they begin "Dear Adrian"; and they end with expressions of love. They are such letters as a woman would write to her husband. They are such letters as this woman, Mrs. Thompson, might well have written to Mr. Hitt if she entertained a deep affection for him, if their relations were sentimental. They are not such letters as Mrs. Thompson would write to a carpenter who was simply in her employ as a servant, whom she found it convenient to keep in her house as a guard against burglars.

I cannot recall, much less state in an orderly manner, all the testimony which bears upon the solution of the question of the actual relations of these two people. The inference from the whole, I think, is plain that this man and woman had an interest in each other which they were concealing from the world, and especially from the relatives and friends of the woman. When Mrs. Thompson was prostrated by her last illness, and her niece, Mrs. Beulah Wilson, an intelligent, well-educated lady, took charge of the house, the conduct of Mr. Hitt was such as to lead Mrs. Wilson to ask her aunt if she were married to him, because she says that she was anxious to know what the fact was, and in asking this question she does not seem to have feared the resentment of her aunt, nor does she seem to have incurred such resentment. Without pursuing this subject further, I may say that I think the testimony abundantly sustains Mr. Hitt's contention as to what his relations with Mrs. Thompson in fact were.

Mr. Hitt testifies that from the time these relations were established, November 7, 1887, for 13 years, until Mrs. Thompson's death, he was engaged in the business of making and exploiting inventions. As soon as he went to live with Mrs. Thompson, as soon as these intimate relations were established, according to his own testimony, he abandoned all effort to maintain a carpenter shop, and practically all regular efforts to make any money by the prosecution of his trade. Down to that time he had maintained a carpenter shop in Jersey City. From this time onward he ceased to endeavor to earn money in that way, and he devoted himself to the exploiting of these inventions. He interested various parties with money in these inventions. There is a series of partnerships and corporations in which Mr. Hitt was interested; and for short periods the testimony shows that he received a daily wage of \$3, or something like that, the periods of such employment, however, being comparatively brief. There is no evidence that Mr. Hitt was making any substantial amounts of money by any business that he maintained from 1887 down to 1900, with the exception of this

patent business, to which I am about to refer. Well, he had to live during that period; he had to be lodged, and fed, and clothed. He also was making inventions and procuring patents, for which he required considerable sums of money. He sold these patents, or different interests in them, and from time to time—it is proved beyond all doubt—he received moneys, sometimes considerable sums, and the evidence indicates that he turned these moneys over to Mrs. Thompson. One of his partners, Mr. Cobin, says that Mrs. Thompson practically was his banker; that Mr. Hitt never had any money, that he always went to her for money, got what he required, and all moneys that he made went to her.

Now, it would be an impossibility to deal with the mass of testimony in regard to the various sums of money which Mr. Hitt alleges he received from 1885 until 1900, and all of which he would have us infer were turned over to Mrs. Thompson for his benefit. The testimony, I will say, that Mr. Hitt adduces to show that he received any considerable sums of money during this period, or any such sum as \$32,000, is entirely unsatisfactory to my mind. He starts out by claiming that in 1885 he walked to California on a wager with a man who is unknown in this cause, who is not traced, named Joseph Smith, and that he won the wager of \$2,000; and then he made another wager with the same man, Smith, that he could walk back within a certain time, and he walked back and made \$8,000; and he would have us believe that by the summer of 1885 he had collected about \$8,000 in cash as the proceeds of this extraordinary double walk. A part of this money he received in cash at the Astor House in New York, alone. Nobody saw him receive it. Nobody knows anything about his reception of this money who is brought to testify in this cause. This court is asked to believe that he had \$8,000 in cash in 1885, when he was endeavoring to establish himself in a petty business as a carpenter and inventor and builder here in Jersey City. It did not go into any bank that we know of. He asks us to believe—and he alleges this in his answer—he alleges in his answer that within six months after he received this sum of money he turned it over to Mrs. Thompson. That means that by the winter of 1885-86—about that time—he gave this woman \$8,000; a woman with whom he was not living, with whom his relations were not intimate, for whom he was occasionally doing jobs of work, and at whose house he was occasionally staying for a time. That is what he would have us believe. It is unfortunate for Mr. Hitt that he can bring up one who knows anything about this money at all. Its origin is in a wager. It is an extraordinary way to make so much money. It would be very extraordinary if a man like this could make that much money and nobody knew anything about it. I have to

reject his story as too improbable to accept without strong corroborating testimony.

It appears in the case that Mr. Hitt himself made various statements in regard to this walk, to various witnesses, which are inconsistent with his present claim. "One witness, whose credibility does not seem to be attacked in any way, says that Mr. Hitt told him that he made the wager, not with a man named Smith, but with a man named Richard Fox, and that it was for \$5,000. The same witness, or another—I have forgotten which—testified that Mr. Hitt told him that he had made this walk (and I believe it is conceded that he did walk to California) on a wager, and that what he made by the walk out he lost by failure to complete the walk back within the time limited. He stated also, according to one witness, that he had been "beat" out of the money. So that we have the origin of this \$8,000 left in a state of great doubt and obscurity. On the other hand, it is a very curious thing that Mrs. Thompson could have received \$8,000 in cash from this man in the winter of 1885-86, and no trace be left of it. No bank got it from her. She then, if I recall the situation correctly, was dependent very largely for banking facilities and the care of her money upon friends in New York, with whom she was in constant correspondence, and from whom she was receiving dividends on stock, from intimate financial friends who took great interest in her. It seems incredible that Mrs. Thompson could have disposed of \$8,000 at that time and no one know anything at all about it.

The other items of money that Mr. Hitt claims he received from 1885 to 1900 are to a very large extent very imperfectly proved. The testimony in regard to them is very unsatisfactory. There are a number of instances where Mr. Hitt alleges that he received money, and had money, but he does not produce the men who paid the money—the persons who would know about it—although an examination of the testimony makes it highly probable that some person could be produced who would corroborate him. No such corroboration is offered. I think I may state with safety that, with the exception of some moneys that were received for the sale of these patents, or machinery connected with the business that Hitt carried on—with the exception of some of those moneys, which are traced to Mrs. Thompson—there is no proof, except from Hitt himself, that he ever received the sums of money which he claims to have received, and no proof of any kind that Mrs. Thompson ever received such sums from him.

Now, let us see what the probabilities would be in regard to any moneys realized by Hitt out of this patent business from 1887. It is not disputed that a building or shop of some kind was erected upon one of Mrs. Thompson's lots, opposite her residence, where Mr. Hitt installed himself, and where

he worked constantly and industriously at these various inventions that he was endeavoring to make. He interested a man named Cobin in those patents. Cobin was associated with him for some time. He afterwards interested Mr. Plenty and Mr. Berg; and then again, at another time, he interested the Simons, wealthy merchants of New York. All these people dealt with Mr. Hitt as a poor man. Mr. Cobin evidently became quite intimate with Mr. Hitt. He comes here and testifies at length in his behalf. Mr. Cobin started in by paying \$1,500 for an interest in one of Mr. Hitt's patents, and then they undertook to manufacture the patented article. Mr. Cobin says, in substance, that he was to supply the money, and Mr. Hitt was to do the work. Mr. Cobin never found out that Mr. Hitt had any money. He regarded him as a poor man. Mr. Hitt, in dealing with Mr. Cobin, the Messrs. Plenty and Berge, and the others, occupied the position of the struggling inventor who has a patent that is valuable, and who wants the capitalist to come in and take a share in the patent as compensation for the amount necessary to put the patented article in the market. And yet, if we believe Mr. Hitt's story, while he was dealing with these men on the basis of his being a poor man, having no money, and their having a good deal, Mrs. Thompson was holding for him \$15,000, \$20,000, \$25,000, in cash. He was a comparatively well to do man. Mrs. Thompson owed him more than could be realized from her estate at a forced sale. And yet nobody suspected it—nobody found it out.

In 1896 a judgment was recovered against Mr. Hitt in the district court, for about \$200 I think, and a short time before or after—about that same time—another judgment was recovered. Nobody could collect anything out of Mr. Hitt. And in 1896, when a levy under one of these judgments was made upon the machinery in Hitt's place, Mr. Hitt delivered to the constable a claim, signed by Mrs. Thompson or in her name, claiming that she owned all the machinery that was subject to levy. Yet we are asked to believe by Mr. Hitt that at that time he was a comparatively rich man.

Now, if Mr. Hitt had amassed all this money, largely by his inventions, it is not probable that he would have been willing to give up large interests in his valuable patents to these persons who only contributed a small sum of money—the small amount of capital necessary—to conduct the business successfully. That is not the way inventors do. Let an inventor get \$10,000 out of a patent, and he has almost always four or five other patents in mind that are a great deal better. Mr. Hitt would almost inevitably have made some exhibition in his business transactions of the possession of this money, if he had any such sum of money. It is incredible to my mind that this money would have flowed se-

cretely, through secret channels, from him to this woman, Mrs. Thompson, and that he should have taken from her, as he claims he did, simply her promissory notes. It would require an enormous amount of testimony to overcome the intrinsic improbabilities of the story that this man tells.

Now, he says in his answer that from 1887 down to 1900, 13 years, he (Hitt) ran the house—paid the expenses of running Mrs. Thompson's house; and also that he carried on during that period a business for them both, but in her name. That is the statement made in the first answer, which I believe was eliminated from the subsequent answers?

Mr. Taylor: I think it was, sir.

THE COURT. I think it was eliminated. The first answer was, unnecessarily, sworn to, was it not?

Mr. Taylor: Yes, sir.

THE COURT. That is what Mr. Hitt meant to be a sworn statement—that he ran this establishment, paid all the expenses, but was carrying on the business in Mrs. Thompson's name, and for their joint benefit. That is the purport of it. He makes out a case of partnership, in the whole of this business carried on in relation to these patents, from 1887 down to 1900. I am inclined to think that there is a good deal of truth in Mr. Hitt's statement that this was in some respects a partnership business. It is not true that Mr. Hitt paid the expenses of the house. That statement is not only not proved on his part—and he might have brought a great deal of proof if it were true—but the contrary is proved. It is proved that Mrs. Thompson paid the expenses, and there is no evidence of any kind whatever, as I recollect the whole mass of this testimony, that Mr. Hitt ever paid Mrs. Thompson one dollar for his board.

Now we have, according to Mr. Hitt's own insistence, a man and woman living together in illicit relations, occupying the same house, but concealing those relations, and each one naturally representing to the onlooking world that their relations were innocent—were founded in the business interests of the two. Mr. Hitt states that he was carrying on this business all this time in Mrs. Thompson's name as a partnership business, and he has repeated that statement, or similar statements, a number of times, as has been proved. I am inclined to think that there is a good deal of truth in that. Once let it be granted that Mrs. Thompson was ensnared into a relation with this man such as I have indicated, and all the rest very naturally follows. He would live with her practically as her husband. He would get all the benefit of the household that she maintained—be boarded and lodged. It is proved that she bought him clothing—I think underclothing; and he, full of ideas, some of which were

practical perhaps, and some of which we know were visionary, was carrying on the shop of a patentee and inventor, across the street, working day and night, and selling these patents and interesting various people in them. Why, the money manifestly came from Mrs. Thompson, just as Mr. Cobin's testimony indicates; she was the banker, and any moneys that he got would naturally go to her. I have not the slightest doubt when he got \$1,000 or \$1,500, as he did on one or perhaps several occasions, by check, it would go to Mrs. Thompson.

But how about Mrs. Thompson's side of the account? We haven't that here at all. Mr. Hitt lived with Mrs. Thompson for 13 years, as I have said—boarded and lodged with her. It is proved that he received sums of money from time to time in order that he might get out patents, and received moneys from her for the purchase of machinery. The mere fact that on one, two, three, or more occasions, sums of money that Mr. Hitt received, amounting to \$500 or \$1,500, or whatever, were immediately turned over to Mrs. Thompson, is only the natural result of the state of affairs that existed, of the relations that bound these people together. I should consider it very strange indeed if Mr. Hitt, receiving all that he plainly did receive from Mrs. Thompson, sustained by her financially in so many of his transactions, should have pocketed the money that was occasionally realized when he succeeded in interesting some unfortunate victim in one of his unsuccessful patents. And that leads me to speak for a moment of this very curious and significant fact: That while Mr. Hitt made a large number of inventions, which he has described, while his counsel produced a great many patents, or certified copies from the Patent Office, of patents issued to him, nobody has mentioned a single patent which Mr. Hitt made from which anybody has made any money by manufacturing and selling the patented article. The sole source of revenue to Mr. Hitt as a patentee, which is proved in this case, from all these 13 years of persistent, industrious effort on his part—the only source of revenue to him in his business—has been the sale of a patent or an interest in some of his patents to some third party. Mr. Cobin came over here from New York, bought an interest in one of the patents—and I think it was the hand car patent—for \$1,500, and supplied what money he could, and left, I think, not very long afterwards, perhaps within a year or two, with a loss of capital and a gain of experience. The other gentlemen who were induced to go in with him met with precisely the same fate. All the money that Mr. Hitt ever got, as proved in this case, on account of his patents, was by their sale, and not by the manufacture and sale of any article that was covered by his patent.

It is incredible to me that such a man as Mr. Hitt could, in September, 1899, as the

result of 13 years of the sort of business which he says he carried on, have succeeded in secretly lending to Mrs. Thompson \$32,000 of money, while all the time he was in some way clothed, lodged, fed, supplied with money—supplied with the amount of capital which he may have expended, or in fact did expend, during that period. And it is almost equally incredible, I may say it is highly improbable, that Mrs. Thompson, during the same period, could have secretly disposed of \$32,000 through channels that we cannot discover—in a way that is not disclosed in this case. Why, it would be a most extraordinary and mysterious exchange of situations between these two people. We have, in 1887, Mrs. Thompson with a nice little estate of probably \$30,000 or \$35,000, with no extravagant habits, an exceedingly careful woman according to the undisputed testimony, and with an income of perhaps \$1,500 or \$1,800, a nice substantial income, upon which she could live, and manifestly did live in the way in which she was pleased to live, without any impairment of her principal.

Mr. Hitt we have, a stranger from the West; a stroller; a convicted counterfeiter, by the way; a man who had been walking on a wager to San Francisco the year before, with plainly no more than the proceeds of the walk, if there were such, in his pocket, and with some other very uncertain items of property which he undertakes to describe to us as existing out in the West. We have this man embarking in this sort of patent business, which is notoriously uncertain, in which he never gets a single patent which is proved to have been valuable as a source of revenue to anybody who undertook to manufacture the patented article. He goes on in this speculative, inventive business for 13 years, and all the moneys that he gets, apart from the \$8,000 that he is said to have got from his wager, amount to a few thousand dollars—not very many—which he received from the sale of these patents, as I have said. And now, at the end of the 13 years, the situation of these two parties is just about reversed. The fortune that Mrs. Thompson had has disappeared, nobody knows where, and Mr. Hitt has become possessed of just about the same fortune—\$32,000—from sources which certainly had been concealed from all the persons he was associating with, and with whom he was doing business, and who were deeply interested in his financial resources.

I am unable to take \$32,000, practically the entire fortune of Mrs. Thompson, and give it to Mr. Hitt, in affirmation of this claim of his, merely because he brings a piece of paper, in his own handwriting, a promissory note, the body of which was written by him, and because Mr. George M. Culver testifies that he saw the ceremony of the signing and delivery of this note. There is something very strange about Mr. Culver's being brought in as the important

witness in this case. It is perfectly evident that there would be nothing on which this claim of Mr. Hitt could rest at all to this note of \$32,000 if Mr. Culver's testimony be eliminated. The whole case of Mr. Hitt's rests on this piece of paper which bears on its face the signature of Mrs. Thompson, and the testimony of Mr. Culver. All the improbabilities to which I have referred—all the statements which seem to me to be almost incredible which I have discussed—all these things are to be set aside because of the probative force of this piece of paper alone, supported by the testimony of Mr. George M. Culver. Mr. Culver is an old companion of Mr. Hitt. He has known him for 20 years. He knew him out West before he ever came to Jersey City. He came to New York in 1884, I think it was, in company with Mr. Hitt, and they then and there established a sort of corporation, in which they were officers, and which they called the American Investment Company, I think it was, and they went into the business, or tried to go into the business, of exploiting patents. The concern lasted only a few months, during which Mr. Hitt and Mr. Culver were roommates, living together in New York, as well as being connected in this business. Then they turn up in Jersey City together. Mr. Culver has a deep interest in this walk to California; goes part of the way in order to see how his friend is coming out. After Mr. Hitt's return from his walk he boarded free at Mr. Culver's house for a time. Mr. Culver is a man who has lived in a large number of houses in Jersey City. He has moved some 15 or 20 times, perhaps more; very often neglecting to pay his rent, according to his own admissions. For eight or nine years he has had a position at Ellis Island in connection with the immigration office there. He has had a position there which seems to be similar to that of a watchman or police officer—perhaps combines both functions. It is a subordinate position. That his relations with Mr. Hitt have been intimate and friendly is perfectly plain. If Mr. Hitt were going to pick out some one in Jersey City to be a witness for him, I think it is fair to say that it would seem that Mr. Culver would be or might be the very sort of man whom he would select. Now there is something very strange to my mind in Mr. Culver being the witness here. He says that he saw the \$30,000 note made in 1896; that he witnessed it at Mrs. Thompson's request; that in 1899, in September, he was passing her house, and Mrs. Thompson requested him to call. He said he would do so, but he did not do so for two or three days; and then, as he and Mr. Hitt would both have us believe, without Mr. Hitt's knowing anything about it, he called in the afternoon at Mrs. Thompson's house, and then, when Mr. Hitt came in, he witnessed the note. Mrs. Thompson then picked this

man out, waited three or four days, recognizing the importance of this note that she was giving, and the propriety of having a witness who could be relied on to prove it in the event of her death. She selects this man Culver, who is the intimate friend and companion and former business associate of the payee of the note, on whose behalf the note is to be proved, and she waits three or four days for this man to come, and he is the witness whom she chooses for the protection of Mr. Hitt. It is unreasonable, I think, to suppose that Mrs. Thompson would have made such a selection. It is easier to my mind to believe that, if the note was signed, the witness Culver was brought to the place where it was signed by Mr. Hitt, and that there were circumstances attending the signing and delivery of that note, which, if disclosed, would account for the signing of it, if in fact it was signed—if there was any such note signed by Mrs. Thompson. Only a short time before the note for \$30,000, made in 1896, is said to have been signed, Mr. Hitt had procured this man Culver to come as tenant and occupy a house of Mrs. Thompson, adjoining hers, for the purpose of keeping a boarding house. He was put out, or he left, and Mrs. Thompson recovered a judgment against him for almost an entire year's rent. Mr. Culver was not the sort of a man that Mrs. Thompson would naturally bring into her affairs. One witness testified that Mrs. Thompson expressed herself in very uncomplimentary terms in regard to Mr. Culver. But it is hard to believe that after this man Culver had left Mrs. Thompson's house, and deprived her of nearly a year's rent, three years later, the judgment for the rent being unpaid, Mrs. Thompson would have brought this man to her house to be the solemn, credible witness of this important transaction, for the protection of Mr. Hitt. Mrs. Thompson was, according to the testimony of many witnesses, an intelligent, level-headed, business woman. If she wanted to have a witness who could protect Mr. Hitt, she hardly would have picked out this man. There were other witnesses, many near at hand, who more naturally would have been brought in, and who, within the plain view of Mrs. Thompson, would have been safer witnesses to employ than Mr. Culver.

In regard to the attempt on the part of the complainant to prove by the timebooks, or copies of the timebooks, kept at Ellis Island, that Mr. Culver was on Ellis Island, and could not have been in Jersey City, when this note was executed, I have had no opportunity to re-examine the question of the competency of the testimony which was offered on that subject. I retain the tentative conclusion which I reached at the end of the argument of the question, to the effect that the testimony which was offered is incompetent and must be disregarded. I

do not think that this is a matter of great importance, because it does not strike me that the testimony, if competent, is entitled to very great weight. Mr. Culver, as I recall his testimony, stated that as the time-books had formerly been kept, before recent reforms were instituted, absentees were uniformly marked as present. No witness was brought to contradict this testimony.

I do not think it is necessary in this case to determine whether the note for \$32,000 is a forgery or not. Two experts swear it is a forgery; two experts of high degree—Messrs. Kinsley and Carvalho. Two experts of equally high degree—Messrs. Ames and Hay—swear that the note is genuine. And we have had some five or more hundred pages of testimony of these learned experts, sustaining their respective theories. I do not intend to waste any time in the discussion of that testimony, or in an attempt to make a determination as to the genuineness of this signature. The testimony of these experts on this signature shows that it may be genuine, or that it may be a forgery. Perhaps it would be more accurate to say the testimony of Messrs. Kinsley and Carvalho was to the effect that the signature is a forgery. The testimony of Mr. Ames and Mr. Hay, I think I may say, is to the effect that the signature may be genuine, or may be a forgery. These gentlemen admit that a forgery—an imitated signature—may be so well done that all their art is vain to establish the fact of forgery. It is a mistaken notion that many people have that a signature cannot be forged successfully. There are numberless instances where signatures are copied with such accuracy that it is impossible to demonstrate whether they are genuine or whether they are forgeries.

Now, then, Mr. Hitt is not only a convicted counterfeiter, or convicted of having counterfeit coin in his possession, he is an inventor, an engraver, and he is a very ingenious man. There is no question about that whatever. There is a great deal about his history, his character, and his peculiar abilities, to justify the suspicion that he might be a very successful simulator of handwriting. But I am not going to undertake to determine the question whether this signature is a genuine one, or whether it is a forgery. It is enough to reach the conclusion that the note does not represent a valid indebtedness of \$32,000, or any substantial indebtedness, from Mrs. Thompson to Mr. Hitt. It may not have been forged. It may be that Mr. Hitt, using his persuasive arts, bringing whatever forces of persuasion or constraint he could upon Mrs. Thompson, induced her to sign this note. He may have given her a note, for all we know, for the same amount, or for double the amount. There may have been a variety of circumstances under which this note might have been made, which would, however, take it altogether out of the category of obligations.

And right in connection with that matter it is worth while to note the fact that plainly this was not a business transaction. The relations of these people, according to Mr. Hitt's own story, were peculiar, and such as I have described. Mrs. Thompson was spending large sums of money on Mr. Hitt, and no account was stated between them when this note was made—none whatever. How does it happen to be just \$32,000, even? How did it happen that in 1892 (it may have been 1893 or 1894) Mr. Hitt surrendered all the notes that he alleges he received when the separate advances were made, and took a note for just \$24,000—the first note that this man Culver says he saw—just \$24,000? Was that a business transaction? Well, it might be. It might be that they settled up their affairs, and, being very intimate and friendly, they might have thrown off the interest, and made it a round sum, \$24,000, and that note therefore was made in that form. But how comes it that in 1896, three or four years later, they met, and the \$24,000 note is destroyed, and a new note given for \$30,000? That is Mr. Culver's story. That is Mr. Hitt's insistence. Is that a business transaction? Does that represent an indebtedness? And then we have the curious fact that three years later, during which interval I believe Mr. Hitt claims that he advanced Mrs. Thompson some \$1,500, they meet, and this same ceremony is gone through with, performed again, in the presence of Mr. Culver—the \$30,000 note is surrendered, and a note is given for \$32,000. How did they reach that figure, \$32,000? The defendant makes no explanation. The interest alone on the \$30,000 note for the three years would be \$5,400. And if I am right in my recollection that Mr. Hitt claims he advanced \$1,500 during that interval, as I think is the case, it is evident that the new note, instead of being for \$32,000, ought to have been for \$37,000 or more. Was that a business transaction? Was that such a transaction as these two people, living as man and wife, with their intimate personal relations and with their complex financial relations; would have been liable to make—just the round sum of \$32,000, apparently with no receipts given, no statement of account? There is a great deal to suggest that, if Mr. Culver was present and saw this thing done, it was not a business transaction; that it was understood by the parties that a note was given for a purpose—some purpose which we may surmise, but about which we have no proof whatever.

The conduct of Mr. Hitt after the death of Mrs. Thompson affords practically a conclusive test of the truthfulness of his claim that she died indebted to him in the sum of \$32,000—a sum greater than her entire estate, if liquidated in the ordinary way, would probably yield. In applying this test, the declarations and actions of Mr. Hitt, which depend for their proof upon the un-

supported testimony of Mrs. Thompson's relatives—the nephews and nieces—may be excluded from consideration. It is true that, whenever an apparently impartial and entirely unimpeached witness testifies to conduct on the part of Mr. Hitt which discredits his claim to the \$32,000 indebtedness, he does not hesitate to contradict the witness point blank, or attempt to give an explanation of his conduct which sustains an ingenious theory that the impartial witness was not false, but mistaken or forgetful.

Mr. Hitt stands contradicted by a very large number of witnesses, including a number of the interested relatives of Mrs. Thompson. If it were necessary to discover who tells the truth where Mr. Hitt is contradicted by one of the nieces or nephews, the safe conclusion would be that Mr. Hitt, whose interest is far greater than the opposing witnesses, cannot in every case be right, and the contradicting nephew or niece false and wrong.

But without going into all the details of Mr. Hitt's conduct subsequent to Mrs. Thompson's death, including particularly his declarations, there is enough of this conduct so proved as to make it absolutely necessary that the proof should be accepted, notwithstanding his denials or attempted explanations.

Now, let us see what facts Mr. Hitt must have known—what facts must have been ever present in his mind during the period following Mrs. Thompson's illness and death, during which he pursued the conduct which we must accept as proved by impartial witnesses. We now assume that Mr. Hitt's claim is substantially true. Mr. Hitt knew that Mrs. Thompson's estate owed him \$32,000 for borrowed money, for which he held Mrs. Thompson's note, which had been executed in the presence of a living witness manifestly for the purpose of facilitating its proof. He knew the nature and extent of Mrs. Thompson's estate, was capable of describing it in detail, and was plainly aware of its approximate value. The note for \$32,000 which Mr. Hitt held had been executed less than a year prior to Mrs. Thompson's stroke, and during that time comparatively few transactions are alleged to have taken place between these people, so that Mr. Hitt could hardly have been in a position of anxiety on account of any unsettled pecuniary matters between himself and Mrs. Thompson. What would a man in Mr. Hitt's position naturally have done upon the death of this debtor, whose entire estate was probably inadequate to meet the debt due to him? Would not such a creditor have naturally immediately announced his claim, and stated, in substance, to the relatives or devisees under the old will: "You can take the property into your possession, but here is my claim, which will absorb it all." Instead of pursuing this course, it seems almost safe to say that every act and declaration of Mr. Hitt

in relation to Mrs. Thompson's estate and his claims upon it appear to be inconsistent with the existence of this \$32,000 note and claim. When young Dr. Culver saw Mrs. Thompson, within about four hours after her seizure, what Mr. Hitt wanted to know from the doctor—what he was anxious about—was whether there was any immediate danger of Mrs. Thompson's dying, because Mrs. Thompson was indebted to him, and he wanted to get some papers signed by her. Upon Dr. Culver's second visit, later in the day, Mr. Hitt renewed his anxious inquiry on this subject. If Mr. Hitt held Mrs. Thompson's note for an amount as great as her estate would yield, to his knowledge—a note executed in the presence of a witness who lived in Jersey City, and could readily be produced—why should he be so anxious about getting further papers signed?

Although I have avoided, for obvious reasons, dealing with the \$32,000 claim and the \$10,000 claim on the Kingsford note, together, yet I cannot help pointing out here how preposterous these two claims, when taken together, appear to be, in view of this testimony of Dr. Culver. Mr. Hitt not only held this note for \$32,000, which he knew would probably absorb the entire estate, but, if we accept his further claim, founded upon the testimony of Clara Longquist, only two hours before he anxiously followed Dr. Culver into the parlor to ascertain whether Mrs. Thompson could sign papers, so as to secure an indebtedness to him, Mrs. Thompson had given him the Kingsford note for \$10,000, and had made this donation in the presence of a person whom he desires us to accept as a credible witness. Some days later, during Mrs. Thompson's illness, she undertook to cancel a mortgage which she held upon property belonging to a relative, and Mr. Hitt stood by and made no objection. She also sought to procure a lawyer for the purpose of effecting this cancellation, and for the purpose of making a will or making conveyances of her property. Mr. Hitt took part in these transactions, without disclosing the fact that Mrs. Thompson's estate owed him more money than it could pay—that every dollar of her estate would probably be required to meet his claim for borrowed money.

After Mrs. Thompson's death, Mr. Hitt made a large number of claims affecting the estate of Mrs. Thompson to many different witnesses, including a number of witnesses about whose impartiality and honesty no question can be raised. There were many instances in which it is almost impossible to believe that Mr. Hitt, whether he is to be dealt with as an honest man or as a dishonest man, a truthful man or a constitutional falsifier, would have concealed the existence of this \$32,000 note if it was in existence at the time. In many instances the explicit statements which he makes are entirely inconsistent with the theory that his pecuniary relations with Mrs. Thompson were

indicated by a series of settlement notes made from time to time, which finally culminated in the note for \$32,000, made less than a year before Mrs. Thompson's death. A number of these inconsistent statements are testified to by relatives of Mrs. Thompson, but many more are testified to by witnesses whose credibility cannot be in any way impeached. There is a great deal in the testimony to justify the theory that Mr. Hitt, being disappointed in procuring any testamentary disposition in his favor from Mrs. Thompson, was for many weeks after her death casting about for some grounds—any grounds—on which to make a claim against her estate.

On the day of Mrs. Thompson's death he declared to Messrs. Wollever and Durrell that Mrs. Thompson had not left him the scratch of a pen; that she left him nothing in his interest; that she intended to leave him something, and was going to make out a will or other writing just prior to her death, but that her relatives would not let her alone, and he (Hitt) could not have any private conversation with her, and so she failed to make out the papers. Mr. Wollever further testified that Mr. Hitt stated that Mrs. Thompson was going to give him (Hitt) the house belonging to Mrs. Thompson, which he (Mr. Wollever) occupied as tenant. The attempted explanation of this testimony by counsel, on the theory that Mr. Hitt was speaking merely of a will, is plainly inadequate and unsatisfactory. Hitt was bewailing his loss, and distinctly creating the impression that he (Hitt) had lost a benefaction from Mrs. Thompson because her intention to convey property to him in some way had been thwarted by her relatives, who constantly surrounded her. If Hitt had this \$32,000 note in his possession, not to mention the \$10,000 Kingsford note in addition, it is unreasonable to suppose that he would have made such statements and acted such a part as are described by Messrs. Wollever and Durrell. Mr. Wollever further testified that immediately after Mrs. Thompson's death Mr. Hitt came to him, and claimed that the rents of the house occupied by Wollever were due to him (Hitt), and proposed that the tenant (Wollever) should destroy his lease and his prior receipts from Mrs. Thompson, and accept receipts from Hitt in place thereof. Hitt served notice upon Wollever to pay the rents to him, and the paper was put in evidence, bearing date August 25, 1900. How can one believe that Mr. Hitt, having an honest claim upon Mrs. Thompson for \$32,000, not to include the Kingsford note, which would make his total claim \$42,000, would make this fraudulent assertion to Mr. Wollever, or serve this fraudulent claim to the rent upon him?

At the very start, immediately after Mrs. Thompson's death, we find Mr. Hitt setting up the false claim to a common-law marriage. This an unscrupulous and dishonest man in

Mr. Hitt's position would be very liable to do, in view of the facts which I have found to be established in this case in regard to the relations of these two people, provided he thought that he could thereby obtain any personal advantage. But if Hitt had a prior charge on all Mrs. Thompson's estate as creditor to the extent of \$32,000, disregarding the alleged gift of the Kingsford note, it is difficult to see why he would conceal his perfectly honest business demand, which amounted to a small fortune, and, while bewailing the failure of Mrs. Thompson to give him any benefaction, set up this claim to a common-law marriage. A few days after Mrs. Thompson's funeral, Mr. Hitt found means to exclude her relatives from her residence. He declared that he had a lease from Mrs. Thompson of the residence, or a portion of the residence, which lease had a considerable time yet to run. While he was thus in possession he told one Mrs. Miller, who appears to be an entirely disinterested witness, and who inquired with surprise as to the reason of his remaining in possession, that he was remaining until he should get \$5,000 that was due to him. One of the relatives testifies that Hitt told him that he was going to get seven or eight thousand dollars, or that that amount was due him. Hitt spoke to several witnesses about his making a claim against Mrs. Thompson's estate for services that he had rendered to her, and stated, if I remember right, to one witness, that what he could prove, or the period for which he could make charges, would yield him very little. To a number of witnesses Mr. Hitt most distinctly claimed that he had an interest as partner with Mrs. Thompson, or otherwise, in specific pieces of her property, and he even alleged that half the money in her name on deposit in the bank belonged to him (Hitt). Mrs. McCarty, an intimate friend of Mrs. Thompson—not interested, however, in her estate—testifies that on the day of Mrs. Thompson's funeral she (Mrs. McCarty) had a conversation with Hitt in which she asked him of Mrs. Thompson had made a will, and that Hitt replied that that was conditional on how the heirs treated him; that Mrs. Thompson had not left him a cent; that he had not a cent to his name; and that he could not be dispossessed for 18 months.

I shall not undertake to state, for I certainly cannot recall, all of the declarations of Mr. Hitt in regard to his various claims upon Mrs. Thompson's estate which he made after her stroke, and especially after her decease, which are, to my mind, inconsistent with the existence of this alleged debt of \$32,000. It is impossible to disregard this mass of evidence against Mr. Hitt, and it is impossible to accept his denials or explanations.

Before leaving this part of the case, however, I should refer particularly to the interviews between Mr. Hitt and the complainant

Dr. Varick, as administrator, and his counsel, Mr. Isaac S. Taylor. These gentlemen first called at the Thompson residence on August 16, 1900, a month after Mrs. Thompson's death. They called in an official capacity, for the purpose of getting information in regard to Mrs. Thompson's estate, and the claims against it. They found Hitt in possession, with his niece, Clara Longquist, and at first indisposed to let them in. Mr. Taylor proceeded, in the discharge of his duty as counsel for the administrator, to put questions to Mr. Hitt, and he took notes of the information which he thus received. Mr. Taylor testified, refreshing his recollection from these notes. Mr. Hitt made various claims in relation to moneys which he said he had put into Mrs. Thompson's property, and, among other things, stated that as to certain houses Mrs. Thompson and himself were partners, and that he had put in them about \$5,000. He stated further that Mrs. Thompson had given him the Kingsford note and the furniture in the house on June 29th, the day of her stroke. Mr. Taylor then asked Hitt what other claims he had against Mrs. Thompson, and Hitt replied that he had no claim, except in matters of partnership, and that he would give up the possession of the house if his claims were secured. Mr. Hitt then went on to volunteer very minute information as to all the facts and circumstances upon which he based his claim to a common-law marriage with Mrs. Thompson. Although he had every opportunity to refer to this note of \$32,000, if it then was in existence, Mr. Taylor testifies that he said nothing about it. Mr. Taylor was conducting a close professional inquiry as to the assets and liabilities of Mrs. Thompson's estate. If anything had been said about this note, he could hardly have missed it. It is a very curious fact that Hitt told Mr. Taylor that Mrs. Thompson had told this man Culver about the common-law marriage some years after it had taken place. The ingenious counsel for defendant tried to make it appear that Mr. Taylor, owing to partial deafness, misunderstood Mr. Hitt's statement—that Mr. Hitt referred to some obligation which he held against Mrs. Thompson, of which Mr. Culver was the witness. Mr. Hitt, of course, gives testimony in support of this theory, just as he, without hesitation, contradicts the testimony of half a dozen or a dozen different witnesses, many of whom are plainly entirely credible and impartial. There is a large mass of testimony in addition to Mr. Taylor's, some of which I have heretofore referred to, which goes to show that Mr. Hitt, disregarding considerations which ought to have secured his silence on the subject, put forth this claim that Mrs. Thompson was his common-law wife, in the belief that he thereby established a foundation for some claim on his part against her estate. That Mr. Hitt for some weeks after Mrs. Thompson's death thought that he was promoting

his interests and strengthening his claim against the Thompson estate by claiming the existence of this common-law marriage, I think, is clearly established. It is certainly a most significant and suggestive fact that while the common-law marriage, in Mr. Hitt's mind, was the important fact to be proved, and long before he had alleged the existence of a \$32,000 note, or apparently became conscious that his claims as a creditor to the extent of \$32,000 made all other claims of little or no consequence, he pointed out this man Culver as the convenient witness by whose testimony the common-law marriage was to be established.

On August 23d Mr. Taylor and Dr. Varick again went to the Thompson residence, in order to make an inventory, and had further conversation with Mr. Hitt. Mr. Taylor testifies that he again asked Hitt what his claims against the estate were, and that Hitt said that he had no claims, except in matters of partnership in patents and real estate, the extent of which he declined to state, but that he would inform Mr. Taylor later what this partnership was. On September 7th Mr. Taylor testifies Hitt told him that he claimed one-half of all the real estate and all the personalty. Later in the same month Hitt refused to surrender possession of the Thompson residence, telling Mr. Taylor that they could not put him out. At none of these interviews did Hitt refer to any note for \$32,000, and Mr. Taylor and Dr. Varick both testify that their first notice of any such alleged note came at a later date—I think, in October.

My conclusion from the whole testimony in regard to the declarations and other conduct of Mr. Hitt during a period of some weeks following Mrs. Thompson's illness and death is that it is not reasonable to conclude that Mr. Hitt would have said the things he is proved to have said, done the things he is proved to have done, made the claims against Mrs. Thompson's estate which he is proved to have made, if he honestly believed that he stood as a creditor of Mrs. Thompson's estate to the extent of \$32,000, and that he held an honest note, signed by Mrs. Thompson, for that amount, and signed in the presence of a witness who could be produced at any time. The explanation which Mr. Hitt undertakes to give of his silence in regard to this note, because he had temporarily lost it, is to my mind entirely unsatisfactory, and involves difficulties for which no explanation of any kind is offered.

I have occupied too much time with what I intended to be a mere outline of the considerations which have persuaded me that this \$32,000 debt is an entire fiction; and therefore the complainant, on that issue, is entitled to a decree for the cancellation of the note, and establishing its invalidity.

And now, having reached this conclusion upon this first question, the more difficult question remains, and that is as to whether

the alleged gift causa mortis of the Kingsford note was made by Mrs. Thompson to Mr. Hitt on June 29, 1900, the day when she received her stroke, from which she died about two weeks later. I may again refer here to the effect upon Mr. Hitt's claim to this gift of a conclusion in his favor as to the \$32,000 note. It is because I have felt constrained to conclude, from the testimony in this cause, that Mrs. Thompson did not owe Mr. Hitt \$32,000, that a great deal of the difficulty comes in relation to the alleged gift. If she owed him \$32,000, she knew right well, if she was an intelligent woman, that she owed him more than could probably be realized from her estate. That she would, in this situation of affairs, practically in secrecy—in secrecy so far as her family was concerned—make him a donation of the \$10,000 note, is very improbable. At any rate, it is not likely that she would make the donation in the manner and under the circumstances that the defendant would have us believe. But the fact that I find is that Mrs. Thompson owed Hitt nothing at the time of her death. My own belief is that if she received all the money that he ever got by the sale of his patents, or otherwise, that would not even up the account between them. They were living in a very peculiar way. They could give moneys to each other without creating any indebtedness. In my judgment, the testimony here shows that Mr. Hitt had very much the better side of the bargain, as between himself and Mrs. Thompson. All the wages that he earned, and profits that he made, if he turned them over to this woman, would not make up to her, in my judgment, what she must have expended directly on his behalf. These moneys went to Mrs. Thompson, in my opinion, very much as the wages of a mechanic—of an honest, sober, industrious mechanic—go, every two weeks, to his wife, when he gets his wages and goes home.

I think, therefore, we start out to deal with this alleged gift upon the theory that Mrs. Thompson owed Mr. Hitt nothing on June 29, 1900, at the time she received this stroke. She knew that her relations with Hitt were exceedingly unsettled, and that proceedings might be had after her death which would result in very unpleasant disclosures. She had every reason to have a settlement with Mr. Hitt, and it may be that this unsettled situation was preying upon her mind, and resulted in the statements which she made, and which are proved by numerous witnesses, some produced on one side, and some on the other, in this case. These witnesses show that the open account between herself and Mr. Hitt was giving her trouble. She was fond of Mr. Hitt, though. There is no doubt about that. There was no breach of their relations down to the very last day of her life; and here were these letters, these affectionate letters, written just a few days before her stroke—written by her to Mr. Hitt. She would naturally desire to

accomplish two things, in my opinion: She would wish to have her affairs in such shape that there would be no discreditable disclosure after her decease. She worried about that, and she wanted to have a settlement, so that could be all cleaned up, if she was about to die. And I think that it is highly probable—whatever might have been the balance of an account stated between these two parties, if such an account were possible—that Mrs. Thompson would wish to make some benefaction to Mr. Hitt. When I refer to the stating of an account between them, I am not intimating for a moment that the relations between these two people—the money relations, the pecuniary relations—were of a character to be reduced to any legal or business rules. They were confidential relations, and, as I said a little while ago, the money passed between them as between man and wife. But if a fair and equitable account of benefits received by each from the other could be stated, then, in my opinion the account would be largely, substantially, in Mrs. Thompson's favor; and yet, notwithstanding that fact, it seems to me to be highly probable that Mrs. Thompson would wish not only to have a settlement and clearance with Mr. Hitt, so as to have all their transactions protected from scrutiny after her decease, but that she also might wish to make him a substantial present. The fact that Hitt had had a disreputable career in the past is of no consequence, because Mrs. Thompson is not shown to have known it. When he was charged with having been guilty, I think of arson (and it appears, I think, that he was arrested out West for that crime, and was tried and acquitted), Mrs. Thompson investigated the matter (so she said—so she told Mr. Cobin), and satisfied herself that the charge was not true. All that was bad about Hitt had occurred prior to June, 1900. All that Mrs. Thompson knew about Hitt that was evil, she must have known then. But there is not a shadow of doubt about it that in June, 1900, Mrs. Thompson had an affectionate regard for Mr. Hitt. She loved this man, whether he was a bad man or not. Her feelings towards him were such, it seems to me, as to make it highly probable that she would wish to benefit him, either by a will, or by a gift causa mortis if the circumstances did not admit of her making a will. I think, therefore, we start out with the proposition that the circumstances of these two people at the time of the alleged gift were such as to make a gift causa mortis from Mrs. Thompson to Mr. Hitt highly probable. The question is, did she make such a gift?

It is urged on behalf of the complainant that this note, being a negotiable note, could not be the subject-matter of a gift without an indorsement. I cannot adopt that view. There is no authority whatever to sustain it. The authorities cited are to the effect that even nonnegotiable notes may be the subject

matter of a gift *causa mortis*. The authorities are not to the effect that negotiable notes cannot be the subject of a gift without indorsement. The authorities cited are dealing with the effect of the delivery of the evidence of a chose in action, where the legal title to the chose in action does not pass by delivery; and the authorities are all to the effect that nonnegotiable notes, insurance policies, savings-bank books, and similar evidences of choses in action, may be the subject-matter of gifts *causa mortis*, upon the idea that, while the legal title does not pass, an equitable title does pass; that the possession of the evidence of the chose in action places the donee in a position, if not to collect, still to exclude the donor or his estate from collecting; and thus a conclusion has been reached, not without adverse rulings, however, that this class of choses in action may be the subject-matter of a gift *causa mortis*, by delivery. But where you have a negotiable instrument, there is no reason why a transfer of it, by way of gift *causa mortis*, cannot be made by delivery and without indorsement. I can see no reason why, if a nonnegotiable note can be the subject-matter of a gift, a negotiable note may not in like manner be the subject-matter of a gift; in each case, of course, there being no indorsement and no assignment. But where the subject-matter of the alleged gift *causa mortis* is a negotiable promissory note, and the gift is made by the payee of the note to a third party, where it is alleged that such gift was made by delivery of the note to a third party, and it appears that both parties to the transaction understood perfectly well that the regular mode of transferring such a security was by indorsement, then the absence of an indorsement is a circumstance which throws great suspicion upon the gift, in my opinion.

Mrs. Thompson understood perfectly well on the 29th day of June, 1900, if she was in the possession of her faculties, that she could not give this note to Mr. Hitt, so that he could collect it readily, without indorsement. Mr. Hitt understood that perfectly well. And yet it is alleged Mrs. Thompson, with time to write and the ability to write her name, handed this note over to Mr. Hitt, as a gift which would be absolutely operative in the event of her decease, and that she was deeply interested in making this gift to him. Yet she did not call for a pen, and indorse the note that she thus endeavored to give.

It seems to me that in all cases where it is claimed that a chose in action has been transferred as a gift *causa mortis*, by delivery alone, and it also appears that there was opportunity to accompany the delivery of the evidence of the chose in action by a written assignment, and the parties understood the necessity of such written assignment in order to effect a complete legal transfer, it is safe to hold that a strong presumption is raised against the existence of a

donative purpose on the part of the dying person, together with the other external facts which are necessary to support that donative purpose and make it effective as a gift. There is no explanation offered in this case for the neglect of Mrs. Thompson to indorse this note. The whole proof of the donation consists in the testimony of Clara Longquist, the niece of Mr. Hitt. She came from the West and took up her residence with Mrs. Thompson in February, 1899, and remained there continuously with Mrs. Thompson until Mrs. Thompson's death. Mrs. Thompson received her into the house. She was not there as a servant. She was there more as a child. Her presence in the house only further illustrates the affectionate feelings of Mrs. Thompson towards Mr. Hitt. But Clara is the only witness, and the question is whether, under all the testimony in this case, this court would be justified in taking \$10,000, almost a third of the entire estate of Mrs. Thompson, from her relatives, in order to give it to Mr. Hitt. The question is, is it safe to stand a decree affecting so much property upon the testimony of this single witness—this niece of the alleged donee, who was living with him, dependent upon him, and who at the time was only 16 years of age? It must be conceded that this young woman gave her testimony with great positiveness, and she repeated her story without variation; that she withstood several of the tests which astute cross-examiners subjected her to. There is very little in her story which can be pointed out which indicates untruthfulness. A transaction such as she described, however, might have occurred in the bedroom of Mrs. Thompson after she had received this stroke, and still it might not have included a gift of this promissory note.

These gifts *causa mortis* are dangerous things. The law requires, before Mr. Hitt can come into this court and claim \$10,000 as an ordinary testamentary gift from Mrs. Thompson, that he should produce an instrument in writing signed by Mrs. Thompson, and also acknowledged with peculiar solemnity by her in the presence of two witnesses, who thereupon subscribed their names as witnesses. That is what Mr. Hitt would have to prove if he claimed a testamentary gift in the ordinary form of one-third of Mrs. Thompson's estate. And yet, in cases of these gifts *causa mortis*, it is possible that a fortune of a million dollars can be taken away from the heirs, the next of kin of a deceased person, by a stranger, who simply has possession of the fortune, claims that he received it by way of gift, and brings parol testimony to sustain that claim.

In a long series of cases, which I cannot cite from memory, some in this state, and some in other states—recent cases—the danger of extending the law of gifts *causa mortis* is distinctly pointed out. We have the case in this state of *Keepers v. Fidelity De-*

posit Company, 28 Atl. 585, in the Court of Errors and Appeals, in which Mr. Justice Dixon delivers the opinion of the court, and points out the danger of extending the scope of these gifts *causa mortis*. In that case he refers to a gift of a fortune invested in securities, and deposited in a safe deposit box, and where the donee produces the key and claims a symbolical delivery. The Court of Appeals called a halt to the extension of the rule as to the force and effect of delivery as a necessary element of a gift *causa mortis*. They stop short of the delivery of a key as a symbol. They recognize the fact that it would be very dangerous law if a man could possess himself from the dead body of a friend of the key of a safe deposit box, and then, by means of oral testimony which he could bring into court, establish his title to his friend's entire fortune.

Chancellor Kent, if I remember right, years ago laid down the rule that a chose in action which was not legally transferable by delivery could not be the subject of a gift *causa mortis*. If I remember right, under his ruling this alleged gift to Mr. Hitt would be held ineffectual, in the absence of an indorsement or a written assignment. After his day the law of gifts *causa mortis* undoubtedly was extended so as to make it possible to make such a gift of a life insurance policy, a savings-bank book, or of this sort of a note. It becomes one to speak cautiously, in view of the very many decisions on this subject, but I cannot help saying that I strongly incline to think that the rule laid down by Chancellor Kent is the wiser and safer rule. And just as the Court of Errors and Appeals in the Keepers Case protected the entire deposits of a rich man in a safe deposit box from the fraud of some person who might steal the key of the box from his dead body, so the savings of people of small means in savings banks and in life policies—because that is a common mode of investment nowadays—might well be protected by a rule which would require an assignment in every case. It seems to me that where the chose in action does not pass by delivery, where an assignment is necessary to make legal title, although it is too late to try to lay down a rule that without a written assignment no gift *causa mortis* will be sustained, I do not think it is too late to suggest as a proper rule that the absence of a written assignment, where there was knowledge of its importance and opportunity to make it, should raise a strong presumption against the gift—a presumption which cannot be removed in a case like this by a single witness, whose relation to the donee, or alleged donee, is such as evidently justifies the apprehension that she testifies under his control, under restraint from him, or at his dictation. It seems to me that in such a case the witness to sustain the gift should be an absolutely impartial witness—one about whose ability to tell the truth, and disposition

to tell the truth, there can be no question whatever.

I incline to think that there is a further presumption established against this alleged gift, based on the confidential relations of the parties. There seem to be good grounds for holding that a gift by Mrs. Thompson to Mr. Hitt of \$10,000, about one-third of her entire fortune—a gift which both donor and donee seem to have intentionally refrained from disclosing to Mrs. Thompson's next of kin—should be deemed *prima facie* the product of undue influence. If this be a correct conclusion, the gift could hardly be freed from its taint by the uncorroborated testimony of a girl of 16 years old, a relation and dependent of the alleged donee, who merely testifies to the facts which occurred at the time the gift was made, but who did not at that time know of the nature and extent of the confidential relations of the parties.

Notwithstanding the probability that Mrs. Thompson might feel disposed to give Mr. Hitt some substantial present upon her decease, and the direct and positive testimony of Clara Longquist, there seem to be strong grounds for the conclusion from the testimony already referred to that this gift *causa mortis* of \$10,000—about a third of the donor's entire estate—has not been proved by testimony which can be safely accepted as adequate. But when we come to look at the conduct and declarations of Mr. Hitt which are amply proved in this case, excluding even the testimony of the interested nieces and nephews, the difficulties in the way of establishing this gift are greatly multiplied, and, in my judgment, become insurmountable. As we have seen, within two hours after the alleged gift was made, with the gift of \$10,000 in his pocket, Mr. Hitt anxiously followed young Dr. Culver to know whether Mrs. Thompson would be in a condition to sign papers to secure an indebtedness due from her to him. We must now exclude the \$32,000 note from consideration, and the alleged \$32,000 indebtedness as a myth. We are dealing then with a man, a claimant, who stands before the court not only as a convicted criminal, but also as one who in this cause has preferred a fraudulent claim against the estate of a deceased friend. If Mr. Hitt had this \$10,000 gift in his pocket, he hardly would have exhibited such anxiety to have Mrs. Thompson sign some paper which would settle an indebtedness due to him from Mrs. Thompson. If such an indebtedness was in existence, it seems strange that Mrs. Thompson should have made this gift to Mr. Hitt without making any reference to the debt which she owed, and the existence of which he (Hitt) was anxious about, notwithstanding the \$10,000 benefaction which he had just received from his debtor. That Mr. Hitt made this anxious inquiry of Dr. Culver is not disputed. The rational way of accounting for it, in my opinion, is that Hitt was desirous that Mrs.

Thompson should make a will or conveyance for his benefit, and he naturally made the same representation to Dr. Culver in regard to moneys that were due him from Mrs. Thompson's estate which he afterwards repeated to Dr. Varick, Mr. Taylor, and other witnesses. It is a most extraordinary fact, if this \$10,000 gift was made, that the existence of it was sedulously concealed by both donor and donee, even though circumstances occurred from time to time under which a declaration of the gift, especially by the donor, if such a gift had been made, would almost have been inevitable. Clara Longquist, Mr. Hitt's niece and dependent, who is brought forward as the sole witness of the gift, also concealed her knowledge of it; and, while her silence is less significant than that of Mr. Hitt and Mrs. Thompson, it is nevertheless a fact which makes against the truthfulness of the story which she now tells. The contention on behalf of Mr. Hitt is that Mrs. Thompson was fearful that she would die at any moment, or become incapable of making a will or otherwise taking care of Mr. Hitt, and that, in order to insure Mr. Hitt the benefaction which she intended, she hastily made this gift immediately after her seizure, and while her faculties were still bright. But a few days after her stroke, according to the testimony of a large number of witnesses, Mrs. Thompson was competent to do business, and proceeded, still in contemplation of death, to make gifts of her jewelry, and even had brought before her the tin box from which it is alleged she had already taken the Kingsford note, and was making arrangements to cancel a mortgage which she held upon the property of her sister or niece, and yet she made no mention of this gift to Mr. Hitt. It seems almost impossible to believe that Mrs. Thompson could have remembered that she had made this gift, and yet refrained from mentioning the fact in the presence of her relatives who were the very persons whose knowledge of the fact would most amply protect Mr. Hitt. We can frame very many declarations which Mrs. Thompson very naturally would have made on this occasion when both Mr. Hitt and so many of her relatives were present in her bedroom. But the business goes on, the jewelry is distributed, the receipt is written on the mortgage for cancellation, the arrangements for procuring a lawyer are made, and Mr. Hitt takes part in all this business, but conceals the fact that Mrs. Thompson had made a gift to him of one-third of her estate in the form of this Kingsford note. What possible reason can be suggested which would appeal to Mr. Hitt's mind as an inducement to conceal the gift of this note? Would not a person in Mr. Hitt's situation, whether he was an honest man or a rogue, plainly see that the concealment of this gift was most dangerous; that the gift would have to be declared after Mrs. Thompson's death; that the very time and occasion for

making an attack upon the gift impossible was presented when all these relatives were in Mrs. Thompson's presence, and all he (Mr. Hitt) had to do was to announce the gift, and express his gratitude to his benefactress. In regard to the mental condition of Mrs. Thompson about two hours after her stroke, when the alleged gift was made, the proofs are not satisfactory, and make a finding as to the fact somewhat difficult. Without discussing any technical questions in regard to the burden of proof, or attempting to state the mass of testimony relating to this subject, I may say that the result of all the testimony, including also the failure of Mrs. Beulah Wilson to testify in regard to the matter at all, leaves my mind in doubt as to the competency of Mrs. Thompson to make such a gift as this at the time when, according to the testimony of Clara Longquist, the gift was made.

The magnitude of the alleged gift, also, in my opinion, makes against Mr. Hitt's contention. While it may be admitted that Mrs. Thompson, assuming that her pecuniary relations with Mr. Hitt were reduced to a business basis, and an account between them stated, might very naturally have wished to make a further benefaction to Mr. Hitt upon her decease, in addition to all the advantages which he had derived from their association together and from the use of her property, still I hardly think that the testimony in this case justifies the opinion that Mrs. Thompson would probably have given Mr. Hitt a clean slate, and then, in addition, have donated to him a third of her entire estate. The various statements that Mr. Hitt made to the effect that Mrs. Thompson had done nothing for him—left him not the scratch of a pen in his interest—all of which statements plainly implied that Mrs. Thompson had died without having an opportunity to express in substantial form her friendship for him, add improbability to the story that in fact Mrs. Thompson had made what in effect was a testamentary disposition to the extent of \$10,000 in favor of Mr. Hitt.

The most important declaration of Mr. Hitt subsequent to Mrs. Thompson's death which discredits this alleged gift *causa mortis* was made to Mr. Josephus Plenty. This gentleman is evidently a man of character and of financial responsibility—a man who, as a witness, is shown to be entirely impartial, and whose credibility has not been in any way attacked. Mr. Plenty was one of the business men who were induced by Mr. Hitt to embark in the business of exploiting his patents. Within a few months prior to Mrs. Thompson's death, Hitt had worked for Mr. Plenty for a time as mechanic, earning wages at the rate of about \$2.50 a day. The relations which these men sustained to each other were such as to make it highly probable that Mr. Hitt would talk frankly with Mr. Plenty, especially in relation to the

estate of Mrs. Thompson. Mr. Plenty had been acquainted with Mrs. Thompson, and had been brought into business relations with her in connection with the patent business between himself and Mr. Hitt, and the machinery which Mr. Hitt and Mrs. Thompson owned in connection with that business. Mr. Plenty testifies that within a few days after Mrs. Thompson's death he had a conversation with Mr. Hitt, which appears to have been the sort of conversation which, under the circumstances, very naturally would take place between these two men upon their first meeting after Mrs. Thompson's death. Mr. Plenty inquired about Mrs. Thompson's death, and Hitt told him the circumstances of her stroke. Hitt stated that he and his niece were alone with Mrs. Thompson in the house; that she directed the niece to bring a tin box, and that it was brought; that Mrs. Thompson took out some papers and gave them to Hitt, and that among these papers were some certificates of stock in the Johns Manufacturing Company; that she handed these certificates, which amounted to about \$70,000, par value, to Mr. Hitt, with directions that Hitt was to sell them, and put up a monument to Mrs. Thompson, and divide the remainder of the proceeds among the nephews and nieces. Mr. Plenty further testifies that he asked Hitt if Mrs. Thompson had not done anything for him, and that he replied that that was all that she did. Mr. Plenty also states that at that time Mr. Hitt said nothing about either a \$32,000 note or a \$10,000 note. Upon being further questioned, and going over the subject again, Mr. Plenty testified that he asked Hitt if Mrs. Thompson had done anything for him, and Hitt said "No," but that Mrs. Thompson had left him the stock as a trust. It is difficult to believe that Mr. Plenty can be mistaken in regard to the substance of this conversation. The circumstances under which it occurred, and the previous relations of Mr. Plenty with Mr. Hitt and Mrs. Thompson, indicate that Mr. Plenty must have felt a considerable degree of curiosity in making the inquiry of Mr. Hitt whether Mrs. Thompson had done anything for him. Plainly, the inquiry covered not only a testamentary benefaction, but a gift causa mortis. In reply, Hitt undertook to describe the very transaction in which he now claims, and his niece testifies, the gift causa mortis was made. If the gift of the \$10,000 note in fact had been made, it follows that Hitt must have intentionally concealed the existence of the gift from Mr. Plenty, and must have intentionally told him what was not true. Nothing appears in the relations then existing between Mr. Plenty and Mr. Hitt which would seem to have been likely to induce Mr. Hitt to conceal the gift by misrepresentation and falsehood. I have not sought to recall the testimony of the in-

terested relatives in regard to declarations or other conduct of Mr. Hitt which seem to discredit the gift causa mortis which he now makes. Mrs. Beulah Wilson, however, a niece of Mrs. Thompson, and, I think, a nephew as well, unite in testifying that Mrs. Thompson, in Hitt's presence, a few days after her stroke, spoke of the Kingsford note as a valuable asset of her estate, which she then had in her tin box, and that Hitt heard this statement.

The declarations and other conduct of Mr. Hitt which I have mentioned—and there are more of the same sort which I do not undertake to recall—in my judgment, so far discredit the story which Clara Longquist now tells as to make it impossible, under the rules of law and of evidence to which I have referred, relating to the establishment of gifts causa mortis, to accept the uncorroborated story of this single witness as sufficient to prove that this very large gift in fact was made. It may be that Mr. Hitt, after Mrs. Thompson's death, pursued a policy of concealment, misrepresentation, and mendacity with reference to the gift which he then had in his possession. But Mr. Hitt makes no such claim; but, on the contrary, seeks to maintain that he was always truthful, and in his endeavor to establish that fact, meets the adverse testimony to which I have referred with contradiction or unsatisfactory explanations. If the state of the evidence which appears to me to compel the conclusion that Mr. Hitt has failed to satisfactorily prove this gift which he now claims is due in any measure to the dishonesty of Mr. Hitt in the conduct of this cause, and his untruthfulness in giving his testimony—if, in case Mr. Hitt had told the whole truth with frankness, a better case would have been made on his behalf for the establishment of this gift—he has himself to blame for the condition of the proofs upon which this court is obliged to act.

I have occupied three times as much time in the discussion of this case as I expected to occupy at the start, and I have, no doubt, omitted to touch upon a great many circumstances which sustain the two conclusions which I have announced. I think, however, that what I have said will be sufficient to indicate to counsel the main lines of argument which have led me to the conclusions which I have stated.

I shall therefore advise a decree that the note for \$32,000 is not a valid obligation in the hands of Mr. Hitt, and that it be surrendered to the complainant for cancellation, and also that the alleged gift causa mortis of the Kingsford note has not been proved in this case by sufficient evidence to justify its establishment, and that, in the absence of such proof, the fund representing this note, now in court, should be awarded to the complainant.

(84 N. J. E. 663)

WEST JERSEY & S. R. CO. v. WATERFORD TP. et al.

(Court of Chancery of New Jersey. May 14, 1903.)

RAILROADS — CHARTER — GRADE CROSSINGS — ALTERATION — OVERHEAD BRIDGES — AUTHORITY OF TOWN COMMITTEE.

1. The charter of the Camden & Atlantic Railroad Company (P. L. 1852, p. 268, § 9) makes it the duty of the company to construct and keep in repair good and sufficient bridges over or under the said railroad where any public road crosses the same, and to alter or grade said roads, so that passage shall not be impeded thereby. This clause confers upon the railroad company the power to alter the grade of the public highways so as to carry them over the railroad tracks by overhead bridges.

2. To justify such alteration of grade of the public highway, there must be reasonable cause for such a change. The fact that the company's trains cross the public highway traveling at a speed of 70 miles an hour is reasonable cause for the carrying of the public highways across the railroad tracks by overhead bridges.

3. The committee of the township in which the crossing is located has no power to prevent the railroad company from erecting such overhead bridges and making the incidental changes in the grade of the public highways.

4. If the railroad company constructs an insufficient bridge, that fact does not authorize the committee of the township in which the crossing is situate to prevent the building of any other overhead bridge in that township. If such a bridge be insufficient, the proper proceeding is to invoke the action of lawful authority for the correction of the defects of that particular structure.

5. The charter of the Camden & Atlantic Railroad Company makes it the duty of that company and its successors not only to construct good and sufficient bridges for the purposes named, but also to keep them in repair continuously.

(Syllabus by the Court.)

Bill by the West Jersey & Seashore Railroad Company against the township of Waterford and others. Injunction granted.

The bill is filed to restrain the township of Waterford, in the county of Camden, and the members of its township committee, from hindering the complainant in the erection of an overhead crossing to carry a public highway at Franklin avenue, near West Berlin, in said township, across the Camden & Atlantic Railroad, owned and operated by the complainant company.

It appears that the railroad crossing in question is on that part of the complainant company's system which was formerly the Camden & Atlantic Railroad. For the successful conduct of the complainant company's business it is necessary to run trains at high speed, reaching 70 miles an hour at times, thus rendering the public roads which cross the complainant's railroad at grade very dangerous to travelers along those highways. Passengers traveling on the trains are also subjected to danger of injury by the liability to collisions between the railroad trains and vehicles crossing the tracks on the highways, and consequent derailing of the trains. In order to meet the requirements of their business without thus endan-

gering the public safety, the complainant company arranged to abolish all grade crossings of the public highways over its railroad within the township of Waterford, and at its own expense to erect overhead bridges carrying the public highways at all such places across the complainant's railroad. The complainant submitted a proposition to this effect to the township of Waterford. On the 14th day of August, 1900, the township committee passed a resolution authorizing the complainant company to construct overhead bridges in that township, carrying the public highway across the complainant's railroad at a grade of 7 feet per 100, provided the owners of property adjoining the embankments of such crossings should be compensated, and should agree to the plan submitted by the complainant company. A copy of this resolution of the township committee was given to the complainant company. Subsequently to the receipt of that resolution, the complainant company entered into negotiations with the owners of land adjacent to the crossing at Franklin avenue, near West Berlin, in the township of Waterford, and obtained their approval of the plan for the elevated crossing over that avenue, and by the payment of \$1,150 purchased the consent of those owners to that improvement, and also about half an acre of land necessary for its accomplishment. In the month of September, 1902, the complainant company proceeded to erect the bridge carrying the public road at Franklin avenue across the railroad above grade. It also entered into contracts for the construction of the improvement at a cost of over \$11,000. In the early part of the month of October, 1902, work was begun for the change of grade. A temporary bridge was put in the place of a planked road theretofore used at the crossing, to enable the public to cross during the construction of an overhead bridge. On October 17th, while the complainant's foreman and a gang of men were engaged in the work, he was arrested on complaint of the township committee, and was placed under bonds not to obstruct the highway, and to keep the peace. The bill alleges that the complainant thereupon sent the original resolution adopted by the township committee authorizing the crossing, and was thereupon informed for the first time that the township committee had repealed the resolution in question; and defendants then stated that, if the action already taken in arresting and bonding the foreman was insufficient to stop the work, they would station guards with shotguns, with instructions to use them if any attempt was made to proceed with the work. The complainant avers that no objection of any kind or character had ever been offered to the proposed construction, and that it relied upon the above-named resolution and its purchase of the land and the consent of the adjoining owners for the construction of the overhead crossing; that

It will be greatly damaged if prevented from constructing said overhead crossing; the safety of travel over its railroad by the general public will be decreased, the expense of maintaining watchmen at the crossing will be increased, and the complainant's plan for a general improvement of its railroad and the abolition of all grade crossings will be interrupted. The complainant further alleges that the speed demanded by the traveling public requires trains to run at times at the rate of 70 miles an hour, causing traveling on the public highways to be dangerous wherever they cross its railroad at grade, and travel on its railroad to be dangerous because of the liability of its trains to come into collision with vehicles passing along the public highway over its railroad tracks at grade, thus derailing its cars. The complainant shows that by the provisions of the charter of the Camden & Atlantic Railroad Company (P. L. 1852, p. 268, § 9), under whose powers and duties the complainant operates its railroad, it is made the duty of the complainant to construct and keep in repair good and sufficient bridges over and under its railroad wherever a public or other road crosses the same, and to alter and grade the said public road so that the passage and repassage of carriages, horses, etc., over the same shall not be impeded. That the construction of overhead crossings along the whole length of its road from Camden to Atlantic City is a reasonable exercise of the complainant's power to make changes in the grade of public highways crossing its railroad, and it expressly avers that such power resides in the complainant as in the said Camden & Atlantic Railroad Company, and was being lawfully exercised by the construction of the overhead crossing in question. The complainant prays that the defendants may be restrained from hindering or interfering with the construction of the overhead crossing in question.

The defendants answer the bill, admitting that the complainant is operating the railroad in question, and that the resolution set out in the bill was passed by the Waterford township committee, but aver that it was passed at an informal meeting, without any notice and without advertisement and without authority, that it was without any binding effect upon the township of Waterford, and was beyond the power of the township committee to pass it. The answer admits that the person in charge of the work of constructing the bridge over the railroad was arrested for obstructing the highway, and placed under bond, because at request he refused to desist from that work, and that threats of force were made if the obstruction of the highway at Franklin avenue in the construction of the overhead bridge at that point was continued. The answer sets out a resolution of the township committee under date of March 4, 1902, repealing the previous resolution of the 14th of August,

1900, and states that a copy of the repealing resolution was left at the office of the superintendent of the complainant company on the 30th day of September, 1902. The defendants allege that the terms of the contract for the construction of the bridge make it a nuisance and a serious impediment to public travel and business; that the scheme of the complainant, if carried out, would cause 10 additional overhead bridges to be built in the village of Berlin, in the township of Waterford, and would endanger the life and limb of citizens using such crossings; that the proposed bridge is in its dimensions and construction insufficient, unstable, and dangerous, and, if all crossings in said township are to be similarly bridged, the taxpayers of the township will not be able to sustain the expense of keeping the same in repair. The defendants aver that their acts of interference and prevention, referred to in the bill, at Franklin avenue, are lawful and justifiable; that the construction of overhead bridges across the complainant's railroad would greatly increase the danger of accidents and the risk of the public, and make the public and highways in the township well-nigh impassable. The defendants expressly deny the authority of the complainant company under the charter of the Camden & Atlantic Railroad Company to build the overhead bridges referred to in the complainant's bill, and to change the grade of the public road in the township of Waterford, and also denies that such bridges are a necessity in any sense; on the contrary, assert they are a menace and a nuisance, and pray the same benefit of their answer as if they had demurred to the bill. Affidavits annexed to the defendants' answer admit that the defendants have stopped the construction of the overhead bridge at Franklin avenue by arresting the complainant company's foreman in charge of that work, declaring that force would be used if necessary to stop "further transgressions." These affidavits also show that the ground upon which the defendants oppose the building of the bridge carrying Franklin avenue over the railroad is that the complainant company had previously built another overhead bridge at another crossing of its railroad and the public highway; that this other structure was found to be insufficient and unsatisfactory, and a public nuisance; that freeholders of the township petitioned the township committee to have the highway made passable where this other inefficient and defective bridge was built; that thereupon the township committee passed the repealing resolution rescinding the previous grant of authority to the complainant to build overhead crossings in the township, and caused a copy of the repealing resolution to be served upon the superintendent of the complainant company. The affidavits also state the anticipation of the township committee defendant that the proposed structure at Franklin avenue will, if permitted to be

completed, be as much of a nuisance as is the overhead bridge already constructed, and also state the opinion of the township committee that such bridges, besides interfering with public travel and increasing the risk of accidents, will become a source of larger and continued expense to the taxpayers of the township because of repairs necessary to keep them at all passable, and that they will destroy the appearance of the town of Berlin and depreciate the value of the best residences there situate. The affidavits also express the opinion that overhead bridges are not a necessity, and that they will not enable the complainant company to drive its trains at a higher rate of speed than they have for the past two or three years.

The application for a preliminary injunction came to a hearing upon the bill and affidavits, and the answer of the defendants and the affidavits annexed thereto.

J. H. Gaskill, for complainant. J. W. Westcott, for defendants.

GREY, V. C. (after stating the facts). The defense in this case, so far as it attacks the character of the structure proposed to be erected by the complainant company to carry the public highway across its railroad tracks by an overhead bridge at Franklin avenue, proceeds upon a conjecture that the proposed bridge will be as bad as another bridge has been found to be, which the complainant previously erected at West Berlin. One of the defendants' affidavits indicates that the consent of the township committee to the erection of overhead bridges was rescinded in order to compel the complainant company to make the previously built bridge at West Berlin conveniently passable to travelers of the highway crossing that bridge. That is, the township committee say to the complainant company, "The overhead bridge you have erected at West Berlin is a nuisance. Until you make that bridge satisfactory for public travel, you shall not erect any other overhead bridges in Waterford township." If the complainant company has erected an insufficient overhead bridge at West Berlin, it may be good reason why some legal procedure should be taken to compel the reformation of that bridge, but it is no reason for preventing the building of any other overhead bridge in the township. Each structure must stand upon its own merits. If any be defective in meeting the requirements of a lawful bridge, the proper authority may be invoked by proceedings for the correction of the defects of that particular structure. The proposed bridge at Franklin avenue has not yet progressed sufficiently towards completion to indicate whether it will sufficiently carry the public highway across the railroad tracks. It would certainly be unreasonable to prevent its erection because it may possibly be insufficient,

unless the detail of its proposed finished construction were proven. No such proof is offered. Instead, the defendants' witnesses guess that it will be like another structure whose qualities they denounce.

The whole justification of the defendants' interference, preventing the construction of overhead bridges to carry the public roads across above the grade of railroad tracks, is based upon the assumption that the township committee may lawfully prevent the complainant company from altering the grade of the public highways of the township so that they may be carried overhead across the railroad tracks. The special acts incorporating those companies which were organized before the passage of the general railroad act of 1873 (P. L. 1873, p. 88) contain clauses imposing upon those companies the duty to provide bridges to carry the public highways over or under the railroad tracks. The general railroad act also contains such a clause applicable to companies incorporated under its provisions. Gen. St. p. 2661, § 84. The special charter of the Camden & Atlantic Railroad Company (P. L. 1852, p. 268, § 9) makes it the duty of that company "to construct and keep in repair good and sufficient bridges or passages over or under the said railroad where any public or other road shall cross the same and to alter and grade the said roads, so that passage of carriages, horses and cattle, passing and repassing, shall not be impeded thereby." A similar clause was the ninth section of the charter of the Central Railroad of New Jersey. P. L. 1847, p. 133. The Central Railroad Company was indicted in Warren county for obstructing a public street. It appeared that the street in question had formerly crossed over the surface of the railroad company's tracks. The company altered the position of the highway in this respect, and passed it through a tunnel under its tracks. On the part of the state it was denied that the company had the power to make this alteration, and this denial formed the substantial foundation for the indictment. The Supreme Court declared that the obligation imposed by the company's charter was a continuing duty, which in its performance must be measured by circumstances, and as an illustration stated this proposition: "Suppose a public street in a town had been originally laid over the surface of the railroad tracks, and that by reason of the growth of the company's business in that locality its trains should pass in such quick succession as to render the street almost impassable; could it be pretended, under these circumstances, that the company could discharge itself from the obligation which the section in question imposed, except by passing the street, thus obstructed, under its road, so as to restore it to public use?" *State v. Central R. Co.*, 32 N. J. Law, 224. The court declared that the duty prescribed was at all times and

under all circumstances to keep the public highways, at the points where they crossed the railroad, in a condition fit for safe and convenient use, and that in order to accomplish this end the power to alter the grade of the road as public emergencies require, so as to pass it, if necessary, under the railroad tracks, must reside in the corporation.

It should be noted that the clause of the charter presently under consideration, that of the Camden & Atlantic Railroad, under which the complainant company in this cause is operating, contains express words making it the duty of that company "to alter and grade" the public highways where they cross the railroad company's tracks, so that passing and repassing shall not be impeded. In the Central Railroad Case, above cited, those words are absent, but the court gave to that charter the same effect by construction. In the present case the duty of the railroad company to carry the road across its tracks off grade is explicitly declared. The judgment above cited was made the basis of the decision of the case of Palmyra Tp. v. Pennsylvania Railroad Company, 62 N. J. Eq. 601, 50 Atl. 369, where all the cases on the subject are collated and compared. On appeal from that decision the Court of Errors and Appeals, in 63 N. J. Eq. 799, 52 Atl. 1132, affirmed the decree of this court on the opinion here expressed. The ground of challenge, in the present case, of the complainant's right to carry the highways across its tracks by an overhead bridge, is in principle the same as was set up and overruled in the case of State v. Central Railroad, above quoted. Neither court decisions nor statutory enactments have been cited on this argument which in any way justify the interference by the township committee with the complainant company's proposed improvements.

Some of the defendants' affidavits do express the opinion that overhead bridges carrying the highways across the railroad tracks above the grade of the latter will be more dangerous to the traveling public than are crossings made at grade. This proposition seems to be so impossible of acceptance as to be unworthy of serious consideration. There is a plain showing, in the complainant's bill and affidavits, that the nature of the business carried on over the company's tracks by trains traveling at the rate of 70 miles an hour will be highly dangerous to travelers who on the highways cross the tracks at grade. The proposition to relieve the public traveling the highways, or in the complainant company's railroad cars, from the danger of grade collisions between the railroad company's trains and teams traveling the highway and crossing at grade, is entirely reasonable.

The expense of making and maintaining such overhead bridges must be assumed and carried by the railroad company, upon

whom, by the statute, is imposed the continuing duty of maintaining such crossings.

No justification appears in the defendants' answer or annexed affidavits for their interfering with the exercise by the railroad company of its duty to carry the highways across its tracks without impeding the passage and repassage of carriages and passengers along the public highway.

A preliminary injunction should be allowed, restraining the defendants in accordance with the prayer of the bill of complaint.

In re WILSON.

(Court of Chancery of New Jersey. May 19, 1908.)

PARENT—CUSTODY OF CHILD.

1. The father of an eight year old daughter is the only surviving parent. He is entitled to the permanent custody of his child, unless those who contest his right show that the character of the father and the environment to which the child would in his charge be subjected are such as actually to endanger the life, health, morals, or permanent happiness of the child.

(Syllabus by the Court.)

In the matter of the application of Alexander Wilson for the custody of his child. Petition granted.

Jacob C. Hendrickson, for petitioner. Eckard P. Budd, for respondent.

GREY, V. C. (orally). The principles which must control the disposition of this case appear to me to be so clearly indicated that the matter may be settled without hearing from the petitioner's counsel in reply to the argument of the respondent's counsel, who has, I think, presented all that can be said against the granting of the petitioner's prayer. The petition asks for the permanent custody of the child Marguarite Wilson, the daughter of Alexander Wilson and Maggie Wilson, his wife. The marriage of the parents, the legitimate birth of the child, and her age (a little over seven years) are all undisputed. The child herself is here, brought by the writ of habeas corpus issued in aid of the petition. The court has had the opportunity of personal inspection of the child. She is in the custody of a maternal aunt, the respondent in this matter.

There is some dispute as to the terms under which the child came into the custody of the respondent, but this dispute is of no substantial significance. The respondent claims that her custody of the child was originally consented to by the little one's mother, who was then living, and that subsequently, after some persuasion, it was assented to by the father, after the death of the mother, and that this custody, so assented to by the father, was to be of indefinite existence; no time being mentioned

¶ 1. See Parent and Child, vol. 37, Cent. Dig. §§ 14, 16, 17, 18, 21.

when the child should be returned. The child, when less than two years old, was taken from California with the assent of the father, and brought to New Jersey, by the defendant. This is undisputed. The father testifies his consent was for a six months' visit, in the expectation that at the end of that time she should be returned to him. The father lived in Oakland, Cal., and the home of the respondent, Mrs. Ball, was in Mt. Holly, N. J., where she had the child. The father's business required his continued presence in California. He was working for a salary, and could not readily arrange personally to come across the continent to bring his child home. Mrs. Ball knew all these circumstances, for she had lived over a year in his household.

Mrs. Ball and her daughter, and Mrs. Slack, her mother, who was an elderly lady, had become intensely fond of the little girl. The correspondence carried on between the parties (shown by numerous letters written from the Mt. Holly home to the father) proves indisputably that Mrs. Ball recognized the father's right to have his child, and begged him to postpone its exercise because of the grief, and, indeed, danger to the health, of the grandmother, Mrs. Slack, which would ensue if the child were removed from her household. The father's letters in reply discuss this situation and regret it. Nowhere in the correspondence is there any assertion by any one in the Mt. Holly household of a right permanently to retain the child, nor in the father's letter is there any indication that he had any doubt of his right to have her whenever he chose to enforce it. This correspondence can be interpreted in no other way than as a clear admission that there never had been any arrangement that Mrs. Ball should have the permanent custody of the child, and that the father had a legal right to have his child delivered to him at any time. They also as conclusively show that the Mt. Holly family, Mrs. Ball and her daughter, and Mrs. Slack, her mother, had become so affectionately attached to the child that they were quite unwilling to give her up at all. The correspondence is full of explanations and excuses for detaining the child, but running through all the letters are plain indications that the controlling reasons which influenced these Mt. Holly ladies to retain the custody of this little child was the intense affection which they had for her. In order to gratify that feeling, they were willing to refuse to recognize the rights of the father under any circumstances. They wanted to postpone a struggle, if possible, but they meant at all events to keep her.

Mr. Wilson in the year 1898 sent a Mrs. Closson to Mrs. Ball, directing her to give the child to Mrs. Closson, so that she might be brought to his home in California. Mrs. Ball refused to give the child to Mrs. Closson. She did not say she had been given

the permanent custody of the child, nor did she set up any right to refuse to deliver her, but excused herself on account of the distress which the child's removal would cause the grandmother, Mrs. Slack. Again, a year or two later, Mr. Wilson sent for the child by his brother, Dr. Wilson, and his wife. Again Mrs. Ball refused to send her, for reasons affecting the personal comfort of the child in taking so long a journey in charge of persons with whom she had so slight an acquaintance. No right to her permanent custody was claimed by Mrs. Ball. Later on further correspondence was carried on through counsel retained by the father in Mt. Holly, who personally conferred with Mrs. Ball and demanded the delivery of the child. Now, for the first time, appeared any assertion on the part of Mrs. Ball of any legal right to the permanent custody of the child. Mrs. Ball declined to give her up, or to arrange any plan by which she could be sent to her father, insisting that he was bound personally to come from California to New Jersey to get her, and declaring that, if he did, he would not get her without a fight for her custody. The petition in this case was thereupon filed, and Mrs. Ball's defense to it is the contest which she foretold.

The resistance to the delivery of this child to her father, her only living parent, is put upon several grounds. It is alleged that the history of the child's ancestry indicates a liability to tuberculosis, and that Oakland as a neighborhood, and the particular location of the father's house there and his household arrangements, are all of them such as will probably develop this latent tendency. The evidence to establish the existence of these unfavorable conditions is of itself in no way conclusive. It is energetically disputed by the testimony submitted on the part of the petitioner. If it were shown to be true that the environment of Mr. Wilson's present residence is unfavorable to the health of his child, I cannot assume that Mr. Wilson will continue to live under these unhealthy conditions, and make this assumption the basis of my judgment for taking this child away from him. To maintain such a claim there must be a showing by the clear weight of the evidence that the delivery of the child to the father will place her under conditions in which the injury to her health is reasonably certain. That existing circumstances may possibly have that effect is of little weight, when those circumstances may be changed at any time.

It is also urged that the father, Mr. Wilson, is an unfit person to have the custody of this little girl, because it is alleged he is of a disposition to treat her cruelly, subjecting her to danger of physical injury. The evidence on this point is that of Mrs. Ball and her daughter, who some five years or more ago resided in Mr. Wilson's household at Oakland for nearly two years. They testify that he whipped his little children to excess, and

on a number of occasions finished the punishment by kicking them. These statements are flatly contradicted by Mr. Wilson. His present wife, who has been married to him and lived with him and his other children for the past ten months, testifies that he treats all his children with tenderness and consideration.

It is to be noted, in examining these contradicting statements, that Mrs. Ball and her daughter testify with relation to a condition of affairs which they say existed in Mr. Wilson's household some five years ago, when they visited him. This period antedated the taking of the little girl to Mt. Holly by Mrs. Ball, so that all the letters sent from the Mt. Holly household to Mr. Wilson in excuse for the refusals to return the child were written when Mrs. Ball and her daughter had full knowledge of these alleged cruelties on the part of Mr. Wilson toward his children. Those letters addressed Mr. Wilson in terms of the utmost respect. They are even affectionate in their terms, speaking to him as a person who, by reason of his family connection with the writers, was entitled to and received their kindly consideration. The correspondence shows the uttermost strain in the effort to find excuses for the retention of the child, but nothing indicates that the writers have in any way lost or lessened their respect for Mr. Wilson, or that they hesitated to return the child to him because of any feared danger by reason of his harsh or cruel treatment to his children. Nor is there in any of the letters any suggestion of the unhealthfulness of the climate, or the possible unhappiness of the child if given into the custody of her father. The only excuses found and stated in the correspondence are the apprehended grief of the grandmother, if deprived of the child, and the unwisdom at her tender age of giving her into the custody of strangers to take charge of her in traveling so great a distance.

I am constrained to believe that, if in fact the conditions here urged as reasons for depriving this father of the custody of his child had ever existed to the extent presently insisted upon, Mrs. Ball and her daughter, who conducted this correspondence, would certainly have said something which indicated their knowledge of these conditions. It is not alleged or claimed that Mr. Wilson was habitually cruel to his children. Even as stated by Mrs. Ball herself, the alleged cruelty was always associated with the administration of punishment. She does not testify that the punishment itself was unjust. She admits that the children deserved punishment when their father administered it, but she says that in administering it he went to an excess. This is wholly a matter of opinion. It is hardly possible to justify kicking a child as a means of punishment, yet it cannot be said that the testimony submitted by Mrs. Ball and her daughter, even if true, shows any such degree of cruelty as threatens

the future life, health, or permanent happiness of Mr. Wilson's children. If these statements be accepted as accurate, they apply to a condition alleged to have existed six years ago. No proof is submitted to show that at the present time Mr. Wilson administers any excessive punishment to his children. All the proof that is submitted is to the contrary. It is but fair to the petitioner to say that, considering the whole of the testimony applicable to this phase of the case, the allegation that he at any time dealt cruelly with his children is not sustained.

It is also contended that the happiness of the child herself must be considered, and that her long association with Mrs. Ball, who has shown the most motherly care for her, and her ignorance of the personality and character of her father, make it certain that she will suffer seriously if separated from Mrs. Ball and given to the petitioner. This is a most distressing situation. There can be no question of the tenderness of Mrs. Ball's affection for this child. Her presence here in this litigation, though mistaken in its assertion of her rights, proved the depth of her love for the child. A very touching appeal is made, based on the mutual love of Mrs. Ball and the little girl for each other. A court must, however, award its judgments in accordance with legal obligations, and not personal feelings. Mrs. Ball is under no legal obligation to maintain this child, not the slightest. The child might be made a public charge, so far as Mrs. Ball's relation to her is concerned. The permanent happiness of a child under eight years of age is not likely to be affected by a change of custody from one person who loves her to another who will naturally treat her with kindly consideration until association shall have developed her affection for her new caretaker. The separation will undoubtedly be at first a grievous thing, but at the child's impressible age adjustment to new associations is readily accomplished. It would be a happy condition indeed if matters could be so arranged that the affection which Mrs. Ball has for this child shall not be lost to her. The law requires that the child be given to the father, but those who are interested in her would do wisely if they preserve for her all the loving consideration which has heretofore surrounded and cared for her.

It has been said that the future welfare of the child would be best secured by refusing custody to her father. This view is the same that was urged in the case of *Griffin v. Gascoigne*, 60 N. J. Eq. 259, 47 Atl. 26. In that case the court was invited, as it is in this, to disregard the immediate family relation, and award the custody of the child to that one of litigants who would and could deal with it most beneficially for its future welfare. That argument was rejected. I quote from that opinion: "Such a view would take his child from the poor man, and give it to his richer neighbor, who might of-

fer to adopt it. It would stand as a temptation to the breaking of family ties whenever the attractiveness of a child might tempt one who could secure it a higher station in life to make the struggle for its possession. In the rightful adjustment of the family relation, the child should occupy that station in life into which he is born. If his father is poor, he must share his poverty. If the father is cross and ill-tempered, and is occasionally inebriated, these are distressful characteristics, which may make the child's life less happy; but, until it is shown that they are of such force and importance as to endanger the child's welfare in that place in life into which it has pleased God to call him, their existence constitutes no reason to deprive the father of the possession of his child. The true view is that the custody of the child should remain with his parents, irrespective of greater benefits which the custody of another might secure for him, unless the character of the parents and the environment to which the child would, in their charge, be subjected, are such as actually to endanger his life, health, morals, or permanent happiness." If Mrs. Ball had asked the advice of her lawyer, at the time when the petitioner, in 1898 or 1899, sent Mrs. Closson for the child, the distress which must attend upon the present separation would have been prevented. She would then in all probability have been advised that she had no legal right to detain the child. She would thereafter, under such advice, have trained the child to the expectation of her return to her father as a future happiness in store for her. Her own affection for the child would have been less absorbing, and the suffering necessarily accompanying the present separation would have been avoided.

Upon the whole case there is no showing of any circumstances which would justify the denial to the father of the custody of his child. I will therefore make an order that the child must be given to the permanent keeping of the petitioner. This order must be executed here and now, unless the petitioner assents to a different disposition.

(63 N. J. L. 489)

KARNUFF et al. v. KELCH et al.

(Supreme Court of New Jersey. June 16, 1903.)

PLEADING—DUPLICITY—VERDICT—PRESUMPTION—AD DAMNUM CLAUSE.

1. Duplicity in a pleading must, at common law, be taken advantage of by special demurrer; under our statutory practice, by a motion to strike out.

2. Where in a single count of a declaration there be joined together several causes of action, or several grounds of special damage, some of which are sustainable but the others not, if there be a verdict for the plaintiff, with entire damages, the verdict and consequent judgment thereon will be sustained by the presumption that the trial judge directed the

jury not to find damages upon the defective allegations.

3. The case of *Farwell v. Smith*, 16 N. J. Law, 133, commented on in *Potts v. Clarke*, 20 N. J. Law, 537, has been overruled by subsequent decisions, so far as it stands opposed to the above rules.

4. The ad damnum clause in a declaration may limit the scope and effect of the plaintiff's claim, with respect to his title to the special damages laid in the declaration.

5. In an action of tort brought by husband and wife, the declaration, which contained but a single count, set forth some grounds of special damage for which the plaintiffs were entitled to sue jointly, and another ground of special damage for which the husband, in his own right, was alone entitled to recover; the ad damnum clause claimed simply the "damages of the said plaintiffs"; the verdict awarded a single sum for "the damages of plaintiffs"; and the judgment was that the plaintiffs recover "their said damages."

Held (following *Consolidated Traction Co. v. Whelan*, 37 Atl. 1103, 60 N. J. Law, 154), that the effect of the verdict and judgment was to give only those damages to which the plaintiffs were jointly entitled.

(Syllabus by the Court.)

Error to Circuit Court, Middlesex County.

Action by Frieda Karnuff and George Karnuff against William Kelch and Henry Kelch. Judgment for plaintiffs. Defendants bring error. Affirmed.

Argued February Term, 1903, before GUMMERE, C. J., and FORT, HENDRICKSON, and PITNEY, JJ.

Alam H. & Theodore Strong, for plaintiff in error. Voorhees & Booraem, for defendants in error.

PITNEY, J. The declaration avers that the plaintiffs were seised and possessed of a tract of land in Middlesex county, upon which they had built their residence, and had their garden, a well, and various buildings, and upon which they lived with their family; that they also had upon the same tract two other houses, occupied by their tenants, and which they were accustomed to rent; that the defendants constructed an embankment upon lands adjoining the plaintiffs' premises, and kept the embankment filled with water; that the embankment was so negligently and carelessly constructed that, by reason thereof, water percolated through it and overflowed the plaintiffs' lands, thereby polluting the plaintiffs' well, preventing them from cultivating their garden and from using the water of the well, and from renting out their houses; and that, by reason of the water lying stagnant upon said lands, the plaintiffs became sick, and were forced to expend moneys in curing such sickness—"to the damage of the said plaintiffs two thousand dollars, and therefore they bring their suit, etc." The defendants pleaded the general issue, and upon the trial the jury found the defendants guilty, and assessed "the damages of plaintiffs" at the sum of \$300. The judgment is that the plaintiffs recover against the defendants "their said damages," etc.

There is no bill of exceptions. Error is as-

¶ 1 See Pleading, vol. 29, Cent. Dig. §§ 434, 503.

signed upon the record (1) on the ground that the declaration is not sufficient in law; (2) that the plaintiffs by the judgment have recovered damages for the sickness of the plaintiffs; (3) that the plaintiffs by the said judgment have recovered damages for the sickness of the plaintiff George Karnuff.

The argument submitted in behalf of the plaintiffs in error is to this effect: That the record shows that the plaintiffs have recovered in this action damages for the sickness of the husband, and also for the sickness of the wife; that the damages awarded are entire, and are presumed to have been given for these injuries, as well as for the others alleged in the declaration; that, although the plaintiffs jointly might recover for the sickness of the wife, yet there could be no recovery in such an action on account of the sickness of the husband, because for such damage he must sue alone; and that where damages are thus given generally, and the declaration includes matter which either affords no cause of action at all, or affords no right of recovery in the same suit, the entire verdict is vitiated, and judgment will either be arrested on motion, or, if entered, will be reversed on error. To these contentions there are several adequate replies.

The mere misjoinder of the wife in an action brought by her husband to recover damages for injuries personal to himself is not ground for reversal of this judgment, because by section 37 of the practice act (Gen. St. p. 2539) it is provided that the misjoinder of a plaintiff shall not be objected to by the defendant unless he give written notice of such objection within five days after plea filed, and the record shows no such notice given. Again, by section 22 of the practice act (Gen. St. p. 2536) it is declared "that in any action by a husband and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right arising ex delicto, and separate actions brought in respect to such claims may by order of the court be consolidated." This, of course, plainly authorizes the combination in one action of claims for injuries to the person of the wife with injuries personal to the husband, arising ex delicto. I see no reason why there may not be joined in the same action claims arising ex delicto in the joint right of husband and wife with respect to real estate held by them either as joint tenants or as tenants by the entirety. At least, if the objection depends merely upon the misjoinder of parties, it is waived unless timely notice be given under section 37. The failure to give notice under section 37, however, has merely the effect of waiving formal objections, and does not deprive the defendants of any substantial right. If there were any substantial reason for denying the right to recover in this action for any of the several kinds of damage particularized in the declaration, the defendants were entitled to have the re-

covery properly limited by the trial judge, although no notice of misjoinder had been given. *Brown v. Fitch*, 33 N. J. Law, 418; *Stone v. West Jersey Ice Co.*, 65 N. J. Law, 20, 46 Atl. 696.

Upon an examination of the declaration, it will be observed that it charges the defendants with the commission of but a single legal wrong, to wit, the overflowing of the plaintiffs' land with water negligently permitted to escape from the defendants' embankment. In averring the damage necessary to constitute a cause of action, several kinds of damage are specified, which the defendants now assert are incongruous one with another, so that they cannot be recovered in a single action, to which both husband and wife are parties. The vice complained of amounts, at most, only to duplicity; and this, at common law, could be objected to only by special demurrer (1 Chit. Pl. [13th Am. from 6th London Ed.] p. 228), and under our practice can be availed of only by a motion to strike out (Gen. St. p. 2557, § 139; *Id.* p. 2555, § 132; *Id.* p. 29, § 12; *Jackson v. Pennsylvania R. Co.* (N. J. Sup.) 54 Atl. 532, and cases cited). The irregularity is cured by a general verdict. In 1 Chit. Pl. p. 682, it is said: "Where several causes of action have been stated in one count, one of which is sustainable, but the others not, if there be a verdict for the plaintiff, with general damages, upon the whole count, such verdict will be sustained by the Intendment and presumption that the judge duly directed the jury not to find damages upon the defective allegation. But if a declaration contain several counts, any of which is wholly defective, and general damages upon the whole declaration be given, the judgment would be arrested or reversed on error." The second defect suggested in the language quoted from Chitty is cured by section 186 of our practice act (Gen. St. p. 2563), which enacts "that where there are in a declaration several counts, some of which are faulty or bad, and others not, and entire damages are given, the verdict shall be good; but the defendant may apply to the court to instruct the jury to disregard such faulty or bad counts." Where the misjoinder of causes of action is in a single count, the defendant has the right (without section 186) to apply to the court to instruct the jury to disregard the bad or faulty matter, and the presumption after verdict is that such instruction was asked for and given.

To the contrary, the plaintiff in error cites to us an opinion delivered in this court by the late Chief Justice Hornblower in *Farwell v. Smith*, 16 N. J. Law, 133, 137, and what was said obiter by the same distinguished jurist in the later case of *Potts v. Clarke*, 20 N. J. Law, 537, in vindication of his opinion in *Farwell v. Smith*. Without spending time in detailed criticism of the views there expressed, it is sufficient to say that they stand in conflict with repeated subsequent decisions, notably *Hendrickson v. Pennsylvania R. Co.*,

43 N. J. Law, 464. In that case this court distinctly held that when, in a count in a declaration, special damages are laid, some grounds of which are good, and some bad, a general demurrer to the entire count will not be sustained. The late Chief Justice Beasley, who delivered the opinion, mentioned that the same principle is applied in an action of covenant, where there are several breaches assigned, some well and others ill, and the demurrer is general; in such cases the plaintiff will prevail. At the last term of this court we had to deal with a demurrer to a declaration founded upon a bond with condition containing several requirements, of which several breaches were assigned. Some of the requirements of the bond being attacked as invalid, this court overruled the demurrer on the ground that one, at least, of the breaches assigned, related to a valid requirement. *Mayor, etc., of Carlstadt v. City Trust Co.*, 54 Atl. 815.

Thus far we have dealt with the present case as if the declaration did in fact demand damages both for the sickness of Mrs. Karnuff and also for the sickness of her husband. If such were the fact, the giving of a verdict and judgment for a single sum as the "damages of the said plaintiffs" would raise the presumption that the trial judge did not permit the jury to include damages which the husband alone was entitled to claim. But although the averments of special damages in the declaration include some that are recoverable by the husband and wife, and others that are recoverable by the husband only, the declaration, in its conclusion, claims only the "damage of the said plaintiffs"; the record shows that the jury assessed only the "damages of plaintiffs," and that in the judgment the plaintiffs recovered only "their said damages." In *Weber v. Morris & Essex R. Co.*, 35 N. J. Law, 409, 414, 10 Am. Rep. 253, where the declaration set forth a sufficient cause of action, but the ad damnum clause was defective, in averring that the damages there specified had accrued to a third party, it was said by Mr. Justice Van Syckel that the purpose of the ad damnum clause is "to give notice to the defendant of the extent of the plaintiff's claim, and, where there is an entire absence of such conclusion, it may be treated as a notice to the defendant that nominal damages only will be insisted upon." The ad damnum clause was thus treated as limiting the scope and extent of the plaintiff's claim with respect to his title to the special damages laid in the declaration. A decision more closely in point with the present case, and one that controls us, is that of the Court of Errors and Appeals in *Consolidated Traction Co. v. Whelan*, 60 N. J. Law, 154, 87 Atl. 1106. There, as here, the assignments of error were made upon the record, there being no bill of exceptions. The declaration, which contained but a single count, was for an injury done to the wife by the negligence of the defendant, and the husband

had added claims in his own right arising out of that injury, under the provisions of section 22 of the practice act (Gen. St. p. 2536). There, as here, the ad damnum clause in the declaration claimed only the "damages of the plaintiffs." The verdict assessed the damages of both plaintiffs in a single sum, and the judgment was that the plaintiffs recover of the defendant "their said damages." The court held that, as the declaration had demanded damages only upon the joint claim, the effect of the verdict and judgment was to give damages only for such causes of action as had accrued to the plaintiffs jointly.

The present demurrer must therefore be overruled.

(75 Conn. 675)

UNCAS PAPER CO. v. CORBIN et al.
(Supreme Court of Errors of Connecticut.
June 10, 1903.)

ASSIGNMENTS—ACTION BY ASSIGNEE—RIGHT TO SUE—BONA FIDE OWNERSHIP OF CLAIM—ISSUES—VERDICT—SETTING ASIDE AS AGAINST EVIDENCE—TIME FOR APPLICATION—APPEAL—CORRECTION OF FINDINGS.

1. Though the seven days ordinarily to be allowed under Rules of Supreme Court of Errors, § 14, had not elapsed when the case was called for argument, appellee, if he intended to deny the averments of the application to rectify the appeal by correcting the findings, should have done so before the argument was commenced.

2. In an action for goods sold, brought by an assignee of the claim, paragraph 1 of the complaint averred that "plaintiff is actual, bona fide owner of the * * * claim * * * by a written assignment made and executed," etc. Held, that a general denial of the paragraph, while it admitted due execution and delivery of the written assignment, put in issue the right of plaintiff to sue as the actual and bona fide owner of the claim assigned.

3. The assignee of a chose in action cannot sue in his own name without showing that he is its owner in his own right and for his own benefit, without accountability.

4. Great weight is due to the ruling of a trial court setting aside a verdict as contrary to the evidence, especially where made promptly and of the court's own motion.

5. Evidence considered, and held to sufficiently tend to show that plaintiff, suing as assignee of a claim, was not the actual and bona fide owner thereof, to warrant the court's action in setting aside a verdict in its favor as against the evidence.

6. Whether or not the rule of court requiring motions in arrest to be filed within 24 hours governs motions to set aside a verdict (Rules of Court, § 113; Gen. St. 1902, § 805), the trial court has a discretionary power to entertain them, though filed later.

Appeal from Superior Court, New London County; William S. Case, Judge.

Action for goods sold, brought by the Uncas Paper Company against Maria A. Corbin and others (H. H. Corbin & Son). Verdict for plaintiff set aside as against the evidence, and plaintiff appeals. Affirmed.

Paragraph 1 of the complaint was as follows:

"The plaintiff is the actual, bona fide owner of the debt, claim, and chose in action hereinafter set forth, by a written assign-

ment made and executed to it on February 18, 1901, by Cornell & Ward, a partnership composed of R. R. Cornell and Theodore H. Ward."

This paragraph was denied in the answer.

There was an application to rectify the appeal by an addition to the finding, to the effect that the plaintiff requested the court to rule and to instruct the jury that the defendants, by not having denied specially in their answer the right of the plaintiff to sue as an assignee of the claim of Cornell & Ward, but by filing an answer and counterclaim, and going to trial on the merits, had waived any question as to the capacity or right of the plaintiff to sue as assignee of the claim. This application was filed on April 22d, and supported by affidavit agreeably to the rules of the Supreme Court of Errors, § 14. The appeal had been taken to the April term of this court, which opened on April 28, and the case was reached and argued on that day.

Lucius Brown and Amos A. Browning, for appellant. Cornelius J. Danaher, for appellee.

BALDWIN, J. (after stating the facts). The verdict was set aside as against evidence, on the ground that the jury clearly mistook the law in finding that the plaintiff ever became the equitable and bona fide owner of the claim in suit. In the application to rectify the appeal, which was supported by the affidavit of counsel, it is averred that the appellant asked the trial court to rule that this question was not open under the pleadings. This averment has not been denied, and although the seven days ordinarily to be allowed under Rules of Court, § 14, had not elapsed when the case was called for argument, we think that, if it was intended to deny it, this should have been done, at latest, before the argument was commenced. See *State v. Hunter*, 73 Conn. 435, 445, 47 Atl. 665. We therefore grant the application, and shall treat the appeal as if one of the grounds on which it is based had been the refusal of the superior court to make the ruling requested.

There was no error in such refusal. The general denial of paragraph 1, while, under the rule, it admitted the due execution and delivery of the written assignment, put in issue the right of the plaintiff to sue as the actual and bona fide owner of the claim assigned. *Woronieki v. Pariskiego*, 74 Conn. 224, 228, 50 Atl. 562.

Under the statutes of this state, the assignee of a chose in action cannot sue in his own name without showing that he is its owner in his own right and for his own benefit, without accountability. *Gaffney v. Tammany*, 72 Conn. 701, 48 Atl. 158. The superior court set aside the verdict because it was of opinion that, in view of the evidence presented and of the evidence not presented, the jury must have mistaken the law upon this

point. Great weight is due to this ruling of the trial judge, and all reasonable presumptions are to be made in its support. *Loomis v. Perkins*, 70 Conn. 444, 446, 447, 39 Atl. 797. His dissatisfaction with the verdict was shown immediately upon its return and acceptance, when, unasked, he directed the clerk not to enter judgment upon it until further order. Its acceptance was, under our practice, little but a formal prerequisite to a discharge of the jury from the further consideration of the cause, and did not imply that it was acceptable to the court as a proper determination of the issues tried. *Blissell v. Dickerson*, 64 Conn. 61, 71, 29 Atl. 226. When a motion to set aside a verdict as against evidence is held under advisement for a long period of time, and then granted, the presumption in favor of the order is greatly weakened or destroyed. *Lewis v. Healy*, 73 Conn. 136, 46 Atl. 869. For a similar reason, the presumption in favor of such an order is greatly strengthened when the action of the court is prompt, and taken originally of its own motion.

The power of a trial judge over the verdict is an essential part of the jury system. *Burr v. Harty*, 75 Conn. 127, 52 Atl. 724. If he sets it aside as against the evidence, it is to be presumed that he felt that course to be imperatively demanded by the interests of justice. Here was a suit brought by an assignee in a county where his assignors could not have brought it. It was brought on an assignment only three days old, and by a firm of lawyers, one of whom, according to testimony that was uncontradicted, and apparently, if untrue, might have been contradicted, had shortly before threatened the defendants that, if they did not pay the bill, it would be assigned in such a way as to give jurisdiction to the courts of that county. A claim for \$900, arising from a resale of goods bought by the assignors of the assignee, was sold for \$100; and both this sum and the difference between it and \$900 was, according to evidence given by one of the assignors, credited upon their books to the assignee. No explanation of the reason for the latter credit was made, and it is difficult to imagine one. The books were not produced to verify it. The officer who made the purchase for the plaintiff was not produced. We cannot say that, upon such a state of evidence, the superior court erred in setting aside the verdict rendered. *Howe v. Raymond*, 74 Conn. 68, 49 Atl. 854.

The motion to set it aside was not filed within 24 hours after its acceptance. Whether the rule of court requiring motions in arrest to be filed within that period governs motions to set aside a verdict, we need not inquire. Rules of Court, § 113; Gen. St. 1902, § 805; *Hamilton v. Pease*, 38 Conn. 115, 120. If it does, the trial court has a discretionary power to entertain them, although filed later. *Tomlinson v. Derby*, 41 Conn. 268, 270. In the present case, also, judgment was stayed

or arrested within the 24 hours by the order of the court, made *sua sponte*.

There is no error. The other Judges concurred.

(75 Conn. 679)

WOODRUFF v. BUTLER.

(Supreme Court of Errors of Connecticut.
June 10, 1903.)

LANDLORD AND TENANT—LEASE—STATUTE OF FRAUDS—ACTION FOR RENT—VARIANCE—FINDING—EXHIBITS.

1. A lease in writing signed by the lessor alone, though it was intended that the lessee should also sign it, and a letter written by the lessee, on receiving the lease, giving his assent to its terms, constituted a complete agreement in writing duly executed by each party, and the statute of frauds was satisfied.

2. The fact that it was mutually understood that a written lease should be executed by both parties was immaterial.

3. The complaint in an action for rent set out a lease of a "house and lot." The proof showed a lease of a "fully furnished dwelling house" on the lot. It was objected below "that the material allegations of the complaint did not aver the facts established by the evidence, or, in other words, that there was a material variance between allegations and proof," and that "the contract, if any, established by the proof was not the one set out in the complaint," etc. *Held* too general to present the question of variance.

4. The date of the leasing of property as alleged in the complaint in an action for rent is immaterial.

5. A finding which stated that certain exhibits were received in evidence and marked "Exhibit A," etc., and that in view of them certain conclusions of fact and law were reached, made them a part of the findings as fully as if each were incorporated into it at length.

6. In an action for rent a claim that in estimating the damages a certain allowance should be made, urged for the first time after judgment, comes too late.

Appeal from Court of Common Pleas, Litchfield County; Gideon H. Welch, Judge.

Action for rent by George M. Woodruff, trustee, against Elliott L. Butler. Judgment for plaintiff, and defendant appeals. Affirmed.

The following facts were found: The defendant's wife was his agent to hire a furnished house for the summer. The house in question was shown her by the plaintiff's broker, and the bounds of the house lot pointed out. She offered \$600 for its use, as then furnished, for four months, and the offer was accepted. The house was then occupied by a Mrs. Wiggin, for whom and others the defendant was trustee. It was agreed that a written lease should be sent to the defendant. One was executed by the plaintiff, giving the bounds of the lot, and describing the house as a "certain fully furnished dwelling house," and the rent as payable in monthly payments of \$150 each; and the broker sent it to the defendant by mail. It was in the form of an indenture between the parties, with reciprocal covenants by each, and the concluding clause was, "In witness whereof the parties have hereunto set their hands and seals this 12th day of

May, 1902." The defendant then first learned who owned the house. He wrote back to the broker on May 14th that the lease was all right, asking if its return was desired, and adding that if returned he should have nothing to show as evidence of his rights. The broker at once replied by mail that he wished its return, but would have it recorded or give him a copy of it, if desired. Meanwhile Mrs. Wiggin had made some requests to Mrs. Butler as to the furniture to be left in the house, and the use of the garden. This occasioned dissatisfaction, and on May 17th the defendant wrote the broker, returning the lease, and saying that he had decided not to take the house. He did not, and Mrs. Wiggin continued in its occupancy. This action was brought after the lapse of three months of the terms specified in the lease, for three months' rent, and the judgment was for \$450.

Wilbur G. Manchester, for appellant.
George M. Woodruff, for appellee.

BALDWIN, J. (after stating the facts). The lease sent to the defendant was so executed as to bind the plaintiff. As soon as the defendant wrote back that it was "all right," the statute of frauds was satisfied, and it bound him. It was the evident intention of the broker when the lease was sent that the defendant should sign, seal, and return it. But that he did not do so made it none the less a written memorandum of an agreement for the transfer of an interest in land signed by the owner; and the defendant's letter referring to it, and stating his assent to its terms, was a written memorandum of the same agreement, signed by the party to charge whom the action has been brought. These two papers, taken together, constituted a complete agreement in writing, duly executed by each party.

The defendant asks a correction of the finding, so that it may state explicitly that at the time when the oral agreement for a lease was made it was mutually understood that a written lease should be executed by both the parties. Such a correction would be immaterial. The lease, as executed by the plaintiff, correctly set forth the agreement, and was in proper form. To carry out the understanding claimed, it only remained, therefore, for the defendant to execute it. If instead of this he signified his assent by signing another paper, such a deviation from the oral agreement could not vary the rights of the other party. The oral contract was now merged in the written one.

The complaint sets out a lease of a "house and lot." The proof showed a lease of a "fully furnished dwelling house" on this lot. It is made a reason of appeal that this constituted a fatal variance. The only claims of this nature made before the trial court were "that the material allegations of the complaint did not aver the facts established

by the evidence, or, in other words, that there was a material variance between allegations and proof," and that "the contract, if any, established by the proof was not the one set out in the complaint, but was one made at a different time, in a different manner, and covering a materially different subject-matter." The language of these claims was too general to point with the necessary clearness to the subject of the variance, and under our rules of practice can lay no foundation for an appeal. Questions of law which are made in a trial court must be "distinctly" stated; that is, so stated as to bring to the attention of the court the precise matter on which its decision is asked. To present the point now set up, the claim upon the trial should have been, not simply that there was a variance, or that the agreement alleged and that proved covered "a materially different subject-matter," but that the lease alleged was of a house and lot, and that, if any proved, of a fully furnished house and lot.

It is also contended that, although the complaint alleges a hiring on May 10th, the proof was of a hiring on May 14th. The date alleged was immaterial. The real hiring was when the written lease was accepted by the defendant. This acceptance merged all the prior negotiations in a completed contract, the terms of which neither party could thereafter vary without the consent of the other. This renders unimportant the exceptions taken to the judgment on account of prior or subsequent misunderstandings between the parties or those claiming to represent them.

Exceptions were taken to the finding because it does not formally state that certain written exhibits attached to it are made part of it. As to these it states that they were received in evidence and marked "Exhibit A," "Exhibit B," etc., and that in view of them certain of the conclusions of fact and law were reached. This makes them a part of the finding as fully as if each were incorporated into it at length.

The finding states that the plaintiff is trustee for Mrs. Wiggin and others, and this is excepted to as a fact found without evidence. The record shows that the parties agreed upon the trial that he was trustee for her, and discloses no evidence that there were others to share in the benefits of the trust. This exception we might support if it were material. It is, however, important only as bearing on another exception to the finding, because it does not state that the defendant claimed upon the trial that in estimating the damages allowance should be made for the continued use of the premises by Mrs. Wiggin throughout so much of the term of the lease as had elapsed when the suit was brought. That exception is not well taken. The finding could not properly contain such a statement, for no such claim was in fact made upon the trial. It was first set

up after judgment as a basis for a ground of appeal, and for that purpose it came too late.

There is no error. In this opinion the other Judges concurred.

(75 Conn. 663)

**NORWALK HEATING & LIGHTING CO.
v. VERNAM et al.**

(Supreme Court of Errors of Connecticut.
June 10, 1903.)

**LANDS—ABUTTING OWNER—AERIAL RIGHTS—
OVERHANGING STRUCTURE—REMEDY—INJUNCTION.**

1. The possession and occupancy of a structure projecting over land of another, but not touching it, though an invasion of that other's rights, is not an ouster of possession within the meaning of Gen. St. 1902, § 4042, declaring conveyances of land of which the vendor is ousted by the entry and possession of another void.

2. A property owner may enjoin the continued maintenance by an adjoining landowner of a structure projecting over his land.

3. The fact that an adjoining landowner made an addition to his building projecting over plaintiff's premises, but not touching them, without knowing that he had a right to do so, and in order to invoke a determination of the question by legal proceedings, does not affect plaintiff's right to damages and to an injunction restraining its continued maintenance.

Appeal from Court of Common Pleas, Fairfield County; Howard J. Curtis, Judge.

Action by the Norwalk Heating & Lighting Company against Lavinia B. Vernam and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Levi Warner, for appellants. J. Belden Hurlbutt, for appellee.

BALDWIN, J. The plaintiff owns certain land, which is substantially covered by the waters of the Norwalk river. The defendants own adjoining land on the river bank, having a brick building upon it extending to the boundary line. To this building they have attached a wooden structure, supported by beams resting on its foundation walls, which is 10 feet wide and 19 feet deep, and projects over the plaintiff's land without touching it. The plaintiff's title rests on a conveyance made after this structure was completed. It has requested the defendants, who are occupying it by tenants as part of a store, to remove it, and they have refused. It desires to build on its premises, and this structure prevents it from doing so, and interferes with its use of its land. The complaint states substantially this case, and has been found true.

It is contended that the conveyance to the plaintiff was void, because given when its grantor was ousted of possession. Gen. St. 1902, § 4042. The court of common pleas properly held that the possession of the projecting structure at that time by the defendants was no interference with the possession by the plaintiff's grantor of the premises over which it projected. The construction and maintenance of such a structure, like the

construction and maintenance upon a house of eaves overhanging another's land, is an invasion of right, but not an ouster of possession. *Randall v. Sanderson*, 111 Mass. 114. The possession of the adjoining proprietor remains unaffected, except that it is rendered less beneficial. The possession and occupancy of the projecting structure has no effect on the ownership of the soil beneath, unless it be maintained under a claim of right for 15 years, and so should ripen into a perpetual easement. It follows that equitable relief was properly claimed and granted. While the plaintiff might have itself removed the nuisance, without appealing to the courts, it was not restricted to reliance upon self-help. Nor had it only a right of action for damages. An injunction might originally have been brought by the plaintiff's grantor to prevent the construction of the projection. This not having been done, the plaintiff could ask for a mandatory injunction to prevent its wrongful continuance.

It is found that the defendants made this addition to their building without knowing that they had a right to do so, and in order to provoke a determination of that question by legal proceedings. While this absence of a direct claim of right might be material were the question as to their having gained an easement by an adverse user for 15 years, it does not affect the plaintiff's cause of action in this proceeding. They cannot defend on the ground that they did not in fact make a claim which it would be naturally inferred from their acts that they were making.

There is no merit in the exceptions taken to the finding on the ground that it is against the evidence.

There is no error. The other Judges concurred.

(75 Conn. 656)

MUNGER v. DOOLAN.

(Supreme Court of Errors of Connecticut.
June 10, 1908.)

ATTACHMENT — NONRESIDENTS — SERVICE — SUFFICIENCY — ADMINISTRATORS — INTEREST IN INTESTATE'S PROPERTY—RIGHT TO AVOID ATTACHMENT.

1. Where one was sued and served as a non-resident being described as of parts unknown, and appearance for him was not made, the court acquired no jurisdiction over him, personally, and was powerless to render a general personal judgment against him.

2. Rev. St. 1902, § 828, providing a special procedure for the attachment of property belonging to nonresidents is exclusive, and, being in derogation of common right and common law, is to be strictly construed.

3. Rev. St. 1902, § 828, providing a special procedure for the attachment of a nonresident's property, prescribes a leaving by the officer of a copy of the process and complaint, together with a return describing the estate attached, with defendant's agent or attorney within the state, or, if there be none, with the person in charge or possession of the property. *Held*, that an attachment served by leaving a copy of the process and complaint at the property attached, for defendant, and not for the person in possession thereof, was void.

4. The fact that the person in possession of defendant's property was the plaintiff in the attachment suit did not excuse service on her.

5. Where an attachment was void for defective service, all subsequent proceedings based thereon—judgment lien, foreclosure, and certificate—were also void.

6. A person who has procured a void attachment on his debtor's property has placed himself in no new position, such as to entitle him to plead equitable defenses or demand equitable consideration in proceedings to have such attachment judicially declared void.

7. Under Rev. St. 1902, § 362, giving to an administrator the right to possession of his intestate's realty during the settlement of the estate, and its income and products, an administrator whose intestate's estate, against which claims exist, consists only of one piece of property, subject to a void attachment, has sufficient interest in such property to maintain an action to have the attachment declared void.

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Action by Verrenice Munger, administrator, against Elizabeth J. Doolan, brought to declare void and set aside certain judicial proceedings by which defendant acquired the apparent title and possession of certain real estate. From a judgment for plaintiff, defendant appeals. Affirmed.

In 1893 the defendant brought suit against her brother James Doolan, returnable to the court of common pleas in New Haven county, and recovered judgment. A judgment lien was thereupon placed upon certain real estate in Ansonia standing in said defendant's name, which had been, in form, attached in said suit. Proceedings to foreclose said lien followed, and judgment of foreclosure was obtained against said James Doolan, the only defendant. The time for redemption expired on the first Monday of October, 1894, and, no redemption having been made, a certificate of title, by virtue of the foreclosure, was filed on the day following; and Elizabeth Doolan, the then plaintiff, and now defendant, has since continued in possession of the premises, claiming to be the owner thereof by force of the said proceedings. In 1880 said James Doolan, who had theretofore made his home with his said sister Elizabeth in Ansonia, left for parts unknown. He has never since been heard from by his sister or any other relatives or persons who would naturally hear from him if living. In 1899, upon the application of a brother of James, the plaintiff, Munger, was duly appointed by the court of probate for the district of Derby administrator on said James' estate. The present action was brought by him as such administrator to declare void and set aside all of said legal proceedings. James became the owner of said real estate in 1869. After his disappearance, Elizabeth assumed charge and possession thereof, and so continued down to the time her claimed ownership under the foreclosure began. The other pertinent facts are stated in the opinion.

William S. Downs, for appellant. Verrenice Munger and Robert L. Munger, for appellee.

PRENTICE, J. (after stating the facts). Various questions arising out of the situation disclosed by this record have been argued before us. Prominent in the plaintiff's brief is the claim that, as James Doolan had been absent from his home and unheard of for the period of thirteen years at the time when his sister Elizabeth instituted her original suit against him, he was dead, in contemplation of law, and that therefore all the proceedings in that action, and all those which followed to enforce the judgment obtained therein, were void. The prominent place in the defendant's brief is given to an attempt to support the proposition that, whatever be regarded as James Doolan's legal status, the legal proceedings resulting in the foreclosure of the judgment lien were effective as a sequestration to satisfy the present defendant's claim against her brother, of the real estate in question, through a quasi judgment in rem under the provisions of statute. It is quite unnecessary to discuss the above claim of the plaintiff, involving, as it incidentally does, a number of important considerations, since within the purview of the defendant's chief contention is found a situation, created at the very inception of the legal proceedings, which stamps the whole of them as altogether void. Instead of resulting in a lawful appropriation of James Doolan's estate, regardless of whether he was living or dead, as claimed, it is clear that they were of no effect, and that James' known existence could not have imparted any life to them. They are all dependent for their vitality upon the jurisdiction of the court of common pleas of the original action, and its rendition in that action of a valid judgment, either general or qualified. When that action was brought, James' whereabouts, if he was alive, were unknown. He had no known place of abode in this state, and had not had one for 13 years. He was therefore not a resident. *Earle v. McVeigh*, 91 U. S. 503, 23 L. Ed. 398. He was sued and served as a nonresident, being described as of parts unknown. Of necessity, therefore, neither personal service, nor service at his usual place of abode, was or could have been made upon him. *Earle v. McVeigh*, supra. Appearance for him was not made. As a consequence, the court never acquired jurisdiction over James personally, and was powerless to render a general personal judgment against him. Numerous authorities in this state and elsewhere have placed this conclusion beyond the domain of doubt, and the defendant frankly concedes it. *Starr v. Scott*, 8 Conn. 484; *Easterly v. Goodwin*, 35 Conn. 273; *O'Sullivan v. Overton*, 56 Conn. 103, 14 Atl. 300; *Williams Co. v. Mairs*, 72 Conn. 430, 44 Atl. 729; *Cooper v. Reynolds*, 10 Wall. 317, 19 L. Ed. 931; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

It follows that the court acquired no jurisdiction, unless by virtue of an attachment of property. See cases last cited. An attempt to make such an attachment appears

upon the record. This attempt related to certain real estate in Ansonia standing in the name of James Doolan, and owned by him at the time of his disappearance. The return shows that the officer serving the process lodged in the office of the town clerk a certificate of attachment in due form, and thereafter on the same day left a true and attested copy of the writ, with his indorsement thereon, "at the last usual place of abode of the defendant in Ansonia." The finding discloses that the place where this copy was left was the house of the plaintiff in the action, to wit, Elizabeth Doolan, which house had been James' place of residence prior to his disappearance. It only remains to inquire whether this action by the officer created a valid attachment of the real estate described in the certificate of attachment. It is apparent that the officer proceeded as he would in attaching the real estate of a resident defendant. Our statutes (section 828, Rev. St. 1902) provide, and then provided (section 910, Rev. St. 1888), a special procedure for the attachment of estate within this state belonging to defendants not residing within the state. This statute is and was exclusive. Being in derogation of both common right and common law, it is one to be strictly interpreted and pursued. Its provisions and requirements may not be disregarded with impunity, nor waived or changed by courts. *Cady v. Gay*, 31 Conn. 395; *Sanford v. Pond*, 37 Conn. 588; *Hubbell v. Kingman*, 52 Conn. 17; *Ahern v. Purnell*, 62 Conn. 21, 25 Atl. 393. This principle has special pertinence and assumes added importance in cases where, as here, a man's property is sought to be appropriated by another in his absence in parts unknown. The method which is prescribed involves a leaving by the officer of a copy of the process and declaration or complaint, together with a return describing the estate attached, with the agent or attorney of the defendant in this state, or, if there is no such agent or attorney, with him who has charge or possession of the estate attached. James Doolan had no agent or attorney in this state. Elizabeth, however, was in possession of the property. The leaving with her of the prescribed copy was therefore an essential prerequisite to a good attachment. No copy was so left. The fact that she was the plaintiff did not excuse the omission to fulfill what was made by law a condition precedent to the acquisition of a lien. It may be doubtful whether, in any event, the requirements of the statute which call for a copy to be left "with" the agent, attorney, or person in charge or possession would have been satisfied by a leaving at the abode of such person for him; but even this was not done in the present case. A copy was, indeed, left at Elizabeth Doolan's house, but it was there left for James, and not for Elizabeth. This the return makes clear. She is not named in it. It is only by a resort to extrinsic evidence that we learn of the

accident of circumstance which makes the alleged last usual place of abode of James her abode. It does not do to say that a copy left in service at a given house for a given person is a copy left in service upon anybody who chances to reside there—much less, a copy left “with” each occupant of the house, and in whatever capacity may in the end prove most serviceable. In this case we have not even the intent of the officer to reach Elizabeth, to help out the matter. He has made his intent clear in his return. He was seeking to reach the defendant through his last usual place of abode. The suggestion that the copy presumably came into the hands, or at least to the knowledge, of Elizabeth, does not improve the situation. The statute requires that a specified course be pursued, if a man's property is to be taken from him without jurisdiction of his person. It recognizes no equivalents, and admits of no evasions. Nothing less than or different from that which the statute prescribes can satisfy its requirements, even though the same substantial ends are accomplished. *Cady v. Gay*, 31 Conn. 895. There was no lawful attachment. Such being the case, all the proceedings had in the action, including the judgment, were *coram non iudice* and absolutely void. *Strong v. Strong*, 8 Conn. 408; *Martin v. Hunter's Lessee*, 1 Wheat. 382, 4 L. Ed. 97; *Earle v. McVeigh*, 91 U. S. 503, 23 L. Ed. 898. The judgment being void, all the steps subsequently taken to effectuate it necessarily fall also. The questions relating to the presumption of James' death thus become unimportant. His death, established, could only serve to furnish an additional reason for the result otherwise accomplished.

The conclusion we have reached as to the void character of all the steps Elizabeth took in the premises resolves the incidental question raised by her as to the necessity of a payment to her of what is now equitably due her before the judgments can be set aside, and her defense of laches. Notwithstanding what she has done, she stands just as she would if she had done nothing. In legal effect, she has done nothing. She has put herself into no new position, of the benefits of which she is to be deprived, and in which she is enabled to claim equitable protection and advantage. No judgment has been set aside. There has been none, and the present judgment simply makes formal, judicial declaration of that fact. Were the judgments merely voidable ones, different questions might be presented.

Only one other question remains. The defendant disputes the plaintiff's right to maintain this action. It is by no means clear that this question was fairly presented to the trial court. No notice is taken of it in the memorandum of decision. The finding was clearly made with no regard to it, and the plaintiff does not discuss it in his brief. If, however, it is presented for our decision, the finding is not so barren of pertinent facts

that the right of the plaintiff to sue in his representative capacity is not disclosed. By the provisions of section 362 of the General Statutes (Rev. St. 1902), first enacted in 1855, the plaintiff is entitled to the possession of his intestate's realty during the settlement of the estate, and its income and products, which vests in him as personal estate. Disregarding any right which the first portion of the statute might be claimed to confer upon an administrator, two facts are fairly deducible from the finding, to wit: (1) That the real estate in question comprised not only all the real estate of James Doolan in this state, but the sole source of assets thereof; and (2) that a claim for some sum, at least, against the estate, existed in favor of Elizabeth. No means, therefore, exist for the payment of either the expenses of settlement or claims, unless the administrator can avail himself of the income, and possibly the avails, of the corpus of the real estate in controversy. He therefore has an interest sufficient to enable him to maintain his action. *Livingston v. Bird*, 2 Root, 440; *Andrus v. Doolittle*, 11 Conn. 283; *Sheldon v. Bradley*, 37 Conn. 324.

There is no error. The other judges concurred.

(75 Conn. 683)

CONNECTICUT TRUST & SAFE DEPOSIT CO. v. CHASE et al.

(Supreme Court of Errors of Connecticut. June 10, 1908.)

WILLS—CONSTRUCTION—LEGACIES—ADEMPTION—STOCKS AND BONDS—DEBENTURE CERTIFICATES—MORTGAGES.

1. A will directed the executors to sell certain real estate belonging to testatrix, and provided for the distribution of the proceeds of the sale. Thereafter testatrix herself sold the property to the trustees of a certain company, taking therefor a note and mortgage; the former stating that it was given in accordance with a declaration of trust under which the trustees acted. This declaration of trust provided that the trustees should have no power to bind the shareholders in the company personally, and that the person contracting with the trustees should look only to the funds and property of the trust for payment under such contract. At the time of testatrix's death a portion of this mortgage was unpaid. *Held*, that the legacies payable out of the proceeds of the property were not adeemed.

2. A devise of a specific portion of the land sold for the purpose of the erection of a church was, however, revoked by the conveyance.

3. A will bequeathed to certain persons the income of all loans belonging to testatrix secured by mortgage on real estate. When the will was executed, and also at her death, testatrix owned certain mortgage loans of this description. Subsequent to the making of the will she sold a tract of realty, taking therefor a note and mortgage, which provided in effect that the note should create no personal liability, and that the land only should be liable for the debt. *Held*, that this mortgage and note did not come under the description of “all loans secured by mortgage upon real estate.”

4. A will bequeathed “all of testatrix's stocks in any and all corporations” to certain parties. At the time of testatrix's death she owned debenture certificates of a corporation, issued for

money borrowed, bearing interest and convertible after 10 years, at the option of the holder, into shares of stock of the company of the same par value, and, if he did not avail himself of the option, then payable in cash in 15 years. *Held*, that these debenture certificates were not within the bequest.

5. Neither could the legatees of such stocks claim the stocks for which the debenture certificates might be exchanged.

6. A will provided that "from the avails of said house I also give to the town of C. the sum of \$500, * * * to be expended," etc. "I also give, as a further memorial for my parents, * * * \$500, to the Baptist Church of C., * * * to be used," etc. *Held*, that the legacy to the church was payable only out of the proceeds of the house.

Case Reserved from Superior Court, Hartford County; Milton A. Shumway, Judge.

Action by the Connecticut Trust & Safe Deposit Company, as administrator cum testamento annexo, against James B. T. Chase and others, for construction of the will of Cornelia S. Chase, deceased. Case reserved, and decree advised.

The will was dated March 1, 1895. The testatrix died December 10, 1901. She was a widow, with two adopted daughters. After giving legacies to a stepson and a sister of her husband, she gave her daughters "the income, during their respective lives, each one-half thereof, of all my stocks in any and all corporations, except those hereinbefore specifically bequeathed, together with the income from any and all loans secured by mortgage upon real estate," with remainders over. She then devised to them a lot on Belmont avenue, in Springfield, and to the First Baptist Church of Springfield a lot on Ft. Pleasant avenue, in Springfield, provided it should build a church and parsonage thereon within 10 years, in which case it was to receive also \$5,000, all this to be a memorial of her husband. The will also contained the following provisions:

"(7) As soon as a favorable opportunity arrives therefor, I direct my executor to sell my real estate situated on the southerly side of Ft. Pleasant avenue, except that specifically bequeathed, being all my land in Springfield, and being the same shown upon a plan thereof prepared by George N. Merrill; and I direct that from the proceeds of such sale six thousand dollars (\$6,000.00) be given to each of my daughters above mentioned, to the end that they may purchase homes for themselves; one thousand dollars (\$1,000.00) to Sarah Thornton Chase, of Newport, R. I.; one thousand dollars (\$1,000.00) to Jessie Chase, of said Newport; four thousand dollars (\$4,000.00) to William Jotham Chase, son of J. B. T. Chase, the same to be expended upon his education; five hundred dollars (\$500.00) to John Santry, of New Haven, Conn.; one hundred and fifty dollars (\$150.00) to his sister, Mrs. Geo. Martin, of Lebanon, Conn.; one hundred dollars (\$100.00) to Ann Connolly, of Hartford, Conn.; one thousand dollars (\$1,000.00), each, to Elizabeth and Bertha Marshall, sisters, both of Spring-

field, Mass.; two hundred dollars to Mrs. Mahlon Chichester, of Shelter Island, Conn. (\$200.00); six hundred and seventy dollars (\$670.00) to the State Bank of Hartford, Conn.; five hundred dollars (\$500.00) to Mrs. Alonzo Hamilton, of Dorchester, Mass.; one thousand dollars (\$1,000.00) to Mrs. Eliza Marshall, of Springfield, Mass.; five hundred dollars (\$500.00) to Mrs. Harriet Wetherell, of Chicago, Ill.; one thousand dollars (\$1,000.00), each, to Cornelia Chase Thompson and Harold G. Thompson, of Willimantic, Conn.; two hundred dollars (\$200.00) to my cousin, Bessie Adams, of Cromwell, Conn. In case the avails of the sale of said real estate should not be sufficient to pay all the bequests named in this article, they are all to abate pro rata."

"(8) My house in Hartford, 76 Church street, I direct to be sold at such time as my executor shall deem expedient, and from the avails thereof, unless before my death I make provision for the perpetual care of the lots, graves, and monuments hereinunder referred to, there shall be given to the Spring Grove Cemetery Association, of Hartford, the sum of five hundred dollars (\$500.00) for the perpetual care of the lot in its cemetery conveyed to my brother Samuel, being the lot in which he is buried, and for the perpetual care of the Luther Savage lot in the old North Burying Ground. I also direct that the family of James B. T. Chase, of Springfield, Mass., have the right of burial in the above-named Spring Grove Cemetery lot, on the west side of the monument, south of the graves of the Chase family. I direct that the family of Albert G. Thompson, of Willimantic, Conn., have the right of burial in said lot, south of the gate. I also direct that my daughter, Mrs. Ada Chase Hillman, and her husband, have the right of burial in said lot, on the northwest side, next to the grave of Jessie Maria Chase. Should Ann Connolly, of 76 Church street, Hartford, Conn., desire it, I direct that she have a burial place in said lot; her grave to be at the foot of that of Miss M. L. Savage, second tier. From the avails of said house I also give to the town of Cromwell, Conn., the sum of five hundred dollars (\$500.00), the interest of which is to be expended for the perpetual care of the grounds and graves of the Savage and Gridley families in the old burying ground, once called the 'North Society,' now of Cromwell. I also give, as a further memorial for my parents, Jesse and Maria Savage, five hundred dollars (\$500.00) to the Baptist Church of Cromwell, the interest of which is to be used for the benefit of the church. Whatever remains from the sale of my house in Hartford after payment of the specific bequests hereinbefore named therefrom, I give and bequeath, in the name of my sister, Maria L. Savage, in equal shares, to the Connecticut Baptist Education Society, the Connecticut Literary Institution of Suffield, Conn., the American

Baptist Missionary Union, the American Baptist Home Mission Society, the Woman's Baptist Foreign Missionary Society connected with the First Baptist Church of Hartford, Conn., the Woman's American Baptist Home Mission Society connected with the First Baptist Church of Hartford, Conn."

There was a general residuary devise and bequest in favor of certain charities.

On June 15, 1897, the testatrix sold and conveyed all her land on Ft. Pleasant avenue to James D. Safford and four others, as trustees of the Riverview Heights Company, for \$85,000, and in part payment took a note for \$65,000, secured by a mortgage of the same date to her of the land. The following is a copy of the note:

"\$65,000.

"Springfield, Mass., June 15, 1897.

"Seven years after date, for value received, we, the trustees of the Riverview Heights Company, according to a declaration of trust, recorded in Hampden County registry of deeds, and in accordance with section six (6) of said declaration, promise to pay Cornelia S. Chase, or order, sixty-five thousand dollars, with interest semiannually at the rate of five per cent. per annum.

"James D. Safford,

"Edwin A. Carter,

"Lewis F. Newman,

"Christopher I. Gagnier,

"Pierre Angers,

"Trustees of the Riverview Heights Co."

A declaration of trust by the trustees in favor of the shareholders of the Riverview Heights Company was so recorded, and its sixth section provided that "the trustees shall have no power to bind the shareholders personally, and in every written contract they shall enter into reference shall be made to this declaration of trust, and the person or corporation contracting with the trustees shall look only to the funds and property of the trust for payment under such contract, or for the payment of any debt, damage, judgment, or decree, or of any money that may otherwise become due and payable by reason of the failure on the part of said trustees to perform such contract in whole or in part, and that neither the trustees nor the shareholders, present or future, in this company, shall be personally liable therefor."

Prior to her death the testatrix received partial payments upon the principal of said mortgage indebtedness, and released certain portions of said land from the obligation of said mortgage, in pursuance of an agreement made between the testatrix and the mortgagors, dated June 15, 1897. At the time of her death the amount unpaid upon the principal of said mortgage note was \$35,000. There was no evidence as to what she did with the \$50,000 which she had received of the purchase money. On February 23, 1901, in consideration of the personal guaranty by said James D. Safford of the pay-

ment of the balance then due on the note, with interest at 4½ per cent., she reduced the rate of interest to that figure. Up to the time of her death she remained on friendly terms with all the legatees named in clause 7 of her will, and was desirous that William Jotham Chase, a boy who was her stepson's child, should receive a liberal education. Before her death she also sold and conveyed the lot on Belmont avenue. When she made her will, and at her death, she owned sundry mortgages of real estate given her for money lent. At her death she owned debenture certificates of the New York, New Haven & Hartford Railroad Company, of the par value of \$2,000, issued for money borrowed, bearing interest at the rate of 4 per cent., and convertible after 10 years, at the option of the holder, into shares of stock of the company of the same par value, and, if he did not avail himself of the option, then payable in cash in 15 years. She also owned stocks in sundry corporations, not specifically bequeathed, of the value of over \$83,000. The amount due on the note at the death of the testatrix was so secured as to be collectible.

John T. Robinson, for plaintiff. Charles Phelps, for defendants Corinna Josephine, Chase Thompson and others. Jonathan Barnes and J. Warren Johnson, for defendants James B. T. Chase and others. William Waldo Hyde, for defendants Eliza M. Marshall and others. William B. Smith, for defendant Connecticut Literary Institution. D. W. Perkins, for defendant American Baptist Home Mission Society and others.

BALDWIN, J. (after stating the facts). The legacies given in clause 7 of the will were not adeemed by the sale of the Ft. Pleasant avenue property. The purchase price was not fully paid and by reason of the mortgage back the testatrix remained always invested with a legal title to the land. *Searle v. Sawyer*, 127 Mass. 491, 34 Am. Rep. 426. The balance due her, and evidenced by the mortgage note, no one was originally under any personal obligation to pay. The declaration of trust was so referred to in the note as virtually to become a part of it, and excluded any personal liability on the part of the trustees. The testatrix could only look to the funds and property of the Riverview Heights Company, and it does not appear that it owned anything except what it acquired by the purchase from her. *Shoe & Leather National Bank v. Dix*, 123 Mass. 148, 151, 25 Am. Rep. 49. A few months before her death she obtained, for a consideration, a guaranty from one of the trustees; but, if the legacies were not adeemed by the sale, they were not adeemed by her thus adding to her security for the balance of the purchase money.

The land sold comprised one parcel which she had conditionally devised to the First

Baptist Church, and another which she had directed her executor to sell at the first favorable opportunity for the purpose of raising money to pay certain bequests. The sale rendered it impossible for the First Baptist Church to fulfill the conditions of the devise to it. That devise was, therefore, clearly revoked by the conveyance to the trustees. But the sale facilitated the payment of the legacies. It provided a sufficient fund to meet them, if it can be used for that purpose, whereas the will contemplated a possible deficiency. This fund was nothing but a charge upon the land described in clause 7, and on that which had been the subject of the revoked devise to the church, or possibly a charge upon these lands and other property of the Riverview Heights Company. It has not been contended by any of the parties before us that there is not enough of the land described in clause 7 remaining unsold by the trustees of the Riverview Heights Company, and subject to the mortgage lien, to make it certain that the amount necessary to satisfy these legacies (about \$25,000) can be collected upon the note; and for the purposes of this decision the mortgage may be regarded as if it rested solely upon such land.

A total ademption by acts of a testator occurs in two cases only: (1) When he gives in his lifetime to a legatee what he had left him in his will; or (2) when, before his death, he so deals with the subject of the bequest as to render it impossible to effect the transfer or payment which the will directs. In the case at bar, it was admitted by the counsel for all the residuary legatees who appeared at the hearing that none of the legacies provided for by clause 7 were paid by the testatrix. The finding shows that her dealings with the subject of the bequest have changed its form, but not its substance. The same land remains under the power of her executor. He can use it to satisfy the legacies, not indeed, in the first instance, by selling it, but by requiring its present owners, as a condition of their retaining title, to pay to him a sum sufficient to discharge them.

In *Arnold v. Arnold*, 1 Brown's Ch. Cas. 401, 2 Dickens, 646, Lord Chancellor Thurlow held that a devise to trustees to sell and pay the proceeds to certain beneficiaries was rendered inoperative in their favor by a sale of the land subsequently made by the testator himself. That was a case where a conveyance of the legal title to one, while ambulatory, and so in the nature of an undelivered deed, was revoked by a later conveyance of the legal title to another by a deed which was delivered. The will was a conveyance; the deed was a conveyance; and, after the deed was delivered, the subject of the testamentary conveyance was absolutely and forever removed from the control of the testator. In the case at bar, the legal title was never devised to the executor. He had merely a power. The object of the power

was a conversion, and as to any question of succession under such a will the conversion is to be regarded as if made at the instant of the testator's death. *Bates v. Spooner*, 75 Conn. 501, 54 Atl. 305. The land devised, also, remained by the act of the testatrix charged in favor of her or her estate with a payment sufficient to meet the legacies. The charge made by the will was in effect continued by the deed, and the only real change is that the executor now is to sell or collect a note secured by a mortgage of the land, instead of selling the land itself.

The adopted daughters of the testatrix have the largest legacies under the clause in question. In determining whether they or the residuary legatees are to profit by the mortgage note, the reason of the rule that heirs are not to be cut off by doubtful implication supports their claim.

They are also given life interests in "the income from any and all loans secured by mortgage upon real estate." When the will was executed, and also at her death, the testatrix owned certain mortgage loans of this description. The daughters assert a right either to the income from the mortgage note of the trustees of the Riverview Heights Company, or, if that be disposed of to pay legacies, then from whatever may be derived from any balance, not required for that purpose, that may remain. A loan, strictly speaking, whether secured or unsecured, only exists when something has been lent to one who is under an obligation to return it. That may, in a secondary sense, be called a loan secured by mortgage which is merely an indebtedness of the vendee for all or part of the price of property sold, secured by a mortgage back to the vendor. *Day v. Cohen*, 165 Mass. 304, 43 N. E. 109. To describe by such terms a mortgage in favor of a vendor upon land sold, when there is no one personally indebted or liable for the sum secured, would be to employ them in a sense still more unreal and remote. When a word used in a will has a strict and primary meaning, and also a secondary meaning, it is a sound rule of construction that it is to be given the former, unless the context indicates that the testator intended otherwise, if, thus understood, the provisions of the will, as applied to his estate, would have an intelligible and sensible import. *Leake v. Watson*, 60 Conn. 498, 508, 21 Atl. 1075. There is nothing in the other provisions of the will before us to qualify the primary meaning of the words employed in stating this legacy. On the contrary, it is plain that the testatrix did not contemplate her leaving at her death mortgages on any of the Ft. Pleasant avenue lands. Part she had devised to a church, and the rest she had directed to be sold for a specific purpose, to effectuate which prompt payment in cash would be required.

Nor are the daughters entitled to the income from the railroad debenture certificates, under the bequest to them of the income of

all the stocks of the testatrix in any and all corporations. These certificates were not stocks. They were only convertible into stocks at a certain time subsequent to her decease, at the option of the holder; but, if he did not so elect, they would remain what they originally were—certificates of indebtedness for money borrowed. These legatees could not claim the interest which might be collected upon them before that time arrived; for it would not be income on stocks. They could not, after the time arrived, in case a conversion were made, claim the dividends on the stock received in exchange; for it would not be stock which ever belonged to the testatrix.

The legacy to the Baptist Church of Cromwell is payable only out of the proceeds of a sale of the Hartford house. Its position in clause 9, in immediate juxtaposition before and after with legacies only so payable, taken in connection with the use of the word "also," sufficiently indicate such to have been the intent of the testatrix.

The superior court is advised that (1) the legacies given by clause 7 are payable, and payable only, out of whatever may be collected on or received from the mortgage note secured on the Ft. Pleasant avenue land; (2) any balance remaining from such collection or receipts falls into the residuary estate; (3) the debenture certificates of the New York, New Haven & Hartford Railroad Company are also part of the residuary estate; and (4) the legacy to the Cromwell Church is payable only from the avails of the Hartford house. No costs will be taxed in this court in favor of any party. In this opinion the other Judges concurred.

(75 Conn. 689)

GOLD BLUFF MINING & LUMBER CORP.
et al. v. WHITLOCK et al.

(Supreme Court of Errors of Connecticut. June 10, 1903.)

CORPORATIONS—STATUTES—BY-LAWS—CHANGING BY-LAWS—ELECTING ADDITIONAL DIRECTORS—AUTHORITY.

1. Under Gen. St. 1902, § 8366, providing that the directors of corporations organized under the statute shall be chosen annually at such time as the by-laws provide, and section 8377, providing that by-laws may be amended at any stockholders' meeting, the stockholders of a corporation may change the time for the annual meeting of the corporation.

2. Gen. St. 1902, § 3366, provides that corporations organized under the statute shall have three or more directors, who shall be chosen annually, as provided by the by-laws, and that they shall hold office for one year. Section 3377 provides that at any stockholders' meeting the by-laws may be amended. *Held*, that where the exigencies of the business of a corporation, or the inability or refusal of its directors to care for the interest of the stockholders, requires an increase in the number of directors, and the by-laws are amended so as to provide a new date for the annual meeting, at such meeting the additional directors may be elected.

3. Gen. St. 1902, § 3366, provides that every corporation organized thereunder shall have three or more directors, who shall hold office

for a year, and who may fill any vacancy in the board for the unexpired portion of the term. *Held*, that the provision does not apply to newly created directorships, but merely gives the directors authority to appoint for the remainder of a term which has been partly filled.

4. Gen. St. 1902, § 8377, provides that no by-law of a corporation organized under the statute shall be adopted, unless notice of the proposed action shall have been given in the call for the meeting at which the adoption, amendment, or repeal is to be acted on. *Held*, that failure of a call for a meeting to state properly that it was the purpose to amend the by-laws by changing the date of the annual meeting would not be sufficient reason for granting an injunction restraining any such change, since the insufficiency of the notice would not prevent the proposed change if all the stockholders were present and voting, and since a proper notice of another meeting might be given.

Case reserved from Court of Common Pleas, Fairfield County; Howard J. Curtis, Judge.

Action by the Gold Bluff Mining & Lumber Corporation and others against Sturges Whitlock and others for an injunction to restrain defendants from voting to elect additional directors before the next annual meeting of the corporation and from changing the by-laws for that purpose. Case reserved for the advice of the Supreme Court of Errors on defendants' demurrer to the prayer for relief. Judgment advised for defendants.

Edward A. Harriman, for plaintiffs. Prentice W. Chase, for defendants.

HALL, J. The complaint alleges, in substance, that the plaintiff company was organized in 1902, under the general corporation act of 1901, with a capital stock divided into 1,200 shares of \$100 each, of which the plaintiffs Walter Randall and Alton T. Terrell are each the owners of 280 shares, the defendant Sturges Whitlock of 578 shares in his own right and 60 shares as trustee, and the defendants Prentice W. Chase and Charles H. Brewer each of one share; that the board of directors, consisting, under the present by-laws, of three members, is composed of the plaintiffs Randall and Terrell and the defendant Whitlock, all elected at the first stockholders' meeting in November, 1902, at which meeting said Whitlock was elected president, said Terrell secretary, and said Randall treasurer of the company; that the annual meeting for the election of directors is, by the by-laws, required to be held in the month of November of each year; that the defendant Whitlock, as president, has issued a call for a special meeting of the stockholders of the corporation to be held in April, 1903, the purpose of which, as stated in the written notice, is to amend the by-laws by changing the number of directors from three to five, to elect two additional directors, and to change and amend the by-laws to conform to the necessities and requirements for the proper management of the affairs of the company; that the defendants intend at such meeting to elect two directors, who will un-

lawfully attempt to act as members of the board of directors, and, in combination with the defendant Whitlock, will claim to be a majority of the board of directors, and will endeavor to bind the corporation by their acts, in disregard of the wishes of the present lawful board of directors, and that the defendants intend at said meeting to change the by-laws of the corporation, without having given the required notice of the intended change; that the plaintiff corporation is the owner of a large mining property in the state of California, which requires skillful care and management, and that said action of the defendants would cause such a conflict of authority as would work an irreparable injury to the plaintiffs.

The plaintiffs ask for an injunction restraining the defendants from voting to elect any persons directors of the corporation before the next annual meeting, and from making at said special meeting any other change in the by-laws than by providing that the number of directors to be chosen at the next annual meeting be increased from three to five, and from making any other change in the by-laws without having given legal notice thereof to the stockholders. The defendants demur to the prayer for relief, substantially upon the grounds that it appears from the complaint that the special meeting was legally called, and that it does not appear that the proposed action of the defendants in changing the by-laws of the corporation and electing two additional directors is unlawful.

The right of the defendants to amend the by-laws at the special meeting, so as to provide for the election of additional directors at the next annual meeting, is not questioned; but it is argued that an immediate election of the additional directors at the special meeting would be in direct conflict with the provisions of the corporation act under which the plaintiff association was organized. The section referred to (section 3366, Gen. St. 1902) provides that "the property and affairs of every such corporation shall be managed by three or more directors, who shall be stockholders, and shall be chosen annually by the stockholders, at such time and place as may be provided by the by-laws. The directors shall hold office for one year and until others are chosen and qualified in their stead, and may fill any vacancy in their board for the unexpired portion of the term. * * * Section 3377 provides that at any stockholders' meeting "by-laws may be adopted, or the by-laws previously adopted may be altered or repealed. No by-law shall be amended or repealed, unless written notice of such proposed action shall have been given in the call for the meeting, at which such adoption, amendment or repeal is to be acted upon."

The plaintiff company is a private business corporation, voluntarily formed under an act

of the Legislature, for the pecuniary profit of its stockholders, the contract of membership in which is in many respects similar to that existing between the members of commercial partnerships (*Pratt v. Pratt, Read & Co.*, 33 Conn. 446-456), and to the management of the affairs of which, and to the appointment of its directors and agents, the rules and principles regulating the government and election of officers of public corporations, between whose corporators no such contractual relation exists, have little application. *State v. Tudor*, 5 Day, 329-335, 5 Am. Dec. 102. The directors are the agents of such a private corporation, chosen by the shareholders to carry out the chartered purposes of the corporation. Practically the stockholders are the corporation, and there is between them an implied agreement that the majority shall have "supreme authority to direct the policy of the corporation in attaining its chartered purposes, and shall have the power to appoint the usual managing agents, to whom the immediate control and direction of the company's business is delegated." 1 *Morawetz, Corp.* §§ 34-474-515-516. But such power of the majority does not enable them to directly overrule or control the action of a majority of the board of directors, acting within the discretionary powers intrusted to them as agents of the corporation. It can only be exercised by the legitimate methods pointed out by the by-laws or charter of the association, or the statute law under which it is organized. Such control over the policy of the company and the management of its property is generally properly and lawfully exercised by a majority of the stockholders, through the power given them by charter or statute to enact by-laws and to determine, by removal and appointment, the persons, and the number of persons, usually within certain limits, who shall act as the directors and agents of the corporation. 3 *Thomp. Corp.* § 3972.

Under the present by-laws the annual meeting for the election of directors is to be held in November, and the board of directors consists of three members. But under the statute the stockholders may by by-laws fix the time when directors shall be annually chosen, may alter or repeal by-laws previously adopted, and may appoint more than three directors. By a proper use of their power to fix the time for the election of directors, the stockholders, by altering the by-laws, may undoubtedly change the date of the annual meeting, and such a change would necessarily require the next election of directors to be held either within or after a year from the last previous election. It may well be doubted whether, under our statute, by changing the date of the annual meeting to a date considerably within a year from that now fixed, the defendants could shorten the terms of any of the present directors, by appointing, on said changed date, other persons to fill their places. But

that question is not before us, since the statement, both in the call for the meeting and in the complaint, is only that the two additional directors, and not successors to the present directors, are to be appointed at the meeting called.

It would be competent for a majority of the stockholders at a special meeting to amend the by-laws, so as to increase the number of directors from three to five, and upon the adoption of such an amendment they would be entitled to have the additional directors immediately appointed. If the exigencies of the company's business, or the inability or unwillingness of its directors to properly care for the property or interests of the shareholders, requires an immediate increase of the number of directors, there seems to be no good reason why the stockholders should be compelled to submit to the control of their three present agents until the expiration of the terms for which they were appointed, nor does the statute require them to do so. In *re A. A. Griffing Iron Co.*, 63 N. J. Law, 168, 41 Atl. 931.

If the by-laws should be amended, so as to increase the number of directors from three to five, and to change the date of the annual meeting to a date earlier than November 26th, and thereupon the two additional directors should be immediately appointed for one year, the present directors, as well as those newly appointed, would hold office, as the statute provides, for one year, and until others are chosen and qualified in their stead, and such action would not conflict with the real purpose of the requirement of the statute that directors shall be chosen annually. But it seems doubtful whether the provisions of the statute requiring directors to be chosen annually, and for the term of one year, were intended to apply to those who might be appointed upon an increase of the number of directors by an amendment of the by-laws at a special meeting, and whether, without changing the date of the annual meeting, such additional directors might not be immediately appointed, to hold office until the time of the next annual meeting. In *re A. A. Griffing Iron Co.*, supra. We do not deem it necessary to decide that question, as we understand the defendants propose to change the date of the annual meeting and to elect the new directors for the term of one year.

Upon an increase of the number of directors it would become the right and duty of the stockholders to choose the additional directors. The words of the statute empowering the directors to "fill any vacancy in the board for the unexpired portion of the term" are inapplicable to newly created directorships, and would not authorize the present directors to appoint the new members of the enlarged board. While the word "vacancy" may sometimes fitly describe the condition of an office which has never been filled, yet, when read with the other words

of the sentence, we think such meaning cannot properly be given to that word as here used. The words, "for the unexpired portion of the term," clearly indicate that the directors may appoint, not for a full term, but for the remainder of a term which has been partly filled by another. In *re A. A. Griffing Iron Co.*, supra.

The failure to state more particularly in the call for the special meeting that it was the purpose to amend the by-laws by changing the date of the annual meeting would not be a sufficient reason for granting the injunction prayed for, since an insufficiency of the notice would not prevent the making of the proposed change, all the stockholders being present and voting (*Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 117, 34 L. Ed. 706), and since a proper notice of another meeting may now be given.

The court of common pleas is advised to sustain the demurrer and render judgment for the defendants. In this opinion the other Judges concurred.

(75 Conn. 650)

VINCENT v. MUTUAL RESERVE FUND LIFE ASS'N.

(Supreme Court of Errors of Connecticut. June 10, 1903.)

WRIT OF ERROR—BOND TO PROSECUTE—SUFFICIENCY—PLEADING—AMENDMENT—FAILURE TO CLAIM DAMAGES.

1. Under Gen. St. 1902, § 821, providing that the authority signing a writ of error shall, before its issue, take good and sufficient bond with surety that the plaintiff in error shall prosecute his suit to effect, the certificate of the giving of the security is not defective because denominating such security a "recognizance," instead of a "bond."

2. A writ of error was indorsed with a memorandum to the effect that "C. H. is recognized in the sum of \$50 to prosecute." Held, that such memorandum imported that plaintiff in error was the principal, and C. H. the surety, and was a sufficient bond, within the statute.

3. Where a writ contains no *ad damnum* clause, or other formal claim for damages, the court nevertheless has jurisdiction to allow such a clause to be inserted by amendment, under Gen. St. 1902, § 643, providing that whenever, in any civil action, the claim for damages shall be so stated that the court has no jurisdiction, such court may allow the writ to be amended.

Error from Superior Court, New Haven County; Ralph Wheeler, Judge.

Action by Mary Vincent against the Mutual Reserve Fund Life Association. Order erasing the cause from the docket, and plaintiff brings error. Reversed.

In this court the defendant in error filed a plea in abatement of the writ on the ground that no bond with surety for the prosecution of the writ had been taken at the time the writ was issued, to which plea the plaintiff demurred. By consent the case was heard at the same time upon the demurrer and upon the merits. Demurrer sustained and plea

¶ 3. See Pleading, vol. 29, Cent. Dig. § 731.

in abatement overruled. Upon the merits, error order of erasure reversed, and cause remanded. The case is stated in the opinion.

Charles S. Hamilton, for plaintiff in error.
James H. Webb, for defendant in error.

TORRANCE, C. J. The demurrer to the plea in abatement will be first considered. The only entry upon the record with regard to the taking of a bond for the prosecution of the writ of error was the following memorandum on the writ: "Charles S. Hamilton, of New Haven, is recognized in the sum of \$50 to prosecute." The statute (section 821, Gen. St. 1902) provides that the authority signing a writ of error "shall before its issue take good and sufficient bond with surety, that the plaintiff in error shall prosecute his suit to effect and answer all damages if he fail to make his plea good." The plea in abatement alleges, in substance, that, when the writ of error in this case was issued, no bond was taken, other than such a bond as is indicated by the certificate or memorandum in relation to that matter noted upon the writ, and that such a bond does not comply with the requirements of the statute. The ground of the demurrer is, in substance, that the plea admits the truth of the facts stated in the certificate or memorandum, and that in so doing the plea admits that a proper recognizance, and therefore a proper bond, was taken when the writ issued. The decision of the question presented by the demurrer turns upon the construction of the certificate. The certificate states, not that a bond, but only that a recognizance, was taken; but a recognizance is a bond, within the meaning of the section of the statute above recited. *New Haven v. Rogers*, 32 Conn. 221; *Lovejoy v. Isbell*, 70 Conn. 557, 40 Atl. 531. The plaintiff in error contends that the certificate imports that a bond with surety was given, while the defendant in error contends that its import is that a bond without surety was given; so that the only dispute between the parties is whether the certificate imports that the bond given was with or without surety. The certificate is in the form permitted by statute to be used, in writs of summons or attachment, where a bond for prosecution is required by statute, for noting the fact that such a bond has been taken. In such writs the fact that such a bond was taken may be noted on the writ in the statutory form, "or in words to that effect." Section 715, Gen. St. 1902. In such writs, under certain circumstances, the recognizance required is either (1) that of the plaintiff, as principal, with some substantial inhabitant of the state as surety; or (2) that of some substantial inhabitant of the state alone (section 714, Gen. St. 1902); and the statutory form of noting upon the writ the fact that a recognizance was taken imports that one or the other of these forms of recognizance was used, but does not indicate which was in

fact used. Such a certificate is at least prima facie evidence, and, when the facts stated in it are admitted, is conclusive evidence, that a recognizance in one or the other of these forms was taken; and the short certificate may be expanded into the full and formal recognizance of the form actually taken, whenever it becomes necessary to do so. *Watson v. Watson*, 9 Conn. 141-145, 23 Am. Dec. 324; *Gregory v. Sherman*, 44 Conn. 466; *Bradley v. Vall*, 48 Conn. 375. Where our statutes merely require that a bond for prosecution shall be taken on the issue of a writ of any kind, it has never been the practice to set out the bond in the writ. It has always been deemed sufficient to note briefly upon the writ the fact that such a bond had been taken. *Hosmer, C. J.*, in *Watson v. Watson*, 9 Conn. 141-145, 23 Am. Dec. 324. This practice has been followed in cases of writs of error, as may be seen from the many cases of that kind scattered through our Reports, one example of which is seen in the case of *Riply v. Merchants' National Bank*, 41 Conn. 187.

We will assume, without deciding, that a writ of error is not a writ of summons or attachment, within the meaning of the statute (section 715, Gen. St. 1902). Upon that assumption, no statutory form, permissive or otherwise, for noting upon the writ of error the fact that a bond was taken, exists; but the general practice in such cases has been to follow the form used for that purpose in cases of writs of summons and attachment. Where that is done, as in the case at bar, we think the certificate should receive the same construction as if it were contained in a writ of summons or attachment.

In this view of the matter, the certificate here in question imports either (1) that the plaintiff, as principal, and some substantial inhabitant of this state as surety, became bound; or (2) that some substantial inhabitant of the state alone became bound. If the recognizance actually was in the first of the above forms, then it is clear that it fully complied with the statute (section 821, Gen. St. 1902) requiring a bond with surety to be taken on the issue of the writ of error.

It remains to determine whether, if the recognizance noted was taken in the second of the above forms, it would be, equally with the first, a compliance with the statute. The certificate shows that the recognizance was entered into by an inhabitant of this state, and one not a party to the suit, and no question is made about his being a substantial inhabitant. The certificate, upon this view of it, imports that a substantial inhabitant of this state entered into a bond for the prosecution of the writ of error; and this means that, in effect, the plaintiff in error is the principal in that recognizance, and that the substantial inhabitant is a surety. "In 1875 the Legislature passed the act which now enables a bond for costs to be given either by the plaintiff

with surety, or by the surety without the plaintiff. Pub. Acts 1875, p. 24, c. 42. The effect of this act was to treat a bond by the surety as the equivalent of a bond by the plaintiff with surety." *Lovejoy v. Isbell*, 70 Conn. 557-560, 40 Atl. 531. The bond for prosecution of a writ of error, taken in either of the forms aforesaid, furnishes the defendant in error substantially the same security, and the difference between them is practically of no importance.

We think the certificate in the case at bar, in either of these two views of it, imports, in legal effect, that such a bond with surety was taken when the writ was issued as the law requires, and that consequently the demurrer to the plea in abatement must be sustained, and the plea overruled.

Upon the merits of the case at bar the principal question is whether the court below erred in holding that it had no jurisdiction of a certain cause brought before it by the plaintiff in error against the defendant in error. It appears from the record that said cause was brought before the superior court in New Haven county in April, 1901. The complaint in that case alleged in substance (1) that the defendant therein was a life insurance company duly empowered to issue the life insurance policy set out in the complaint; (2) that in February, 1901, the defendant, in consideration of certain sums of money as premiums paid and agreed to be paid by the plaintiff to the defendant, made and delivered to the plaintiff its policy of insurance upon the life of one Ann Murphy, the mother of the plaintiff, thereby insuring the life of Ann Murphy in the sum of \$1,000, payable to the plaintiff, under the conditions set forth in the policy; (3) that said Ann Murphy, while said policy was in full force, died in March, 1900; (4) that the plaintiff and Ann Murphy had fulfilled all the conditions of said policy on their part to be kept and performed, and that due proof of said death had been made according to the requirements of the policy; (5) that the amount of said insurance had not been paid. The complaint contained no formal claim for damages, nor any clause whatsoever commonly known as the "ad damnum clause." Within the proper time the defendant in said cause filed in the court below a plea to the jurisdiction, and also a motion to erase the cause from the docket, both based upon the want of any claim for damages or ad damnum clause in the complaint. On the next day after said plea and motion were filed, and within 30 days after the return day, the plaintiff filed an amendment to her complaint, in which, after the last paragraph of the complaint, she inserted the following: "The plaintiff claims fifteen hundred dollars (\$1,500) damages." On motion the court expunged this amendment, and then erased the case from the docket, on the ground that, for want of a claim for damages in the complaint, the court had no jurisdiction of the

cause, and no power to allow the amendment offered. In so doing the court below undoubtedly, and naturally enough, felt bound by the decision in the case of *Deveau v. Skidmore*, 47 Conn. 19, and other cases of that kind in our Reports. We think, however, that the case at bar, upon the point now in question, cannot be distinguished from the case of *Sanford v. Bacon*, 75 Conn. —, 54 Atl. 204, recently decided by this court, and that the decision in that case must govern in this. In that case the complaint asserted that the plaintiff made a claim, but it failed to state the thing claimed. The claim, as stated, was in effect no claim. The plaintiff, in effect, demanded nothing, because he failed to state what he demanded. In cases where jurisdiction does or may depend upon the amount stated in the claim or ad damnum, there is no difference between failing to state what you claim, and making no claim at all. The effect is the same, for all practical purposes. The facts in the case at bar upon the point now under consideration are substantially like the facts in *Sanford v. Bacon*, supra. In that case we held that the law as enunciated in *Deveau v. Skidmore* was essentially changed by the statute; that the statute (section 643, Gen. St. 1902) applied to cases where no claim is stated, as well as to cases where a sum below or above the jurisdictional limit of the court is claimed as damages; and that under this statute the court had power to allow the writ or complaint to be amended so as to bring the cause within the jurisdiction of the court, if the writ might have been drawn originally as so amended. For the reasons given in that case, we think the court below, in not allowing the amendment offered, and in ordering the cause erased from the docket, committed an error, for which said order must be reversed. The demurrer to the plea in abatement is sustained, and the plea is overruled.

There is error. The order erasing the cause from the docket of the superior court is reversed, and the cause remanded to that court, to be proceeded with in the manner provided by law. The other Judges concurred.

(205 Pa. 420)

WARWICK IRON & STEEL CO. v. McKEAG.

(Supreme Court of Pennsylvania. May 4, 1903.)

APPEAL—DISMISSAL—DEFECTIVE PAPER BOOKS.

1. Where the paper book shows that the proceedings below were on a case stated, but contains no docket entry, and no judgment or assignment of error, the appeal will be dismissed.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Warwick Iron & Steel Company against Wallace McKeag. Judgment

for plaintiff, and defendant appeals. Appeal quashed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Harry E. Kohn, for appellant. Louis L. Tafel, for appellee.

BROWN, J. When this case was called for argument, we directed attention to the insufficiency of appellant's paper book, and on that account were inclined to quash the appeal. We heard argument, however; thinking that, deficient as the paper book was, we might be able to gather from it whatever would be needed to enable us to properly dispose of the appeal. This we have not been able to do. The judgment of the court below is not given, nor can we gather from appellant's argument, except by inference, what it was. There is not a single reference to it in the argument. There is no assignment of error, and we do not know of what the appellant complains. No docket entries are printed, and, if a judgment was entered by the court below, we are ignorant of its date, and cannot say that the appeal was taken in time to give us jurisdiction. If there was a judgment, the court may have filed an opinion to sustain its judgment; but, if so, we know nothing of it. No intelligent report could be made of the case from the paper book.

Appeal quashed.

(205 Pa. 491)

MCCLOSKEY et al. v. MCCLOSKEY et al.
(Supreme Court of Pennsylvania. May 4,
1903.)

RESULTING TRUST—EVIDENCE—WHAT CONSTITUTES.

1. Under Act April 22, 1856 (P. L. 533), providing that all creations of trusts in land shall be void unless in writing, but that any conveyance by which a trust shall arise shall be excepted from such prohibition, does not create a trust by implication where the trustee under a trust created by parol refuses to carry out his agreement.

2. Testator devised all his estate on the death of his wife to his daughters. There was no evidence of any fraudulent representations by the daughters at the time of the execution of the will. *Held*, that an alleged promise by the daughters, after the execution of the will, to the testator, that after the death of their mother they would hold a portion of the estate in trust for their two brothers, who were insolvent, will not be enforced in equity, such trust being by parol, and not within the exceptions of Act April 22, 1856 (P. L. 533), as a trust ex maleficio.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Charles B. McCloskey and others against Annie C. McCloskey and others to enforce a trust. Demurrer to bill sustained, and plaintiffs appeal. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Joseph S. Goodbread, for appellants. Elias P. Smithers and Furman Sheppard Phillips, for appellees.

BROWN, J. The trust which the appellants pray may be declared as existing for them rests entirely in parol. Their allegation is that it was created by William McCloskey, now deceased, who was the father of Charles B. McCloskey, one of the appellants, and of John McCloskey, who died since his father, and whose widow and children are the other appellants. The bill of complaint sets forth that, as John McCloskey and Charles B. McCloskey had become financially involved, their father, the said William McCloskey, was anxious that no part of his estate which might go to them after his death should be liable for their indebtedness, and consulted with his wife and children as to the best means to be adopted by him to prevent the shares of the sons from falling into the hands of an uncle, who was their creditor; that, as a result of the father's deliberation and consultation with his wife and children, he caused his will to be written; and that, by its terms, with the exception of two legacies of \$500 each, the testator bequeathed and devised his entire estate to his wife, Catherine M. McCloskey, for life, and after her death to his three daughters, Annie C., Sarah A., and Ellen B., the appellees. The averment in the bill relied upon by the appellants to establish the trust in their favor is that the father, after the execution of his will, informed and instructed his children that it was so written to protect his sons against the claim of their uncle, and "he then and there charged the defendants, his daughters, the said Annie C. McCloskey, Sarah A. McCloskey, and Ellen B. McCloskey, and his wife, Catherine M. McCloskey, that after the death of his wife, the said Catherine M. McCloskey, they, the said daughters, held two equal shares, or two equal fifth parts, of his entire estate in trust for their brothers, Charles B. McCloskey and John McCloskey, notwithstanding his said will to the contrary." There is a further averment that "the said Annie C. McCloskey, Sarah A. McCloskey, and Ellen B. McCloskey accepted the trust so reposed in them by their said father; that, from the time of making said will and up to the date of the death of their father, they from time to time declared that they held two equal shares, or two equal fifth parts, of the estate of their father, after their mother's death, in trust for their two brothers, the said Charles B. McCloskey and John McCloskey, as ordered and directed by their father."

The trust as set forth has nothing to support it, except the oral declaration of William McCloskey, after his will had been written, that he had created it for his sons, and had charged his daughters with the execution of it. It not only rests in parol, but is an express one, and those who would

have it enforced are confronted with the act of April 22, 1856 (P. L. 533), the fourth section of which is "that all declarations or creations of trusts or confidences of any lands, tenements or hereditaments, and all grants and assignments thereof shall be manifested by writing, signed by the party holding the title thereof, or by his last will in writing, or else to be void; provided, that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by implication or construction of law, or be transferred or extinguished by act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as if this act had not been passed." In the face of the foregoing provision, the trust in this case, as averred in the bill, cannot stand. "The plain meaning of this enactment is that a trust in land can now be proved in no other way than by writing." *Barnet v. Dougherty*, 32 Pa. 371.

Though the trust is set forth as an express one, created by parol, the applicants seek to avoid the effect of the act of 1856 on the ground that a trust has resulted to them from the fraud of the appellees, and is therefore within the exception of the act. But the only misconduct charged is that the appellees now refuse to recognize the trust, and that, notwithstanding their promise to be bound by it, they now declare they will not regard it. This is not enough to take the case out of the plain words of the statute. If no valid trust was created in the first instance by William McCloskey because he did not declare it in writing, there are no trustees to be bound by their promises, nor any cestuis que trustent to be protected. The statute of frauds would soon become a dead letter if the mere broken promise of a trustee, under a trust created by parol, who had agreed to carry it out, should, without more, be held sufficient to create a trust by implication within the exception of the act. It is only when a trustee refuses to perform or recognize a trust that courts are asked to declare its existence as against him, and, if a trust which has no legal existence under the statute can be brought in to being as within the exception simply because a trustee breaks his promise to perform, no case will be without the exception. "The statute of frauds would be worse than waste paper if a breach of the promise created a trust in the promisor which the contract itself was insufficient to raise." *Kelium et al. v. Smith*, 33 Pa. 158. The case is within the rule as laid down in *Barnet v. Dougherty*, 32 Pa. 371; *Willard v. Willard*, 56 Pa. 119; *Kistler's Appeal*, 73 Pa. 393; *Bennett v. Dollar Savings Bank*, 87 Pa. 382; *Barry v. Hill*, 166 Pa. 344, 31 Atl. 126; and *Martin v. Baird*, 173 Pa. 540, 34 Atl. 809—that, where there is nothing more in the transaction than arises from the violation of a parol agreement on the part of

the alleged trustee, equity will not decree a trust.

There is no averment in the bill that the testator was induced by the appellees to dispose of his estate as he did, or that any misrepresentation, artifice, or fraud was practiced upon him by his three daughters, causing him to make them the devisees of practically his whole estate upon the death of their mother. If there were such an averment, the demurrer, of course, could not be sustained; for, if the devise was procured under a distinct declaration or promise by the devisees that they would hold two-fifths of the land in trust for the appellants, they could not take advantage of their own bad faith and fraud, and there would be a trust to be sustained as coming within the proviso of the act. Where an absolute devise is procured through the promise of a devisee that he will hold it for such uses and purposes or for such beneficiaries as the testator may designate, the breaking of the promise, without which the devise would not have been made, is bad faith to the testator. If such promise be broken, the devisee, as the holder of a legal title procured by fraud, is turned by equity into a trustee *ex maleficio* of a trust arising out of his own bad faith, and not, therefore, within the statute of frauds. If he could profit from his bad faith, that statute, which is intended to prevent fraud, would itself become the instrument for the perpetration of it. But unkept promises, declarations, or misrepresentations which will create trustees *ex maleficio*, must be made before or at the time the legal title is acquired or the devise made; for nothing subsequently said by a grantee or devisee will turn an estate that had passed absolutely from the grantor or testator into a trust for others. The land of a grantor or testator, who alone can impress it with a trust, never passes from him so impressed, unless the impress is in writing, or he is induced at the time of his conveyance or devise to make it by reliance upon the pledged faith of his grantee or devisee, subsequently broken, that his express wishes will be carried out.

In construing the act of 1856, shortly after its passage, in *Barnet v. Dougherty*, *supra*, it was said: "The fourth section of that act enacts 'that all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, and all grants or assignments thereof shall be manifested by writing, signed by the party holding the title thereof, or by his last will in writing, or else to be void.' The plain meaning of this enactment is that a trust in land can now be proved in no other way than by writing. The proviso, indeed, excepts from its operation resulting trusts, such as the law implies. A resulting trust, however, is raised only from fraud in obtaining the title, or from payment of the purchase money when the title is acquired. Payment of the purchase money subsequently is not sufficient to

raise a legal implication of a trust, as all the authorities show. The defendant's offer in this case was not to show any fraud in making the purchase at sheriff's sale, such as to constitute Richards, or his grantee, Dougherty, a trustee *ex maleficio*. No misrepresentation, no mismanagement of any kind, was averred; none was offered to be proved. Yet it is fraud in the purchase which makes the holder of the title a trustee. Subsequent fraud, if any exist, no more raises a trust than does subsequent payment of the purchase money." The doctrine, as announced in that case, that a resulting trust arises only from fraud in obtaining the title, has been since repeatedly applied to devises as well. "That a trust *ex maleficio* is not within the prohibition contained in the seventh section of the statute of frauds and perjuries, 29 Car. 2, c. 3, which was adopted and enacted in this state by the fourth section of the act of April 22, 1856 (P. L. 533), has been the uniform doctrine of the English courts. Hill on Trustees, 59, and the cases there cited; to which may be added *Plumer v. Reed*, 38 Pa. 46, and *Beegle v. Wentz*, 55 Pa. 369 [93 Am. Dec. 762], decided by this court since the passage of the act. Indeed, it is not easy to see how such a trust ever could be made out except by parol evidence, and, if this is not competent, a statute made to prevent frauds would become a most potent instrument whereby to give them success. That this doctrine is applied to cases arising under wills where a person procures a devise to be made in his favor on the distinct declaration or promise that he will hold the land in trust either in whole or in part for another may be seen in the cases referred to in 1 *Jarman on Wills*, 356; 1 *Story's Equity*, § 256." *Church v. Ruland*, 64 Pa. 432. "Bound, therefore, as we must be, by the spirit and letter of the statute, we can but repeat what was held as law in the case of *Barnet v. Dougherty*, 32 Pa. 371, that a resulting trust can only arise from some fraudulent act by or through which the title had been obtained, or by the payment of the money of the alleged use party for the purchase of the property at the time when the conveyance is made, and that neither subsequent fraud nor subsequent payment will avail to raise such a trust." *Salter v. Bird*, 103 Pa. 436.

As there was no valid trust expressly declared in writing, as required by the act of 1856, or arising by implication, the appellees were entitled to judgment on the demurrer.

Judgment affirmed.

(205 Pa. 468)

ADAMSON v. SOUDER.

(Supreme Court of Pennsylvania. May 4, 1903.)

MARRIED WOMAN—DEED—RELEASE OF POWER—BONA FIDE PURCHASER.

1. Where a wife and her husband convey any interest they may have in the lands of the hus-

band's deceased brother, the joinder of the wife is only for the purpose of passing any inchoate right she may have in the lands of her husband.

2. Where land is conveyed as collateral security for an antecedent debt, the grantee is not a purchaser for value within the protection of the recording act.

Appeal from Court of Common Pleas, Philadelphia County; Willson, Judge.

Action by Joseph Adamson against Anna M. Souder. Judgment for defendant on special verdict, and plaintiff appeals. Affirmed.

The following was the special verdict:

"We find the following facts:

"April 13, 1861, the West End Land Association conveyed to Benjamin K. Souder, *inter alia*, the premises described in the writ, in terms as therein set forth, by deed recorded May 24, 1862, in deed book A C H, No. 49, page 274. On the same day Benjamin K. Souder made a declaration of trust in favor of Anna M. Souder, in terms as therein set forth, for all the premises described in the foregoing deed. This declaration of trust was recorded October 8, 1894, in deed book J J C, No. 12, page 15. Benjamin K. Souder died April 13, 1877, intestate, leaving surviving a brother, Joseph W. Souder (husband of Anna M. Souder), and two sisters, Catherine R. Souder and Margaret Manderson. No conveyance by him of the premises described in the writ was ever recorded during his lifetime. Joseph W. Souder and Anna M., his wife, by deed dated January 24, 1879, conveyed to Catherine R. Souder all the interest which they or either of them had in the lands of which Benjamin K. Souder died seised or possessed of, or in any way entitled to in terms as therein set forth; recorded January 24, 1879, in deed book L W, No. 14, page 93. Catherine R. Souder died October 29, 1886, leaving a will dated June 17, 1886, as offered in evidence, and letters of administration d. b. n. c. t. a. were granted thereon by the register of wills of Philadelphia county to Frederick G. Elliott on May 6, 1896. Frederick G. Elliott, administrator d. b. n. c. t. a. of Catherine R. Souder, deceased, by deed dated October 23, 1897, offered in evidence, conveyed to Joseph Adamson, the plaintiff, all the interest of Catherine R. Souder in the estate of Benjamin K. Souder, deceased, which she acquired under deed dated January 24, 1879, from Joseph W. Souder and Anna M., his wife, and of which said Catherine R. Souder died seised, as set forth in said deed. The last-mentioned deed was made in pursuance of the order of the orphans' court of Philadelphia county in certain proceedings, the record of which was offered in evidence, entitled 'Estate of Catherine R. Souder, deceased.' On January 30, 1895, Albert B. Parvin, substituted trustee, conveyed to Anna M. Souder, the defendant, the premises described in the writ, as set forth in said deed, which said deed was offered in evidence, recorded in

deed book J J C, No. 2, page 544. On January 25, 1895, Anna M. Souder presented her petition to common pleas No. 1, as of December term, 1894, No. 1,036, praying for the appointment of a substituted trustee in place of Benjamin K. Souder, then deceased, under the declaration of trust dated April 13, 1861, from Benjamin K. Souder to Anna M. Souder. Whereupon, on January 28, 1895, the court appointed Albert B. Parvin trustee to succeed Benjamin K. Souder, with like powers and duties, above record being offered in evidence."

"If under the facts the court be of the opinion that the plaintiff is entitled to recover, then we find in favor of the plaintiff, and judgment to be entered for the plaintiff. But if under these facts the court be of the opinion that the plaintiff is not entitled to recover, then judgment to be entered for the defendant, notwithstanding the verdict."

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Samuel H. Kirkpatrick and Edgar J. Pershing, for appellant. James E. Hood and Reginald H. Innes, for appellee.

BROWN, J. The legal title to the real estate in dispute was acquired by Benjamin K. Souder on April 13, 1861. On the same day he executed a declaration of trust declaring that he held the land in trust for Anna M. Souder, the appellee, as it had been paid for with her money. He died April 13, 1877, intestate, leaving, as his heirs, Joseph W. Souder, the husband of the appellee, and two sisters, Catharine R. Souder and Margaret A. Manderson. The declaration of trust in favor of the appellee was not recorded until October 8, 1894, and the next year Albert B. Parvin, the trustee appointed in the place of Benjamin K. Souder, conveyed the legal title to the premises to the equitable owner. On January 24, 1879, Joseph W. Souder and Anna M., his wife, conveyed unto Catharine R. Souder whatever interest they had in the estate of the said Benjamin K. Souder. The deed was general in its terms, referring to no particular property, but conveying the right, title, and interest of the grantors in the lands of Benjamin K. Souder, wherever situated. It recites that Benjamin K. Souder, having been seised of certain pieces of real estate, without describing them, situated in the city of Philadelphia, died intestate, unmarried, and without issue, leaving to survive him, as his only heirs, the said Joseph W. Souder, and two sisters, Catharine R. Souder and Margaret A. Manderson, to whom his land descended as tenants in common under the intestate laws of the state. It is manifest that what was conveyed to Catharine R. Souder by this deed was simply the undivided third interest of Joseph W. Souder in whatever real estate the decedent owned at the time of his death. Anna M. Souder had acquired nothing from Benjamin K. Souder

under the intestate laws, and she joined in the deed of her husband to his sister, as wives do daily, only for the purpose of passing any inchoate right of dower that she might have had in the land. She conveyed nothing that belonged to her. It is under this deed that the appellant, as the vendee of Catharine R. Souder's administrator, selling what had been conveyed to her by Joseph W. Souder, claims title to the premises in controversy.

To say nothing of the absence of any proof that, by the general terms of the deed of January 24, 1879, it was intended to convey an undivided interest in the property claimed by the appellant, did he acquire any interest in the same? If Benjamin K. Souder was not the owner of the land when he died, Joseph inherited no interest in it as one of his heirs, and consequently conveyed nothing by his deed to Catharine. At the time of his death, these two lots were not of the lands and tenements of Benjamin. He had purchased them with the moneys of his sister-in-law, Anna M. Souder, and had solemnly declared that the title was in him as her trustee. It is true he had not recorded this declaration of trust, and a purchaser from him or from his heirs prior to October 8, 1894, for value, and without notice of the trust, would have acquired title as against Anna M. Souder. But is this appellant, or was Catharine R. Souder, such a purchaser? The deed to the latter, though absolute on its face, was but as collateral security for her brother's antecedent indebtedness to her. She so understood it; for by her will she declares that, when he paid her the \$7,000 he owed her—the consideration named in the deed—"he is to receive all the papers he gave me as security." The orphans' court found that it was but such collateral, and we approved the finding. Souder's Estate, 169 Pa. 239, 32 Atl. 417. The sister, therefore, was not a purchaser for value within the protection of the recording act. Ashton's Appeal, 73 Pa. 153; Pratt's Appeal, 77 Pa. 378; Callendar v. Kelly, 190 Pa. 455, 42 Atl. 957. She parted with nothing to induce her brother to make the conveyance to her. Nothing passed from her to him for it. As additional security to herself, she took only what he had to give, and, as no interest in these lots had ever passed to him as heir of his brother—because the latter had not died seised of them—he, in turn, could convey no interest in them to his sister. If she had been a purchaser from him for value, without notice of an outstanding title in another, his apparent title would have become real in her, to be absolutely protected by the recording act against any unrecorded one.

At the time the plaintiff below acquired the title to the estate upon which he relies for the recovery of at least an undivided third of the land claimed by the appellee, the declaration of trust in her favor had been on record for more than three years, and, when

he became the purchaser at the orphans' court sale of what Catharine R. Souder had acquired from Joseph, he could have learned, from an examination of the record, before he made his bid, that the interest which had been conveyed to her was collateral security for a prior indebtedness; and the deed which he finally accepted, and which he now produces as the evidence of his title, notified him that the conveyance from Joseph to Catharine "was made to the said Catharine R. Souder as collateral security for the payment of a debt of \$7,000 which said Joseph W. Souder owed the said Catharine R. Souder, and which was owing to her by him at the time of her decease."

The contention of the appellant is twofold: To his claim for the whole of the land as the grantee of Anna M. Souder, the answer is that she, by the deed of her husband of January 24, 1879, conveyed nothing that belonged to her; and to his reply that he ought then to have at least an undivided third, because the declaration of trust was not recorded, the rejoinder is that neither he nor his grantor was a purchaser for value, and he purchased with full notice, not only that Catharine R. Souder had not been a purchaser for value, but that the conveyance to her was but as collateral security.

Judgment affirmed.

(205 Pa. 534)

LARKINS v. LINDSAY.

(Supreme Court of Pennsylvania. May 4, 1903.)

RES JUDICATA.

1. In an action for breach of covenant to exchange lands, the contract provided that the title was to be clear of liens, marketable, and insurable. Before action brought plaintiff had filed a bill for specific performance of the same covenant, which was dismissed on the ground that plaintiff's title was not marketable. *Held*, that the question of marketable title was res judicata.

Appeal from Court of Common Pleas, Philadelphia County.

Action by John Larkins against Daniel S. Lindsay. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

David Lavis, for appellant. Alex. Simpson, Jr., for appellee.

PER OURIAM. A decree in equity is not, like a judgment at law, necessarily conclusive as to every matter which either was or might have been involved in the decision. Regard must be had to the reasons of the chancellor, as well as to his decree; for, to take the most obvious illustration, the case may have been disposed of on grounds of adequate remedy at law, or other reasons not involving the merits. But where the merits, or any facts material to the final determination of the controversy, have been

considered and passed on, the matter is as much res adjudicata as it would be by a judgment at law.

This action is for breach of covenant to exchange lands. The covenant sued on provided that "the titles in both cases [are] to be clear of all liens, marketable, and insurable," etc. In 1896 a bill was filed by the present plaintiff for specific performance of the same covenant, and after hearing on the merits was dismissed, on the ground that plaintiff's title was not marketable. This was a final adjudication of that question between these parties. The court was therefore right in directing a verdict for the defendant.

Judgment affirmed.

(4 Pen. 363)

LANE et al. v. LANE.

(Supreme Court of Delaware. June 16, 1903.)

WILLS—POWER OF APPOINTMENT—EXECUTION—CONFLICT OF LAWS.

1. The law of the domicile of the testator governs, as against the law of the domicile of the person to whom he gives by will a power of appointment, in determining whether the donee's will is an execution of the power.

2. A will of a testator domiciled in Pennsylvania, disposing of all his "estate, real and personal, of whatever kind and wheresoever situate," is not an execution of the power contained in a will made by a testator domiciled in Delaware, authorizing the former testator to dispose of by will the principal, the income of which was given to him for life, though under the law of Pennsylvania it would be a valid execution.

Appeal from Chancery Court, New Castle County.

Suit by Fannie S. Lane, as administratrix of Jesse Lane, Jr., deceased, against Martin Lane, as trustee under the will of Jesse Lane, deceased, and others. From a decree for plaintiff, defendants appeal. Affirmed.

Argued before SPRUANCE, GRUBB, PENNEWILL, and BOYCE, JJ.

George Tucker Bispham and Benjamin Nields, for appellants. William S. Hiles, for respondent.

SPRUANCE, J. The complainant below, Fannie S. Lane, administratrix of Jesse Lane, filed her bill in the court of chancery for New Castle county against Martin Lane, trustee, and the other respondents, for an accounting by the said trustee, and for a decree that he pay to the complainant a certain legacy, with its increase and income, alleged to be the property of the complainant as administratrix as aforesaid. The case was heard by the chancellor upon bill and answer and an agreed statement of facts. The following are the material facts disclosed by the record:

Jesse Lane, the elder, by his will bearing date April 15, 1890, bequeathed, inter alia, as follows: "Item 8. I give and bequeath unto

¶ 1. See Powers, vol. 40, Cent. Dig. § 123.

Edward Bringham, Jr., the sum of fifty thousand dollars, in special trust to invest the same in some safe and productive securities, with power from time to time to call in and reinvest the same, as may be necessary, and all the interest, dividends, and income which may accrue therefrom to receive and pay over into the proper hands of my son, Augustin S. Lane, for his sole use during his natural life; and upon his decease then in trust to dispose of said principal sum of fifty thousand dollars in such manner as my said son Augustin by his last will and testament, or by any writing executed as such, shall direct and appoint, and in default of such appointment then in trust to pay and distribute the said principal sum of fifty thousand dollars to and among the children of my said son Augustin living at the time of his death and the issue of any deceased child of said Augustin in equal shares, but so that such issue of any child of said Augustin, deceased in his lifetime, shall take among them equally, if more than one, only the share their parent, if living, would take; and, in default of any children or issue of the said Augustin surviving him, then in trust to pay over and dispose of the said sum of fifty thousand dollars, and any and all other sum of money held by said trustee for the use and benefit of said Augustin under the provision of this will, in equal shares to my son, Martin Lane, and to the trustee herein appointed for my daughter, Anna B. Elliott, and to the trustee herein appointed for my daughter, Sally Harvey, to be held by said trustee in special trust to invest, apply, and dispose of in the same manner and subject in all respects to the trusts declared respecting the several legacies herein bequeathed in trust for my said daughters, Anna B. Elliott and Sally Harvey," etc.

The said testator, Jesse Lane, was, at the time of making said will and at the time of his death, domiciled in and a citizen of the state of Delaware; and his will was proved before the register of wills for New Castle county. He died in the year 1881, leaving to survive him the said Augustin S. Lane, Martin Lane, Anna B. Elliott, and Sally Harvey. The said trustee, Edward Bringham, Jr., renounced and disclaimed the said trusts, and Martin Lane was duly appointed by the chancellor trustee in his stead. The said Martin Lane at the time of his appointment was and now is domiciled in and a citizen of the state of Delaware. The said legacy of \$50,000 was paid to the said Martin Lane, trustee, who continued to execute the trusts during the lifetime of the said Augustin S. Lane. The said trustee had never rendered or passed any account of said trust fund or its income.

The said Augustin S. Lane made his last will and testament, bearing date October 8, 1887, whereby he devised and bequeathed, *inter alia*, as follows: "(2) All my estate, real and personal, of whatever kind and

wheresoever situate, I give, devise, and bequeath to my brother, Martin Lane, his heirs, executors, administrators, and assigns, in trust to safely invest and keep the same invested, and out of the income derived therefrom to pay to my wife, Fannie, during the term of her natural life, the sum of twelve hundred dollars per annum, in twelve equal monthly payments of one hundred dollars each, and in further trust to pay out of the remaining income from my said estate a sum sufficient for the support and education of my son Jesse, until he shall arrive at the age of twenty-one years, at which time I give and devise and bequeath to him all my estate (except such part as may be required to pay the above annuity to my wife), to my said son Jesse, his heirs and assigns, absolutely; and, in the event of my said son dying before the age of twenty-one without leaving children living at the time of his decease, then my will is that the part of my estate so as aforesaid willed to him shall belong to and be the property of the same persons who, under the intestate laws of Pennsylvania, would be entitled to the same if I had died unmarried and without issue and intestate. My will being that no estate (other than sufficient of the income for his support) shall vest in my said son until he shall arrive at the age of twenty-one years, or, in the event of his sooner dying leaving children him surviving, that the estate shall vest in such child or children who may be living at his decease. (3) At the death of my said wife I direct that the part of my estate which may be retained by my said trustee to secure the annuity to her shall go and belong to the same person or persons and for the same estate as is expressed in the second clause of my will with respect to that part of my estate therein bequeathed and devised."

The said Augustin S. Lane was, at the time of making his said will and at the time of his death, domiciled in and a citizen of the state of Pennsylvania; and his will was proved before the register of wills for Delaware county, in said state. He died in the year 1890, leaving to survive him his widow, the said Fannie S. Lane, and one child, Jesse Lane, Jr., his only issue. The said Jesse Lane, Jr., died in the year 1899, intestate, unmarried, without issue, and not having attained the age of 21 years. The said Fannie S. Lane was duly appointed and qualified as his administratrix. The said Augustin S. Lane left a personal estate, after payment of debts, of \$52,518.70. The chancellor decreed that said will of Augustin S. Lane was not an execution of the power of appointment given to him by the will of his father, Jesse Lane, and that the said legacy of \$50,000, held by the said Martin Lane as trustee as aforesaid, should be paid to the said Fannie S. Lane, administratrix of Jesse Lane, Jr., with the accrued income thereof since the death of the said Augustin, less the amount of such income paid to the said Jesse Lane, Jr., in his

lifetime, and that the said trustee should state and file an account of the income of said trust fund since the death of the said Augustin. From said decree this appeal was taken.

The question for our determination is whether, by the will of Augustin S. Lane, there was a valid execution of the power of appointment given to him by the said eighth item of the will of his father, Jesse Lane, the elder. If there was not, then under the will of Jesse Lane, the elder, upon the death of Augustin S. Lane, his son and only surviving issue, Jesse Lane, Jr., became entitled absolutely to the trust fund, and his administratrix, the complainant below, is entitled to recover the same, with the accrued interest and income thereof. The rules of the common law applicable to this case have been quite well established by numerous decisions in England and in this country.

In *Parker v. Kett*, 12 Mod. 469, decided in 1701, it was said by the court: "When one has an authority, and does an act which can be good no other way but by virtue and in pursuance of that authority, it shall rather be understood to have been by force of his authority, than void, though in doing the act he takes no notice of his authority; but where one has an interest and an authority together, and he does an act generally, it shall be construed in relation to his interest, and not to his authority."

Andrews v. Emmot, 2 Bro. Ch. 297, is a leading case upon this subject. By a marriage settlement certain bank annuities were conveyed to trustees in trust for certain purposes, and in trust, after the decease of John Andrews and his wife, if there should be no child, to transfer the trust fund to such persons as the said John Andrews should by deed or will appoint. John Andrews by his will, after giving sundry legacies, bequeathed, after the death of his wife, "all the rest and residue of his monies, and securities for money, goods, chattels, and personal estates, whatsoever and wheresoever, and of what nature, kind, or quality soever, to John Emmot." The Master of Rolls, after quoting the above citation from *Parker v. Kett*, said: "If one applies this doctrine to the present case, the testator has not referred to the power, but has done the act generally; and he had property of which he could dispose. * * * The testator has not described anything. All his expressions will refer to his own property." Held, that the will of John Andrews was not an execution of the power. Upon appeal the decree below was affirmed; the Lord Chancellor, holding that the power was not executed by the will of John Andrews, saying: "It is necessary, in order to do this, that he should, by his will, notify his intention to do it [execute the power]. It is too late now to expect that a testator, in order to execute a power, should make an express reference to it, because it has been determined that, if a man disposes of that over which

he has a power in such manner that it is impossible to impute to him any other intention but that of executing the power, the act shall be an execution of the power."

In *Roach v. Haynes* (1803) 8 Ves. Jr. 584. Lord Chancellor Eldon held that a power of appointment was not executed by a general bequest of property described as "my estate and effects"; that such a bequest could pass only that in which the testator had an interest, and not that as to which she had merely an authority to appoint.

In *Bradley v. Westcott* (1807) 13 Ves. Jr. 445, Sir William Grant, Master of Rolls, decided that a power of appointment was not executed by a bequest of "all my personal estate, money, securities for money, goods, chattels, and effects, whatsoever and wheresoever, and of what nature, kind, or quality soever, and all my estate and interest therein," and that said bequest was applicable only to the testator's own personal property.

To the same effect are *Lovell v. Knight* (1829) 3 Sim. 275, and *Lempriere v. Valfy*, 5 Sim. 108.

In *Denn v. Roake* (1830) 6 Bing. 475, Alexander, C. B., in delivering to the House of Lords the unanimous opinion of the judges that the will of one Sarah Trymer did not operate as an execution of her power to dispose of certain real estate by her will, said: "There are many cases upon this subject, and there is hardly any subject upon which the principles appear to have been stated with more uniformity or acted upon with more consistency. They begin with Sir Edward Clere's Case in the reign of Queen Elizabeth, to be found in the Sixth Report, and are continued down to the present time; and I may venture to say that in no instance has a power or authority been considered as executed, unless by some reference to the power or authority, or to the property which was the subject of it, or unless the provision made by the person intrusted with the power would have been ineffectual—would have had nothing to operate upon, except it were considered as an execution of such power or authority. In this case there is no reference to the power, there is no reference to the subject of the power, and there is sufficient estate to answer the devise without calling in the aid of the undivided moiety now in question. * * * It is said that the present is a question of intention, and so, perhaps, it is. But there are many cases of intention, where the rules by which the intention is to be ascertained are fixed and settled. It would be extremely dangerous to depart from these rules in favor of loose speculation respecting intention in a particular case. It is, therefore, that the wisest judges have thought proper to adhere to the rules I have mentioned, in opposition to what they evidently thought the probable intention in the particular case before them."

Sir Edward Sugden, in his admirable work on Powers (volume 1, p. 385), uses

this language: "It is firmly settled that a mere general devise or bequest, however unlimited in terms, will not comprehend the subject of the power, unless it refer to the subject, or to the power itself, or generally to any power vested in the testator."

The rules of the common law in respect to the execution of powers were changed by St. 1 Vict. c. 26, § 27, passed in 1837, which provided that a general devise of the real estate of the testator should be construed to include all real estate over which such testator may have had a power of appointment, and should operate as the execution of such power, unless a contrary intention should appear by the will, and that a bequest of personal estate in like general words should operate as the execution of such power under similar circumstances.

The leading American case is *Blagge v. Miles* (1841) 1 Story, 428, Fed. Cas. No. 1,479, in which Judge Story says: "It is now admitted to be established, as the general rule, that the intention of the testator is the pole star to direct the court in the interpretation of wills. * * *

Similar doctrines now generally prevail in regard to the execution of powers, and especially in regard to their execution by last will and testament. * * * The intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful, under all the circumstances, then that doubt will prevent it from being decreed an execution of the power. * * * Three classes of cases have been held to be sufficient demonstrations of an intended execution of the power: (1) Where there has been some reference in the will, or other instrument, to the power; (2) or a reference to the property, which is the subject on which it is to be executed; (3) or where the provision in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual, or a mere nullity—in other words, it would have no operation, except as an execution of the power."

The rule thus stated was referred to with approval by the Supreme Court of the United States in *Blake v. Hawkins*, 98 U. S. 315, 396, 25 L. Ed. 139, and *Lee v. Simpson*, 134 U. S. 572, 590, 10 Sup. Ct. 631, 33 L. Ed. 1038. In many of the states the common-law rules as to the execution of powers have been altered by statutes similar to that of St. 1 Vict.; but, where not so altered, with very few exceptions, said rules appear to be in force in this country.

In Maryland a statute of this character was adopted in 1888; but prior to that time it was uniformly held that the intention to execute a power of appointment by will must appear by a reference in the will to the power, or to the subject of it, or from the fact that the will would be inoperative without the aid of the power. *Mory v. Michael* (1861) 18 Md. 227; *Foos v. Scarf*

(1880) 55 Md. 301; *Cooper v. Haines* (1889) 70 Md. 282, 17 Atl. 79.

The common-law rule was applied in New Jersey in the case of *Meeker v. Breintnall* (1884) 38 N. J. Eq. 345, and in Connecticut in the case of *Hollister v. Shaw* (1878) 46 Conn. 248.

In Massachusetts, in *Amory v. Meredith*, 7 Allen, 397, decided in 1863, the common-law rule was rejected, and the rule of St. 1 Vict. adopted, as more likely to accomplish the intention of persons having powers of appointment. The court say: "We are aware of no decisions in this commonwealth, binding on us as an authority, which should compel us to adopt a rule of construction likely in a majority of cases to defeat the intention it is designed to ascertain and effectuate. Seeking for the intention of the testator, the rule of the English statute (1 Vict. c. 26, § 27) appears to us the wiser and safer rule." This case was followed in the later Massachusetts cases, and also in New Hampshire. *Emery v. Haven* (1893) 67 N. H. 503, 35 Atl. 940.

In Pennsylvania the courts adhered to the old rule of construction until the adoption of the statute of 1879, which provided that "a bequest of the personal estate of the testator or any bequest of personal property described in a general manner, shall be construed to include any personal estate or any personal estate to which such description shall extend as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

If this statute was applicable to the question before us, the will of Augustin S. Lane would, without doubt, be a valid execution of the power. But the donor of the power, Jesse Lane, being a citizen and resident of this state, and his will a Delaware will, and the trustee a citizen and resident of this state, the question as to execution of the power is to be determined by the law of this state, and not by the law of Pennsylvania, the domicile of Augustin S. Lane.

Questions as to the execution of a power of appointment of personal property are to be decided by the law of the domicile of the donor of the power, and not by the law of the domicile of the donee of the power. This was conceded in the argument of the counsel of the defendants, and is abundantly established by authority in this country and in England. *Cotting v. De Sartiges*, 17 R. I. 669, 24 Atl. 530, 16 L. R. A. 367; *Sewall v. Wilmer*, 132 Mass. 131; *Bingham's Appeal*, 64 Pa. 345; *Pouey v. Hordern*, L. R. [1900] 1 Ch. Div. 492; *Hernando v. Sawtell*, L. R., 27 Ch. Div. 284, 294; *In re Megret* [1901] 1 Ch. Div. 547.

The only reported case in this state as to the execution of a power of appointment is *Davis v. Vincent*, 1 Houst. 416, decided by the superior court in 1857. By the will of

John Goslin power was given to his widow by her will "to devise the estate, both real and personal, to their children, or their proper heirs, as she might deem right and equal in her best judgment, which should be final." By her will she provided as follows: "My executors, hereinafter named, shall advertise and sell at public sale all of my real estate." The court held that she was not authorized by her husband's will to direct a sale of the property, and that there was, therefore, no valid execution of the power. After alluding to the fact that the will of the widow contained no reference to the will of her husband, or to the right or power conferred by it, or to the subject-matter of the power, and that in her will she invariably speaks of the land as her own, the court adds: "We therefore cannot say that we are satisfied, in addition to the other objections raised to the execution of the power delegated, that it was the intention of Mrs. Goslin to execute it in the manner which her husband's will required, and which intention must always appear in the execution of such a power, either by a reference to the power itself, or by some relation to the subject-matter of it, in a way which can leave no doubt of the intention to execute the power."

While the first ground of objection was sufficient, the latter were equally applicable and conclusive, and cannot properly be treated as obiter. We regard this case as a distinct recognition of the binding force in this state of the common-law rules relating to the execution of powers. In the absence of any decision upon the subject in this state, we should feel obliged to adopt the common-law rule of construction, as the practice here has been quite uniform to adhere to the common law until altered by statute, and especially so in matters relating to title to property. *Clawson v. Primrose*, 4 Del. Ch. 643.

Applying the settled common-law rules of construction to the will of Augustin S. Lane, we have no difficulty in reaching the conclusion that it was not an execution of his power of appointment. It certainly cannot be said of this will that the intention to execute the power is apparent and clear, and that it is not fairly susceptible of any other interpretation. It is at least doubtful, under all the circumstances, and that doubt is sufficient to prevent it from being decreed an execution of the power. *Blagge v. Miles*, supra. There is nothing in the will, or in the circumstances of the testator, his family, or estate, so far as they are known to us, to indicate that it was his intention to execute the power. He designates the property bequeathed by him as "all my estate, real and personal, of whatever kind and wheresoever situate." While he was entitled to the income of the trust fund during his life, and had the right to dispose of it by his will, it was not, in any proper sense, his estate, or any part of his estate.

The words, "of whatever kind and where-

soever situate," do not in any degree enlarge the meaning or operation of the words "all my estate." In *Andrews v. Emmot and Bradley v. Westcott*, supra, similar, and even stronger, superadded words were held to have no such effect. The words "all my estate," "my estate," and "estate," as they occur in the latter part of the second item and in the third item of the will, obviously refer to what the testator had already bequeathed, viz., his own property, and not to that as to which he had only a power of appointment.

This will does not allude to the will creating the power, or to the power, or to the trust fund, the subject of the power. If the operation of the will be limited to the testator's own estate, it will not be ineffectual, as he had at the time of his decease a personal estate the income of which was abundantly sufficient to pay the annuity of \$1,200 for his wife and to support and educate his son during his minority.

We are therefore of the opinion that the decree of the chancellor should be affirmed, and it is so ordered.

(73 N. H. 166)

NEW ENGLAND TELEPHONE & TELEGRAPH CO. v. CITY OF MANCHESTER.

(Supreme Court of New Hampshire. Hillsborough. May 5, 1903.)

TAXATION—TELEPHONE COMPANY'S REAL ESTATE—LIABILITY TO LOCAL TAXATION.

1. Pub. St. 1901, c. 64, § 3, imposes on every telephone company a tax on the value of its telephone line within the state, "including poles, wires, instruments, apparatus, office furniture, and fixtures of all kinds." Section 4 authorizes the state board of equalization to assess the tax. Section 12 declares that telephone companies shall be taxed only in the mode prescribed in this chapter, "except upon real estate not used in their ordinary business." Chapter 56, § 14, provides that real estate shall be taxed "in the town in which it is situate." *Held*, that real estate owned by a telephone company, and used in its ordinary business, is not subject to taxation by the town in which it is situate.

Transferred from Superior Court; Peaslee, Judge.

Petition for abatement of taxes by the New England Telephone & Telegraph Company against the city of Manchester. Facts agreed. Case transferred from the superior court. Case discharged.

The plaintiffs are a corporation duly established under the laws of Massachusetts. They operate lines in New Hampshire, and have in this state property consisting of telephones, lines, wires, poles, and other implements and instrumentalities required for conducting their business. Their property in other states is of a similar character, and is used for a similar purpose. The corporate property is wholly represented by capital stock. The plaintiffs own real estate situate on Concord street, in Manchester. The building thereon was designed and erected exclu-

sively for a telephone exchange, and is used solely for that purpose. All wires and connections in Manchester and those leading from Manchester elsewhere are operated in the building, and the engines, dynamos, and other apparatus used in the business are located therein. The building also contains offices occupied by the local manager and others connected with the company, and a storeroom for supplies used in conducting the business in Manchester and vicinity, and making repairs and renewals, and in providing for new construction. In 1901 the state board of equalization, acting under chapter 64 of the Public Statutes, determined the value of the plaintiffs' property in this state for purposes of taxation to be \$320,000, and assessed a tax thereon of \$5,408, which sum was paid to the state treasurer. In the same year the assessors of Manchester assessed a tax upon the plaintiffs' real estate on Concord street, and payment of the same was demanded. A petition for abatement was seasonably filed and denied. March 8, 1902, the plaintiffs under protest paid to the city the sum of \$250.26, as the amount of the tax and interest thereon.

Joseph W. Fellows, for plaintiffs. George A. Wagner, for defendants.

REMICK, J. The law provides that "every person or corporation owning or operating a telegraph or telephone line within the state shall pay to the state, for its use, an annual tax upon the value, on the first day of April of each year, of the telegraph or telephone line within the state, then owned or operated by such person or corporation, including poles, wires, instruments, apparatus, office furniture, and fixtures of all kinds, at a rate as nearly equal as may be to the average rate of taxation at that time upon other property throughout the state" (Pub. St. 1901, c. 64, § 3); and also that "the state board of equalization shall determine the value of the property to be taxed by virtue of the preceding sections and the rate of taxation, and shall assess such taxes." Pub. St. 1901, c. 64, § 4.

The defendants contend that, as real estate is not specifically mentioned in the foregoing section 3, all the real estate of telegraph and telephone companies is taxable, like real estate generally, in "the town in which it is situate." Pub. St. 1901, c. 56, § 14. There might be force to this contention were it not for section 12, c. 64, Pub. St. 1901, which provides that "telegraph and telephone corporations and companies shall be taxed only in the mode prescribed in this chapter, except upon real estate not used in their ordinary business." It is entirely clear, in the light of this section, that the Legislature intended that such real estate of telegraph and telephone companies as is "used in their ordinary business" should be taxed by the state board of equalization for the use of the state,

as provided by section 4, c. 64, Pub. St. 1901, and not by the "town in which it is situate," as provided by section 14, c. 56, Pub. St. 1901. As it is found that the real estate in question was owned by the plaintiffs and "used in their ordinary business," it follows that its taxation by the city of Manchester was unlawful, and that the tax should be abated.

Case discharged. All concurred.

(72 N. H. 145)

BARTLETT v. GILCREAST.

(Supreme Court of New Hampshire. Rockingham. May 5, 1903.)

FRAUDULENT CONVEYANCE—GRANTEE'S MORTGAGE—ADJUDICATION OF NO LIEN—PREJUDICE TO GRANTEE—EXECUTION—REAL ESTATE—SUFFICIENCY OF LEVY.

1. The owner of an undivided half interest in realty, who receives a conveyance of the other half, which is fraudulent toward creditors, and who then mortgages the premises, cannot complain of a ruling holding the mortgage a lien only on her original interest.

2. Pub. St. 1901, c. 233, § 34, provides that attachable real estate may be taken on execution and sold, as rights of redeeming mortgaged realty are taken on execution and sold, the debtor having the same right of redemption. *Held* a levy on real estate subject to a mortgage could not be sustained under this section, the sale contemplated by the statute being of the land, and not of a right to redeem from a mortgage.

3. The description of the wrong mortgage in the levy on an equity of redemption vitiates the levy, as at the auction sale of the equity the public may be misled.

Exceptions from Superior Court; Young, Judge.

Suit by B. J. Bartlett against Anna L. Gilcreast. Judgment for plaintiff, and defendant excepts. Exception sustained.

Real estate standing in the name of John R. Gilcreast, and belonging to him and his wife (the defendant) jointly, was conveyed by him to her, April 13, 1897. The conveyance was a gift of his half. He was indebted at the time to one Sleeper, and his half of the real estate was all the property he owned. After the conveyance the defendant mortgaged the premises to John H. Parmerton. Sleeper recovered judgment against John R., and levied the execution upon all his right in equity to redeem the land. After describing the land, the return of the levy proceeds as follows: "The same being subject to a mortgage made by said debtor to one John H. Parmerton, dated the twenty-third day of September, 1892, to secure the payment of two hundred thirty dollars." The plaintiff was the purchaser of the right at the sheriff's sale. Upon these facts it was adjudged that, as between the parties to the action, the Parmerton mortgage is a lien upon the defendant's half of the real estate, and she was ordered to convey the other half to the plaintiff. The defendant excepted.

G. K. & B. T. Bartlett, for plaintiff. John G. Crawford, for defendant.

CHASE, J. The defendant's first position is that the levy of the Sleeper execution is void for the reason that John R.'s interest in the real estate was an estate in fee in one undivided half of it, instead of a right to redeem the same from a mortgage. The case is ambiguous concerning the mortgage. The sheriff's return of the levy mentions a mortgage given by John R. to Parmerton in 1892. The case makes no further specific allusion to this mortgage. It states that the defendant mortgaged the land to Parmerton after the conveyance to her, which was April 23, 1897. The court adjudged that, as between the parties to the action, "the Parmerton mortgage" is a lien upon the defendant's half of the property. This seems to indicate that the court found there was only one Parmerton mortgage, and that was the one given by the defendant, and that he held that, as between the parties to the action, this mortgage did not cover the half of the property formerly owned by John R. As this holding was favorable to the defendant so far as the question under consideration is concerned, and as the plaintiff did not except to it, no attempt has been made to review the questions of law involved in it. For the purposes of the present inquiry, as the case is understood, the fact is established that there was no mortgage upon John R.'s half of the property at the time of the levy. If so, the levy should have been made by setting off the real estate, or enough of it to satisfy the execution, in the manner prescribed by sections 1-13, c. 233, Pub. St. 1901, or, by a sale of John R.'s half, as prescribed by section 34 of the same chapter (Laws 1899, p. 314, c. 73, § 1), instead of by a sale of the right of redemption from a mortgage (*Richards v. Gilmore*, 11 N. H. 493). The sale contemplated by section 34 is of the property taken on the execution. An equity of redemption is a less interest in the land than an unincumbered estate in fee, and a sale of the former does not include the latter, although a sale of the latter may include the former. It follows that the levy in this case cannot be upheld by section 34 of the statute.

If it were found that the equity of redemption levied upon was the right to redeem from the mortgage given to Parmerton by the defendant, it would not follow from that fact and the other facts reported that the levy would be valid. There is no presumption that this mortgage created a lien upon the land of the same character and amount as the mortgage referred to in the return of the levy. The public may have been misled and deceived by the offer for sale of an equity which differed in value from the value of the real equity, and would-be purchasers may have been thereby deterred from bidding. *Pearson v. Gooch*, 69 N. H. 208, 40 Atl. 390.

Unless the report of the case has been misunderstood, the levy was not made as required by law, and was void; and, the plain-

tiff's title failing, the bill should be dismissed. *Parker v. Stevens*, 59 N. H. 208.

Exception sustained. All concurred.

(72 N. H. 61)

LITTLE v. BOSTON & M. R. R.

(Supreme Court of New Hampshire. Rockingham. March 3, 1903.)

STREET RAILROADS—PERSONAL INJURIES—CROSSING—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE—TRIAL—REMARKS OF COUNSEL.

1. On evidence that the motorman of an approaching street car saw plaintiff turn his horses toward the track, and knew that if plaintiff continued there would be a collision, which the motorman could have avoided by applying the brakes at any time before he was within 40 feet of the crossing, the jury were warranted in finding that the motorman's negligence, after discovering plaintiff's negligence, was the proximate cause of the personal injuries to plaintiff, and a nonsuit was properly refused.

2. In an action for personal injuries by collision with a street car at a crossing, it was prejudicial error for the plaintiff in his closing argument to challenge the defendant to make experiments showing the distance in which such car could be stopped; defendant then having no right to offer further evidence, and it being improbable that the judge would then have granted a view for any purpose.

Transferred from Superior Court; Pike Judge.

Action on the case by Henry Little against the Boston & Maine Railroad. Verdict for plaintiff, and case transferred from the superior court on defendant's exceptions. Exceptions sustained.

The defendant's motion for a nonsuit was denied, subject to exception. The defendant also excepted to remarks of the plaintiff's counsel in closing argument, wherein he challenged the defendant to then make experiments showing the distance in which an electric car like the one in question could be stopped.

Samuel W. Emery, for plaintiff. Frink & Marvin, for defendant.

BINGHAM, J. The defendant contends that the plaintiff's injury was due to his negligence in attempting to cross the track without making any effort to ascertain whether a car was approaching. The plaintiff concedes that if his conduct in approaching and entering upon the track as he did was negligent, and a proximate and contributing cause of his injury, the defendant's position would be correct. His answer, however, is that there was evidence from which the jury were warranted in finding that his conduct was not a proximate and contributing cause of his injury, but that the accident was due solely to the negligence of the defendant's motorman in not seasonably stopping the car after he saw the plaintiff turn his horses toward the track, apparently intending to cross in front of the car, and when he knew or ought to have known that the plaintiff's

negligent purpose, if carried out, would place him upon the track when the car reached the place where he was crossing.

In *Gahagan v. Railroad*, 70 N. H. 441, 450, 50 Atl. 146, 151, 55 L. R. A. 426, where the engineer saw the plaintiff approaching the track without observing the approaching train, it was held that, "if the engineer knew or ought to have known that the plaintiff's negligence would place him upon the crossing when the train reached it, the engineer was equally bound to avoid the collision as if he saw the plaintiff actually on the track." And the rule announced in *Parkinson v. Street Railway*, 71 N. H. 28, 51 Atl. 268, where the motorman saw the plaintiff upon the track, was that, if the plaintiff's want of care creates a dangerous situation, and thereafter the defendant by the exercise of ordinary care could, while the plaintiff by the exercise of like care could not, avoid the accident, the defendant's want of care under such circumstances is the legal or proximate cause, while the plaintiff's negligence furnished merely the occasion for the injury.

In the present case there was evidence that the plaintiff did not see the approaching car until it was right upon him; that when he turned his horses toward the track he was seen by the motorman, who then thought he was intending to cross the track in front of the car; that the motorman then had reason to know that if the plaintiff continued in his purpose there would be a collision; and that the motorman could have avoided the accident by applying the brakes at any time before the car was within 40 feet of the place where the plaintiff was crossing the track. If it also could have been found from the evidence that after the car was within 40 feet of the place of the collision it was beyond the power of the motorman to have then prevented the accident, and if the jury did so find, it cannot be said that they would not be justified in also finding that the plaintiff was so situated in reference to the track that he could not have avoided the accident.

Under the circumstances presented by the evidence, the jury were therefore warranted in concluding that the legal or proximate cause of the plaintiff's injury was the defendant's failure to exercise reasonable care, after the motorman, seeing the plaintiff was negligently approaching the track, should have known that his negligence would place him upon the track when the car reached the point where he was crossing it.

If it would have been permissible for the defendant in the course of the trial to have presented evidence of experiments, or upon a view to have made experiments before the jury, showing in what distance a car equipped as the one in question was could have been stopped, and for the plaintiff's counsel to argue that it did not do so because it would have shown that the car could have been stopped in the distance the plaintiff

claimed (questions not here considered), it was improper for him in his closing argument to the jury to then challenge the defendant to make such experiments, knowing that the evidence was closed. At that stage of the case the defendant had no legal right to offer further evidence, and it was exceedingly improbable that the presiding justice would then have permitted a view for any purpose. To challenge the defendant, in the presence of the jury, to then make experiments, as was done by the plaintiff's counsel, was unwarranted, improper, and prejudicial. A new trial must be had.

Verdict set aside. All concurred.

(72 N. H. 12)

MECHANICS' NAT. BANK v. COMINS
et al.

(Supreme Court of New Hampshire. Merrimack. Jan. 10, 1903.)

INSURANCE—INSURABLE INTEREST—ASSIGNMENT OF POLICY—INTEREST OF ASSIGNEE—CONDITION OF POLICY—WAIVER—PLEDGE OF POLICY—DISCHARGE—ESTOPPEL—EVIDENCE—HARMLESS ERROR.

1. It cannot be held, as matter of law, that persons who advance funds to conduct the business of a corporation have no insurable interest in the life of the manager and promoter.

2. A life policy valid in its inception may be assigned to one having no insurable interest in the life insured, if the assignment is bona fide, and not a mere device to cover a gambling transaction.

3. Provisions in a policy of insurance, forbidding an assignment thereof to any person not having an insurable interest in the life of the person insured, being inserted for the benefit of the company, may be waived by it by paying the amount of the policy into court, and cannot be taken advantage of by a claimant of the money.

4. Where a life policy was assigned to secure notes, the beneficiary under the policy was estopped to assert that it was released from the pledge by a renewal of such notes, to which he assented.

5. Where a mortgage sale and the amount of proceeds of such sale appeared as facts from the record, admission in evidence of an indorsement on the wrapper containing the notes secured by mortgage, evidencing the same facts, was not reversible error, especially in the absence of any claim that the facts were otherwise than as shown by the record.

Transferred from Superior Court; Peaslee, Judge.

Bill in equity by the Mechanics' National Bank against Edward P. Comins and the Connecticut Mutual Life Insurance Company, praying that the company be ordered to pay to the plaintiffs the proceeds of a policy of insurance on the life of George T. Comins, father of Edward, and that the latter be restrained from setting up a claim to the same. The company in its answer admitted liability on the policy to some person, and paid the money into court. Edward alleged that the fund belonged to him. Trial by the court, and a decree that the fund be paid to the plaintiffs. Defendant excepted. Exceptions overruled.

¶ 2. See *Insurance*, vol. 23, Cent. Dig. § 166.

Prior to May 11, 1892, the George T. Comins Company (of which Edward was treasurer, George was manager, and in which both were stockholders) was indebted to the plaintiffs upon promissory notes for \$28,160.74. On that day Edward assigned to the plaintiffs a policy taken out in the Connecticut Mutual Life Insurance Company by George upon his own life in the sum of \$10,000, payable to Edward if he survived his father. George joined in the assignment. The policy was assigned as security for the indebtedness upon the notes above mentioned, and the plaintiffs had no insurable interest in George's life, other than that to be found from the facts herein reported. Neither George nor Edward was personally indebted to the plaintiffs. George died August 1, 1898, and there was then due upon the policy \$1,426.45. The policy contained the following provision: "No assignment of this policy shall be valid unless made in writing and a duplicate or certified copy thereof be filed at the office of said company, and any claim against this company, arising under this policy, made by an assignee or creditor, shall be subject to satisfactory proof of interest in the life of the insured, in due form, and to any breach of the conditions of this contract by any of the parties hereto, whether such breach exist prior or subsequent to any such assignment; and such proof of interest shall be a condition precedent to any right of action on this contract by or on behalf of such assignee; and this company shall in no case be responsible for the validity of any assignment." December 1, 1892, the notes being overdue, the Comins Company gave the plaintiffs five new notes for the same aggregate amount, payable at different times, and the old notes were surrendered. This transaction was not a payment of the old obligations, but a substitution therefor of the new ones. Edward signed the new notes as treasurer, and at the time of the transaction he entered on the Comins Company's journal a list of the old and new notes, together with the following memorandum: "Certain small notes of different dates consolidated by making larger notes of one date. Aggregate the same." In 1893 the premium upon the policy in suit was paid by a check of the Comins Company, and an entry that the policy was held by the bank was made by Edward upon the counterfoil. Edward made no demand for the policy when the new notes were given, nor until after George's death. Subject to exception, the court found that Edward was a party to the transaction of December 1, 1892. In November, 1894, the Comins Company owed the plaintiffs about \$92,000, including the overdue sum of \$28,160.74. Having obtained title to all the property of the Comins Company by foreclosure and assignment, the plaintiffs transferred the same to the Beecher's Falls Company, and received therefor \$92,000 of stock in that corporation. Ed-

ward contended that this transfer was made with the understanding that it satisfied the debt of the Comins Company to the plaintiffs, and that the policy held as collateral security was released by the transaction; while the plaintiffs claimed that the stock was taken with the understanding that the earnings of the Beecher's Falls Company should be applied in reduction of the indebtedness of the Comins Company. The plaintiffs' cashier testified that the bank had received nothing from the Beecher's Falls Company, and, while it did not appear that the notes of the Comins Company would not ultimately be paid in full from the profits of the Beecher's Falls Company, there was no evidence tending to show a reasonable likelihood of such result. The court found that the contention of the plaintiffs as to the purpose of the transfer was true. As part of the process of transferring title to the Beecher's Falls Company, the plaintiffs foreclosed two mortgages—one to secure notes for \$28,160.74, and the other to secure notes for \$51,208.89. These facts, and the amount of the proceeds of each sale (\$5,000 and \$18,000), were shown by the record. The plaintiffs' cashier testified generally concerning this transaction, and read the following entry made by him upon the wrapper containing the former notes: "Proceeds of sale of machinery, foreclosure under mortgage, \$5,000, Nov. 5, 1894, to be endorsed on the within notes." He also read the following entry made on the wrapper containing the other notes: "Proceeds of sale of lumber and machinery at Beecher's Falls, Vt., at foreclosure under mortgage dated Aug. 2, 1893. Proceeds of sale, \$18,000, to be endorsed on the within notes. Sale Dec. 18, 1894." Both entries were read subject to exception. The defendant Comins also excepted to the court's refusal to order a decree in his favor and to that entered for the plaintiffs.

Streeter & Hollis, for plaintiffs. George M. Fletcher and Sargent, Niles & Morrill, for defendant.

REMICK, J. The fundamental contention of the defendant is that the assignment was against public policy and void, because the plaintiffs, to whom it was made, had no insurable interest in the life of George T. Comins, the subject of the policy assigned.

It is indeed firmly established that insurance procured by one person upon the life of another, the former having no insurable interest in the latter, is void as a wager contract, against public policy, which condemns gambling speculations upon human life. And the defendant contends that a policy can no more be assigned than originally issued to a person having no insurable interest. To this contention the plaintiffs reply: (1) That they had an insurable interest in the life of George T. Comins at the date of the assignment by reason of being a heavy creditor of

the George T. Comins Company, of which George T. Comins was the manager; (2) that, the policy having been originally issued to George T. Comins under such circumstances as to constitute it a good and valid contract of insurance as against the world, its subsequent assignment to them in the regular course of business was valid, whether they had an insurable interest in the life of George or not.

1. Did the plaintiffs have an insurable interest? "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. * * * But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured." Warnock v. Davis, 104 U. S. 775, 779, 26 L. Ed. 924; Adams' Adm'r v. Reed (Ky.) 38 S. W. 420, 421, 35 L. R. A. 692. "It may be said, generally, that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life." Connecticut, etc., Ins. Co. v. Schaefer, 94 U. S. 457, 460, 24 L. Ed. 251. "It is not necessary * * * that the one for whose benefit the life of another is insured should be a creditor of that other. It is enough that, in the ordinary course of events, loss and disadvantage will naturally and probably arise, to the party in whose favor the policy is written, from the death of the person whose life is insured." Hoyt v. Insurance Co., 3 Bosw. 440, 446; Kentucky Ins. Co. v. Hamilton, 63 Fed. 93, 11 C. C. A. 42. "The interest need not be such as to constitute the basis of any direct claim in favor of the plaintiff upon the party whose life is insured; it is sufficient if an indirect advantage may result to the plaintiff from his life." Trenton, etc., Ins. Co. v. Johnson, 24 N. J. Law, 576, 586. The tendency of the American decisions "is to hold that, wherever there is any well-founded expectation of or claim to any advantage to be derived from the continuance of a life, there is an insurable interest in the life, though there may be no claim upon the person whose life is insured that can be recognized in law or in equity." Bliss, Life Ins. §§ 21-31; May, Ins. §§ 102-111. "A person has an insurable interest in the life of another when there is a reasonable probability that he will gain by the latter's remaining alive, or lose by his death." 3 Kent (14th Ed.) 566, note. The result of a recent review of the American cases is thus stated: "An insurable interest which will take an insurance policy out of the class of wager policies is such an interest arising from ties of blood or other relations as will justify a reasonable expectation of advantage or benefit from a continuance of the life of the assured. This rule, it would appear, does not dispense entirely with a pecuniary inter-

est, but merely permits that interest to consist of a mere expectation of pecuniary benefit, as distinguished from the requirement of the other rule, that the interest must amount to a claim recognizable or enforceable in law." 54 L. R. A. 234. In short, "the essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazards of a life." Connecticut, etc., Ins. Co. v. Schaefer, 94 U. S. 457, 460, 24 L. Ed. 251; Kentucky Ins. Co. v. Hamilton, 63 Fed. 93, 101, 11 C. C. A. 42; Loomis v. Insurance Co., 6 Gray, 396. If, as the plaintiffs concede, there is no case in point with the one at bar, the foregoing quotations from so many different sources of the highest authority leave no doubt as to the general principle governing it. In accordance with this principle, it is held that a partner has an insurable interest in the life of his copartner, upon whose co-operation he relies for the success of the business. Connecticut, etc., Ins. Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. 949, 27 L. Ed. 800; Morrell v. Insurance Co., 10 Cush. 282, 57 Am. Dec. 92; Walton v. Assurance Co., 20 N. Y. 32; Powell v. Dewey, 123 N. C. 103, 31 S. E. 381, 68 Am. St. Rep. 818; 18 Cent. Law J. 347. So, when one furnishes the capital and outfit for a mining expedition, it is held that he has an insurable interest in the life of him to whom he commits the management and success of the enterprise. It is hardly necessary to say that the success of a corporate enterprise may be so interwoven with the personality of its manager that its stock is taken, and money is loaned to carry it on, as much in reliance upon that personality as upon the intrinsic merit of the enterprise; and no good reason appears why a stockholder or creditor, the value of whose investment may be reasonably said to depend upon the life or health of the man at the helm, should not have an insurable interest in his life, the same as one who invests money in a partnership, relying upon the skill or experience of his copartner, has an insurable interest in the life of the latter, or one who equips a mining expedition has an insurable interest in the life of him to whom its management is committed. The creditor or stockholder under such circumstances would seem to have that "reasonable expectation of pecuniary benefit or profit from the continuance of another's life" which is held sufficient to constitute an insurable interest. In such case "the essential thing, * * * that the policy should be obtained in good faith, and not for the purpose of speculating upon the hazards of life," would appear to be present. In this view we are not prepared to say, as matter of law (Wainwright v. Bland, 1 Moo. & R. 481; Swick v. Insurance Co., 2 Dill. 160, Fed. Cas. No. 13,692; Langdon v. Insurance Co. [C. C.] 14 Fed. 272, 274, 275; Steinback v. Diepenbrock, 158 N. Y. 24, 31, 32, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. Rep. 424), that the plaintiffs, who were furnishing the funds to carry

on the business of the George T. Comins Company, had no insurable interest in the life of George T. Comins, the manager, and apparently the originating and directing personality in the enterprise.

2. But assuming that the plaintiffs had no such insurable interest in George T. Comins as would entitle them to take out a policy on his life, it does not follow that a policy previously taken out by George T. Comins upon his own life, with no objectionable purpose, but under the full sanction of the law, could not afterwards be assigned by him to the plaintiffs, with the consent of the beneficiary, for a sufficient consideration and bona fide object. In *Elliot on Insurance* (1902), the latest treatise upon the subject, the state of the law is thus declared (section 62): "The question whether a policy valid at its inception may afterwards, before the death of the insured, be assigned to one who has no insurable interest in the life of the insured, has been much discussed, and the authorities are in hopeless conflict." "The tendency in business life has been to liberalize the rules governing life insurance, and thus to broaden its scope. It was found desirable that life insurance policies should pass freely by transfer and assignment, and, so long as this was with the consent of the parties, it was felt that the objections on the ground of public policy were largely illusory. Thus a more liberal rule has been adopted in many states, where it is held that a policy supported by an interest at its inception is a mere chose in action, which may be assigned to a person who has no insurable interest in the life. Such assignment does not create a new contract, but merely continues the old contract in force. A person may thus insure his own life, and either name or assign the policy to whomsoever he chooses, without reference to the interest of such beneficiary in his life. The rule that the assignee of a valid policy need not have an insurable interest in the life prevails in California, Colorado, Georgia, Illinois, Indiana, Maryland, Massachusetts, Mississippi, New York, Ohio, Rhode Island, Vermont, Wisconsin, South Carolina, and in England and Canada. The doctrine seems to be supported by the weight of authority, but it must be noted that, under either rule, the essential fact is that the transaction must be bona fide, and not a mere cover for a wagering or speculative insurance, or a device to evade the law. In fact, many of the cases which hold an assignment without interest void will, upon close examination, be found to rest upon the fact that the transaction in question was merely colorable, and an attempt to obtain speculative insurance." *Id.* § 63. "There seems to be a clear distinction between cases in which the policy is procured by the insured bona fide of his own motion, and cases in which it is procured by another. It is a very different thing to allow a man to create voluntarily an interest in his termina-

tion, and to allow some one else to do it at their will. The true line is in the activity and responsibility of the assured, and not the interest of the person entitled to the funds. It is well established that a man may take out a policy on his own life, payable to any person he pleases; and it is drawing a distinction without a difference to hold that he cannot take out a policy and afterwards transfer its benefits." *May Ins.* (4th Ed.) § 398A. "It is one thing to say that a man may take insurance upon the life of another for no purpose except as a speculation or bet on his chance of life, and may repeat the act ad libitum, and quite another thing to say that he may purchase the policy as a matter of business after it has once been duly issued under the sanction of the law, and is therefore an existing chose in action or right of property, which its owner may have the best of reasons for wishing to dispose of. There is in such a purchase in our opinion, no immorality, and no imminent peril to human life." *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496. "It is said that if the payee of a policy be allowed to assign it, a safe and convenient method is provided by which a wagering contract can be safely made. The insured, instead of taking out a policy payable to a person having no insurable interest in his life, can take it out to himself and at once assign it to such person. But such an attempt would not prove successful, for a policy issued and assigned under such circumstances would be none the less a wagering policy because of the form of it. The intention of the parties procuring the policy would determine its character, which the courts would unhesitatingly declare in accordance with the facts, reading the policy and assignment together as forming part of one transaction. * * * The point of actual separation between the cases asserting the assignability, and those asserting the nonassignability, of policies of insurance to persons not interested in the continuance of the life of the assured, seems to be that those asserting nonassignability proceed on the assumption that the question is one of law, and that, if a policy is not assignable in one case, it cannot be in any case; while in the other line of cases the underlying principle is that all valid contracts are assignable, but that contracts are not necessarily valid and free from the taint of gambling because upon their face they appear to be regularly and properly issued. In order to ascertain the truth, all the facts and circumstances may be proved; and, if it then appears that the parties intended by the contract to enable a third and uninterested party to speculate upon the life of another, the court will declare such contracts invalid, not because of the assignment, but in spite of it." *Steinback v. Diepenbrock*, 158 N. Y. 24, 31, 32, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. Rep. 424; *Swick v. Insurance Co.*, 2 Dill. 160, Fed. Cas. No. 13,692; *Langdon*

v. Insurance Co. (C. C.) 14 Fed. 272; *Wainwright v. Bland*, 1 Moo. & R. 481. See, also, notes, 57 Am. Dec. 103, 52 Am. Rep. 143, 58 Am. Rep. 855, 16 Am. St. Rep. 906, and 17 Am. Law Reg. 86.

We think both reason and authority sustain the conclusion that a life policy of insurance valid in its inception may be assigned to one having no insurable interest in the life insured, if the assignment is bona fide, and not a device to evade the law against wager policies. *Fairchild v. Association*, 51 Vt. 613; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496; *Fitzgerald v. Insurance Co.*, 56 Conn. 116, 132, 133, 13 Atl. 673, 17 Atl. 411, 7 Am. St. Rep. 288; *Steinback v. Diepenbrock*, 158 N. Y. 24, 29-32, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. Rep. 424; *Rittler v. Smith*, 70 Md. 261, 265-269, 16 Atl. 890, 2 L. R. A. 844; *Crosswell v. Association*, 51 S. C. 103, 105, 106, 28 S. E. 200; *Bursinger v. Bank*, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848. Authorities might be multiplied, but, as they are fully collected on both sides of the question in the foregoing cases and notes, it would be useless to do so.

The defendant relies upon *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924, and *Lanouette v. Laplante*, 67 N. H. 118, 36 Atl. 981. Speaking of the former case, and of the earlier case of *Cammack v. Lewis*, 15 Wall. 643, 21 L. Ed. 244, the Supreme Court of Massachusetts, in *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 32, 52 Am. Rep. 245, said they "were both cases in which the policies were taken out by the procurement of the assignees, in order that they might be assigned to them, under such circumstances as that they will be held to be in evasion of the law prohibiting gaming policies. The remark of Mr. Justice Field in the latter case, that 'the assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name,' was not necessary to the decision." The Supreme Court of Connecticut has also said, referring to *Warnock v. Davis*: "The expressions to the effect that the law permits a transfer only to a person who has an insurable interest in the life insured were doubtlessly occasioned by the belief that the contract under consideration was a wager." *Fitzgerald v. Insurance Co.*, 56 Conn. 116, 133, 13 Atl. 677, 7 Am. St. Rep. 288. That they were not intended to declare that a policy valid in its inception could not under any circumstances be transferred to one having no insurable interest would seem clear from the later expressions of the same judge in *New York, etc., Ins. Co. v. Armstrong*, 117 U. S. 591, 597, 6 Sup. Ct. 877, 880, 29 L. Ed. 997, where he said: "A policy of life insurance, without restrictive words, is assignable by the insured, for a valuable consideration, equally with any other chose in action, where the assignment is not made to cover a mere speculative

risk, and thus evade the law against wager policies." The earlier decisions of the same tribunal are as inconsistent as this later one with the view of *Warnock v. Davis*, contended for by the defendant. Thus, in *Connecticut, etc., Ins. Co. v. Schaefer*, 94 U. S. 457, 462, 24 L. Ed. 251, the court said: "But supposing a fair and proper insurable interest, of whatever kind, to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained." The head note is: "Any person has a right to procure an insurance on his own life and assign it to another, provided it be not done by way of cover for a wager policy." In *Ætna Life Ins. Co. v. France*, 94 U. S. 561, 24 L. Ed. 237, the court said: "As held by us in the case of *Connecticut Mutual Life Insurance Company v. Schaefer*, * * * any person has a right to procure an insurance on his own life and assign it to another, provided it be not done by way of cover for a wager policy." *Warnock v. Davis* is reviewed and distinguished, and the conclusion reached in the present case ably sustained, in *Fitzgerald v. Insurance Co.*, 56 Conn. 116, 132, 133, 13 Atl. 673, 17 Atl. 411, 7 Am. St. Rep. 288; *Steinback v. Diepenbrock*, 158 N. Y. 24, 31, 32, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. Rep. 424; *Rittler v. Smith*, 70 Md. 261, 265, 268, 267, 16 Atl. 890, 2 L. R. A. 844; and *Crosswell v. Association*, 51 S. C. 103, 105-106, 28 S. E. 200.

In *Lanouette v. Laplante*, 67 N. H. 118, 36 Atl. 981, the court said: "The transaction in a legal aspect does not differ from what it would have been if he [the beneficiary] had himself procured the insurance with Mrs. Lawrence's [the subject of the insurance] assent." Thus the policy was treated as a wager contract in its inception. The case, therefore, is no more an authority than *Warnock v. Davis* for the proposition for which the defendants contend here, but is entirely consistent with the conclusion reached in the present case.

American Legion of Honor v. Sides, 67 N. H. 595, 39 Atl. 1112, was not a case of assignment. The policy there in question was payable to the defendant when issued, and the premiums were paid by him. The court evidently proceeded upon the idea, as in *Lanouette v. Laplante* and *Warnock v. Davis*, that "the transaction in a legal aspect did not differ from what it would have been if the defendant had himself procured the insurance," and that it was a wager contract in its inception. The fact that the case was disposed of without comment, upon the authority of *Lanouette v. Laplante*, confirms this view. Like *Warnock v. Davis* and *Lanouette v. Laplante*, it is distinguishable from the present case.

3. The provisions in the policy regarding assignment, upon which the defendant relies, were inserted for the protection of the com-

pany. The company has waived them by admitting liability and paying the money into court. They are not available to the defendant. *Knights of Honor v. Watson*, 64 N. H. 517, 15 Atl. 125; *Brown v. Mansur*, 64 N. H. 39, 5 Atl. 768.

4. But, assuming the validity of the assignment, the defendant contends that, as it was made as a pledge or security for the debt of another, its legal relation was that of a surety, and that it was discharged by certain transactions between the plaintiffs and the principal debtor changing the terms of the contract, to which the policy was collateral, and the status of security, to which the defendant, in case he paid the principal indebtedness, would have been entitled to subrogation.

Of the soundness of the legal proposition that, "when a person pledges his property as security for the performance of the contract of a third party, the property stands in the position of a surety, and any change in the contract which would have discharged a surety upon the contract will discharge the property pledged as security," there would seem to be no doubt. *Brandt, Sur. & Guar.* (2d Ed.) § 34; *Rowan v. Company*, 33 Conn. 1; *Price v. Bank*, 124 Ill. 317, 15 N. E. 754, 7 Am. St. Rep. 367. The trouble is not with the law of the defendant's position in this respect, but with the facts. As we understand the finding of the court, the defendant assented to the transaction of December 1, 1892, and that the policy should remain with the plaintiffs as security for the notes then substituted. The facts reported are quite sufficient to warrant this finding. Having so assented, it is hardly necessary to say that the defendant is now estopped to claim a discharge on account of that transaction. *Crosby v. Wyatt*, 10 N. H. 318, 324; *Watriss v. Pierce*, 32 N. H. 560; *Hutchinson v. Wright*, 61 N. H. 108; *Brandt, Sur. & Guar.* (2d Ed.) § 342. Furthermore, according to the case, as amended, the transaction of 1892 involved no extension.

As we understand the finding of the court, the transaction of November, 1894, was neither a payment nor an extension of the principal indebtedness, nor a change in the status of any security held by the plaintiffs to which the defendant would have been entitled to be subrogated had he paid the principal debt, except such change as resulted from the bona fide foreclosure of the plaintiffs' mortgages and due application of the proceeds in reduction of the primary obligations. No other interpretation would be consistent with the decree. If we have misinterpreted the finding of the court, and the foreclosure was in fact only a matter of form, and the real transaction was a transfer of the property of the Comins Company to the Beecher's Falls Company, pursuant to a binding agreement between the plaintiffs and the Comins Company that the plaintiffs would thereafter look for their pay to the Beecher's Falls Company

and not to the Comins Company, then there would appear to have been such a modification of the terms of the contract, for the performance of which the policy was pledged, as to effect a discharge of the policy as security.

5. The mortgage sale "and the amount of the proceeds of each sale (\$5,000 and \$18,000) were shown by the record," and, upon such showing, were found as facts. The sale and the proceeds thereof already appearing as "facts" from the record, and the application of the proceeds to the mortgage indebtedness following as matter of law, the admission of the indorsement upon the wrapper, merely evidencing the same facts, was not reversible error, especially in the absence of anything in the case showing or indicating a claim that in these respects the facts were otherwise than as shown by the record. *Wiggin v. Damrell*, 4 N. H. 69; *Foye v. Leighton*, 24 N. H. 29, 37, 38; *Wait v. Association*, 66 N. H. 581, 23 Atl. 77, 14 L. R. A. 356, 49 Am. St. Rep. 630.

Exceptions overruled.

CHASE and WALKER, JJ., did not sit; the others concurred.

(25 R. I. 156)

MCCRILLIS v. COLE.

(Supreme Court of Rhode Island. April 27, 1903.)

FIXTURES—MORTGAGOR AND MORTGAGEE—EQUITABLE MORTGAGE.

1. The owner of land agreed with a third person to build a mill for him, and to sell him the mill and the land at an agreed price, the third person agreeing to buy the land and mill within a certain number of years, paying a certain sum each year, and interest on the price of the land and money expended in erecting the mill. The third person also agreed to furnish a part of the materials. *Held*, that in equity the owner of the land stood as a mortgagee to the third person.

2. The third person purchased an engine and boiler and placed them in the mill, the owner of the land having no knowledge of an agreement relative thereto whereby title was to remain in the seller. *Held* that, as between him and the seller, the owner was entitled to hold the property.

Suit by J. Wilson McCrillis against John W. Cole. Heard on bill, answer, and proof. Decree for complainant.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Littlefield & Barrows, for complainant. Edwards & Angell, for respondent.

STINESS, C. J. The complainant, McCrillis, entered into a contract by which he was to build a mill for Smith, and to sell to him the land and mill at an agreed price. Smith agreed to buy the land and mill within ten years, paying, after two years, \$500 a year on account of the purchase price, and paying as rental, until the purchase was completed, interest on the price of the land

and the money expended by the complainant in erecting the mill. Smith also agreed to furnish a part of the material for the mill and \$600 in cash, labor, or materials, without cost to McCrillis, and to furnish an engine and boiler, with shafting and pulleys, without cost to the complainant, "to be considered a part of the real estate." McCrillis built the mill, and Smith furnished the engine and placed it in the mill on a foundation built by McCrillis. Smith bought the engine of the respondent, Cole, giving a receipt therefor, stating that the engine was "borrowed and received" of Cole, "the same to remain the property of said John W. Cole until such time as the price set against them shall be paid as per memorandum in the margin, when they are to become the property of the borrower, E. E. Smith & Co." Smith was doing business under the above firm name. Smith further agreed with Cole "in the meantime to keep property in good repair and sufficiently insured for the benefit of the said John W. Cole, and to permit him to enter and remove the same" if payment should not be made as agreed. The agreement between Smith and McCrillis was unknown to Cole, and McCrillis was ignorant of the agreement between Smith and Cole. Smith became bankrupt, and, upon Cole's threat to take the engine, the complainant brings this bill for an injunction against its removal. The complainant claims that the engine became a part of the real estate, and that the respondent has no right to remove it. This is the controlling question in the case.

The complainant's first point is that by the agreement between him and Smith the engine was to be a fixture. Undoubtedly, as between themselves, landlord and tenant and vendor and vendee may say whether a thing shall be regarded as a fixture or not, but such an agreement cannot bind other parties having rights in the property. The effect of the agreement, therefore, between McCrillis and Smith is not controlling as to Cole, who was not a party to it. *Kaestner v. Day*, 65 Ill. App. 623. The question, then, is whether the agreement between Cole and Smith was such as to make the engine a fixture, so that title passed to McCrillis when the engine was placed in the mill. The complainant argues that he cannot be bound by a secret agreement between Smith and a third party, as it would work a fraud upon him. This depends upon the question whether the engine did or did not become a fixture as between the parties. If it did, the complainant holds it. If it did not, it was a chattel, and the rule of caveat emptor applies to the complainant if he is to be regarded as a purchaser under his agreement with Smith. The general rule in regard to fixtures, as now established, was so fully considered by Mr. Justice Tillinghast in *Canning v. Owen*, 22 R. I. 624, 48 Atl. 1083, 84 Am. St. Rep. 868, that it is needless to re-

view it. The opinion in that case clearly pointed out the distinction in applying the rule between landlord and tenant and vendor and vendee, the former being broader and more liberal than the latter. Thus he cited from *McConnell v. Blood*, 123 Mass. 47, 25 Am. Rep. 12, as follows: "Many things which, as between landlord and tenant, would be removable as chattels, are regarded as a part of the realty in favor of a mortgagee." In this case the relation of the parties is not clear. McCrillis did not sell and Smith did not buy. They were not actually vendor and vendee. While Smith was to pay a rental pending his agreement to buy, the sum he was to pay was interest on the price of the land and money expended in building, not a sum based on the rental value of the property. From this fact, coupled with the agreement to buy under which Smith entered, we are of opinion that they did not stand strictly in the relation of landlord and tenant. The obvious effect of the agreement between McCrillis and Smith, under which McCrillis was to advance his money, was that the contributions of Smith would be security to him for money he should expend in erecting the mill for Smith's benefit and on his agreement. We therefore think that, as to Smith, he stood equitably as a mortgagee. The general rule between vendor and vendee is substantially the same between mortgagor and mortgagee, because the relation is substantially the same; the mortgage being a form of sale. A mortgagee gets a conditional, instead of an absolute, title, but it becomes absolute on default. In this case a mortgage was not given, but McCrillis held the title to the property conditionally, and upon default held it absolutely, without the need of a sale or deed. As to the rule between vendor and vendee, it was said in *Canning v. Owen*, quoting *Field, J.*, in *Sands v. Pfeiffer*, 10 Cal. 264: "'As against him [the vendor] all fixtures pass to his vendee, even though erected for the purposes of trade and manufacture, or for ornament or domestic use, unless specially reserved in the conveyance.' And the same strict rule which applies between heir and executor applies equally between vendor and vendee, and between mortgagor and mortgagee. 2 Kent's Com. *345." Under this relation of Smith and McCrillis there can be no question that, if Smith had put in the engine with clear title in himself, McCrillis would have taken it, by the agreement between them, upon Smith's default.

What effect, then, is to be given to Cole's claim of title under the circumstances? Has he title as against the complainant under an agreement in the nature of a mortgage? Upon equitable grounds the complainant has the stronger position. Under his contract he retained the title to the land, giving Smith no apparent ownership, as security for his expenditure in building the mill, upon the

chance that it might be left on his hands, the parties agreeing that the engine and boiler should be considered as real estate. He could have done no more. The agreement, as between him and Smith, was valid and reasonable. He was taking a large chance, for which he was entitled to adequate security. Cole, on the other hand, was selling chattels of no use unless affixed to land, knowing the use to which they were to be put, without inquiry as to the ownership of the mill. There is some conflict of testimony as to his knowledge, but it is not material. If he demanded or was shown any evidence of Smith's ownership of the mill, there could be none except the agreement, which showed at once that McCrillis was to hold the property as real estate. If he made no inquiry, then he knew that the engine and boilers were liable to be put into another's mill, where ownership was liable to be brought in question. He was intrusting Smith with possession and apparent ownership of that which was liable to become realty. If we ask which of two innocent persons must suffer loss, the answer is obvious that it must be the one most at fault; and these facts show that the defendant was at fault in not making an inquiry which it was his duty to make. This is the underlying principle upon which decisions upon this point rest, and we think that the law is settled on sound reason and a decided weight of authority. In the first place, we consider it settled in this state by *Canning v. Owen*, supra, that whatever is attached to the realty with a view to enhance the value thereof, and for the purpose of being permanently used in connection therewith, is a fixture; and the fact that it can be removed without physical injury to the freehold does not change its character. In support of this rule, in addition to the cases there cited, we refer to the following as a few of the many cases on this fruitful subject: *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310 (machinery other than that clearly portable); *Smith Paper Co. v. Servin*, 130 Mass. 511 (iron table on brick foundation); *Sweetzer v. Jones*, 35 Vt. 317, 82 Am. Dec. 639 (boilers and engine); *Snedeker v. Warring*, 12 N. Y. 170 (ornamental statue in grounds); *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235 (machinery in a cotton mill); *Vail v. Weaver*, 132 Pa. 363, 19 Atl. 138, 19 Am. St. Rep. 598 (engine and machinery of electric plant).

In the present case the intention of the contract was to make the engine and boilers a part of the realty. The question still remains, however, whether this affects the right of the respondent, Cole, who was not a party to the contract in regard to the erection of the mill. As to this question, in *Davenport v. Shanta*, 43 Vt. 546, the rule is well stated in the syllabus and sustained by the opinion as follows: "When a person

sells machinery under a condition that it shall remain the property of the vendor until the price is paid, but it is of such a character that, when it is put in place in a mill, it would pass under a mortgage of the real estate, and the vendor had reason to suppose it would be and it was so placed before it was paid for, held, that the equity of a subsequent mortgagee, without notice of the vendor's claim and in reliance upon the vendee's title being absolute, is paramount to that of the conditional vendor." This doctrine is sustained as to subsequent mortgagees or purchasers by the following cases: *Wentworth v. Woods*, 163 Mass. 28, 39 N. E. 414; *Ridgeway Stove Co. v. Way*, 141 Mass. 557, 6 N. E. 714; *Southbridge Sav. Bank v. Exeter Mach. Works*, 127 Mass. 542; *Meagher v. Hayes*, 152 Mass. 228, 25 N. E. 105, 23 Am. St. Rep. 819; *Kaestner v. Day*, 65 Ill. App. 623; *Fryatt v. Sullivan Co.*, 5 Hill, 116, affirmed 7 Hill, 529; *Thomson v. Smith*, 111 Iowa, 718, 83 N. W. 789, 50 L. R. A. 780, 82 Am. St. Rep. 541; *Stillman v. Flenniken*, 58 Iowa, 450, 10 N. W. 842, 43 Am. Rep. 120; *Water Co. v. Boiler Works*, 15 Tex. Civ. App. 694, 41 S. W. 835; *Brown v. Roland*, 11 Tex. Civ. App. 648, 33 S. W. 273; *Wickes v. Hill*, 115 Mich. 338, 73 N. W. 375; *McNally v. Connolly*, 70 Cal. 3, 11 Pac. 320; *Miller v. Waddingham*, 91 Cal. 377, 27 Pac. 750, 13 L. R. A. 680; *Knowlton v. Johnson*, 37 Mich. 47; *Muir v. Jones*, 23 Or. 352, 31 Pac. 646, 19 L. R. A. 441; *Wade v. Brewing Co.*, 10 Wash. 285, 38 Pac. 1009; *Case v. Garven*, 45 Ohio St. 289, 18 N. E. 493. The following cases apply the same rule to prior mortgagees and owners: *Thompson v. Vinton*, 121 Mass. 139; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *English v. Foote*, 8 Smedes & M. 444; *Hinkley & Egery Iron Co. v. Black*, 70 Me. 473, 35 Am. Rep. 346; *Roddy v. Brick*, 42 N. J. Eq. 218, 6 Atl. 806; *The Bass Foundry v. Gallentine*, 99 Ind. 525; *Hamilton v. Huntley*, 78 Ind. 521, 41 Am. Rep. 593. We do not regard a distinction between prior and subsequent mortgagees as important in this case. Both classes are recognized as being within the rule, and the fact that the mortgage was subsequent to the delivery of the property claimed in the cases cited was, no doubt, in some of them accidental. The language of some of the opinions indicates that the result would have been the same had the mortgages been prior to the conditional sale of the chattel. However this may be, it is clear that there is a stronger equity in favor of a bona fide purchaser without notice, who is presumed to buy on the basis of what he sees and of what would be regarded to pass as real estate. He pays upon the condition of the property as it appears. To a prior mortgagee or owner in many cases it would simply be an accession. In this case the complainant put out his money on the agreement by Smith to furnish the engine and boilers. His money was as much advanced upon the

understanding that the engine and boilers were to be a part of the realty as one who should buy the realty as it stood.

Without reviewing all the cases cited by the respondent, it is enough to say that many of them are cases between landlord and tenant, and others are not in harmony with later decisions of the same court cited above; e. g., *The Lansing Works v. Walker*, 91 Mich. 409, 51 N. W. 1061, 30 Am. St. Rep. 488; *Penn Mut. Life Ins. Co. v. Semple*, 38 N. J. Eq. 575; *Hendy v. Dinkerhoff*, 57 Cal. 3, 40 Am. Rep. 107; *March v. McKoy*, 56 Cal. 85; *Godard v. Gould*, 14 Barb. 662. Other cases cited by respondent may be distinguished. In *Brand v. McMahon* (Sup.) 15 N. Y. Supp. 39, the claim of the vendor to the machinery was announced by the auctioneer at the sale of the realty. In *New Chester Water Co. v. Holly Mfg. Co.*, 53 Fed. 19, 3 C. C. A. 399, the appellant water company was composed of the members of a firm which had bought the engines of the Holly Company and then conveyed the land on which the engines were placed to the water company. On this fact the water company was charged with notice. In other cases, the mortgagor or grantor having agreed that the property should be personalty, it has been held that his grantee was estopped to claim to the contrary; e. g., *Smith v. Benson*, 1 Hill, 176.

Our conclusion is that the complainant is entitled to hold the engine and boilers.

(% R. L. 151)

ZANTURJIAN v. BOORNAZIAN et al.

(Supreme Court of Rhode Island. April 24, 1903.)

STATUTE OF FRAUDS—AGREEMENTS NOT TO BE PERFORMED WITHIN A YEAR—SALE OF BUSINESS—GOOD WILL—PAROL EVIDENCE—CONSIDERATION.

1. An agreement, on sale of a business, never to engage in it again in the immediate vicinity in competition with the purchasers, is not within Gen. Laws 1896, c. 233, § 6, providing that no action can be maintained to charge any person on any agreement which is not to be performed within a year from the making thereof.

2. Where a written agreement executed on a sale of a business specifies that the good will is included in the sale, without any restrictions as to re-engaging in business, oral evidence that the sellers agreed never to re-engage in the business in the same vicinity is inadmissible as varying the written agreement.

3. Where the good will is included in the sale of a business, the sellers may re-engage in the same business in the same vicinity in the absence of an agreement to the contrary, but cannot apply to their old customers to induce them not to deal with the purchasers.

4. An agreement, subsequent to a contract of sale, to execute another instrument setting forth a promise not to re-engage in the same business, is without consideration and unenforceable.

Bill by Mardiros Zanturjian against Kirker Boornazian and others. Heard on bill, answer, and proof. Bill dismissed.

Argued before TILLINGHAST and DOUGLAS, JJ.

Herbert A. Rice, for complainant. Barney & Lee and James F. Murphy, for respondents.

TILLINGHAST, J. The object of the complainant in prosecuting this bill is to perpetually enjoin the respondents and each of them from carrying on the coal and wood business in the cities of Central Falls and Pawtucket, or in the vicinity thereof.

The bill alleges that on the 21st day of April, 1902, and for a long time prior thereto, the respondents owned and conducted a retail coal and wood business at No. 14 Charles street, in the city of Central Falls; that for some time prior to said date they had advertised said business for sale, representing that they were about to leave said city of Central Falls and engage in other pursuits; and that on said 21st day of April the respondents entered into an agreement with the complainant to convey to him all their stock and property in said business, together with the good will thereof, for the sum of \$900, and further agreed that they would not, nor would either of them, from and after the date of said sale, engage in the business of retailing coal and wood, either directly or indirectly, in either of said cities or in the vicinity thereof, whereby they might come in competition in business with the complainant, and further agreed that they would execute a writing not to so engage in said business; that, in pursuance of said agreement, all of the stock in trade of every kind and description used by the respondents in carrying on their business, together with the good will of said business, was conveyed to the complainant, he paying therefor the said sum of \$900; and that thereupon he took possession of said property, and has ever since conducted, and is now conducting, the business of retailing coal and wood at said location. The bill further alleges that the specific property in question was not worth more than \$500, and that the balance of the amount paid, to wit, \$400, was paid for the further agreement aforesaid on the part of the respondents. It also alleges that the respondents, notwithstanding their agreement not to re-engage in said business, have, since the making thereof, returned to the city of Central Falls, and established a retail coal and wood business directly in the rear of the location aforesaid, and have engaged in and are now engaged in conducting the business of retailing coal and wood, and are soliciting trade relations with their former customers, and in all ways competing in said business with the complainant, all of which is in violation of their agreement aforesaid. The prayer of the bill is that the respondents may be perpetually enjoined from carrying on said business within the locality aforesaid. The answer of the respondents admits that they sold and conveyed said stock in trade and business to the complainant for the sum of \$900, but they deny that they agreed that they would not again engage in

§ 2. See Good Will, vol. 24, Cent. Dig. § 5.

the business of retailing coal and wood in the city of Central Falls or in its vicinity, and they deny that they agreed to execute a writing not to so engage in business, and not to compete with the complainant in manner and form as alleged in the bill. They further deny that the property and goods conveyed by them to the complainant were only of the value of \$500, and that the price agreed upon, namely, \$900, was fixed in view of the fact that they agreed not to again enter into said business, but, on the contrary, they allege that the said property was of the value of \$900 and upwards. They also deny that they were ever requested to execute a writing to the effect that they would not again engage in said business, or that they ever agreed to execute such a writing. The bill of sale of the property in question, which was duly executed and delivered by the respondents to the complainant, after describing the principal articles conveyed thereby, contains this clause, viz., "together with the good will of said business." At the trial of the case, which was heard by the court on oral testimony, counsel for respondents objected to the introduction of oral testimony as to the making of the alleged agreement by the respondents not to re-engage in said business, on the grounds (1) that such an agreement was within the statute of frauds, and (2) that, so long as the parties had reduced their agreement to writing, it could not be added to or varied by parol evidence. The court, however, permitted the testimony to be offered *de bene*, and the question now before us is whether we can properly consider and give weight thereto.

In so far as the objection to the testimony is based upon the first ground, it is not tenable. Under the statute of frauds of this state (Gen. Laws R. I. 1896, c. 233, § 6, cl. 5), no action can be maintained "whereby to charge any person upon any agreement which is not to be performed within the space of one year from the making thereof; unless the promise or agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized." This statute "is confined to contracts which by agreement are not to be performed within a year, and not to such as may by circumstances be postponed beyond the year." *Fenton v. Emblers*, 3 Burri. 1278. Although the alleged agreement in the case at bar was that the respondents would never again engage in said business, yet it was personal to them; and hence, if they had died within the year, as they might, the contract would have been fully performed within the year, and so was not within the statute. This branch of the case is clearly within, and fully controlled by, *Richardson v. Pierce*, 7 R. I. 330, and hence there is no occasion for a further discussion thereof.

Was the testimony obnoxious to the second

rule above invoked, namely, that it tended to vary a written contract by parol? We think this question must be answered in the affirmative. The testimony offered by the complainant as to what took place at the various interviews between the parties prior to the making of the bill of sale was clearly to the effect that the respondents expressly agreed that they would never re-engage in said business as alleged in the bill, and also that they would put this agreement in writing, and that a substantial part of the consideration aforesaid was paid because of this agreement. The testimony offered by the respondents consisted of a full and flat denial of the making of any such agreement. So that, if the testimony were admissible, we should be called upon to decide as to the relative weight thereof. But in view of the fact that, subsequent to said negotiations, the parties went together to the office of Mr. Gooding and had a bill of sale drawn up and formally executed, which, while it did expressly specify that the good will of the business was included in the sale, made no mention of the restriction in question, to now permit the complainant to prove that the contract was something different from that contained in the bill of sale would be to permit a written agreement to be added to or varied by parol, which the law will not allow. For the law presumes the written agreement "to be the contract of the parties, and to embrace all the terms and stipulations deemed material by either at the time of its execution." *Sweet v. Stevens*, 7 R. I. 375. See, also, *Myron v. Union Ry. Co.*, 19 R. I. 125, 32 Atl. 105; *Dyer v. Print Works*, 21 R. I. 63, 41 Atl. 1015; *Watkins v. Greene*, 22 R. I. 34, 46 Atl. 38; *Vaughan v. Mason*, 23 R. I. 348, 50 Atl. 390; *Am. & Eng. Ency. of L.* (2d Ed.) vol. 4, p. 568, and cases cited in note 3. Even conceding, therefore, that the complainant has shown by a clear preponderance of evidence that the respondents did orally agree not to re-engage in said business, as alleged in the bill, so long as this stipulation was not incorporated in the written agreement which was subsequently made, and so long also as no claim is made by the complainant that any fraud was practiced upon him in connection with the making and execution of the written contract in question, he falls to show a case which entitles him to relief.

That, notwithstanding the fact that the respondents sold the good will of the business in question to the complainant, they still have, in the absence of an express stipulation to the contrary, the right to re-engage in a similar business in the same neighborhood, seems to be well settled by the authorities. See *Pierson v. Pierson*, 27 Ch. Div. 145; *Knoedler v. Boussod* (C. C.) 47 Fed. 465; *Bassett v. Percival*, 5 Allen, 345; *Smith v. Gibbs*, 44 N. H. 335-343. The complainant's counsel does not attempt to controvert this proposition of law. The respondents clearly have not the right, however, to apply to any

of their old customers privately, either personally or by another, to secure their patronage or to induce them not to deal with the complainant, for this would be in plain violation of their written agreement.

The complainant offered some testimony to the effect that, subsequent to the making of the bill of sale, the respondents agreed to make another writing, if and whenever the complainant desired the same, in which they would set forth the agreement not to re-engage in said business, and complainant's counsel contends that respondents are bound by this agreement. We do not find that this position is sustained by the evidence. But even if it were, such contract was without consideration, and hence unenforceable.

The bill must therefore be dismissed.

(35 R. I. 143)

**STARKWEATHER & SHEPLEY v.
BROWN et al.**

(Supreme Court of Rhode Island. April 24, 1903.)

**CORPORATIONS—MANUFACTURING COMPANIES—
FILING REPORTS—FAILURE TO FILE—
STOCKHOLDERS' LIABILITY—STATUTORY
CONSTRUCTION—RESIDUARY LEGATEE—LIA-
BILITY OF TESTATOR.**

1. The charter of a corporation organized to acquire and hold real estate provided that the corporation should be subject to Pub. St. c. 135, relating to "manufacturing corporations," section 11 of which provides that every manufacturing corporation included within the act shall file returns, etc. *Held* that, in view of the fact that many business corporations which are not manufacturing ones have charters referring to the same statute, the corporation in question must be considered as subject thereto.

2. Section 11, as amended by Laws 1892, p. 357, c. 1089, § 1, enacts that any manufacturing corporation having no factory in the state shall file returns in the office of the town clerk of the town where it has an office, and chapter 26, relative to statutory construction (section 8), provides that "town clerk" may include "city clerk." *Held*, that the corporation in question was required to file the returns in the office of the city clerk of the city where it had an office.

3. Though, at the time the charter was passed, manufacturing corporations having no factory in the state could not comply with section 11, because no provision was made as to where they should file returns, the amendment (Laws 1892, p. 357, c. 1089, § 1) having required them to be filed where such a corporation had an office, the provision applied to the corporation in question.

4. The stockholders of such corporation were liable, under the stockholders' liability imposed by chapter 155, for failure to file the returns as required by section 11.

5. The residuary legatee of a stockholder in a corporation is not a proper party to an action against him as stockholder in a corporation, as she has no interest in his estate which can prevent an application of any portion of his estate to his stockholder's liability.

Bill in equity by Starkweather & Shepley against D. Russell Brown and others to enforce a stockholder's liability. Decree for complainants, save as to defendant Harriet A. Wellman, as to whom the bill is dismissed.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Walter B. Vincent, for complainants.
Comstock & Gardner and Dexter B. Potter, for respondents.

DOUGLAS, J. The complainants are judgment creditors of the Oakland Beach Association, a corporation created by act of the General Assembly passed May, 1883. One of the defendants is a stockholder in said corporation, and the other two are the administrator with the will annexed and the widow and residuary legatee of a deceased stockholder. Both alleged stockholders were such at the time when the complainants' debt accrued. The complainants' judgment was recorded July 7, 1902, and execution thereon has been returned nulla bona.

1. The bill is brought to enforce upon the defendants the penalty imposed by chapter 155 of the Public Statutes of 1882, corresponding to chapter 180, p. 556, of the General Laws of 1896, upon the stockholders of manufacturing corporations which do not make the returns required of such corporations by the provisions of section 11 of that chapter. The defendants severally admit that the corporation never made such returns, but urge as a common defense that the provisions of said chapter are not applicable to it, notwithstanding the terms of its charter, inasmuch as it is not a manufacturing corporation, and never had a manufactory established in any town in this state or elsewhere.

The charter created a corporation "for the purpose of acquiring and holding as an estate in fee simple the real estate situated in the town of Warwick and known as 'Oakland Beach,' and other real estate adjacent thereto, and of purchasing and holding personal property of various kinds in connection therewith, and of establishing and maintaining a place of recreation and sojourn thereon, either by managing the same under their own direction, or by leasing the same to others, with full power to sell and convey said real estate, or any portion thereof, so as to vest in the purchaser a good and sufficient title thereto in fee simple, and for the transaction of any other business connected therewith or incidental thereto, with all the powers and privileges and subject to all the duties and liabilities set forth in chapters 152 and 155 of the Public Statutes and in any acts in amendment thereof or in addition thereto."

Title 19 of the Public Statutes, "Of Corporations," contains chapter 152, "Provisions Respecting Corporations in General;" chapter 153, "Of Banks and Institutions for Savings;" chapter 154, "Of Returns of Banks and Institutions for Savings;" chapter 155, "Of Manufacturing Corporations;" chapter 156, "Of Insurance Companies;" chapter 157, "Of Foreign Insurance Companies;" chap-

ter 158, "Of Railroad Corporations;" chapter 159, "Of Turnpike and Toll-Bridge Corporations;" chapter 160, "Of Voluntary Associations;" chapter 161, "Of Proprietors of Common and Undivided Lands;" and chapter 162, "Of Hospital Corporations." All these chapters, after the first, contain provisions which are applicable only to the classes of organizations to which their language refers, and which are absolutely meaningless if attempted to be applied to other classes. So that if, instead of chapter 155, the General Assembly had made this corporation subject to the provisions of chapter 153 or 158, the reference would at once be seen to be an error which could have no binding effect, as it could have no sensible meaning.

The same result will follow if we attempt to apply to this corporation the literal terms of chapter 155. Section 1 of that chapter relates to "the members of every incorporated manufacturing company." Section 2 refers to "such" company. Section 3 relates to "said" officers. Section 4 says every "such" company, and so do sections 5, 6, and 7. Section 8 begins, "In case any manufacturing company," etc. Section 11 reads: "Every manufacturing company included within the provisions of this chapter shall file returns," etc. Section 12: "If any of 'such' companies shall fail to do so," etc. Section 13: "The liability of members of an incorporated manufacturing company provided by sections 1 and 12 of this chapter, and of the members of such corporations," etc., "shall be limited," etc.; and so on throughout the chapter. Some of the provisions of the chapter, as e. g., those of sections 11 and 12, do not apply to manufacturing corporations already established, unless they accept the provisions of the same in the manner set forth in section 17; but, on the other hand, none of the provisions of the chapter in terms apply to any but manufacturing corporations, and by section 27 the provisions of the chapter are to apply to all manufacturing corporations thereafter created without exception. The argument is, in substance, that if, as must be admitted, the words of section 11, "Every manufacturing company included within the provisions of this chapter," do not affect a manufacturing company, unless it is included within the provisions of the chapter, so a company included by the terms of its charter in the provisions of the chapter is not subject to the provisions of section 11, unless it is a manufacturing company, and in like manner that no corporation but a manufacturing company can be subjected to the provisions of the chapter contained in other sections.

We think this argument magnifies the letter of the statute unduly, and ignores the obvious and natural meaning of the charter. The plaintiff cites many charters of business corporations, which were not manufacturing companies, in which the same provision was inserted; so many, indeed, that

we cannot consider the reference to chapter 155 in this charter as accidental, since it was in accordance with a frequent practice of the Legislature. The words of the charter plainly mean that this corporation, though not a manufacturing company, shall be subject to all the provisions which manufacturing companies are made subject to by chapter 155; i. e., by force of chapter 155 manufacturing corporations generally are subjected to certain provisions, and by force of this charter this corporation is made subject to the same provisions. This was the intent of the Legislature, undoubtedly; but the question remains, how far is it possible to enforce it? If there are any provisions of chapter 155 which can be observed by a company chartered to deal in real estate, and having no right to establish a manufactory, such provisions are binding upon the company. If there are no such provisions, the reference to this chapter which attempts to impose them must remain inoperative, and the will of the Legislature will have been frustrated through lack of proper words to express it. It is said in *Jones v. Dexter*, 8 Fla. 276, 288, after a review of many cases: "From the principles thus announced it is not difficult to deduce the rule that where a statute has been enacted with special reference to a particular subject, and by another statute its provisions are directed in general terms to be applied to another subject of an essentially different nature, the adopting statutes must be taken to mean that the provisions of the original statute shall be restrained and limited to such only as are applicable and appropriate to the new subject."

2. For the purposes of this case it is necessary to inquire, first, as to the application of section 11 of the statute, which, at the time the complainants' debt was contracted, had been amended by chapter 1089, § 1, Laws 1892, and in its amended form appears as section 11, p. 558, c. 180, of the General Laws of 1896. If we substitute for the subject to which this section relates the name of this corporation, we can test the application of its provisions very easily. With this substitute the amended section reads as follows: "Every manufacturing company included within the provisions of this chapter [The Oakland Beach Association] shall file in the office of the town clerk of the town where the manufactory is established, and every manufacturing corporation included within the provisions of this chapter [The Oakland Beach Association] which has no manufactory established in any town in this state shall file in the office of the town clerk of the town in this state where an office of the corporation is located, annually on or before the fifteenth day of February, a certificate signed by a majority of the directors truly stating the amount of its capital stock actually paid in, the value as last assessed for a town tax of its real estate, the value

of its personal assets and the amount of its debts or liabilities on the thirty-first day of December, of the year next preceding." It requires no latitude of construction to hold that the first sentence of this section to the word "and" is utterly without meaning or effect as applied to the corporation. It cannot file the return in the town where its manufactory is established, for it has no manufactory and can have none in any town; but, these words being omitted, the rest of the section imposes a duty which this corporation can well perform. By the terms of its charter it is required to have a counting room or place of business in the city of Providence; and so, under our statute of constructions—chapter 26, § 8—the return is directed to be filed in the office of the city clerk of the city of Providence.

It is argued by the defendants that the intent of the charter must be inferred from the provisions of chapter 155 as it was when the charter was passed; but the words of the charter equally subject the corporation to the subsequent amendments of that chapter. At the time this charter was passed manufacturing corporations which had no manufactories in this state could not comply with the provisions of section 11, as they could not file returns in a place which did not exist any more than this corporation could; and it is possible that it was to correct the omission with respect to both classes that the amendment was made. We conclude, then, upon this point, that the charter of the Oakland Beach Association imposed upon the corporation the duty of making the returns prescribed in section 11.

3. The next question is whether the stockholders of this corporation are subject to the same penalty, in case the corporation does not make its required returns, that stockholders of manufacturing companies generally are subject to under sections 12 and 13 of the chapter. These sections, which are identical in chapter 155 of the Public Statutes and chapter 180 of the General Laws, are as follows:

"Sec. 12. If any of such companies shall fail to do so all the stockholders of such company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such notice shall be given, except as hereinbefore provided, unless such company shall have become insolvent and assigned its property in trust for the benefit of its creditors, in which case the obligation to give such notice by the filing of such certificate shall cease.

"Sec. 13. The liability of members of an incorporated manufacturing company provided by sections one and twelve of this chapter and of the members of such corporations under other statutory provisions, for the debts of such company hereafter contracted or for obligations hereafter incurred, shall be and hereby is limited to the shares of such mem-

bers in such corporation paid up to the par value thereof; and if the corporation shall fail to file the certificate provided to be filed under the provisions of section eleven of this chapter, such members shall be liable for said debts and obligations in an additional amount up to but not exceeding the said par value of their said shares."

It is very true that this section is penal in character, as we have repeatedly held (*Sayles v. Bates*, 15 R. I. 342, 5 Atl. 497; *Wing v. Slater*, 19 R. I. 597, 35 Atl. 1302, 33 L. R. A. 566; *Kilton, Warren & Co. v. Providence Tool Co.*, 22 R. I. 605, 613, 48 Atl. 1039), and as similar statutes have been held in other states and by the United States courts (*Merchants' Bank v. Bliss*, 35 N. Y. 412; *Chase v. Lord*, 77 N. Y. 1; *Bruce v. Platt*, 80 N. Y. 379; *Steam Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786; *Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038; *Sayles v. Brown* [C. C.] 40 Fed. 8; *Gray v. Coffin*, 9 Cush. 192; *Dane v. Dane Mfg. Co.*, 14 Gray, 489; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559; *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904; *Moyer v. Pa. Slate Co.*, 71 Pa. 293; *Mean's Appeal*, 85 Pa. 75). But there is no room for construction in the clauses relating to the present case. The corporation has failed to file the certificate required by section 11, and it follows that the stockholders became jointly and severally liable for all the debts of the company existing when the certificate was required to be filed and all debts contracted by the company until such certificate was filed, or, inasmuch as no certificate was ever filed, for all debts contracted by the company up to the commencement of this suit, and the liability of each stockholder for this neglect is limited by section 13 to an amount equal to the par value of his shares.

The contention of the defendants is that not only this statute should be construed strictly, but that the charter of the corporation should also be given the strictest construction. It is not the plain meaning of the general statute that they dispute, but the inclusion of the members of this corporation in its provisions. We cannot assent to this proposition. A charter is a legislative grant, and in case of doubt is to be construed most strongly against the grantee, not against the state. It is to be observed, also, that the grant is not to a corporate body, but to individuals, who are named in the act, and their successors, who are the stockholders in the corporate body which they constitute. So long as the corporation observes certain conditions, which are imposed by reference to general statutes, these stockholders may shield themselves under the corporate character and name. When they in their corporate character fail to fulfill these duties, they may be pursued again as individuals.

In the present case the references to the chapters of the statutes confer upon the corporations powers and privileges, as well as liabilities. The grant of corporate powers is

coupled with the imposition of liabilities, and the grantees take the former on condition that they will sustain the latter. There can be no doubt that the Legislature intended to incorporate into the charter of this company such provisions of chapter 152 as were applicable, and we have no doubt that such was the intention, also, with reference to the provisions of chapter 155 and the amendments to it which are applicable. The provisions of chapter 152 were mostly grants of privileges, and those of chapter 155 restrictions or regulations; but the corporators who accept this charter cannot take it with the privileges and reject the regulations. If the duty of making returns is imposed upon the corporation, it follows that the default of the corporation in that regard must impose the liability specified upon the stockholders.

The defendants cite the case of *Park Bank v. Remsen*, 158 U. S. 337, 15 Sup. Ct. 891, 39 L. Ed. 1008, as holding that a special charter, which provided that the corporation thereby created should "possess all the general powers and privileges and be subject to all the liabilities" conferred and imposed upon corporations organized under a general statute, did not subject the trustees of such corporation to a penalty imposed by the general statute for default in making returns. The case is distinguishable from this, in that it concerned officers, and not stockholders, of the corporation, and by the more cogent fact that the charter itself defined the liabilities of the stockholders. Mr. Justice Brewer, who delivered the opinion, says (page 346, 158 U. S., page 893, 15 Sup. Ct., and 39 L. Ed. 1008): "Section 9 of the charter of the warehouse company makes special provision for the liabilities of the stockholders of the company, which was obviously unnecessary if by the clause quoted all the provisions of the general incorporation act in respect to the liability of stockholders, trustees, and other officers were transferred to and made a part of the charter." While these considerations prevent the direct application of the decision in this case, it must be acknowledged that the reasoning of the opinion supports the views urged by the defendants. It proceeds substantially in this wise: The general statute referred to is penal in its nature, and must be construed strictly. Hence the word "corporation"—not in the statute, but in the charter—must be deprived of its natural sense, which includes its officers and stockholders, and limited to its barest literal meaning. The argument seems to us fallacious, and, notwithstanding its high authority, we cannot hold that when the charter of the Oakland Beach Association subjects the corporation to liabilities it leaves the stockholders unaffected, particularly as the only conceivable motive in mentioning chapter 155 was to adopt its system of returns and penalties.

We think the words in the charter are of equal inclusion with the equivalent words in the last section of chapter 180, viz.: "All

manufacturing corporations hereafter created shall be subject to the provisions of this chapter." Could any one read these words as meaning that such corporations should not be subject to the provisions of the chapter which affect stockholders? We think not. But the only intelligible reading of this charter, as we have seen, makes this corporation by name subject to the same provisions that the other corporations are subjected to by description. There is no hardship in this interpretation. The stockholders control the corporation. The officers must make the returns, if the stockholders direct them to do so; and, if they disobey such instruction, the statute provides that the stockholders may avoid the personal liability by filing their own certificate. In this case they also neglected this precaution, and we must hold them liable.

It is further urged on behalf of Harriet A. Wellman that the bill sets forth no cause of action against her, as she is residuary legatee under the will of Harvey D. Wellman, deceased, and has never been otherwise connected with the Oakland Beach Association. We think this position is well taken. The whole of the estate of the testator is liable to be used by his administrator with the will annexed for the payment of his debts, and the residuary legatee has no interest in the estate which can prevent such an application of it. The administrator is a party, and through him the complainants can secure all their rights in the premises. They have no claim at present upon the residuary legatee. The bill as to her must be dismissed.

(25 R. I. 131)

STATE v. EPSTEIN.

(Supreme Court of Rhode Island. April 22, 1903.)

CRIMINAL LAW—EVIDENCE—ADMISSIBILITY—ACCUSATIONS IN ACCUSED'S PRESENCE—SILENCE OF ACCUSED—STATEMENTS THROUGH INTERPRETERS—HEARSAY—RES GESTÆ.

1. The silence of a party under arrest, when charges or accusations are made against him, ought not to be allowed to raise any inference against him.

2. Especially is this true where it appears that he does not understand the charges, and is not in a physical condition to enable him to understand them.

3. Where police officers in the presence of accused interrogated the person claimed to have been assaulted by him, through an interpreter, as to what took place at the time of the assault, and the responses were given through the interpreter, their testimony as to what the assaulted person stated was hearsay and inadmissible.

4. Statements made by a person assaulted, immediately following the assault, in the presence of third persons who had come to his assistance, that accused had struck him and robbed him, are part of the *res gestæ* and admissible against accused.

¶ 1. See Criminal Law, vol. 14, Cent. Dig. §§ 892, 899, 949.

Max Epstein was convicted of murder. Heard on petition for new trial. Petition granted.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Charles F. Stearns, Atty. Gen., for the State. Francis I. McCanna and Thomas Z. Lee, for defendant.

TILLINGHAST, J. The defendant, who, on the 21st day of December, 1901, was convicted of the crime of murder, now petitions for a new trial on various grounds, among which are certain alleged erroneous rulings of the trial court in the admission and rejection of testimony. The following statement will serve to show the relation and situation of the parties to the homicide in question shortly before and at the time when the fatal injury was inflicted, together with the substance and character of the testimony objected to:

On the night of July 28, 1901, the defendant, in company with Abraham Zarrinsky, the person whom the defendant is alleged to have murdered, went to the attic room where Zarrinsky lived, at No. 2 Bullfinch Court, Providence, where they remained for a few minutes, and then went together to the defendant's boarding place. Finding the door locked, Zarrinsky invited defendant to return and lodge with him in his room, which invitation the defendant accepted. This room was in the attic of a 2½-story house, and was about 14 feet in length and about 12 feet in width. The parties were fellow workmen, and were on friendly terms at this time. Zarrinsky had in his possession about \$200 in money, which he carried in a bag on his person. When the parties entered Zarrinsky's room for the night, he locked the door, according to the testimony of the defendant, and put the key in his pocket. He then took two drinks from a bottle of alcohol, as the defendant testifies, and invited him to drink therefrom, but he declined. At about 2:30 o'clock on the next morning a man named Kwasha, who occupied the tenement beneath Zarrinsky's room, heard a noise in said room, and heard a call for help. He did not recognize the voice, but shortly afterwards Zarrinsky came down stairs and said that the defendant had taken his money and gone out. Kwasha then ran out, and found the defendant lying on the ground, between the house and the fence, quite badly injured. His collar bone was fractured, he had a cut on his head, was bleeding from one ear, and appeared to be in great pain. During the combat in the room Zarrinsky was heard by some of the people below to cry out: "What are you licking me for? you have got my money!" And, on being asked by Barnett Kwasha, from the window of the room below, what was the matter, Zarrinsky replied: "There is a murder up here. He is taking my money and is licking me." Shortly afterwards Zarrinsky

brought down pieces of a broken bottle, and said, in the presence of the defendant, who was then lying on the ground where he had fallen: "With this bottle he struck me." He also said that the defendant had taken his money, whereupon the defendant answered: "I ain't got the money." Zarrinsky was pale and had marks on his head, and the defendant, in addition to the injuries above specified, had an injury on his side. Both parties were then taken into custody by the police, placed in the patrol wagon, and taken to the police station, where the defendant was laid upon the floor and Zarrinsky was seated in a chair. Shortly afterwards, Dr. Griffin, the police surgeon, was called to the police station, where he examined the injured parties; and they were then removed to the Rhode Island Hospital, where Zarrinsky died, from the effects of the injuries received in said combat, on the morning of July 28, 1901.

While the defendant and Zarrinsky were in the custody of the officers at the police station, Zarrinsky, in answer to questions propounded to him through an interpreter by the officers, in the presence of the defendant, made certain accusations against him, to most of which he made no reply; and the prosecution was permitted, against the defendant's objection, to prove the making of these accusations, together with the fact that the defendant made no reply thereto. The principal accusations made by Zarrinsky, according to the interpretation thereof by some one who was present, were as follows: "He has got \$90 in gold and \$135 in bills." Zarrinsky told how Epstein came and asked him to take him up to sleep in his room, and that he did so, and that the defendant licked him and wanted to take his money. In answer to the question: "What did Mr. Epstein then say, if anything?" the witness answered: "The lieutenant questioned Mr. Epstein, and he said he was sick and could not answer him." In cross-examination, counsel for defendant questioned the witness with relation to what took place at the police station, and the following information was adduced: "Q. Well, do you remember anything the defendant said at the police station? A. I remember Mr. Epstein saying: 'Don't bother me. I am not able to answer you.'" This was said in Jewish. It was said to a man who was a Jew, and he translated it to the captain.

Lieut. Edward O'Neill testified that the defendant was lying on the floor at the time of said conversation, and that he appeared to be suffering. Witness noticed blood oozing from the left ear, and he appeared to be in pain. "Q. And his injuries seemed to take up most of his attention? A. I should judge they did. Q. Who else were in the room? A. There were quite a number, I don't know who they were. Three or four officers in uniform." The officer further testified that, when he asked defendant where Zarrinsky's money was, he replied: "I am sick, and I don't understand." The officer further testi-

fled that defendant had said nothing at all up to that time in his presence; also that Zarrinsky said that he and defendant went to bed together, and that subsequently he waked up and found Epstein going through his pockets and taking his money, and that he (Zarrinsky) got up and called to him to give up his money, whereupon Epstein struck him with a bottle. "He hit me on the head with the bottle, and he kill me." The officer asked him how much money he had, and he told him that he had something over \$200, he could not tell the exact amount, but there were \$90 in gold; there were \$10 gold pieces, and there were \$20 gold pieces. The officer then asked Zarrinsky if he struck Epstein, and he said: "No, I want my money. He broke the bottle on my head, and jumped out of the window." * * * I asked him what Epstein did with the money? He pointed out to me and said: 'He put it in that pocket.' I went to Epstein's left pocket and found a pocketbook which contained about \$2 in silver. Before I said anything, Zarrinsky said: 'That is not mine.' I looked in the other pocket and found nothing." The officer further testified that he went to the room where the combat occurred, and found the money bag lying on the floor near the window where the defendant went out; that he took this money to the station, and Zarrinsky said it was his when he saw the bag. The officer then asked defendant again what he did with Zarrinsky's money, and he replied: "I am sick. I don't understand." Zarrinsky then stated again to the officer how Epstein got out of the room; that he ran from him, when he broke the bottle on his head, and jumped out of the window; and that to this latter statement Epstein replied that Zarrinsky pushed him out, which statement Zarrinsky denied.

Dr. Clifford H. Griffin gave his first attention to the defendant when he arrived at the police station on the morning of July 27th. He says: "I found Mr. Epstein lying on the floor of the room, with his feet towards the door and his head towards a man sitting in a chair, who was Zarrinsky. I first gave my attention to the man on the floor. I made an examination. He seemed to be in considerable pain, and in taking hold of his hand or arm to examine his pulse he complained of pain in his shoulder. * * * I found him bleeding from the nostrils and left ear. There was a fracture of the left clavicle, a lacerated wound of the left thumb, contusions about the left elbow, and an abrasion along the outer side of the left arm. He was conscious. Q. Did you talk with Mr. Epstein? A. Not more than to get his name and what is on this piece of paper. Q. Did he speak English? A. He said that he understood when I asked him his name and age. He seemed to speak with some difficulty." The doctor was then allowed to testify as to charges made by Zarrinsky against the defendant, who was lying on the floor, similar to those already detailed and testified to by

the witnesses Kwasha and O'Neill. The statements testified to by the doctor as being uttered by Zarrinsky were the result of personal interrogatories put to Zarrinsky by Dr. Griffin in his capacity as a physician. He testified that he did not know whether Epstein heard the statements or not, and that he (witness) spoke through an interpreter.

Other persons who were present at the police station when these various conversations were had with Zarrinsky were also permitted to testify as to the charges which he made against the defendant and as to the defendant's silence during most of said conversations.

Without further specifying in detail the particular language which was used by the police officers and others in interrogating Zarrinsky and in giving his replies thereto, it is sufficient to say that said interrogatories and answers substantially covered the entire transactions which took place between Zarrinsky and Epstein, as related by the former, from the time when they entered the attic room in question to the time when both the defendant and Zarrinsky were placed in the patrol wagon, after the combat in question, for the purpose of being carried to the station; that is to say, Zarrinsky was freely interrogated by several persons, after arriving at the police station in company with the defendant, as to the acts which were committed by the latter according to the version thereof as given by Zarrinsky. The accusations thus made against the defendant were to the effect that he had robbed Zarrinsky of his money, that he had struck him on the head with a bottle, and had caused him all the physical injuries from which he was then suffering; and it appears that when most of these accusations were made the defendant remained silent.

The question raised is whether this testimony was admissible. The authorities bearing upon this question are not harmonious. One class of cases holds that the fact that the accused is in custody when the charges are made against him, while entitled to weight, will not of itself exclude such statements, if the circumstances were such as properly called for a reply. Amongst the cases which take this view are *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342; *State v. Murray*, 128 Mo. 611, 29 S. W. 700; *State v. Dillon*, 74 Iowa, 653, 38 N. W. 525; *Green v. State*, 97 Tenn. 50, 36 S. W. 700; *Murphy v. State*, 36 Ohio St. 623. *Greenleaf on Evidence* seems to take the same view. See volume 1 (16th Ed.) § 197. The other class of cases holds that the silence of a party while under arrest, when charges or accusations are made against him, cannot be used as sustaining the hypothesis of acquiescence therein.

1. We are of the opinion that the rule laid down in this class of cases is the more reasonable one, and we have therefore decided to follow it. It is clearly the right and privilege of a party in such circumstances to re-

main silent, and the fact that he does so ought not to be allowed to raise any inference against him. The defendant in the case at bar, even if he heard and comprehended the import of the accusations made against him by Zarrinsky, which is certainly extremely doubtful, to say the least, was not called upon to reply to or contradict the same. *Com. v. McDermott*, 123 Mass. 440, 25 Am. Rep. 120. Being in the custody of officers of the law, his silence practically ought to have no more effect, as bearing upon his guilt, than it would have had if maintained by him while under examination in the district court upon formal charges. In such a case it would be clear that he would not be bound to admit or deny what might be said by the witnesses, and that his failure so to do could not be considered as any admission of guilt. Speaking of the effect of silence in the presence of statements made by third parties, *Duncan, J.*, in delivering the opinion of the court in *Moore v. Smith*, 14 Serg. & R. 393, said: "Nothing can be more dangerous than this kind of evidence. It should always be received with caution, and never ought to be, unless the evidence is of direct declarations of that kind which naturally call for contradiction—some assertion made to the man with respect to his right, which, by his silence, he acquiesces in." And it is to be noted that this language was used with regard to the effect of silence in a matter relating to a civil case.

A distinction is made between declarations made by a party interested and those made by a stranger. And it has been held that, while that which one party declares to the other without contradiction is admissible in evidence, that which is said by a third person may not be so. "It may be impertinent," says Mr. Greenleaf in his work on Evidence (volume 1 [16th Ed.] § 198), "and best rebuked by silence; but, if it receives a reply, the reply is evidence. Therefore, what the magistrate before whom the assault and battery was investigated said to the parties was held inadmissible in a subsequent civil action for the same assault. If the declarations are those of third persons, the circumstances must be such as called on the party to interfere, or at least such as would not render it impertinent in him to do so."

In *Com. v. Kenney*, 12 Metc. 235, 46 Am. Dec. 672, the officer in custody of the defendant said, in his presence and hearing, "Here is a man that has been robbing a man." Shortly afterwards one Russell, the person named in the indictment as having been robbed, came in, crying, and said, "That man," pointing to the defendant, "has stolen my money." The defendant made no reply to these statements. At the trial of the case testimony was admitted, against the defendant's objection, to the facts stated. In reviewing the action of the trial court it was held, in an opinion by Shaw, C. J., that the evidence in question was inadmissible. The

court said: "The declaration made by the officer who first brought the defendant to the watchhouse he had certainly no occasion to reply to. The subsequent statement, if made in the hearing of the defendant (of which we think there was evidence), was made whilst he was under arrest and in the custody of persons having official authority. They were made by an excited, complaining party, to such officers, who were just putting him into confinement. If not strictly an official complaint to officers of the law, it was a proceeding very similar to it, and he might well suppose that he had no right to say anything until regularly called upon to answer."

In *Com. v. Walker et al.*, 13 Allen, 570, the district attorney called a police officer as a witness, who was allowed to testify, under objection, that while Carey, one of the defendants, was in a cell in the lockup, he went to the door of the cell with Mrs. Newhall, who was a witness for the prosecution, and pointed out Carey to her, and, in his presence and hearing, asked her if she could identify him as the man who was with Walker, and she said, "Yes;" that he asked her if she could swear to it, and she said, "Yes." The defendant made no reply. In sustaining the exceptions, Foster, J., in delivering the opinion of the court, said: "The testimony of the police officer to the conversation between himself and the witness, Mrs. Newhall, in the presence of the defendant while the latter was in custody, should not have been admitted. The defendant was not bound to deny or reply to the statements made between them, and his silence, under such circumstances, warranted no inference against him."

In *Bob v. State*, 32 Ala. 560, Walker, J., in delivering the opinion of the court, said: "The implication of admissions from silence rests upon the idea of acquiescence. The maxim is, 'Qui tacet, consentire videtur;' and it never applies unless an acquiescence in what is said can be presumed. Neither reason nor law will permit the presumption of acquiescence to be drawn from the silence, unless the circumstances were not only such as afforded the party an opportunity to act or speak, but such, also, as would properly and naturally call for some action or reply from men similarly situated."

In *Gardner v. State* (Tex. Cr. App.) 34 S. W. 945, it was held that, where a party is under arrest, his silence cannot be used against him in a criminal case. Mr. Wharton, in his work on Criminal Evidence (9th Ed.) § 680, takes the same view.

In *State v. Diskin*, 34 La. Ann. Rep. 919, 44 Am. Rep. 448, it is held that mere silence while a party is held in custody under a criminal charge affords no inference whatever of acquiescence in statements of others made in his presence. "He has the undoubted right," says the court, "to keep silence as to the crime with which he is charged, and is not called upon to reply to or contra-

dict such statements. Under such circumstances it is held that the statements so made are not admissible against the prisoner, because they do not even tend to support the hypothesis of acquiescence."

To the same general effect are *State v. Young*, 99 Mo. 666, 12 S. W. 879; *State v. Howard*, 102 Mo. 142, 14 S. W. 937; *Rex v. Appleby*, 8 Starkie's Rep. 33; and *Child v. Grace*, 2 Carr. & P. Rep. 193. See, also, *State v. Ellwood*, 17 R. I. 763, 24 Atl. 782.

Even in those cases where it is held that evidence of a defendant's silence in the presence of charges made against him is admissible, the courts unanimously hold that it must plainly appear that the statements made were fully understood by the party before any inference can be drawn against him by reason of his silence. In the case at bar, therefore, we think most of the evidence in question would have to be excluded in any event; for it not only does not plainly appear that most of the language used at the police station by Zarrinsky and others was understood and appreciated by the defendant, but, on the contrary, we think it is very clear that he did not understand the same, and was not in a physical condition to enable him to understand it. He had jumped or fallen from the attic window referred to, to the ground, a distance of about 25 feet, where he lay, in a helpless condition and seriously injured, until he was taken up bodily by the policeman and placed in the patrol wagon; and at the station he was laid upon the floor in a helpless condition, and was suffering severe pain from the injuries which he had sustained by the fall. In view of all these facts, we are clearly of the opinion that it was error to admit the testimony in question, except in so far as the accusations made were expressly repelled to by the defendant. We are also of the opinion that it was error to admit the statements made in the presence of the defendant immediately after his fall from said window, except as to the one to which he made some reply. Such a fall must have left him in a dazed and semiconscious condition at the best; and it cannot be said with any show of reason that his silence while in such a condition, when charges or accusations were made against him, could be of the least weight in determining as to his guilt of the crime now charged against him.

2. Another, and what seems to us a fatal, objection to the admissibility of most of the testimony now under consideration (although this ground of objection was not taken by counsel) is that most of the statements or accusations made by Zarrinsky at the police station were made through an interpreter, and hence became mere hearsay when testified to at the trial; that is to say, the police officers interrogated Zarrinsky through an interpreter as to what took place

at the attic room in question, and the responses which he made thereto were also given through the interpreter. In so far, therefore, as their testimony at the trial related to what Zarrinsky said in this way, it was clearly hearsay testimony; for they only knew what was in fact said by him from what the interpreter told them that he said. See *State v. Terline*, 23 R. I. 530, 51 Atl. 204, 91 Am. St. Rep. 650. The same objection also applies to what little was said by the defendant in reply to the accusations there made against him. He is a Russian, and had been in this country only about six months at the time of the homicide in question.

3. Whether any of the statements made by Zarrinsky at or about the time when the assault upon him is alleged to have been made were admissible as part of the *res gestæ*, we will now consider. Defendant's counsel contend that they were not. Most of said statements, which were admitted as being part of the *res gestæ*, against the defendant's objection, were such as to fall within the rule as laid down by this court in *State v. Murphy*, 16 R. I. 528, 17 Atl. 998, with which rule we are content, and which we desire to reaffirm. The statements now in question consisted of accusations which were evidently instinctively made by Zarrinsky during and immediately following the assault, and were such as to rebut all inference of calculation in making them. We do not wish to be understood, however, as holding that what was said by Zarrinsky to the policeman and others, after he had returned to the attic room and dressed himself—it appearing that from 15 minutes to half or three-fourths of an hour had elapsed between the time of the making of the assault and the making of such statements—would be admissible under the rule as above stated; for, as already intimated, it is only such statements as are immediately connected with the transaction and really form a part of it that can properly be said to be a part of the *res gestæ*. Moreover, as we infer from the record of the testimony, the statements made by Zarrinsky in the presence of the officers and others, while defendant lay upon the ground after falling from the attic window, were made in his native language; and, if our inference is correct, for the reason above suggested, said statements could only be testified to, in any event, by such of those persons who were present and heard them as understood that language.

We have examined the numerous other exceptions taken by defendant's counsel at the trial, but do not find that any of them are tenable, or deserving of special consideration. As there must be a new trial for the reasons above given, there is no occasion for us to determine whether the verdict is against the evidence.

New trial granted.

(75 Conn. 665)

MALLORY et al. v. GALLAGHER et ux.(Supreme Court of Errors of Connecticut.
June 10, 1903.)**FRAUDULENT CONVEYANCES -- ENFORCING
JUDGMENT LIEN--PETITION--ALLEGATIONS--
EVIDENCE--VARIANCE--SUFFICIENCY.**

1. In an action to enforce a judgment lien on property which had been conveyed by the judgment debtor, the grantee was not injured by proof of her knowledge of the fraudulent purpose, since on the facts alleged and found, that the conveyance was without consideration and was fraudulent in fact, plaintiffs were entitled to judgment without proof that the grantee had knowledge of the fraudulent intent.

2. In an action to enforce a judgment lien on lands alleged to have been fraudulently conveyed by the judgment debtor, the fact that the petition alleged that the property was conveyed in November, 1899, by the debtor to his wife, while the proof showed that it was conveyed in April, 1900, to the wife by one other than the husband, the consideration having been paid by the husband, was immaterial, since in such an action it was not necessary that plaintiff should have made an accurate and detailed statement of the fraudulent acts.

Appeal from Superior Court, Fairfield County; George W. Wheeler, Judge.

Action by Marshall H. Mallory and another against Lawrence T. Gallagher and wife to foreclose a judgment lien. From a judgment for plaintiffs, defendant Helen L. Gallagher appeals. Affirmed.

Stiles Judson, Jr., and Edwin F. Hall, for appellant. John O. Chamberlain, for appellees.

HALL, J. It is alleged in the complaint, and admitted by the answer, that the two tracts of land covered by the lien sought to be foreclosed were attached in March, 1901, as the property of the defendant Lawrence T. Gallagher, in a suit against him by the present plaintiffs; that on the 25th of October, 1901, the plaintiffs obtained judgment against him for \$2,048.85, and that the certificate of lien was filed January 21, 1902. It is also alleged that on the 18th of November, 1899, the defendant Lawrence T. Gallagher, "without consideration, and for the purpose of defrauding his creditors," caused the record title to one of said tracts (hereafter called the "James Street Lot") to be placed in the name of his wife, Helen L. Gallagher, the other defendant; that on the 10th of April, 1900, "without consideration, and for the purpose of defrauding his creditors," he placed the record title to the other tract (called the "Sanford Avenue Tract") in his wife's name; that Lawrence T. Gallagher is the actual owner of said property, and that the defendants are in possession of the same. These averments are denied by the answer, excepting that it is admitted that the record title to said tracts is in the name of Mrs. Gallagher, and that she is in possession of

the property. The complaint asks for a judgment of foreclosure against the defendants, and for possession of the premises. The judgment finds the issues for the plaintiffs; that the allegations of the complaint are true; and grants the prayer for foreclosure and possession against both defendants.

The following facts, in substance, are found by the court: On November 18, 1899, the James street lot was conveyed to Mrs. Gallagher by one Greenwood, a brother-in-law of her husband, for \$600, which money belonged to and was paid for the benefit of Mr. Gallagher. On the 10th of April, 1900, Mrs. Gallagher, through one Johnson, conveyed the James street lot to her husband, and on the 17th of April, 1900, her husband reconveyed it to her through one Jones, a mortgage of \$4,500 having been placed upon it by Jones before the recording of the deed from him to Mrs. Gallagher, the avails of which mortgage were by arrangement paid to Mr. Gallagher for the building of a house on said James street lot. On the 10th of April, 1900, the defendant L. T. Gallagher, through said Johnson, conveyed the Sanford avenue lot to his wife. On April 10, 1900, the James street lot was worth about \$1,000, and the equity in the Sanford avenue lot about \$2,000. All these transfers were for the purpose, known to Mrs. Gallagher, of defrauding the creditors of her husband, L. T. Gallagher. During the period covered by these transactions, the indebtedness for which the plaintiffs obtained said judgment existed, and L. T. Gallagher owed others, and had some incumbered property, but whether enough to pay his debts did not appear.

The first and second reasons of appeal of the defendant Mrs. Gallagher are, in effect, that the judgment is erroneous, because the fact found by the court, that Mrs. Gallagher had knowledge of the fraudulent purpose for which these conveyances were made, is not alleged in the complaint. But Mrs. Gallagher could not have been injured by proof of her knowledge of the fraudulent purpose, since upon the facts alleged and found, namely, that the conveyances were without consideration, and were fraudulent in fact, the plaintiffs were entitled to the judgment rendered, without proof that she had such knowledge. *Hitchcock v. Kiely*, 41 Conn. 611-618.

By the third assignment of error the defendant claims that the judgment is in excess of the relief prayed for, in that the relief prayed for is that the conveyances described in the complaint be set aside, while the judgment also adjudges the deed from Jones to Mrs. Gallagher to be void. We find no such prayer for relief in the complaint, and no such adjudication in the judgment. It is not necessary to the validity of this judgment that the plaintiffs should have made an accurate and detailed statement in the complaint of the different acts of Mr. Gal-

[2. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 772.

lagher in his attempt to defraud his creditors by placing these two pieces of property in his wife's name. This is not an action to set aside certain described conveyances, but to foreclose a lien. The plaintiffs are seeking to foreclose not only Mr. Gallagher, but others whose rights in the property attached are not prior and superior to those which the plaintiffs acquired by their lien. They, in effect, say in their complaint that these two lots, although standing in the name of Mrs. Gallagher at the time of the attachment, are in law, as regards these plaintiffs, to be treated as at that time the property of Mr. Gallagher, and that the conveyances by Gallagher to his wife, though made prior in point of time to the plaintiffs' attachment, must be regarded in law as subsequent conveyances, because made without consideration and to defraud creditors, and that Mrs. Gallagher, to retain her title under such conveyances from her husband, must discharge the plaintiffs' lien.

Whether the James street property was deeded to Mrs. Gallagher in November, 1899, or in April, 1900, was not important. Both dates were prior to the attachment, and the deed of April 17, 1900, from Jones to Mrs. Gallagher, of the James street property, like the deed of April 10, 1900, from Johnson to Mrs. Gallagher of the Sanford avenue lot, was practically a deed from Mr. Gallagher to his wife, and might properly have been regarded as a part of the transaction commenced November 18, 1899, of placing the James street lot in the name of Mrs. Gallagher.

Several other reasons of appeal are assigned, and we are also asked to correct the finding of facts. The claims thus made are substantially that there was no evidence to support the finding that the conveyances in question were without consideration and fraudulent, and that the court has found these facts as inferences from the fact that the defendants testified falsely regarding these subjects. We do not so read the finding of the court or the evidence before us. Certain facts regarding these conveyances were proved, which were not questioned, and which, upon proof that the conveyances were made without consideration, and were not gifts, would render the inference that they were fraudulent a legitimate one. By the admissions and testimony of the defendants, the plaintiffs showed that the conveyances were not gifts, and that no consideration was paid. With these two facts eliminated, the trial court found, from all the circumstances, as it properly might, that the conveyances to Mrs. Gallagher of the two tracts were, with her knowledge, made by her husband for the purpose of defrauding his creditors.

A similar question was presented in the recent case of *Lesser v. Brown* (not officially reported) 54 Atl. 205.

There is no error. The other Judges concurred.

(205 Pa. 500)

In re PHILLIPS' ESTATE.

Appeal of MOSES et al.

(Supreme Court of Pennsylvania. May 4, 1903.)

WILLS—CONSTRUCTION—NATURE OF ESTATE.

1. Where the main provision of a will covers the whole subject and is defined in clear terms, and a subsidiary provision may be construed either as subverting entirely or modifying the original gift, it must in ordinary cases be confined to its restricted operation.

2. In the construction of contradictory clauses in a will, that construction will be favored which avoids intestacy.

3. Testator gave his residuary estate to his nephews and nieces, and the issue of any of them that may be deceased, living at his death, such issue taking their parents' share, and in default of issue such share to be divided among the survivors. By a subsequent clause he directed that no nephew or niece, or representative of such, should have a right to call the trustees under the will to an accounting until he might be entitled to receive the share of his residuary estate, nor should any estate "vest" until such time. *Held*, that the word "vest" was used in the sense of "payable," and that the nephews and nieces took an estate the title of which vested in them on the death of testator.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Henry M. Phillips, deceased. From a judgment dismissing exceptions to an adjudication, Henry Cleremont Moses and others appeal. Affirmed.

It appeared that the testator died in 1884. One sister in 1891, and the other in 1901. All the nephews and nieces mentioned in the will were living at testator's death, but two nieces and four nephews died before the death of the last sister, unmarried and without issue. Charles L. Phillips made assignments of his share as follows: (1) Assignment, August 13, 1887, to John H. Scott, for \$6,530, with interest; (2) assignment, February 17, 1890, to Lydia S. Hinchman, for \$32,500; (3) assignment, October 11, 1899, to Edward P. Allinson, for balance of share. The auditing judge sustained all the assignments made by Charles L. Phillips, but, holding the interest of the assignor in his uncle's estate to be vested and not contingent, ordered distribution of the one-half of the residue, in shares of one-eighth, to each of the nephews living at the testator's death, instead of one-fourth to each of the survivors "upon the death of both of my sisters," resulting in the making of the share of Charles L. Phillips too small to pay any considerable part of the debt covered by the assignment to Edward P. Allinson.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

William H. Burnett and John Weaver, for appellants Henry Cleremont Moses, Altamont P. Moses, and Franklin J. Moses. S. Davis Page and S. K. Louchheim, for appellant Albert B. Welmer. Victor Guillou, for appellee.

BROWN, J. The testator gave the income from his residuary estate to his sisters, Ellen and Emily, for life. Upon the death of both of them, he directed certain legacies to be paid, and then gave all of the remainder to certain nephews and nieces. Whether at his death each of them took a vested interest in his estate depends upon his intention, to be gathered from the three following clauses in his will:

"And all the residue and remainder of my residuary estate * * * one half part thereof I give, devise and bequeath unto the daughters of my deceased brother J. Altamont Phillips, namely, Catharine, Ellen and Rebecca, and the issue of any of them, that may be deceased, living at the time of my death, share and share alike, such issue taking however only their parents' share and in default of issue, any such share shall be divided among the survivors of them as aforesaid.

"And the other one half part thereof, I give, devise and bequeath unto my nephews as follows: Henry, Edwin and Charles L., sons of my deceased brother, J. Altamont Phillips, and Myer, H. Cleremont, Altamont P., Zalegman P., and Dr. Franklin J., sons of my sister Catharine Moses, and the issue of any of them, that may be deceased, living at the time of my death, share and share alike, such issue taking however only their parents' share, and in default of issue, any such share shall be divided among the survivors of them as aforesaid.

"Item. It is my will and I so direct that no nephew or niece or representative of any such shall have the right to call to account with my executors or trustees until such time as he or she may be entitled to receive in his or her possession the share of the residuary estate, nor shall any estate vest until such time."

With the first two clauses standing alone, it is clear that each nephew and niece, living at the time of the testator's death, took a vested interest in his estate. The same is true of the issue of any nephew or niece, so-named, who might have died during the lifetime of the testator. The words of the first two clauses are so plain, and the intention of the testator is so unmistakably expressed, that, though he unquestionably could by a later clause provide that the interest should be purely contingent and not vest until the happening of an event after his death, he will not be understood to have done so, unless such later clause can be read as expressing a change of his intention so clearly found in the lines immediately preceding it. *Kiver v. Oldfield*, 4 De G. & J. 30; *Good v. Fitchthorn*, 144 Pa. 287, 22 Atl. 1032, 27 Am. St. Rep. 630; *Heck's Estate*, 170 Pa. 232, 32 Atl. 413; *Whelen's Estate*, 175 Pa. 23, 34 Atl. 329. "While there is no doubt that, of two contradictory clauses in a will, the first must give way and the last must take effect, yet the two clauses must refer to the same subject-

matter, and the last must be clearly inconsistent with the first. If the main provision plainly covers the whole subject, and is defined in terms that exclude all doubt, and the subsidiary provision may by conjecture be made either general or partial, and may be capable by construction either of subverting entirely, or of modifying only, the original gift, such a subsidiary provision must in the ordinary case be confined to its partial and restricted operation. It is said in 1 Redfield on Wills, star p. 438, that 'plain and distinct words are only to be controlled by words equally plain and distinct.' Such words, to have a controlling effect, must at least possess a definite and certain meaning. The clearly expressed purpose of a testator is not to be overborne by modifying directions that are ambiguous and equivocal, and may justify either of two opposite interpretations. Such directions are to be so construed as to support the testator's distinctly announced main intention." *Sheetz's Appeal*, 82 Pa. 213.

Does the third clause quoted postpone the vesting of the interest until the death of the two sisters of the testator? Its last words are—and upon these alone the appellants rely—that no estate shall vest until the nephews and nieces, or their issue, are entitled to receive their respective shares, which would be upon the death of both sisters; but what precedes the last words of the clause is consistent with the intention of the testator, as expressed in the first two clauses, that the interest should vest at his death. In providing that his executors should not be annoyed by his nephews and nieces (whose dispositions, from the appeals before us, we can fairly assume he knew), he restricted not only their right, but that of the "representative of any such," to call the trustees to account. "Representative," as here used, can have no other than its natural meaning of personal representative—an executor or administrator—and, in giving it such meaning, the intention of the testator is continued; for the words were useless if the interest of each nephew and niece was only in expectancy, and ceased with his or her death. But because the testator intended that the interests should vest immediately, he extended his restriction to the personal representative of any deceased nephew or niece. How, then, did he use the word "vest"? "If the testator has himself subjoined to the gift a declaration that it shall vest at a stated period, and if there be nothing in the context to show that the word 'vest' is to be taken otherwise than in its strictly legal sense, all discussion is of course precluded, for a legacy cannot vest at two different periods. But a question generally arises in these cases as to the real meaning to be attributed to the word." 2 *Jarman on Wills* (Am. Ed.) 467. Recognized meanings of the word "vest" are "payable" and "to vest in possession, or take effect in possession." 2 *Jarman on Wills*, supra;

Thompson v. Thompson, 28 Barb. 432. The manifest purpose of the clause being protection to the accountants, and all but the last eight words being consistent with the clear intent expressed in the two preceding clauses, the meaning of the word "vest" which ought to be adopted is one which will not strike down, but sustain, a clear and general intent. In attributing to it such meaning, often given to it, the apparent inconsistencies in the will disappear, and the intention of the testator cannot be obscured by any argument based on what is generally regarded as the mere technical meaning of the term. As another reason why the word should be read as meaning "payable" or "taking effect in possession," the learned judge below very pertinently said: "And, finally, there is the argument, which in doubtful cases is conclusive, that, as there is no limitation over except in the case of the death without issue of a nephew or niece in the lifetime of the testator, a death without issue after his death, in the lifetime of the sisters, will cause an intestacy, which is never permitted if by any fair construction or interpretation it can be avoided."

Appeals dismissed, at the costs of appellants, and as to them the decree is affirmed.

(205 Pa. 511)

IN RE PHILLIPS' ESTATE.

(Supreme Court of Pennsylvania. May 4, 1903.)

ASSIGNMENT—VALIDITY—INSUFFICIENT CONSIDERATION.

1. Where an owner of a vested interest in remainder assigns the interest, worth \$32,500, for \$8,750 actual cash, and the life tenant dies 10 years after, the purchaser is entitled to the full amount of the residuary interest, in the absence of any evidence of fraud or a fiduciary relationship.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Henry M. Phillips, deceased. Appeal of Charles L. Phillips, distributee, from a decree dismissing exceptions to adjudication. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

John G. Johnson and I. Hazleton Mirkil, for appellant. S. Davis Page and S. K. Louchheim, for appellee.

BROWN, J. Henry M. Phillips died in 1884. After his death Charles L. Phillips, the appellant, one of his nephews, had not merely an expectancy in his estate—"a pure hope of succession" to a portion of his property—but an interest which we have this day decided was a vested one. Whether he and the appellee regarded it as contingent or vested when he executed the assignment of February 17, 1890, to relieve himself from his great embarrassment, to which he freely testifies, is immaterial, for he had a right to assign it if it was either. "A person sui

juris, owning a contingent remainder in land or in personal property, may sell the same for such sum as may be agreed upon between himself and the purchaser, provided the former does not stand towards him in a trust relation, and, in making the purchase, acts in good faith." *Whelen v. Phillips*, 151 Pa. 312, 25 Atl. 44. The appellant says: "In the fall of 1880, and winter of 1889 and 1890, I was out of work, and I had been for some time—I suppose since 1885—except some odd newspaper jobs, and I was hard up; had no money; used up about all the means I could get hold of, by credit or otherwise. I didn't know which way to turn, and I didn't have anything that I considered available for raising money on." In this condition, he assigned to Lydia S. Hinchman, in consideration of \$8,750 actual cash paid to him, not his whole interest in the estate of his uncle, but \$32,500 of it. The time when the assignee would get the money so assigned to her was uncertain. It could not be paid until after the death of Emily Phillips, the surviving sister of the testator, which did not occur until July 6, 1901, more than 10 years after the assignment; but the assignment was absolute, not merely as collateral security, and \$32,500 of appellant's interest in his uncle's estate passed to the appellee. The death of the aunt of the appellant earlier than he had anticipated causes him now to look upon his bargain as a hard one. If her years had been prolonged, it might not have been a good one for the appellee; but there was nothing dishonest in the transaction, and this appellant ought not, in good conscience, to be now heard in his complaint that he did not receive enough, when it is most manifest that the \$8,750 came to him because he sought it as a great relief in his distress, and that at that time he did not regard the bargain as a harsh one for him. We cannot add with profit anything to what the learned adjudicating judge says of the transaction: "The evidence showed that this assignment was executed at the day of its date, and that the consideration was actually paid in cash (\$8,750); the value of the interest sold, when it should come into possession, being estimated at \$32,500. The assignor appears to have been extremely desirous of raising money, and to have made application to various persons for this purpose. He was on terms of intimacy with the late Edward P. Allinson, Esq., through whose agency he was brought into communication with the husband of Mrs. Hinchman, and in this way the transaction was brought about. There was not the slightest evidence of overreaching or unfair dealing. Mr. Phillips was at the time a man of mature years, fully understanding what he was doing, and knowing precisely its effect. There was no relation of trust or confidence between him and his assignee or her husband. He was dealing with his own, and had a right to do with it what he pleased. If he made an improvident or un-

wise bargain, he alone is responsible, and the court is without authority to relieve him—it being conceded by his counsel that the assignment was absolute, and not intended as security for a loan. Moreover, the assignment, it will be observed, was subject to the prior assignment to John H. Scott for \$8,530, and it could not become operative until the death of the surviving sister of the testator, which might not occur for very many years, and, in point of fact, did not occur until more than 10 years after the date of the assignment. Under these circumstances, in the opinion of the auditing judge, there can be no question as to the validity of the assignment."

It cannot fairly be said that the consideration paid the appellant, under the circumstances, was inadequate; but, even if it was, there was no fraud practiced upon him. "A man may be as honest in making a profitable bargain as a bad one, and the law does not require him to pay a full price, if the person he deals with is willing to take less. The owner of property may sell it for very little, or give it away for nothing, if he thinks fit; and, however unreasonable his conduct may seem, his will alone is sufficient to avouch the act—'Stat pro ratione voluntas.'" *Davidson v. Little*, 22 Pa. 245, 60 Am. Dec. 81.

If, when the assignment was executed, there was a mutual mistake as to a fact which was in contemplation of the assignor and assignee as a condition of their contract, the elaborate argument of the learned counsel for appellant, and the many authorities cited, would be in point; but there was no such mistake. The appellant agreed that out of his share in his uncle's estate the appellee should receive a fixed sum—\$32,500—at some future, but uncertain, time, and in consideration of such agreement the appellee paid him \$8,750. Just what the appellant agreed the appellee should receive has been awarded to her. She does not get a dollar more because the appellant may have dealt with her on the basis of a contingent interest, which has since been judicially declared to be a vested one.

Appeal dismissed at appellant's costs, and as to him the decree is affirmed.

(205 Pa. 515)

IN RE PHILLIPS' ESTATE.

Appeal of MOSES.

(Supreme Court of Pennsylvania. May 4, 1903.)

ASSIGNMENT OF CHOSE IN ACTION—PRIORITIES.

1. Where an assignee of a chose in action fails to give notice of the assignment to the person holding the assigned fund, a subsequent assignee without notice of the former assignment will, on giving notice of his assignment, acquire priority.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Henry M. Phillips. Appeal of Andrena Moses from a decree dismissing exceptions to adjudication. Affirmed.

The adjudication showed assignments by appellant of his interest in the decedent's estate to several parties. The material portion of the adjudication was as follows:

"It was admitted that the assignments of H. Cleremont Moses to the Bank of Sumter were duly executed, the consideration being as stated. The execution of the assignment to Mrs. Andrena Moses was also admitted, though the payment of the full consideration was not. But it was contended on behalf of the United Security Life Insurance Company that it was entitled to priority over both of the other assignments, because of the alleged failure of the assignees in either case to give notice of the assignment. There was evidence of notice, both to the accountants and to the United Security Life Insurance Company, in the case of the assignment to the Bank of Sumter; but as the assignment by H. Cleremont Moses was only collateral to a loan to Altamont P. Moses, payment of which will be awarded under the assignment by him, the question of notice is only important so far as concerns the assignment to Mrs. Andrena Moses. How far, as between successive assignees of a fund in the hands of a third person, notice of the assignment to such person is necessary to complete the title of the assignee as against a subsequent assignee, having no actual knowledge of the prior assignment, who gives such notice, does not appear to have been decided in Pennsylvania, though it has been held that an assignment is good, without notice, as against a subsequent attachment. But an attaching creditor stands precisely in the position of the assignor, with only such rights as he has against his assignee; while the rights of a subsequent purchaser for value depend upon entirely different considerations. In England, and in many of the states of the Union, it is perfectly well settled that the title of an assignee does not become complete until he has given notice, and the rule is that the assignees have priority according to the priority of notice. *Story's Equity*, § 421b. A different doctrine, it appears, however, is held in some of the states, where, between different assignees of a chose in action, he who is first in time is first in right, notwithstanding he has given no notice to the debtor or the subsequent assignee, though the debtor will be protected if he has made payment to the assignor or to the second assignee before notice of the prior assignment. *Thayer v. Daniels*, 113 Mass. 129; *Williams v. Ingersoll*, 89 N. Y. 508; *Story's Equity*, § 421c. See, also, *Hollingsworth on Contracts*, 300-302. In 2 *Pomeroy on Equitable Jurisprudence*, it is said: 'The American decisions upon this subject cannot be reconciled. I can only present those settled doctrines of equity

¶ 1. See *Assignments*, vol. 4, Cent. Dig. §§ 149, 150.

which, it would seem, should apply to and govern such a condition of circumstances. In England, and in some of the states, the rule giving to the assignee who first notifies the debtor party or trustee a precedence over all others, even those who are earlier in date, furnishes a certain and simple criterion for determining the priority, it being remembered that this rule is confined to pure personal things in action, and does not extend to liens and other equitable interests in real estate. In the states where the rule referred to does not prevail, the question must turn upon other doctrines. If the interests are equitable in their nature, and the equity of the assignee is intrinsically superior to the others, the settled principles of equity should control, that the order of time determines the order of priority, or, in other words, that the subsequent assignee takes subject to the rights of the one prior in time; and this principle has been applied, in such cases, by many able decisions. On the other hand, if the subsequent assignee has acquired the legal title, and was a purchaser for a valuable consideration and without notice, he is protected; and this doctrine of bona fide purchase seems to have been extended, by some decisions, to subsequent assignees who had only obtained an equitable interest.

"The analogies with regard to sales of personal property in possession are certainly in favor of the view taken in the decisions last referred to, the vendee, in such case, being required, for the protection of subsequent purchasers, to take possession, to the exclusion of the vendor, where the property is capable of actual possession, or by assuming such open ownership as the case admits of, where it is not. Why should a different rule apply to purchasers of choses in action? Why should the purchaser not be required to do all that lies in his power to make it impossible for the assignor to commit a fraud, or to do an injury to subsequent purchasers, relying on his integrity, and having no means of knowing that he has ceased to be the owner, except by inquiry of the person in whose hands the fund is? The failure to give notice to such person puts it in the power of the assignor to do this wrong, and the consequences of the failure ought, therefore, to be upon him who commits it. As was said by Chief Justice Gibson, in *Fisher v. Knox*, 13 Pa. 622, 53 Am. Dec. 503, cited in a very able brief submitted by Mr. Jayne: 'The maxim, "Prior in tempore, potior in jure," holds, it is true, wherever it has not been inverted by enactment, as it has been by the recording laws so far as regards conveyances of land, or where the benefit of it has not been lost by misconduct or imprudence; but it must not be allowed to protect a party who has neglected a requisite precaution to protect from imposition those who may come after him. That a man is bound to enjoy his property so as not to do an injury to another

which can be prevented, is also a maxim entirely consistent with the preceding one, and equally potent. It contains the ruling principle of an extensive range of cases of injury from negligence. * * * Was there not on the part of the prior assignee in these instances culpable indifference to the interest of others? Though no law requires such an assignment to be docketed, the practice to mark the judgment to the use of the assignee is universal, and it ought to have been pursued here; for no prudent purchaser of a judgment invests his money in it before the record has been inspected. From whom else could he derive information? He has nothing but the honor of the assignee; and any one who leaves it in the power of another to deceive may be said to collude with him beforehand. Certainly a chancellor would not execute an equitable assignment in his favor.' This was said in a case where the first assignee of a portion of a judgment had failed to have the assignment noted on the docket, but it applies with equal force to an assignee of a fund, where, in the absence of a judgment or decree, notice of record is impossible, and notice to the holder of the fund is the only means of preventing injury to subsequent purchasers. The auditing judge added a reference to 'what is said by Rogers, J., in *Pellman v. Hart*, 1 Pa. 263.'

"The auditing judge is compelled to hold, therefore, notwithstanding the exceptionally able argument of Messrs. Moise and Matlack, and though his first impressions were to the contrary, that the assignment to Mrs. Andrena Moses, of which notice was not given to the accountants until after the assignment to the United Security Life Insurance Company, must be postponed accordingly. But for this, her assignment could not have been impeached; for, while it is true the testimony in support of it failed to show the payment of the entire sum called for as the consideration, an assignment, even voluntary, by a husband to his wife, he not being indebted at the time, and not contemplating an engagement in a hazardous business, is perfectly valid, though, for obvious reasons, such an assignment, as against a subsequent bona fide purchaser from the husband for value, should be complete in every particular, and notice is required as an essential for this purpose."

Argued before MITCHELL, DEAN, FEILL, BROWN, MESTREZAT, and POTTER, JJ.

Samuel Dreher Matlack and Albert L. Moise, for appellant. Henry La Barre Jayne, for appellee.

BROWN, J. On July 2, 1895, H. Cleremont Moses, a nephew of Henry M. Phillips, assigned to his wife, Andrena Moses, \$15,000 of his interest in his uncle's estate. On February 28, 1899, he and his brother, Altamont, executed a joint assignment of their interests

in the estate to the United Security Life Insurance & Trust Company of Pennsylvania for \$60,000. Notice of this second assignment was at once given to the accountants by the assignee, and to it the court below awarded the share of H. Cleremont Moses in decedent's estate, on the ground that, though the assignment to Mrs. Andrena Moses was first in time, as she had not given the accountants any notice of it until July 23, 1901, it was postponed to that held by the appellee.

Whether, as between successive assignees of a fund in the hands of a third person, that assignee, without regard to the date of his assignment, who first gives the debtor notice of it, is entitled to be first paid, is a question upon which the American decisions cannot be reconciled. In England it is well settled that the claims of competing assignees of a fund rank, as between themselves, not in the order of the dates of the assignments to them, but according to the dates when they respectively give notice to the debtor of their assignments. *Dearle v. Hall, and Loveridge v. Cooper*, 3 Rus. 1-38; *Pollock on Contracts*, 209 (2 Am. [from 4th Eng.] Ed.). The Supreme Court of the United States seem to have adopted the same view. *Judson v. Corcoran*, 17 How. 612, 15 L. Ed. 331; *Spain v. Hamilton's Adm'r*, 1 Wall. 604, 17 L. Ed. 619. To review the conflicting views entertained by the courts of our different states would needlessly consume pages. With us the question does not seem ever to have been definitely settled. The learned auditing judge, sustained by the court in banc, adopted the rule that the assignee who first gives notice has the first right to participate in the assigned fund. In adopting this as the better rule, he reasoned by analogy, saying, what all of us now approve: "The analogies with regard to sales of personal property in possession are certainly in favor of the view taken in the decisions last referred to, the vendee in such case being required, for the protection of subsequent purchasers, to take possession, to the exclusion of the vendor, where the property is capable of actual possession, or by assuming such open ownership as the case admits of, where it is not. Why should a different rule apply to purchasers of choses in action? Why should the purchaser not be required to do all that lies in his power to make it impossible for the assignor to commit a fraud, or to do an injury to subsequent purchasers, relying on his integrity, and having no means of knowing that he has ceased to be the owner, except by inquiry of the person in whose hands the fund is? The failure to give notice to such person puts it in the power of the assignor to do this wrong, and the consequences of the failure ought, therefore, to be upon him who commits it."

As in conflict with the view entertained

by the court below, stress seems to be laid by counsel for appellant on *Chew v. Barnett*, 11 Serg. & R. 389; but the general principle there announced applies to a state of facts very different from those here involved. Chew, as the vendee of Wilson, had acquired from the latter nothing but an equitable estate in the land purchased, because, at the time Wilson sold, he did not hold the legal title. Subsequently, when that title was conveyed to him, he gave a purchase-money mortgage to his vendor, and, on a sheriff's sale upon the same, it was simply decided that the title of the sheriff's vendee was superior to that of Chew, just as the legal title of Wilson's vendor had all the time been superior to that of the equitable title conveyed to Chew. The opinion in that case was written by Gibson, J., who, 25 years afterwards, as Chief Justice, in *Fisher v. Knox*, 13 Pa. 622, 53 Am. Dec. 503, very clearly indicated how he would have decided the present question if it had then been before him: "The maxim, 'Prior in tempore, potior in jure,' holds, it is true, wherever it has not been inverted by enactment, as it has been by the recording laws, so far as it regards conveyances of land, or where the benefit of it has not been lost by misconduct or imprudence; but it must not be allowed to protect a party who has neglected a requisite precaution to protect from imposition those who may come after him. That a man is bound to enjoy his property so as to do no injury to another which can be prevented, is also a maxim entirely consistent with the preceding one, and equally potent. It contains the ruling principle of an extensive range of cases, and, among other cases, of injury from negligence. * * * Was there not, on the part of the prior assignee in these instances, culpable indifference to the interest of others? Though no law requires such an assignment to be docketed, the practice to mark the judgment to the use of the assignee is universal, and it ought to have been pursued here, for no prudent purchaser of a judgment invests his money in it before the record has been inspected. From what else could he derive information? He has nothing for it but the honor of the assignor; and any one who leaves it in the power of another to deceive may be said to collude with him beforehand. Certainly a chancellor would not execute an equitable assignment in his favor." *Campbell's Appeal*, 29 Pa. 401. 72 Am. Dec. 641, and *Pratt's Appeal*, 77 Pa. 378, are in harmony with what was said in *Fisher v. Knox*.

Business transactions constantly require the assignments of choses in action. In many instances personal credit cannot be maintained in any other way, and for assignees who purchase in good faith there ought to be protection. None is found in the recording act, but a measure of it ought

not on that account to be withheld, if it can be extended by courts of equity on equitable principles. The protection invoked by the appellee is against the latent equity of the appellant. If it had been informed of this prior assignment, it is not likely it would have taken the second one from the assignor, who failed to say anything about the first when he made the second. Protection can hardly be expected from an assignor who will sell twice what he knows he has a right to sell but once, for, if conscienceless enough to make a second sale, he will conceal the first in his scheme to cheat one or the other of his assignees. Protection can come only from him who owes the money, and who, by notice to him, may be able to give protection. He is a mere stakeholder, and it is immaterial to him whom he pays. There is no reason why he should not be frank with a prospective purchaser of the whole or a portion of what he owes, or that, upon inquiry from such a one, he should conceal notice of any other prior purchase or assignment, if notice of it was given him. If it be understood that each assignee of a fund, or a portion of it, can protect himself against subsequent assignees only by giving immediate notice to the debtor, such notice will be given, and, when given, the instances will be very rare when subsequent assignees are imposed upon. With the question now fairly before us, we adopt and announce, as the only safe rule, that, if an assignee fails to give notice to the person holding the fund assigned to him, a subsequent assignee, without notice of the former assignment, will, upon giving notice of his assignment, acquire priority. "By such notice the legal holders are converted into trustees for the new purchaser, and are charged with the responsibility towards him; and the cestui que trust is deprived of the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it under the erroneous belief that it continues to belong to him absolutely, free from incumbrances, and that the trustees are still trustees for him and no one else. That precaution is always taken by diligent purchasers and incumbrancers; if it is not taken, there is neglect." *Dearle v. Hall*, supra. This rule is recognized and approved by the best text writers. *Story's Equity Jurisprudence*, §§ 1035a, 1047; *Beach on Modern Equity Jurisprudence*, § 344; *Pomeroy on Equity Jurisprudence*, § 695; *Bispham's Principles of Equity*, §§ 168, 169. In the last, the learned text-writer says: "The decisions, however, in favor of the English rule, appear to be based on the more correct view of the law." As the appellee is claiming under the assignment to it, and not under the attachment issued by it, the second question raised on the appeal need not be considered.

Appeal dismissed at appellant's costs, and as to her the decree is affirmed.

(205 Pa. 535)

In re PHILLIPS' ESTATE.

Appeal of UNITED SECURITY LIFE INS. & TRUST CO. et al.

(Supreme Court of Pennsylvania. May 4, 1903.)

ASSIGNMENTS OF CHUSES IN ACTION—PRIORITIES—INTERVENING ATTACHMENTS.

1. Where a chose in action has been assigned without notice of the assignment to the holder of the fund, and a foreign attachment then intervenes, the original assignment is prior to an assignment after the attachment, in which the assignee has given notice to the holder of the fund.

2. A bank took an assignment of a chose in action as collateral security for a note, and thereafter wrote to the holder of the legal title of the chose in action offering to sell the note, with the statement that it was secured by the assignment. *Held* not such a notice as would secure to the assignee priority over subsequent assignments of which proper notice was given.

Appeal from Orphans' Court, Philadelphia County; Penrose, Judge.

In the matter of the adjudication of the estate of Henry M. Phillips, deceased. From a decree, the United Security Life Insurance & Trust Company and another, executors, appeal. Affirmed.

There appeared from the record the following assignments and attachment of the interest of Altamont P. Moses in the estate of decedent: (1) To Bank of Sumter, S. C., January 30, 1891, and May 30, 1894, for \$10,000. (2) To Marion Moise, June 1, 1894, for \$2,736.14. (3) To the United Security Life Insurance Company, February 28, 1899, for \$60,000 (joined in by H. Cleremont Moses).

A foreign attachment, George D. Manning et al., for \$815.92, served upon the accountants as garnishees, June 3, 1898, precedes the assignment last mentioned.

The adjudication was substantially as follows:

"The assignment of H. Cleremont Moses and Altamont P. Moses to the United Security Life Insurance Company was for the purpose of securing premiums and interest on life insurance policies issued to the assignors by that company. There were two insurances for \$30,000 each, the amounts, less the premiums first payable, being paid in cash to the insured, \$27,195 to each. The premiums were to be paid to the company during a period of 15 years, unless in the meantime the assured should die, in which case the obligation on his part ceased. The assignment provided that, if default should be made in payment of premiums, after notice as there provided, the assignee should be at liberty to sell the assigned interest at public sale and become the purchaser. Default was so made by both assignors, the requisite notice was given in each case, and, at the sale in pursuance of it, the company became the purchaser of the entire interest of both. It also entered up the judgment bond given by each of the assignors. Attachment executions were issued upon these judg-

ments, and the accountants summoned as garnishees; but, so far as the attachments are concerned, the rights of a prior assignee would not be affected even though no notice had been given.

"The share of H. Cleremont Moses will be paid to the United Security Life Insurance Company under the assignment and purchase in pursuance of it as above.

"The evidence shows that the Pennsylvania Company for Insurances on Lives, etc., one of the accountants, received information from the president of the Bank of Sumter of the assignments to it by H. Cleremont Moses and Altamont P. Moses, in a letter dated June 3, 1896, asking the company to become the purchaser from the assignee. No special form of notice of an assignment is required, and, in the opinion of the auditing judge, this letter was sufficient. Information was also given to the United Security Life Insurance Company of these assignments, in an interview between its officers and Mr. Moise in the early part of 1896. It follows that the assignment to the bank by Altamont P. Moses, who, as between himself and H. Cleremont Moses, was the principal debtor, is entitled to payment in preference to the subsequent assignment to the life insurance company.

"Notice of the assignment of June 1, 1894, by Altamont P. Moses to Marion Moise, trustee, to secure the sum of \$2,736.14, was not given until after the assignment to the insurance company, and the latter would therefore—if the view taken by the auditing judge be correct—have priority of right, if the question were not affected by another well-settled principle, growing out of the intervening foreign attachment by Manning et al., served upon the garnishees in June, 1898. This attachment has priority over the assignment to the life insurance company, but, as an attaching creditor stands precisely in the shoes of the debtor, it is subsequent to the assignment to Marion Moise. The result is that the assignment to the life insurance company is made subsequent to both. There are many decisions on the subject cited in the brief presented by Messrs. Moise and Matlack, viz.: *Wilcocks v. Wain*, 10 Serg. & R. 380; *Manufacturers' & Mechanics' Bank v. Bank of Pennsylvania*, 7 Watts & S. 335, 42 Am. Dec. 240; *Tomb's Appeal*, 9 Pa. 61; *Loucheim's Appeal*, 67 Pa. 49; *Thomas' Appeal*, 69 Pa. 120. See, also, *Bowyer's Appeal*, 21 Pa. 210; *Garrett & Martin's Appeal*, 32 Pa. 160, 72 Am. Dec. 779; *Shelly's Appeal*, 38 Pa. 373; and *Miller's Appeal*, 122 Pa. 95, 15 Atl. 672.

The share of Altamont P. Moses will therefore be applied: First, to the payment of the assignments to the Bank of Sumter; second, to the assignment to Marion Moise, trustee; and, third, subject to the attachment of Manning et al., to the United Security Life Insurance Company under the assignment and the purchase in pursuance of it.

"It should be stated that prompt notice of

all the assignments to the United Security Life Insurance Company was given to the accountants."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Edward H. Weil and John G. Johnson, for executors appellants. H. La Barre Jayne and Biddle & Ward, for appellant United Security Life Ins. & Trust Co. of Pennsylvania. Albert L. Moise and Samuel Dreher Matlack, for appellees Marion Moise and Bank of Sumter.

BROWN, J. By two assignments, dated January 30, 1891, and May 30, 1894, Altamont P. Moses assigned to the Bank of Sumter, S. C., \$10,000 of his interest in the estate of his uncle, Henry M. Phillips, deceased. On June 1, 1894, he assigned \$2,736.14 of this interest to Marion Moise, trustee, and on February 28, 1899, he and his brother, H. Cleremont Moses, assigned \$60,000 of the same interest to the United Security Life Insurance & Trust Company of Pennsylvania. Between the dates of the last two assignments, on June 3, 1898, a foreign attachment, issued against Altamont P. Moses out of court of common pleas No. 2 of Philadelphia, was served upon the accountants as garnishees. The share of the nephew was awarded by the court below as follows: "First, to the payment of the assignments to the Bank of Sumter; second, to the assignment of Marion Moise, trustee; and, third, subject to the attachment of Manning et al., to the United Security Life Insurance Company under the assignment and the purchase in pursuance of it."

The award to the Bank of Sumter, as holding the first claim on the fund for distribution, was on the ground that the assignments to it were not only prior in dates to those of the other two, but that it had given notice of them to the accountants and the United Security Life Insurance & Trust Company before the later assignments were executed. If this award depended upon the notice alleged to have been given to the Pennsylvania Company for Insurances on Lives & Granting Annuities and Henry T. Coleman, executors and trustees, it could not be sustained, for the letter of June 3, 1896, from a representative of the Bank of Sumter to Mr. Henry K. Paul, president of the Pennsylvania Company for Insurances on Lives & Granting Annuities, cannot be regarded as notice given by the bank, or intended to be given by it, of the assignments to it. The letter was one offering to sell the notes held by the bank, and contained a statement that they were secured by the assignments to it. While it is true, as held by the learned judge of the orphans' court, that "no special form of notice of an assignment is required," it is equally true that, to affect one with notice not formally given, it must come in such a way, or under such circumstances, to the per-

son alleged to have been notified, that, as a reasonable man, he ought to regard it as notice to control his conduct in relation to the matter which is the subject of the notice; on the other hand, if it is manifest that notice is not intended, it will not be presumed it was received, when, from what takes place between the parties, there is nothing from which notice ought to be inferred concerning what may subsequently become a subject of controversy. The letter written by the bank was intended to induce the Pennsylvania Company for Insurances on Lives & Granting Annuities to purchase the notes of Altamont P. Moses. It was one of innumerable business letters received by the company, and, though there is an incidental reference in it to the assignments by Moses, there is nothing in it which ought to have led the company to regard it as notice of them to be remembered for the information of subsequent prospective assignees of the same interest. But, as the Bank of Sumter is entitled to priority over the United Security Life Insurance & Trust Company for the same reason that Marlon Moise, trustee, was directed to be first paid, if the appeal of the accountants were to be sustained, the order of distribution would not be changed.

Notice of the assignment to Marlon Moise, trustee, was not given until after the assignment to the United Security Life Insurance & Trust Company. But between them attaching creditors intervened. The service of the writ of foreign attachment was prior to the last assignment, and the claim of the attaching creditors is superior thereto. It, however, was subject to the first three, even if the Bank of Sumter and Marlon Moise, trustee, had given no notice to the accountants of the assignments to them. The attaching creditors attached only what still remained to the debtor. They could get nothing from the accountants by their attachments that did not belong to him when the writ was served. By the service of it they became equitable assignees of what Altamont P. Moses still had a right to assign. As to him the prior assignments, with or without notice to the accountants, were valid, and so they were as against his attaching creditors, whose rights rose no higher than his. *Pellman v. Hart*, 1 Pa. 263; *Noble v. Thompson Oil Company*, 79 Pa. 354, 21 Am. Rep. 66; *Hemphill v. Yerkes*, 132 Pa. 545, 10 Atl. 342, 19 Am. St. Rep. 607.

Manning et al. must be paid before the United Security Life Insurance & Trust Company, for their attachment is superior to its assignment; but, before they can be paid, the Bank of Sumter and Marlon Moise, trustee, must get their money; and it therefore follows that the assignment to the United Security Life Insurance & Trust Company is subject not only to the attachment, but to the prior assignments. In support of this view, the court below was sustained by many of our cases, from *Wilcocks v. Wain*,

10 Serg. & R. 380, down to *Thomas' Appeal*, 69 Pa. 120, and *Miller's Appeal*, 122 Pa. 95, 15 Atl. 672.

The appeal of the Pennsylvania Company for Insurances on Lives & Granting Annuities and Henry T. Coleman, executors and trustees, is dismissed, the costs of their appeal to be retained by them out of the fund awarded to the assignees and attaching creditors of Altamont P. Moses. The appeal of the United Security Life Insurance & Trust Company is dismissed at its costs, and as to it the decree is affirmed.

(205 Pa. 531)

IN RE PHILLIPS' ESTATE.

Appeal of MOSES.

(Supreme Court of Pennsylvania. May 4, 1903.)

ASSIGNMENT OF CHOSE IN ACTION—SALE OF COLLATERALS—RIGHTS OF PURCHASER.

1. The owner of a chose in action assigned it to secure a loan, and his son, who had no interest in the fund, joined in the assignment, under an agreement with the assignee that in default of payment of premiums on policies of insurance on their lives, issued by the assignee, it might sell the assignee's interest and become the purchaser at the sale. *Held*, that on such default the assignee could acquire the assigned interest as against the assignor.

Appeal from Orphans' Court, Philadelphia County; Penrose, Judge.

In the matter of the estate of Henry M. Phillips. From a decree dismissing exceptions to adjudication, Franklin J. Moses appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

William H. Burnett and John Weaver, for appellant. Henry La Barre Jayne and Bidle & Ward, for appellee.

BROWN, J. The assignment by Franklin J. Moses to the United Security Life Insurance & Trust Company was for his own benefit. He wished to borrow and did get \$30,000 from the company. His three sons, who joined in the assignment, had no interest in the estate of their granduncle; but, for reasons which we need not conjecture nor consider, the trust company evidently deemed their concurrence as necessary for its security. The assignment, on its face, is absolute, and, with nothing more than it before the court below, the award of the assigned interest would have been properly made to the appellee. It, however, showed, by its policies of insurance and agreements with Cornelius F. Moses and Frank J. Moses, two of the sons who had joined in the assignment, that the same had been executed and delivered to it as collateral security for the payment of the quarterly premiums on the insurance policies which it had issued in consummating the loan to the appellant. The agreement of each of the insured, Cornelius F. Moses and Frank J. Moses, was that, upon

default for three months in paying any one of the premiums, the trust company could, without any demand or notice by it to the insured, sell the assigned interest in the estate of H. M. Phillips, deceased, at public or private sale, with the right in the appellee to become the purchaser or absolute owner thereof. The appellant now contends that, as he was not a party to either of these policies of insurance or agreements, there was no authority from him to sell the assigned interest, and that, therefore, the title of the trust company as the purchaser of it at its own sale is still that of pledgee only.

Even if the appellant did not join in the agreement of his sons with the appellee, he placed the assignment in their hands, to be used by them for the purpose of effecting the loan from the trust company for his benefit. He clothed them with authority to agree with the company upon the terms and conditions under which it should receive and make use of the assignment, and the covenant of the sons with it is not simply that any interest which, at the time of the execution of the assignment, it was supposed may have been in them, should be sold, but that the interest of Franklin J. Jones, this appellant, as well, should be liable to sale. The agreement was that what had been assigned by each of the parties to the assignment should be sold. This is what was sold, and, as there was authority to sell it, evidently intended to be given by the appellant, his appeal from the only decree that could have been made as to his interest is dismissed at his costs, and the decree as to him is affirmed.

(72 N. H. 160)

FAIRFIELD v. DAY.

(Supreme Court of New Hampshire. Merrimack. May 5, 1903.)

ADMINISTRATION—INSOLVENT ESTATE—PENDING ACTION—DISSOLUTION—ATTACHMENT—ISSUANCE OF EXECUTION—ACCIDENT OR MISTAKE—SUFFICIENCY OF EVIDENCE—PRESUMPTION—INJUNCTION—SUIT AGAINST RECEIPTOR—MODIFICATION OF INJUNCTION.

1. Pub. St. 1901, c. 191, § 7, provides that no action shall be begun against an administrator after the estate is decreed to be administered as insolvent, and no pending action shall be further prosecuted unless by leave of court, and, if so prosecuted, judgment for plaintiff shall be certified to the judge of probate, etc. Prior to the issuance of an execution, defendant died, and his death, and the administratrix' application to have the estate administered as insolvent, were suggested on the record. *Held*, in a suit to enjoin enforcement of execution, that a finding that the issuance of the execution was attributable to accident or mistake, and was without defendant's fault, was justified.

2. It will be presumed, on review of an injunction restraining the enforcement of an execution, that sufficient facts were found to warrant the making of the order.

3. Pub. St. 1901, c. 220, § 35, provides that attachments are dissolved by the defendant's death, in case his estate is decreed to be administered as insolvent. *Held* that, on such dissolution, the sheriff's responsibility having ended, his action against a receiptor would fail;

and hence the attachment plaintiff's exception to a refusal to modify an injunction staying execution against the estate, so as to admit of the sheriff's further prosecution of his action, would be overruled.

Exceptions from Superior Court.

Action of assumpsit by Frank E. Fairfield against Alonzo Day. Defendant having died, his executrix appeared to defend the action. Order refusing to modify an injunction restraining the enforcement of the execution, and plaintiff excepts. Exception overruled.

In the action, real estate and personal property were attached upon the writ. One Ellinwood gave a receipt to the sheriff for the personal property, and it was returned to the defendant. The defendant died May 7, 1900. The executrix of his will appeared to defend the action, July 25th. Judgment was recovered November 9, 1901, and, by virtue of the execution issued thereon, a levy was commenced, December 9th, on Day's right in equity to redeem certain real estate from mortgages, which real estate Day conveyed to his wife (now the executrix) after the plaintiff's attachment. An action was brought on the same day by the sheriff against Ellinwood upon the receipt, which is still pending.

The executrix petitioned the probate court, June 9, 1900, that the estate be administered as insolvent. The petition was denied November 30th, but upon appeal by the executrix it was granted by the superior court, April 23, 1902. The plaintiff opposed the granting of the petition in both courts. The words, "Defendant dead; estate administered as insolvent," were entered upon the docket at the April term, 1900. The latter words, "estate administered as insolvent," were stricken off at the October term, 1901, upon the request of the plaintiff's counsel, who informed the court that the petition for insolvency administration was pending, but had not been granted.

The executrix filed a motion, December 9, 1901, subsequently to the commencement of the levy and the action against the receiptor, to have the execution recalled and canceled. After a hearing, the court ordered that the plaintiff be enjoined from proceeding with his levy upon the estate of Day, and from proceeding with his action against the receiptor, except to complete service of the writ and enter it in court, until the determination of the petition relating to insolvency. Upon a hearing, June 11, 1902—the plaintiff claiming that the real estate levied upon was conveyed by the defendant after the attachment—it was ordered that the temporary injunction be dissolved, and that the plaintiff be perpetually enjoined from levying his execution upon "any property of the estate of Alonzo Day." November 10th, the plaintiff moved that the following be added to this order: "It is not intended that this injunction shall affect the right of the plaintiff to levy his execution upon property con-

veyed by the defendant, in his lifetime, to third persons, while subject to attachment upon the plaintiff's writ, nor that it shall affect the rights of either party in the suit of *Burke [sheriff] v. Ellinwood*." A hearing was had upon this motion November 24th, and the action was brought forward, the request for a modification of the perpetual injunction was denied, and the plaintiff was allowed an exception to the granting of the injunction, as if taken at the time. No change in the circumstances existing June 11, 1902, was shown, and no case of accident, mistake, or misfortune was made out, except the fact that the plaintiff then understood that the judge issuing the permanent injunction did not intend it should apply to the *Ellinwood* suit and the levy already begun.

Matthews & Sawyer, for plaintiff. Brown, Jones & Warren, for defendant.

CHASE, J. "No action shall be begun against an administrator after the estate is decreed to be administered as insolvent; and no action against the deceased or his administrator pending in court when such decree is made shall be further prosecuted therein, unless by leave of the court in which it is pending. If an action is thus prosecuted and judgment is rendered for the plaintiff, the judgment shall be certified to the judge of probate, and the amount thereof shall be added to the list of claims." Pub. St. 1901, c. 191, § 7. "Attachments are dissolved by the death of the defendant, in case his estate is decreed to be administered as an insolvent estate, but not otherwise, if the cause of action survives." Pub. St. 1901, c. 220, § 35. In view of these provisions, and of the facts that the docket of the court showed that the defendant was dead and that a petition to have the estate settled as insolvent was pending, of which the court was informed, it is difficult to account for the issue of the execution, except by attributing it to accident or mistake. The ordinary course to be pursued in such case would be to continue the action to await the determination of the insolvency petition, or, if judgment was rendered in favor of the plaintiff, to stay its enforcement. Had this course been taken, the plaintiff's attachments, excepting perhaps the attachment upon the equity which Day conveyed to his wife, would have been dissolved when the decree of insolvency was made, and no execution would have been issued, unless it was to make the attachment of such equity available. Immediately after the plaintiff took steps to enforce his execution, the court, upon the defendant's motion, stayed further proceedings upon it, with slight exceptions, until the determination of the insolvency petition. So far as the changed circumstances would permit, the court did what would have been done in another form before the

issue of an execution, if attention had been called to the matter. It cannot be doubted that the court had authority to make the order, if it was found that the execution was issued through accident or mistake, and without fault on the part of the defendant. *Warner Bank v. Clement*, 58 N. H. 533; *Clough v. Moore*, 63 N. H. 111. It must be presumed that sufficient facts were found to warrant the making of the order. As has been previously intimated, there was abundant evidence to sustain a finding that the execution was issued through accident or mistake, and without the defendant's fault.

Subsequently, while the temporary injunction was in force, it was decreed that the estate be administered as insolvent. The question then came up, what course should be taken with the execution? At the hearing upon this question, the plaintiff claimed, among other things, that he should be allowed to complete his levy upon the equity of redemption which he had attached, and which Day had conveyed to his wife. The result of the hearing was that the temporary injunction was dissolved, and the plaintiff was perpetually enjoined from levying his execution upon "any property of the estate of Alonzo Day." The plaintiff was not satisfied with the order, and moved that an addition be made to it, stating that the intention was not to include within its prohibition a completion of the levy upon the real estate attached and subsequently conveyed by the debtor, nor to affect the rights of either party to the action against the receptor. After hearing the parties, the court declined to make the amendment. The court may have thought that the order was sufficiently explicit in regard to the completion of the levy upon the real estate attached and conveyed by Day—that real estate so conveyed would not naturally come within the description, "any property of the estate of Alonzo Day." The briefs and oral arguments of the counsel show that the defendant, as well as the plaintiff, so interprets the order. But the denial of the motion, so far as it relates to the effect of the order upon the action against the receptor, cannot be accounted for so readily on the theory that it was understood not to have any effect. By the receipt, the signer acknowledged the receipt from the sheriff of personal property attached by him in an action in favor of the plaintiff against Day, and promised to return it to the sheriff on demand. The property attached was returned to Day after the receipt was given, but this fact did not make the receptor a surety or guarantor for the plaintiff's debt. He would not be liable upon the receipt if Day owned the property and no judgment was recovered against him, or if the attachment was dissolved in any way. *Whittredge v. Maxam*, 68 N. H. 323, 44 Atl. 491. The property described in the receipt was supposed to be "property of the estate of Alonzo Day."

If the use of the execution were not limited, and the receptor had not returned the property to Day, he would be at liberty to return it to the sheriff on demand, and then the sheriff's duty would be to levy upon it as the "property of the estate of Alonzo Day." If the court intended that this property should not be regarded as property of Day's estate within the meaning of the injunction, the probabilities are very strong that the plaintiff's motion in relation to that matter would have been granted. No reason has been suggested or is perceived for denying the motion, if the plaintiff's theory is correct. But, aside from this consideration, justice required that the plaintiff should be placed in the position with relation to the receptor that he would have occupied if the accident or mistake of issuing the execution had not been made. The evidence is almost, if not quite, conclusive that this is what the court attempted to do. Such being the intended effect of the injunction, the attachments upon Day's property were dissolved, by the force of the statute above quoted, when the decree was made that his estate should be administered in the insolvent course; and consequently, as the property for which the receipt was given went back into Day's possession, so that the sheriff is not responsible to the estate therefor, the sheriff's action against the receptor must fail.

Assuming that the plaintiff's exception to the granting of the injunction is properly before the court, it must be overruled. This renders it unnecessary to consider the defendant's exception.

Plaintiff's exception overruled.

BINGHAM, J., did not sit. The others concurred.

(4 Pen. 284)

REYNOLDS v. FAHEY.

(Superior Court of Delaware. New Castle.
Feb. 17, 1903.)

ACTION OF ASSUMPSIT—AFFIDAVIT OF DEFENSE—SUFFICIENCY.

1. An affidavit of defense in an action of assumpsit which merely avers that defendant does not owe plaintiff the amount claimed is fatally defective, for failing to state the facts on which the conclusion is based.

Action of assumpsit by Robert Reynolds against John C. Fahey. Judgment for plaintiff.

The defendant filed an affidavit of defense, setting forth, *inter alia*, "that he verily believes there is a legal defense to the whole of the cause of action in said suit, the nature and character of which defense is as follows: That the amount claimed to be due on the said book account sued upon in this action is not owed to the said plaintiff by the said defendant, and no part thereof is due the said plaintiff by the said defendant."

Mr. Hilles, for plaintiff, moved for judgment notwithstanding the affidavit of defense.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

William S. Hilles, for plaintiff. Samuel S. Adams, for defendant.

LORE, C. J. The affidavit of defense states a conclusion of law, and not the facts upon which such conclusion is based. It sets out that the defendant does not owe the amount, but does not state why, so that the court can judge whether it is a legal defense or not.

Let judgment be entered notwithstanding the affidavit of defense.

HERBENER v. CROSSAN.

(Superior Court of Delaware. New Castle.
Feb. 19, 1902.)

MALICIOUS PROSECUTION—PLEADING—JUSTIFICATION—ADVICE—ALLEGATIONS—SUFFICIENCY.

1. In an action for malicious prosecution for burglary, defendant set up by special plea that, before the prosecution, defendant's house had been broken into, and money stolen, whereupon defendant notified a justice, and that before the breaking a person unknown to defendant appeared at his residence, driving plaintiff's horse and wagon, and that on the day of the breaking a person unknown to defendant, driving the same horse and wagon, called at defendant's residence, pretending to want to purchase defendant's realty, and examined the entire structure; that defendant informed the justice of such facts, who reported to defendant that he had ascertained that plaintiff answered the description of the one who had called and inquired, etc.; that plaintiff, the night after the robbery, spent money with unusual freedom, and exhibited large sums of money; and that, when the justice inquired at plaintiff's house for him, the occupants expressed fear of the arrest of plaintiff; wherefore defendant had probable cause, etc. *Held* that the plea was insufficient, since the "advice" of the justice was so interwoven with the other probable cause as to make the plea bad.

Action by John Edward Herbener against James Crossan for malicious prosecution. Demurrer to defendant's plea sustained.

The defendant filed two pleas to the plaintiff's declaration, the second of which was a special plea, setting forth, in substance, that before the committing of the said supposed trespass the defendant's house had been broken into and entered by some person unknown to the defendant, and that a sum of money and divers goods and chattels had been stolen from said premises; that the said defendant thereupon immediately notified one Albert T. Williamson, the justice of the peace mentioned in the said several counts of the plaintiff's declaration, and one William C. Pierson, constable mentioned in said declaration; that a person unknown to the defendant appeared at the defendant's place of residence a short time before the date that his house was broken into, said unknown

¶ 1. See Pleading, vol. 29, Cent. Dig. § 215.

person having come there, driving plaintiff's horse and wagon; that, on the date the said defendant's house was broken into and entered, a person, to the defendant unknown, driving the same horse and wagon, called at defendant's place of residence, pretending to want to purchase defendant's real estate, and entered defendant's house, without invitation, and while therein looked about and examined the entire structure of defendant's house, as though acquainting himself therewith, and asked defendant's wife if she was there alone, and, when informed by defendant's wife that she would call the men who were about the premises, the said person protested, and forthwith left defendant's house; that defendant informed said Williamson and said Pierson of the foregoing facts and circumstances, whereupon the said Williamson instituted an investigation, and reported to the defendant that upon inquiry he had ascertained that the plaintiff answered the general description of the person who had called and inquired if defendant's property was for sale, as aforesaid, and that he, the said plaintiff, had an agent assisting him in his supposed business, who had been in defendant's neighborhood, disguising himself in a suspicious manner; that the said plaintiff and his agent aforesaid, the night after defendant's house had been broken into, spent money with unusual freedom, and exhibited to other persons large sums of money; that, when the said Albert T. Williamson called at plaintiff's house to inquire about said plaintiff, occupants of the house manifested alarm, and expressed fear of the arrest of said plaintiff, and informed said Williamson that said plaintiff's agent had immediately left the state after a letter had been received by said plaintiff concerning said breaking into said defendant's house, and stealing and carrying away of his said money, goods, and chattels; wherefore the said defendant, having good and probable cause of suspicion, and vehemently suspecting the said plaintiff to have been guilty or concerned in the breaking info and entering of defendant's house, stealing and carrying away said goods and chattels of the said defendant, and to have feloniously taken and carried away the same, did in good faith and without malice sign the said warrants in the several counts in the said declaration, and make affidavit thereto, and then and there requested the said constable and peace officer to take the said plaintiff into his custody and safely keep him until he could be carried and conveyed, and to carry and convey him, before the justice of the peace in said declaration mentioned, to be examined by and before said justice touching and concerning the premises, and to be further dealt with according to law; and on that occasion the said constable in said declaration mentioned did then and there arrest the said plaintiff and take him in his custody as soon as conveniently could be, to wit, at the time in said declaration mentioned, the

said plaintiff was examined by the said justice of the peace, and the said plaintiff's premises were searched by the said constable, and the said plaintiff was afterwards discharged out of the custody by the said justice of the peace; and by means of the said several premises aforesaid the said plaintiff was kept and detained in prison for the said several spaces of time in the said several counts in the said declaration mentioned, the same being a reasonable time for that purpose, and lawful and just for the cause aforesaid, which are the supposed trespasses in the several counts of the said declaration mentioned, whereof the said plaintiff hath above complained against the said defendant. And this the said defendant is ready to verify, whereof he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, etc.

Plaintiff filed the following demurrer to the above plea: "And as to the said plea of the said defendant by him secondly above pleaded, the said plaintiff saith that he, by reason of anything by the said defendant in said plea above alleged, ought not to be barred from having and maintaining his aforesaid action against the said defendant in respect to the grievances in the several counts of the plaintiff's declaration set out, because he saith that he, the said defendant, at the said time when, etc., in the said several counts mentioned, of his own malice, and without any reasonable and probable cause whatever, and without the cause by the said defendant in his said second plea mentioned, did commit the said grievances in the manner and form as the said plaintiff hath above thereof complained against the said defendant. And this the said plaintiff prays may be inquired of by the country," etc.

Argued before LORE, C. J., and SPRUANCE and GRUBB, JJ.

Levin Irving Handy, for plaintiff.

Counsel advising must be a licensed attorney. *Murphy v. Larson*, 77 Ill. 172, 175; *Williams v. Vanmeter*, 8 Mo. 339, 41 Am. Dec. 644. Whether there is a probable cause for a prosecution is a question of law only when all the facts which are relevant are either agreed or are undisputed. *Sartwell v. Parker*, 141 Mass. 405, 5 N. E. 807; *Donnelly v. Daggett*, 145 Mass. 314, 14 N. E. 161. The law presumes that members of the bar have more knowledge of law than laymen, and an honest reliance on their advice will justify a prosecution. But it does not presume that a layman who is a pettifogger knows more law than other laymen, and his advice will not justify. *Stanton v. Hart*, 27 Mich. 539, 541. The advice of a person who is not an attorney, but who sometimes advises his neighbors for pay, is not admissible as advice of counsel. *Livingston v. Burroughs*, 33 Mich. 511. So the advice of a person who is a justice of the peace, but not an attorney,

is no protection. *Sutton v. McConnell*, 46 Wis. 269, 280, 50 N. W. 414. In an action for malicious prosecution, proof that the defendant acted under the advice of a magistrate, or other person not learned in the law, is not admissible for the purpose of showing the absence of malice. *Straus v. Young*, 36 Md. 247, 256. In an action to recover damages for a malicious prosecution, the defendant cannot be permitted to prove that he acted under the advice of a justice of the peace in instituting the prosecution. *Brobst v. Ruff*, 100 Pa. 91, 94; *Burgett v. Burgett*, 43 Ind. 78; *Rigden v. Jordan*, 81 Ga. 668, 7 S. E. 857. In an action for a malicious prosecution, evidence that the defendant, in commencing the prosecution complained of, acted upon the advice of a person not a counselor or attorney at law, is incompetent to disprove malice. *Olmstead v. Partridge*, 82 Mass. 381.

I rely in my demurrer on this point: That the defendant has, in his plea, based his defense on the advice of a justice of the peace. Counsel now says that is not his purpose, but he only states that as one of the circumstances. I still hold to the proposition for this reason: That he cannot show that advice, under the decisions, even as one of the circumstances. *Straus v. Young*, 36 Md. 247, 256; *Brobst v. Ruff*, 100 Pa. 94.

J. Harvey Whiteman, for defendant.

LORE, C. J. You have so interwoven the advice and the other probable cause as to make the whole plea bad. We sustain the demurrer.

(4 Pen. 38)

HERBENER v. CROSSAN.

(Superior Court of Delaware. New Castle.
Feb. 19, 1902.)

MALICIOUS PROSECUTION—ELEMENTS OF ACTION—PROBABLE CAUSE—MALICE—BURDEN OF PROOF.

1. In an action for malicious prosecution, it is incumbent on the plaintiff to prove that he has been prosecuted by the defendant as alleged, that the prosecution has terminated in his favor, and that it was instituted maliciously and without probable cause, and that he has sustained damages.

2. In an action for malicious prosecution, the gist of the action is that the plaintiff has been improperly made the subject of legal process, to his damage.

3. Where, in an action for malicious prosecution, it appears that defendant voluntarily and without coercion made the complaint on which the warrant was issued, and was otherwise active in bringing the plaintiff before the justice, a finding that he was the prosecutor in such proceeding is warranted.

4. In malicious prosecution, there must be a concurrence both of malice and want of probable cause.

5. Express malice, as applied to a malicious prosecution, means ill will against a person.

6. A want of probable cause for a prosecution raises an implication of malice.

7. In an action for malicious prosecution, neither proof of express malice, nor the ac-

quittal of defendant, is sufficient to show want of probable cause, and hence plaintiff must negative the existence of probable cause by affirmative evidence.

8. Probable cause for a criminal prosecution is the existence of such facts and circumstances as would excite the belief in a reasonable mind that plaintiff was guilty of the offense.

9. Where, in an action for malicious prosecution, it appears that defendant was actuated by malicious motives and without probable cause, the jury may take into consideration plaintiff's arrest, detention, search of his dwelling, and injury to his reputation and feelings, together with such expenses as he may have incurred relative to the prosecution.

Action by John Edward Herbener against James Crossan for malicious prosecution. Verdict for defendant.

Argued before LORE, C. J., and PEN-NEWILL and BOYCE, JJ.

Levin I. Handy, for plaintiff. J. Harvey Whiteman, for defendant.

BOYCE, J. (charging jury). We have been requested to instruct you to render a verdict for the defendant. This we decline to do.

The plaintiff in this action seeks to recover damages for malicious prosecution alleged to have been instituted by the defendant against the plaintiff, without probable cause, before Albert T. Williamson, a justice of the peace in this county, upon complaint made by the defendant to the effect that the plaintiff did on the 2d day of February, 1901, break into his house in the nighttime, and did steal and carry away certain moneys, goods, and chattels then therein. It is charged by the plaintiff that upon said complaint having been made by the defendant before said justice, on the 6th day of February the same year, the defendant caused process for his arrest, as well as a search warrant, to be issued by said justice, and placed in the hands of William C. Pierson, a constable of this county, who, in company with the defendant, on the said 6th day of February, arrested him (the plaintiff), and also made search of his house for the moneys, goods, and chattels of which the defendant claimed he had been robbed. Both the arrest of the plaintiff and the search of his premises are admitted, but the defendant, in one of his pleas to the declaration, justifies the part which he took in the criminal prosecution; alleging, in substance, that he had probable cause to believe the plaintiff guilty of the breaking into and entering, or of being concerned in the breaking into and entering, his house, and stealing and carrying away said moneys, goods, and chattels; basing his belief, as he alleges, upon the result of an investigation made by the said justice, and subsequently reported to him, relative to the perpetrator of the said offense, the commission of which he had previously made known to the justice. You have patiently, and, no doubt, attentively, listened to the evidence produced in this

¶ 7. See *Malicious Prosecution*, vol. 33, Cent. Dig. §§ 29, 50.

case, and it is unnecessary to summarize more particularly the contentions between the parties to this action. You are the exclusive judges of the weight and value of the evidence, and it now becomes your duty to consider and apply it to the law of the case as announced to you by the court.

In an action for malicious prosecution, it is incumbent upon the plaintiff to prove that he has been prosecuted by the defendant as alleged in his declaration, and that said prosecution has terminated in his favor; that the prosecution was instituted by the defendant maliciously and without probable cause; and that he has, by reason thereof, sustained damages. If the plaintiff has failed to satisfy you by a preponderance of evidence as to any one of these essential elements necessary to the maintenance of this action, he cannot recover. The gravamen of the action is that the plaintiff has improperly been made the subject of legal process, to his damage. 2 Greenl. Ev. § 449.

It is admitted that the plaintiff was proceeded against criminally, and that the prosecution terminated in his favor; but it is denied that the defendant was the prosecutor, and it is contended that he only acted under the directions of the justice. Upon this point we say to you that if you find from the evidence that the defendant voluntarily and without coercion made the complaint upon which the warrants of arrest and search were made, and that he was otherwise of his own accord active and instrumental in bringing the plaintiff before the justice, in the criminal proceeding of which the latter complains, then he was the prosecutor in said proceeding. If, under this instruction, you find that the defendant was the prosecutor, then it will still remain for you to ascertain and determine whether the prosecution was instituted both maliciously and without probable cause. There must be a concurrence in these; for, even if a prosecution be malicious, yet, if there was probable cause, an action cannot be maintained. Whether the defendant was actuated by malicious motives, we will say, for your guidance, that any unlawful act done willfully and purposely to the injury of another is, as against that person, in a legal sense, malicious. 2 Greenl. Ev. § 453.

Malice, in law, is either express or implied. Express malice, as applied to a malicious prosecution, has been defined by this court to mean ill will against a person, and is indicated by the disposition or temper of mind with which the party did a particular act, as where he did it with the view to injure a particular individual generally, or in some specific manner, or that he acted from personal animosity or an old grudge. And it has likewise been held that, if it be shown that there was a want of any probable cause for the prosecution, the law implies malice from that circumstance. Wells v. Parsons, 3 Har. 505.

Touching the question of want of probable cause, it has been ruled by this court that neither proof of express malice, nor the acquittal of the defendant in a criminal prosecution, is sufficient evidence of want of probable cause; and it is therefore necessary and incumbent upon the plaintiff to negative the existence of probable cause at the time of the institution of the criminal proceeding by some affirmative evidence—that is, as was said by Chief Justice Gilpin in the case of Anderson v. Callaway, 2 Houst. 324, the plaintiff must make some proof that there was no reasonable ground for the charge, and that it was without any probable cause to sustain it, or to induce a candid belief in it, for, as was declared by Chief Justice Booth in the case of Wells v. Parsons, supra, however malicious may have been the motives of the defendant towards the plaintiff, he is protected by the law in having prosecuted the plaintiff, if he had probable cause for so doing. This rule of law which protects a party for instituting or conducting a criminal charge, where there is probable cause for it, proceeds upon principles of policy, convenience, and justice. Under the uncontroverted facts in this case, the question of probable cause is a most important element which you have to consider, and the question thus presented is not whether the plaintiff was guilty of the charge preferred against him before the justice, nor whether the defendant made the complaint from malicious motives, but whether the defendant had, at the time of making the complaint and causing the arrest of the plaintiff and the search of his house, reasonable cause for so doing. Davis v. Hardy, 13 E. C. L. R. 152. Whether there was or was not probable cause depends upon the defendant's personal knowledge or information communicated to him of facts and circumstances at the time the prosecution was begun, sufficient to excite in the mind of a reasonably cautious and prudent person a reasonable belief in the plaintiff's guilt. It is immaterial whether the defendant acted on his own knowledge of the facts, or upon information received from what he in good faith may have regarded reliable sources. The question of what constitutes probable cause was said in the case of Fagnan v. Knox, 66 N. Y. 525, not to depend upon whether the offense complained of has been committed, in fact, nor whether the accused is guilty or innocent, but upon the prosecutor's belief, based upon reasonable grounds. And in the case of Cooper v. Utterbach, 37 Md. 282, "probable cause" was held to mean the existence of such facts and circumstances as would excite the belief in a reasonable mind that the plaintiff was guilty of the offense for which he was prosecuted. If, when the defendant made the complaint, and caused the issuance of the warrants under which the plaintiff was arrested and his house searched, he believed that the plaintiff had committed, or was a

participant in the commission of, the offense charged in the complaint, then there was probable cause for his action, and your verdict should be for the defendant. Wells v. Parsons, supra; Boyd v. Cross, 85 Md. 197.

If you find that the defendant was actuated by malicious motives and without probable cause, your verdict should be for the plaintiff, and in that event you should award such damages as you may find from the evidence that the plaintiff has sustained; and for this purpose you may take into consideration his arrest, detention, search of his dwelling, the injury to his reputation and feelings, together with such expenses, if any, as he may necessarily have incurred in and about the said prosecution.

Verdict for defendant.

(55 N. J. E. 310)

WARD et al. v. TALLMAN et al.

(Court of Chancery of New Jersey. June 11, 1906.)

QUIETING TITLE—ADVERSE CLAIM—PLEADING—AMENDMENT—EVIDENCE—SUFFICIENCY.

1. Where a bill to quiet title to realty under Act March 2, 1870 (3 Gen. St. p. 3486), omits a statutory allegation, but complainants' peaceable possession with claim of ownership is admitted, and there is no misunderstanding as to the issues, an amendment may be made to bring the cause within the statute.

2. In a statutory action to quiet title under Act March 2, 1870 (3 Gen. St. p. 3486), the complainants, being in peaceable possession of the premises, are not required to establish their title until the defendant has shown prima facie the adverse title or interest which he claims.

3. In a suit by complainants in peaceable possession of premises to quiet title, defendant's adverse title under an alleged heir of complainants' intestate, who died seised of the premises, is not sustained by proof that such heir called intestate "cousin," with inferences drawn from such fact by persons who had no knowledge in regard to the matter, where it appears that such heir and defendant, with full knowledge of the fact for a period of 40 years, failed to assert any claim based on relationship to intestate.

Bill by Edward H. Ward and others, executors of Hannah D. Hopper, deceased, against Stephen L. Tallman and others. Decree for complainants.

James Steen, for complainants. Frederick W. Hope, for defendants.

STEVENSON, V. C. The suit is under the act of March 2, 1870, 3 Gen. St. p. 3486, to quiet the complainants' title to a house and lot in Eatontown, Monmouth county, of which one George E. Tiffin died seised in 1867. Tiffin died intestate, and the premises in question constituted his mansion house. The widow of Tiffin, whose name after her second marriage was Hannah D. Hopper, remained in possession of the premises continuously after Tiffin's death, for 42 years, until her own death, in 1899. The complainants,

the executors of Hannah D. Hopper, succeeded to her possession as the representatives of her estate and of her general devisees. The defendants claim title through their ancestor, Mrs. Abigail Tallman, who, they insist, was heir at law of George E. Tiffin.

1. The course of pleading has been very irregular. Before the trial, however, the complainants' bill was entirely recast, and an amended answer thereto was filed. The cause has been prosecuted, upon these amended pleadings, strictly as a suit to quiet title under the statute, and any further amendments which have been suggested, and which have been considered made, may be actually made on the record before settlement of the decree, in order that the issues which the parties have litigated and have deemed as presented by the pleadings may appear therein.

In a supplementary brief submitted on behalf of the defendants, the objection is taken that the devisees, for whom the complainants as executors have acted, are not parties to the suit. The understanding was reached at the commencement of the case that these parties could be joined as complainants. The same brief takes the point that the evidence does not show that the complainants were in possession of the land in question.

The answer to the amended bill alleges that the complainants, as executors, "being entitled to take charge of the personal estate of said Hannah D. Hopper at the time of her decease and thereafter, entered into and upon the house and lot in question for the purpose" of effecting a sale of the personal property there located, and that the complainants entered "for that purpose, and not by reason of any right, title, and interest which the said Hannah D. Hopper had in said real estate." The answer then goes on to allege that the "complainants, having entered upon the real estate and in the dwelling house for the purpose aforesaid, wrongfully assumed custody and control of the property, and have since claimed to be in possession thereof, and have permitted some party for them to occupy the property, and attempted to exercise acts of control and possession over it; but these defendants expressly deny that they have any title thereto," etc., and "show that their continuing to do so, or placing some one in charge of said property, or retaining the custody and occupancy of said premises, excepting for the purpose of removing therefrom the personal property of said Hannah D. Hopper, is wrongful and illegal." The answer further alleges that the complainants, as executors of Hannah D. Hopper, deceased, "or some of the parties interested in her estate as legatees, wrongfully and illegally and fraudulently continued to occupy and use the house and lot in question in this cause after the death of the said Hannah D. Hopper, and that the aforesaid executors or their counsel claimed, in answer to

¶ 2. See *Quieting Title*, vol. 41, Cent. Dig. § 88.

inquiries and requests made on behalf of these defendants to vacate said house and lot and permit these defendants to use and enjoy the premises as they were entitled to, that Hannah D. Hopper had some rights, and that the executors could not give up the property to these defendants without an order of the court or the consent of the parties interested." The answer concludes with a prayer or demand that "the complainants be compelled to vacate and surrender said premises to these defendants."

Throughout the whole trial, no evidence was offered to controvert the claim that the complainants were in peaceable possession, and that they were in such possession with claim of ownership was admitted throughout the oral argument. A reference to the bill, however, shows that it is singularly defective in respect of the necessary allegations to bring the case within our statute. *Southmayd v. City of Elizabeth*, 29 N. J. Eq. 203. One of the statutory allegations which appears in the original bill seems to have been dropped out of the amended bill. There has, however, been no misunderstanding as to the issue which has actually been tried and argued in this cause. Under the circumstances, the bill may be amended by the addition of the necessary few lines in order to bring the case within the scope of the statute.

2. The complainants, being in peaceable possession of the land in question, claiming to own the same, have a right to have their possessory title, whether it be good or bad, quieted as against all of the defendants who cannot show a better title. Every answering defendant in a suit under our statute stands in the position of a plaintiff in ejectment. The general intention of our statute is to enable the party in peaceable possession of land, claiming to own the same, to compel all persons asserting claims of any kind at law or in equity, hostile to such possession, to elect to abandon those claims, or undertake affirmatively to establish them. The statute gives no jurisdiction where any suit shall be pending to enforce or test the validity of the outstanding title or interest which is asserted adversely to the party in peaceable possession. The decisions of our courts indicate a further limitation of the jurisdiction to those cases where an adequate remedy cannot be had at law. *Jersey City v. Lembeck*, 31 N. J. Eq. 255, 272, 273; *Shepard v. Nixon*, 43 N. J. Eq. 627, 633, 13 Atl. 617. Our statute appears to have been designed primarily to afford a remedy against an inequitable situation. A person in peaceable possession of land, claiming to own the same, whose rights and advantages of ownership are impaired by an outstanding hostile claim of title, needs no protection under our statute, either in the case expressly excluded from the operation of the act—where an action is pending in which the adverse title can be tested—or in case he can bring an

action at law in which such test can be made. The hardship arises when he cannot either bring an action at law, or avail himself of any pending action at law, or test the validity of the hostile title, while the holder of that title also refuses to institute any test suit, and at the same time injures the title of the party in possession by the assertion of his hostile claim. In this situation of affairs our statute seems to be intended to permit the party peaceably enjoying possession of the land to compel the party holding an adverse title, and refusing to test it in an action at law or suit in equity, to choose between abandoning his title or asserting it, and thus putting it to a test through the proceedings in equity or at law which the statute provides for that purpose. It would seem, therefore, from the very nature of this statutory action, that, where the party in possession has the right to employ it in order to quiet his title, he is not obliged to disclose his own title, much less to defend it, until some defendant has come forward and established at least *prima facie* the adverse title or interest which he claims. In this view of the case it is immaterial whether the complainants, or any of them, derived any title under the will of Mrs. Hannah D. Hopper, or whether Mrs. Hopper ever acquired by adverse possession or otherwise any interest in the premises beyond her interest as dower, or as widow occupying under her right of quarantine, until the defendants, or some of them, established *prima facie* that they hold title as the heirs at law of George E. Tiffin, or some person who took title under George E. Tiffin by descent or purchase.

The question, therefore, to be settled first, is not whether the complainants, or any of them, have title by adverse possession or otherwise, but whether these answering defendants, or any of them, have established *prima facie* any title in themselves. If they have, then the complainants must disclose their title, and show it to be a better title than that of the defendants; if they have not, it would seem that the complainants need make no disclosure of their title. Their peaceable possessory title, although of unknown origin, is entitled to protection under the statute against a defendant who asserts an adverse title which he fails to support by proof.

8. The whole claim of title of these defendants is based upon the proposition that their ancestor, Abigail Tallman, was the heir at law of one George E. Tiffin, who, as is admitted by both parties, died intestate, seised of the premises in question in 1857. This George E. Tiffin left a widow, Hannah D., in possession of the premises, who subsequently, in 1867, remarried with one John Hopper, and after such marriage continued to occupy the premises until her death. John Hopper died in 1894. Hannah D. Hopper, a second time a widow, survived until 1899, when she died, leaving a substantial estate, consisting,

apart from the premises in question, of personal property amounting to about \$50,000, with practically no debts. She left a will, making legacies aggregating about \$8,000, and then devised and bequeathed the residue of her estate to her nephew and three nieces in equal shares, who are deemed co-complainants, directing that the complainants Ward and Hopper, her executors, should sell all her property, with power to make deeds of the same. The premises in question are not specifically described in her will, although the proofs indicate that when her will was made, if she did not own or claim to own the premises in question, which was the residence which she had occupied continuously for over 40 years after the death of her first husband, George E. Tiffin, then she owned no real estate at all to which the provisions of her will in relation to real estate could apply.

The complainants claim that Mrs. Hopper, if she did not have some other title by deed or devise from her first husband, George E. Tiffin, acquired a complete title by adverse possession against all who can now claim under him by descent or devise. The defendants insist that Mrs. Hopper occupied under her right of quarantine continuously during her lifetime, Abigail Tallman, the heir of George E. Tiffin, and the children and grandchildren of Abigail after her death, refraining from asserting their rights, and having dower set off in consideration of the poverty of the widow. As we have seen, it is unnecessary to consider this contention until it appears that the defendants or some of them have *prima facie* shown title by descent or otherwise from George E. Tiffin.

I am unable to find in all this mass of testimony that the defendants have established *prima facie* the fundamental proposition which is necessary to maintain their case and to put the complainants upon their proof of title, viz., that Abigail Tallman took the premises, or any interest therein, by descent from George E. Tiffin as his heir at law.

I shall not undertake to discuss the voluminous testimony presented in this case bearing upon the genealogy of George E. Tiffin and Abigail Tallman, and their probable or possible relationship to each other. A large part of the testimony on behalf of the defendants, bearing on these subjects, was taken in flagrant disregard of the rules of evidence. Leading questions were put where it was of the utmost importance that the witnesses should testify without suggestion of any kind as to the answer. Many witnesses apparently state facts in relation to matters which occurred long before they were born, and their testimony is given in such shape that it is often impossible to determine when their affirmations are based on hearsay and family reputation, and when they are based upon their own inferences.

The defendants' case rests practically upon

the proposition that Abigail Tallman and George E. Tiffin called each other "cousin." There is no evidence explaining in what sense the word "cousin" was used, or whether in fact it indicated that the parties were related by blood in any way. Counsel for defendants endeavored to show that Abigail Tallman's father and George E. Tiffin's mother were brother and sister, but the proof to sustain that proposition entirely failed, and I think that the probabilities from the testimony strongly favor the contradictory proposition.

In the year 1830, George E. Tiffin was in business in Richmond, Va. George D. Tallman, Jr., a youth about 16 years of age, son of Abigail Tallman, was a clerk in Mr. Tiffin's employ. Some old letters from members of Mrs. Tallman's family to this young man, George D. Tallman, Jr., written at this period, were produced in evidence by the defendants. In one of them a message is sent from Mrs. Tallman, and, I think, from other members of her family, to "Cousin George." Assuming that the cousin George referred to was George E. Tiffin—which counsel for the complainants disputes—it is a significant fact that, in another letter written at this time by Oliver Hicks, the brother of Abigail Tallman, to this same young man in Richmond, the writer asks the young man to give his "kind respects to Mr. Tiffin." Such a message certainly is hardly to be expected under the circumstances from a man writing to his nephew, and the message being sent to his own cousin.

The only other class of testimony in favor of the proposition that Abigail Tallman was the heir, or one of the heirs, of George E. Tiffin, to which I shall refer, consists of statements made by Hannah D. Hopper after, and probably long after, Mr. Tiffin's death.

In order to appreciate the probative force of these statements, it is necessary that the extraordinary history or lack of history of this man George E. Tiffin should be thoroughly understood. It is almost safe to say that the origin of George E. Tiffin is left by the testimony in this cause entirely shrouded in mystery. It was understood that his original name was Eaton; that he was taken into the family of a man of means named Tiffin, about whom, however, no further information is given. He adopted the name of his benefactor, and appears to have received a fair education, and to have engaged in business with some measure of success in Richmond, Va., and perhaps elsewhere. A Bible printed in 1784 is produced, which the testimony shows was given by Hannah Hopper to a granddaughter of Abigail Tallman as the Eaton family Bible, or a Bible which belonged to her first husband, George E. Tiffin. The entries of births in this book are extremely peculiar. The handwriting was not satisfactorily proved. If the record proves anything of value in the case, it indicates that George Eaton Tiffin was born

in 1794, and that probably his parents were Robert Eaton and Phoebe Eaton, and probably he had three sisters, whose names and dates of birth are given. If the unexplained record is of a family, the above would be the fair inference. Practically no trace of any of these persons, beyond George E. Tiffin himself, appears in the testimony. In 1835, George E. Tiffin, when over 40 years of age, married Hannah Drummond, who was then a mere child of 15. About the year 1840, Mr. Tiffin and his young wife settled in Eatontown, and soon after he purchased the property now in dispute, and made it his home. He lived in Eatontown continuously until his death, in 1857. He is described as a man of good education and courtly manners. He was a judge of the court of common pleas of Monmouth county, and appears to have been a man of somewhat conspicuous figure in his community, and yet no one to-day appears to know where he came from or who in fact he was. But the fact to be observed in relation to this mysterious stranger is that there is no evidence that his wife at the time of her marriage, or at any time thereafter, ever acquired any more knowledge of her husband's origin and family connections than the other persons whose declarations have been proved on that subject. Abigail Tallman lived not very far away from Eatontown, and visits were made between the Tallman and Tiffin families. These people, as we have seen, called each other "cousin." Inferences of relationship from this fact undoubtedly were drawn during Mr. Tiffin's lifetime, and after his death by the descendants of Abigail Tallman, and the same sort of inference may well have been drawn by Mrs. Tiffin during the lifetime of her first husband, during her widowhood, and after her remarriage with John Hopper in 1867. The gift of the Eaton Bible by Mrs. Hopper to one of the granddaughters of Abigail Tallman, for the purpose of having the book remain in Mr. Tiffin's family, or because of the propriety of having it so remain, indicates that Mrs. Hopper, long after the death of Mr. Tiffin, shared the apparently common belief that he was some sort of a relative of Abigail Tallman. The statements which Mrs. Hopper made in various forms 20, 30, or 40 years after her first husband's death, to the effect that she had no title to the property which she occupied, and that the same belonged to the heirs of Mr. Tiffin, were manifestly true from her point of view. It is a most significant fact that when she made these statements she apparently did not say who the heirs of George E. Tiffin were, and the absence of such a statement in some instances suggests that she did not know who those heirs were. So, also, the statement that Mrs. Hopper made, probably years after the death of her first husband and her remarriage, that the Tallmans—referring apparently to the

descendants of Abigail Tallman—were Mr. Tiffin's nearest relatives, was entirely natural, if Mrs. Hopper supposed, as others did, that these two persons who called each other "cousin" in fact were in some way related. The utter inability of the witness for the defendants, Sarah M. Barclay, to give any information as to the family or relatives of Judge Tiffin, or to indicate how he was related, if at all, to his "cousin" Abigail Tallman, seems to bear strongly against the defendants' claim. Mrs. Barclay was a life-long, intimate friend of Mrs. Hannah D. Hopper. She was the elder by two or three years. She knew Judge Tiffin as well as his young wife before their marriage, and she "lived in Eatontown for thirty years next door but one to Mrs. Hopper." And yet this witness, while testifying to statements made by Mrs. Hopper in regard to Judge Tiffin and the Tallmans, of the kind above referred to, utterly fails to throw any light on the question what the relationship between Judge Tiffin and the Tallmans was, or how it arose. She does not even say that Judge Tiffin and Mrs. Abigail Tallman were reputed to be cousins, or called each other cousin, or that Mrs. Hannah D. Hopper said that they were cousins, or said directly that they were related in any way by blood. When asked if she knew "of any relationship" between Judge Tiffin and Mr. and Mrs. Tallman, the witness answered: "They were very intimate, and visited each other when they were at Shrewsbury." Mrs. Barclay also testified in regard to statements made by Mrs. Hopper containing admissions that the Tallmans had some interest in the Tiffin property. The substance of this testimony, so far as it is safe to accept it as purporting to give Mrs. Hopper's language, appears to be contained in the proposition that Mrs. Hopper "thought they [the Tallmans] had a claim on her property." If Mrs. Hopper thought the Tallmans were relations of Judge Tiffin, and knew of no nearer relations, she would naturally think that they could make some claim. All the statements of Mrs. Hopper in the nature of admissions which have been testified to in this case may, I think, be properly regarded, if proved as nothing more than honest inferences which Mrs. Hopper drew from some supposed relationship between Judge Tiffin and Abigail Tallman, the nature or degree of which she did not pretend to know—a relationship inferred by Mrs. Hopper, as well as other persons, from the use of the word "cousin."

Without discussing further the testimony upon this subject, I think that all the evidence to sustain the claim that Abigail Tallman was a blood relative of George E. Tiffin rests upon proof of the fact that these two persons called each other "cousin," together with the inferences drawn from that fact and stated by a number of very much younger persons, practically all of another generation, and some of them of a third gen-

eration from Mr. Tiffin and Mrs. Tallman, who had no knowledge in regard to the matter whatever. An estate cannot be taken from one person who is in the peaceable possession of it and given to another on the strength of such evidence. Judge Tiffin and Mrs. Tallman, who appear to have been old friends, their acquaintanceship dating back to a time prior to Judge Tiffin's marriage, may have called each other "cousin" for a large number of reasons other than the existence of a tie of blood. As we have seen, it does not appear through which of the parents of Judge Tiffin or Mrs. Tallman the cousinship was traced, nor does it appear, if these two persons were cousins, whether they were first cousins, or fifth cousins, or tenth cousins, or what the degree of relationship as cousins was. They may have been cousins by marriage, or cousins by courtesy, or cousins by blood, but of a kind who can never inherit from each other.

The answering defendants, in seeking to maintain the fundamental proposition to support their claim of title, are certainly confronted by a strong presumption against them arising from the conduct of their parents and their grandparent, Abigail Tallman, through whom their title is claimed. As we have seen, Hannah D. Hopper, the widow of George E. Tiffin, remained in exclusive possession of the family mansion, the premises in question, from the death of her first husband, Judge Tiffin, in 1857, until her death, in 1899, a period of 42 years. Abigail Tallman and her children and grandchildren appear to have submitted to this exclusive possession, and the proofs utterly fail to show that Mrs. Hopper was allowed to occupy in the continuous enjoyment of her right of quarantine by the favor of the Tallmans and in consideration of her poverty. Abigail Tallman died only five years after the death of Judge Tiffin, leaving children and grandchildren. Nine years after Judge Tiffin's death his still youthful widow married a man who is shown to have had some means, and apparently was abundantly able to support his wife. After this remarriage the second generation of Tallmans made no move to assert their alleged claim. As the years went by, Mrs. Hopper received from her own family from time to time amounts of property which in the end aggregated a substantial fortune, apparently a large fortune as compared with the means of some of the Tallman family. And yet this comparatively rich dowress after her remarriage remained in the exclusive possession of Judge Tiffin's property, while his heirs, all of whom certainly were not rich people, submitted to this deprivation of their estate.

There is another most significant circumstance proved in this case which indicates that after the death of Judge Tiffin, in 1857, Abigail Tallman had no proof that she was his heir or next of kin, and that after her death her children and grandchildren had no

such proof. It appears that Judge Tiffin's widow and one Edward H. Van Nuxson were appointed administrators of the Tiffin estate. These administrators filed their final account, showing a balance remaining in their hands of \$2,193.23, "to be disposed of as the law directs." The records of the court show no order for distribution, no release of any paper indicating what was done with the above balance. It is admitted, however, by the parties to this suit, that Mrs. Hopper, then Mrs. Tiffin, appropriated this entire balance, and it does not appear that she did it either by leave of the Tallmans or against the protest of the Tallmans. The whole proceeding strongly suggests the appropriation of property for which no claim could be maintained other than by the public authorities, who oftentimes are not called in and reminded that they can make a claim on behalf of the state or the poor of the township. If Abigail Tallman, as the defendants insist, consented, in view of the widow's poverty, that she should appropriate this money which belonged in whole or in part to her (Abigail), is it reasonable to suppose that the administrators would have been allowed and would have allowed themselves to be placed in the position practically of embezzlers? Would not the natural way of doing the business among such intelligent people have been to have an order of distribution made, giving the widow her half of this balance and awarding the other half to Mrs. Tallman as next of kin, if in fact there was even presumptive proof at that time obtainable that she was such next of kin? A release or transfer executed by Mrs. Tallman would then protect the administrators and protect the widow. If the supposition can be made that Abigail Tallman consented to allow Mrs. Tiffin to appropriate a thousand dollars to which or in which she (Mrs. Tallman) had a claim, while no protective writing or record of any kind was made, it hardly seems probable that after Abigail Tallman had died, and after her children died, and after this widow, who had received such kindness and generosity, had remarried and become rich in her own right, no descendant of Abigail Tallman would have come forward to ask as a matter of justice that this rich woman, a second time a widow, should now at last surrender the Tallman inheritance or make compensation therefor in some other way.

After these years of delay, after this unexplained or insufficiently explained acquiescence and laches on the part of Abigail Tallman, and more particularly on the part of her children and grandchildren, the claim of these defendants, in my judgment, rests under a cloud, and calls for more distinct proof than would be necessary in the absence of this unreasonable delay. The just inference in such cases often is that the claim has not been preferred, when the evidence in regard to it must have been more

accessible, because, if it had, the evidence would not have sustained it. It seems to me that this is the sort of a case to which the principle above referred to can most equitably be applied. When one, with full knowledge of his rights, allows 40 years to elapse, during which he makes no claim, he may well be held under obligation to clearly explain and excuse his delay, or, in the absence of such explanation and excuse, to clearly and distinctly prove his claim. Doubts should be solved against him.

I fail to find any sufficient evidence presented in this case to justify a decree establishing, in favor of any of these answering defendants, any estate, interest, or right in the land now in the peaceable possession of the complainants. Whether the complainants so in possession have a title by adverse possession or otherwise, are matters, therefore, which need not be considered in this case.

A decree will be advised for complainants, with costs.

(69 N. J. L. 544)

JOHNSTON v. BOWERS.

(Supreme Court of New Jersey. June 8, 1903.)

JUDGMENT—STAY OF ENTRY—EQUITABLE POWERS.

1. The equitable control of the court over its own proceedings, judgments, and process enables the court to stay entry and execution of judgment upon a verdict recovered by the plaintiff in an action upon contract, until the plaintiff does equity by remitting the amount of a liquidated credit admittedly due to the defendant, and entered upon the bill of particulars annexed to the declaration, where, by inadvertence at the trial, the credit was not called to the attention of the court or jury, and so did not enter into the consideration of the jury in the making up of the verdict.

(Syllabus by the Court.)

Action by William Johnston against John W. Bowers. Verdict for plaintiff. Rule to show cause. Judgment on verdict, on conditions.

Argued February term, 1903, before GUMMERE, C. J., and FORT, HENDRICKSON, and PITNEY, JJ.

S. D. Oliphant, Jr., for plaintiff. John Sykes, for defendant.

PITNEY, J. By the bill of particulars attached to and filed with the plaintiff's declaration, it appears that his claim against the defendant was made up as follows:

For work done and materials furnished by plaintiff for defendant in the building of a schoolhouse under contract.....	\$3,520 00
For work and materials not included in the contract	319 85
	<hr/> \$3,839 85
Credit due defendant against above account for work done and materials furnished by defendant for plaintiff.....	259 98
	<hr/> \$3,579 87

By the admitted state of facts it appears that upon the trial there was a dispute be-

tween the parties as to the sufficiency of the contract work done by the plaintiff, and also a dispute as to the items of extra work. By oversight, the credit item of \$259.98 was not called to the attention of either court or jury, and so did not enter into the consideration of the jury in the making up of their verdict. The verdict was for \$3,520.40, which included \$115.60 for interest. It thus appears that as a result of the trial the plaintiff's claim of \$3,839.85 was reduced to \$3,404.80, to which was added \$115.60 for interest thereon, making up the verdict of \$3,520.40; and that the verdict gives no credit to the defendant for his counterclaim.

Defendant asks for a new trial on the ground that through accident an injustice has thus been done to him. But no complaint is made that injustice was done to either party with respect to those matters that were submitted to the consideration of the jury. Upon the agreed state of facts, we are bound to assume that the verdict is correct so far as it goes. Therefore neither party ought to be put to the expense and hazard of a new trial upon the matters thus controverted and concluded, if a just result can be otherwise reached.

Under section 237 of the practice act (Gen. St. p. 2572) the plaintiff may annex to his declaration a schedule containing the particulars of his demand, and in such case the defendant is not at liberty to make the statutory demand for a bill of particulars under section 236, and thereby stay the time for pleading. But, by the express terms of section 237, the party so annexing the same shall be bound thereby, unless in "case of surprise or for other good cause the court shall give relief." The effect of such a bill of particulars is not to enlarge or limit the averments of the pleading as a pleading, unless anything thus annexed is referred to in the body of the pleading as so annexed, under section 123 of the practice act. *Harrison v. Vreeland*, 38 N. J. Law. 366; *Brown v. Warden*, 44 N. J. Law, 177; *Metzger v. Credit System Co.*, 59 N. J. Law, 340, 36 Atl. 661; *Snyder v. Merchants' Insurance Co.*, 59 N. J. Law, 69, 34 Atl. 945; *Voorhees v. Barr*, 59 N. J. Law, 123, 35 Atl. 651; *Melick v. Foster*, 64 N. J. Law, 394, 45 Atl. 911; *Shelmerdine v. Lippincott* (Sup.) 54 Atl. 237. But the bill of particulars limits and defines, for the purposes of trial, the scope of the plaintiff's claim, and any credits thereon allowed are of course evidential against the plaintiff. *Boody v. Pratt*, 64 N. J. Law, 281, 45 Atl. 598; same case at a later stage (Err. & App.) 53 Atl. 470.

The suggestion that the credit item here in question is of such a character as to constitute a cross-demand on the part of the defendant against the plaintiff, and ought to have been pleaded as a set-off under the statute (Gen. St. p. 3109, §§ 1-4), is without force. In order to avoid circuity of action, the act treats a set-off in effect as a payment on ac-

count. The earlier statute upon the same subject, passed November 1, 1797 (Paterson's Laws, p. 254; Revision 1821, p. 305; Rev. St. 1847, p. 804, tit. 29, c. 2, § 11), required the defendant to plead payment and give notice of the set-off thereunder, a method of pleading that is still commonly followed, although perhaps not compulsory under our present act concerning set-off. But where the plaintiff himself acknowledges the subject-matter of the set-off, and treats it in his bill of particulars as a payment on account by applying it as a credit upon the amount of his demand, it seems unnecessary to cumber the record by requiring the defendant to file any special plea. Were we of a different opinion, we would, of course, permit the defendant to amend his pleadings. As it is admitted that the defendant is in truth entitled to the credit, we see no difficulty in dealing with the matter directly, upon the equity of the act concerning set-off, precisely as if the defendant's claim had been established by judgment. *State v. Weisted*, 11 N. J. Law, 397.

It is the established practice of courts of law to exercise such control over their own proceedings, judgments, and process as to see that justice and equity are done with respect to the disposition of the proceeds of a judgment. Thus, before chosing in action were made assignable at law, the law courts constantly recognized equitable assignments, and protected the rights of the assignee by dealing with him as the party really entitled to enforce the cause of action and to receive the beneficial proceeds thereof. *Belton v. Gibbon*, 12 N. J. Law, 76; *Sloan v. Sommers*, 14 N. J. Law, 509, 512; *Parsons v. Woodward*, 22 N. J. Law, 196, 206; *Terney v. Wilson*, 45 N. J. Law, 282; *Brown v. Dunn*, 50 N. J. Law, 111, 11 Atl. 149; *Sullivan v. Visconti* (Sup.) 53 Atl. 598, 600. Instances of the control exercised by the court over the funds produced by execution, in distributing them among successive execution creditors, are found in *Stebbins v. Walker*, 14 N. J. Law, 90, 25 Am. Dec. 499, and *Cox v. Marlatt*, 36 N. J. Law, 389, 13 Am. Dec. 454. The power of the court to order one judgment to be set off against another is an exercise of the same equitable control. *Hendrickson v. Brown*, 39 N. J. Law, 239; *McAdams v. Randolph*, 42 N. J. Law, 332; *Brookfield v. Hughson*, 44 N. J. Law, 285; *Schautz v. Kearney*, 47 N. J. Law, 56. The attorney's so-called lien upon the proceeds of the suit for payment of his taxed costs (*Braden v. Ward*, 42 N. J. Law, 518; *Phillips v. Mackay*, 54 N. J. Law, 319, 23 Atl. 941), except where those proceeds have come into his hands, is in truth only a right to call upon the court for the exercise of its equitable control in favor of the attorney, as was pointed out by Mr. Justice Dixon in *Delaney v. Husband*, 64 N. J. Law, 275, 45 Atl. 265.

In the present action the plaintiff, by his bill of particulars, has in effect declared him-

self to be a trustee for the defendant with respect to so much of his own claim as may be necessary to satisfy the defendant's admitted claim against him. Through inadvertence at the trial, the plaintiff's claim only was litigated by the parties and established by the verdict, but the defendant's claim still stands admitted, and he has had no benefit of it. The right of the court to amend the verdict without consent of the plaintiff may be doubtful. But there is no doubt of our right and duty to stay entry and execution of the judgment until the plaintiff does equity to the defendant by remitting the amount of the credit conceded in the bill of particulars, that is, the sum of \$259.98, with interest thereon from the commencement of the suit until the term to which the *postea* was returned. If the defendant wishes to make himself secure against litigation in another jurisdiction, he may do so by paying into court the balance due to the plaintiff, whereupon judgment will be entered upon the verdict, and an entry of satisfaction will at the same time be made.

An order to the above effect will be made, without costs to either party upon this rule.

(65 N. J. E. 181)

KNICKERBOCKER TRUST CO. v. PENN CORDAGE CO. et al.

(Court of Chancery of New Jersey. June 13, 1903.)

CHATTEL MORTGAGE—FAILURE TO RECORD—VALIDITY—NEGLIGENCE OF CLERK.

1. In cases where personal property is mortgaged without change of possession, the chattel mortgage is void as to creditors of the mortgagor, unless it be recorded in the book directed by the chattel mortgage statute to be provided.

2. The record of a chattel mortgage in the real estate mortgage book does not relieve the chattel mortgage of its invalidity as to the creditors of the mortgagor.

3. Whether the failure to record a chattel mortgage according to the statute is the fault of the mortgagee or of the clerk is not material. The statute declares a chattel mortgage to be void as to creditors of the mortgagee unless certain things be done. One of these is that it be recorded according to the statute. The chattel mortgage is in law void as to such creditors, unless it is in fact recorded as required by the statute.

(Syllabus by the Court.)

On rehearing. Decree for defendants.

For former opinion, see 50 Atl. 459.

This cause was heretofore argued in extenso, and an opinion given on the whole case. See 50 Atl. 459. On hearing that argument, the Vice Chancellor understood from counsel then present that the complainant admitted that its mortgage had not been recorded as a chattel mortgage, and that it was ineffectual as a chattel mortgage against the claim of the creditors of the defendant Penn Cordage Company, mortgagor. When that opinion was pronounced, the counsel for the complainant insisted that it was not intended by him to admit the invalidity of the

complainant's mortgage as a chattel mortgage; that he had supposed that he had submitted that point to the Vice Chancellor for consideration and determination. The counsel for the defendants were consulted as to this misunderstanding, and, by agreement, the testimony in the cause has been reopened on the single point, "Is the complainant's mortgage valid, under the chattel mortgage act, against the claim of the creditors of the mortgagor?" This question has been argued by counsel upon the following stipulation and admissions of facts:

"It is stipulated and agreed by and between the parties hereto as follows:

"(1) That on or about April 7, 1896, the original mortgage from the Penn Cordage Company to the Knickerbocker Trust Company, as trustee, dated February 1, 1896, which has heretofore been put in evidence, and marked 'Exhibit C-5' herein, was sent to the clerk of Burlington county, Mt. Holly, N. J., inclosed in a letter, which was in the following terms: 'April 7th, 1896. Dear Sir: At the request of the Knickerbocker Trust Company of this city, we enclose a discharge of mortgage recorded in your office, executed by William Keen to Adolph Segal, the discharge being executed by Howard Lippincott, Segal's Assignee. Kindly satisfy this mortgage of record in your office, and simultaneously record in your office the enclosed mortgage covering the same property, executed by the Penn Cordage Company, to the Knickerbocker Trust Company, as Trustee. On receipt of a memorandum of your fees for satisfying the old mortgage and recording the new one, we will promptly remit. So soon as the old mortgage is discharged of record and the new one recorded, kindly wire the Knickerbocker Trust Company, No. 66 Broadway, this city, to that effect, at the expense of the Trust Company. Yours very truly, Davies, Stone & Auerbach. To the Clerk of Burlington County, Mount Holly, N. J.'

"(2) That the mortgage executed by William Keen to Adolph Segal, referred to in said letter, had theretofore been duly recorded as a mortgage of real property in a book set apart for the recording of real estate mortgages, and also as a chattel mortgage in a book set apart for the recording of chattel mortgages, by the clerk of Burlington county, and that the discharge of said mortgage referred to in said letter was likewise duly recorded and entered in both of said books. That said new mortgage, to wit, said mortgage from the Penn Cordage Company to the Knickerbocker Trust Company, as trustee, was thereafter, to wit, on the 10th day of April, 1896, recorded by the clerk of Burlington county, N. J., in a book kept by him, and designated 'Book A-4' of Mortgages, at page 458, etc., which book was one of the books provided by the clerk of the county for registering or recording mortgages of lands, tenements, and hereditaments, lying and being within his county.

"(3) That the original was returned to the Knickerbocker Trust Company by the clerk of Burlington county, N. J., bearing the following indorsement, subscribed by said county clerk: 'Received April 10th, 1896, recorded in the Clerk's office of Burlington County, at Mount Holly, in Book A-4 of mortgages, folio 458 etc. William W. Worrell, Clerk.'

"(4) That the said mortgage or conveyance, heretofore marked 'Exhibit C-5,' intended to operate as a chattel mortgage, was not, in fact, accompanied by an immediate delivery, nor followed by an actual or continued change of possession of the things mortgaged.

"(5) That the clerk of Burlington county, from the time chattel mortgages were required to be recorded, and prior to and upon April 10, 1896, kept two sets of books in his office, one set of which was provided for registering or recording all mortgages of lands, tenements, and hereditaments lying and being within his county, and the other of which was provided for the purpose of recording therein the instruments by the acts concerning chattel mortgages directed to be recorded; that the mortgage in question was recorded in said 'Book A-4,' which was a book of the former set, and was not recorded in a book of the latter set.

"Counsel being present, it is agreed that Mr. Humphreys, counsel for complainant, will serve copies of his brief on all counsel in the case, with the exception of Mr. Archer, who has notified Mr. Humphreys that his client is not interested in this particular dispute; and that said counsel will reply to said brief within seven days thereafter, and serve a copy of their briefs upon Mr. Humphreys, who will reply thereto within seven days."

The truth of the facts contained in stipulations 1, 2, 3, 4, and 5, is admitted. Counsel for defendants object to the admission of the facts set forth in stipulations 1 and 2 as being irrelevant. Counsel for the complainant object to the admissions of the facts set forth in stipulation 5 as being irrelevant.

John B. Humphreys and Davies, Stone & Auerbach, for complainant. C. V. D. Joline, for defendant Claud S. Fries. Joseph H. Gaskill, for defendant Pennsylvania Railroad Company.

GREY, V. C. (after stating the facts). Two objections are made against the validity of the complainant's mortgage: First. It is contended that the affidavit of consideration does not sufficiently state the consideration of the mortgage. The whole case shows that the true consideration of the mortgage was the securing the payment of the bonds described in the mortgage. The affidavit declares it to be "to secure the payment of \$100,000 of the bonds described in said mortgage." The inquirer is thus referred to the mortgage itself, to which the affidavit is ap-

pending, for further information as to the details of the consideration. He there finds a full statement of the scheme for the raising of money by the issue of bonds to be secured by this mortgage. It differs in no essential particular from the usual methods followed in effecting the issue of bonds upon the security of corporate property. The affidavit of consideration, taken with the statements in the mortgage itself to which it refers, sufficiently meets the requirements of the statute (Gen. St. p. 2113, § 52), as interpreted in the case of *Fletcher v. Bonnet*, 51 N. J. Eq. 615, 28 Atl. 601, by the Court of Appeals, where it was held that an express reference in the affidavit of consideration to the matters contained in the mortgage made the recital thus referred to a part of the affidavit. The complainant's mortgage is not invalid as a chattel mortgage for want of a proper affidavit of consideration. Secondly, The defendants insist that the complainant's mortgage was not recorded as a chattel mortgage in the manner required by the chattel mortgage act. This is the substantial ground on which the complainant's mortgage is challenged.

It is undisputed that this mortgage was not recorded as a chattel mortgage in the book provided by the county clerk for that purpose. It was, however, recorded in the book provided by the clerk for the record of real estate mortgages, and this record preceded the claims of the defendant creditors who now challenge its validity as a chattel mortgage. The complainant insists that a chattel mortgage becomes recorded, within the meaning of the chattel mortgage act, from the moment it is lodged with the clerk for record and is ostensibly received by him for that purpose; that although it may be recorded in the wrong book, or may never be recorded in fact, yet it is, from and after its deposit with the clerk, forever recorded in law, and that creditors (who, if they examined the chattel mortgage books, would, as a matter of fact, find no record of any such mortgage) must be held as matter of law to have had constructive notice of the deposited, though misrecorded or nonrecorded, mortgage. The system of constructive notice, based on the various recording acts, is purely statutory. To ascertain whether an instrument has been so recorded as to give constructive notice of its existence, the requirements of the statute which make the record of that particular instrument notice must be observed. At the common law, the fact that the possession of chattels remained with the chattel mortgagor was, as between creditors of the mortgagor and the mortgagee, of itself prima facie evidence that the mortgage was fraudulent. *Pancoast v. Miller*, 29 N. J. Law, 250-254; *Fletcher v. Bonnet*, 51 N. J. Eq. 619, 28 Atl. 601 (Court of Appeals). While this presumption attended the chattel mortgage, it was held that the chattel mortgagee might relieve himself of the presumption that his mortgage was fraud-

ulent by proof that the leaving of the goods in the possession of the chattel mortgagor was not, in fact, fraudulent. *Runyon v. Groshon*, 12 N. J. Eq. 86; *Pancoast v. Miller*, 29 N. J. Law, 254; *Roe v. Meding*, 53 N. J. Eq. 350, 80 Atl. 587, affirmed on appeal 53 N. J. Eq. 365, 33 Atl. 894. The state of the law in 1853 (when *Runyon v. Groshon* was decided, declaring chattel mortgages to be prima facie fraudulent when unaccompanied by change of possession of the mortgaged goods) tended to prevent the use of personal property as a basis of credit, unless by way of pledge and actual delivery of possession. It placed the holder of a chattel mortgage at the disadvantage that his security was prima facie deemed to be fraudulent, and put upon him the burden of affirmatively proving that it was taken without fraudulent purpose. In order to enable the owner of personalty, while retaining its possession, to mortgage its value, and to relieve the holder of such a mortgage of the imputation of fraud, and at the same time to warn all who might give credit to the owner, because of his possession of the goods, that there was an outstanding claim upon them, the first chattel mortgage statute was passed. That act declared that every conveyance, intended to operate as a mortgage of goods and chattels, which should not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, should be absolutely void as against the creditors of the mortgagor, unless the mortgage, or a true copy thereof, should be filed as directed in the succeeding section of that act. P. L. 1864, p. 493, § 1. The succeeding section directed that the chattel mortgage should be filed in the clerk's (or register of deeds) office, and that that officer should indorse thereon the time of receiving the same. The other provisions of the act of 1864 direct the filing of a copy of the chattel mortgage and statement exhibiting the interest of the mortgagee, under penalty that the mortgage should cease to be valid as against creditors, if that were not done, as prescribed by that statute. If the mortgagee obtained his mortgage to be filed as directed by the act, he was relieved from the presumption that it was fraudulent. The burden of seeing that the statutory requisites were actually performed was cast upon him. If they were not observed, his mortgage was void as to creditors of the mortgagor. While that statute was in force, if a chattel mortgage had been sent to a clerk's office by a mortgagee, and had been received by the clerk, but had not in fact been filed by him as directed by the second section, it would, as against creditors of the chattel mortgagor, have been void by the express words of the statute. Nothing in the act declared that depositing it with the clerk relieved it of the statutory invalidity which attached if it was not filed, nor did the act declare that sending or delivering it to the

clerk was a filing of it. It was void as to creditors if not filed as directed by the act, no matter how that incident was occasioned. In 1885 the chattel mortgage act was revised, and so changed that, instead of filing the chattel mortgage in order to make it valid against the creditors of the mortgagor, it was required that it should be recorded. P. L. 1885, p. 319. It is the provisions of this act which affect the chattel mortgage presently in controversy. The fourth section of the act of 1885 declares: "That every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage having annexed thereto an affidavit or affirmation made and subscribed by the holder or holders of said mortgage, his, her or their agent or attorney stating the consideration of said mortgage and as nearly as possible the amount due and to grow due thereon, be recorded as directed in the succeeding section of this act; provided, that nothing contained in this act shall be taken, construed or held to apply to any mortgage of personal property included in a mortgage of franchises and real estate heretofore or hereafter made by any railroad company and which hath been or shall be recorded or registered as a mortgage of real estate in every county in which such railroad, or any part of it is or shall be located, and it shall not be necessary to record as a chattel mortgage any such mortgage as is in this proviso described." The Court of Errors and Appeals has declared that the same legislative purpose which inspired the previous act, requiring the filing of a chattel mortgage, attends upon the new act requiring that it be recorded. *Roe v. Meding*, 53 N. J. Eq. 367, 33 Atl. 394. Both statutes are intended to protect the creditors of the mortgagor. 53 N. J. Eq. 366, 33 Atl. 394. The phrasing of this act indicates a clear legislative intent that chattel mortgages shall be void as against the creditors of the mortgagee in cases in which possession is not taken of the chattels mortgaged, unless certain named incidents prescribed in the act are performed. The fourth section requires that an affidavit of the holder be annexed, stating the consideration of the chattel mortgage and the amount due and to grow due thereon, and that the mortgage be recorded as directed by the succeeding section of the act. The fifth indicates in what county its record shall be made. The sixth prescribes that no mortgage shall be recorded unless it be acknowledged or proved and the acknowledgment or proof be certified thereon. The command of the statute as to these prerequisites is imperative. *Graham*

Button Co. v. Spielmann, 50 N. J. Eq. 123, 24 Atl. 571; affirmed on appeal 50 N. J. Eq. 796, 27 Atl. 1033. A failure to perform any one of them leaves the chattel mortgage absolutely void as to the creditors of the mortgagor. The same principle runs through the discussion of the chattel mortgage act in the case of *Roe v. Meding*, 53 N. J. Eq. 350, 33 Atl. 394, in the court of appeals. By far the most important of these statutory requirements for the protection of creditors is that which prescribes that the chattel mortgage must be recorded as directed by the succeeding section of the act. Although every other statutory essential may have been performed, all are of no value as notice to the creditors of the mortgagor unless the chattel mortgage be recorded as required by the statute. It is this final act which at law notifies the creditors of the mortgagor. The latter, knowing that constructive notice is given them by the statutory record, may protect themselves by examining the record which the statute directs to be made. The complainant's contention, that its chattel mortgage was in contemplation of law recorded from the moment it was lodged with the clerk, is opposed by the express words of the act itself, which in terms declares that a chattel mortgage is void unless it be recorded. At the time the act respecting chattel mortgages was passed in 1885, the recording act concerning deeds provided that, if a deed were either recorded or "lodged for that purpose with the clerk," it should operate as notice. *Supp. to Revision 1886*, p. 133, §§ 8, 9, tit. "Conveyances." The statute which provided for the recording of mortgages also declared that, if a mortgage be recorded or "lodged for that purpose with the clerk," it should be notice. *Revision 1877*, p. 706, § 22, tit. "Mortgages." This course of legislation upon a kindred subject, existing when the act was passed which provided for recording of chattel mortgages, shows that, when the Legislature intended to make the lodging for record as effective as the record itself, it definitely expressed that purpose. Deeds and real estate mortgages had theretofore been declared recorded when lodged for that purpose. Chattel mortgages were required to be actually recorded. Lodging for record was not declared to be effectual as to them. The ninth section of the chattel mortgage act is also explicit in its declaration that "every chattel mortgage hereafter recorded pursuant to the provisions of this act, shall be valid against the creditors of the mortgagor and against subsequent purchasers and mortgagees from the time of the recording thereof," not from the time it shall be lodged with the clerk for record. This prescription of the terms upon which a security theretofore presumptively fraudulent, should be held to be valid, was entirely with the legislative power. It is not for the courts to extend to such mortgages a greater privilege, to the disadvantage of

creditors, by giving to the chattel mortgagee what the Legislature saw fit to withhold. It must be held that a chattel mortgage is void, as against the creditors of the mortgagor, unless it be actually recorded as required by the chattel mortgage statute.

The next question is whether the complainant's chattel mortgage was in fact recorded as required by the statute. It appears by the stipulation that the complainant's chattel mortgage was recorded in the real estate mortgage book, but not in the chattel mortgage book. The complainant contends that, if a chattel mortgage is recorded in the clerk's office, it is a sufficient compliance with the requirements of the fourth section. Any examination of the chattel mortgage statute makes it entirely clear that it was the legislative purpose in passing that act to prescribe a method whereby chattel mortgages (which theretofore could not be recorded) might thereafter be recorded, and thus be relieved from the imputation of fraud and from the inconvenience which attended upon the preservation and examination of a file. The things which the statute requires to be done in order to relieve the chattel mortgage from the declaration that it is absolutely void are, as above stated, in the nature of conditions. The statute directs (section 7) that the clerk shall provide books in which to record chattel mortgages. The stipulation in this case admits that the clerk of Burlington county, in compliance with the provisions of the chattel mortgage act, had provided and kept books for the recording of chattel mortgages. Those books were separate and distinct from the books in which real estate mortgages were recorded. This practice accords with the provisions of the chattel mortgage act, and is, I believe, invariable in every county in the state. The complainant's mortgage was recorded in the real estate mortgage book, but not in the chattel mortgage book. It is not contended that the statute directs that chattel mortgages should be recorded in the real estate mortgage books, but the complainant insists that the provisions of the fifth section are fully observed when the chattel mortgage is recorded in the clerk's office, no matter in what book. If such be the meaning of the statute, then chattel mortgages may be recorded in deed books, or judgment books, or in the minutes of the courts, or, indeed, in any book, so that it be in the clerk's office. Such a construction would defeat the whole design of the statute, which clearly arranges for and contemplates the recording of chattel mortgages in a book to be specifically provided for that purpose by the clerk, which creditors may examine in order to ascertain whether a party in possession of chattels has mortgaged them. It is a recording in this chattel mortgage book, provided for by the chattel mortgage statute, which the law recognizes as a recording. It is this book which the intending creditor of the mortgagor examines to see whether his

possible debtor has given a chattel mortgage upon the goods, the possession of which by him might lead the intending creditor to give him credit. A recording in the real estate mortgage book is no more a compliance with the provisions of the chattel mortgage act than would be a recording in a deed book, or any other book not recognized by the chattel mortgage statute. To hold that such a recording of a chattel mortgage is effectual would be to make the statute and the record, not a protection to creditors of the chattel mortgagee, but a trap to mislead and deceive them. ~

The complainant insists that its mortgage, as a charge upon the personality, ought not to be held invalid because of the omission of the clerk to record it in the proper book; that it ought not to be held responsible for the mistake or omission of a public officer. The chattel mortgage statute declares that certain things must be done in order to prevent a chattel mortgage from being held invalid. Several of these things must be done by public officers. The affidavit showing the consideration of the chattel mortgage must be taken before some officer authorized to take affidavits. He may omit to annex or sign the jurat. This would invalidate the record. The execution of the chattel mortgage is required by the act to be acknowledged, and the acknowledgment to be certified on the mortgage. This must be done by a public officer. If he insufficiently does it, or omits to do it, the record of the chattel mortgage is insufficient. Both these fatal defects might arise by the omission of public officers. The reason they destroy the efficiency of the chattel mortgage, as against creditors of the mortgagor, is that they show that the statutory requirements have not been performed. The provision of the statute requiring the recording of the chattel mortgage by the clerk is as essential as the requirements that the affidavit of consideration be made or that the acknowledgment be certified. The failure to perform any of these essentials for any reason, no matter by whose fault, invalidates the mortgage as to creditors of the mortgagor. The statutory conditions are not fulfilled. Under this construction of the statute, the actual record of a chattel mortgage in the chattel mortgage book provided by the statute is a necessity to its validity as against creditors of the chattel mortgagor. From this point of view it is of no significance whether the omission efficiently to record the complainant's mortgage as a chattel mortgage was occasioned by the fault of the complainant or of the clerk. The transaction regarding the recording of this mortgage took place wholly by correspondence between the complainant company and the clerk, so that it is possible to know with certainty just what the clerk was instructed to do. The stipulation sets forth a copy of the letter of instructions which the complainant sent to the clerk with the mortgage when it was forwarded to him for recording. If the omission

of the clerk to record this paper as a chattel mortgage has any relevancy in this case, all his responsibility was cast upon him by this letter. An examination of the complainant's letter will show that the circumstances under which the paper was sent for record leave it in some doubt whether the failure to record it as a chattel mortgage was the fault of the complainant or of the clerk. It may, I think, be forcefully argued that the duties of the clerk in recording instruments are ministerial, not judicial; that it is his business to record any paper sent to him in that book in which, by law, such a paper should be recorded, if the paper itself, or the instruction sent him, indicate to a layman's comprehension in what book the paper should be recorded; but that, if the paper does not itself plainly indicate its character, and the letter of instructions does not direct the clerk in which book it should be recorded, it is not the clerk's duty to decide in a judicial way the legal effect of the instrument, and to record it accordingly. The instrument in this case is indorsed "Mortgage," not "Chattel Mortgage." Nothing in the way of indorsement indicated that it was a chattel mortgage. Its contents, if read by one who knew the requisites of a chattel mortgage, showed that it had those characteristics. Whether it is the duty of the clerk to pass such a judgment upon instruments, sent for record, and to record them accordingly, is, I think, somewhat doubtful. The complainant's letter did not inform the clerk that the paper sent was a chattel mortgage, nor did it instruct the clerk to record the paper as a chattel mortgage. Whether, under such circumstances, the clerk was bound to have recorded the paper in question as a chattel mortgage, also appears to me to be doubtful. He did not indorse upon the paper any certificate that he had recorded it as a chattel mortgage. It seems to me, however, that it is not necessary to decide these questions as to whose fault it was that the mortgage was not recorded in the chattel mortgage book. The statute, in my opinion, requires that the chattel mortgage, in cases where no possession is taken of the goods mortgaged, must, in order to be valid against the creditors of the mortgagor, be actually recorded in the book directed by the statute to be provided. If it be not so recorded, the chattel mortgage is void as to such creditors, no matter what may have occasioned the omission to record it as required by the statute.

A decree will be advised in accordance with the views above expressed.

(60 N. J. L. 422)

FELL v. H. FELL POULTRY CO.

(Court of Errors and Appeals of New Jersey.
June 22, 1903.)

MASTER AND SERVANT—ACTION FOR SERVICES—BURDEN OF PROOF—PAYMENT.

1. In the case as presented by the plaintiff's evidence, the court properly refused defendant's

motion for a judgment of nonsuit; and the charge of the judge to the jury clearly and correctly placed upon the plaintiff the burden of establishing by the weight of evidence the terms of the contract, upon which alone his right to their verdict should depend.

2. In the absence of contrary evidence, the law presumes that payment for services rendered by one at another's request shall be made in money.

(Syllabus by the Court.)

Error to Circuit Court, Gloucester County.

Action by Harry Fell against the H. Fell Poultry Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William T. Boyle and Charles A. Coogan, for plaintiff in error. Robert S. Clymer and Robert C. Sparks, for defendant in error.

VREDENBURGH, J. The counsel for the plaintiff in error, in his argument and brief, brings to the attention of the court but two assignments of error—the first, that the trial judge erroneously refused to grant his motion for judgment of nonsuit against the plaintiff below; and, second, that the judge erroneously charged the jury that, "if the defendant claims a different contract, he must prove it, and the burden is on him."

If the judge had granted the motion to nonsuit, I think he would have exceeded the plain legal duty then before him. The action was upon contract—brought to recover payment for services by the plaintiff as manager for the defendant corporation in its business. The declaration was framed upon the common counts, having annexed to it a bill of particulars, specifying that it was founded upon an account for wages due plaintiff from March 1, 1896, to July 31, 1900 (53 months), at \$25 per month, amounting to \$1,325, but credited various payments of cash made by defendant to him, almost monthly, during the service, amounting to \$841.37. The defendant below did not, and does not now, contend, under his motion to nonsuit, that the services sued for were not performed by the plaintiff, nor that they were to be gratuitous, nor had been performed without defendant's request. His insistence pressed before us by his brief is that the testimony of the plaintiff had shown that his contract was made on the 1st day of March, 1896, and that the company was not incorporated until March 10, 1896, and that such contract "could not bind the defendant company." But this contention ignores the legal effect of the testimony which had then appeared in the plaintiff's case. It had been testified by a Mr. Brooke that he had been during the years of 1896, 1897 (and, he thought, 1898) the secretary and treasurer of the corporation defendant, and had kept the books of account of the company as secretary and treasurer, and that he had authority to employ people to work upon the property of the corporation, and that, when the private company was turned over into a cor-

poration, the plaintiff, who had been with and worked for the company before its incorporation, was to receive the same remuneration afterwards, and each month he was credited upon the books with the amount of salary he was to receive, which the witness swore was to be \$25 per month, and his account was charged with the amount which he did receive. This evidence detailed by the secretary as to the contents of the defendant's books of account was not objected to by the defendant, in whose custody those books, presumably, still remained, and was therefore properly before the trial court for its consideration. The plaintiff also had sworn that he had rendered services as general manager for the defendant company from March 1, 1896, until July 31, 1900, and that his claim was for those services, performed after the company was incorporated; that two of the directors (one of them being the president) had told him that they intended to give him a salary of \$25 a month; that the cash payments for which he had given credit were made to him on account of the agreement the company had made with him to pay him such salary or wages. As this evidence of the plaintiff and his witness stood when the motion to nonsuit was made, it clearly established the defendant's liability. It amounted, in legal effect, to a distinct admission by the defendant, in writing, upon its own books, first, of the employment of the plaintiff's services by the defendant at the specified rate; second, of the rendition of such services by the plaintiff for the defendant; third, of numerous payments on account of those services by the defendant to the plaintiff in recognition of its obligation to pay him money for those services at the price claimed. Even if the actual making of the contract in question had, as insisted, antedated the defendant's legal incorporation, the evidence referred to had established an acceptance and repeated ratification by defendant of the contract after defendant had acquired contractive capacity.

Nor has the second assignment of error above quoted, we think, any solid support. The defendant had no standing, under the pleadings, to demand affirmatively in that suit the enforcement of the terms of any contract different from the one sued upon. The plaintiff had sued to recover payment of money under contract for his services, and could recover money or nothing in the suit; and the defendant, not disputing that such services were performed, and that plaintiff was entitled to be paid for his services, introduced evidence to show that the true terms of the contract between them required the plaintiff to accept in payment for his services defendant's stock, instead of money. If this position had been established by the weight of evidence, it would have been a complete defense to the suit. But in the absence of proof to the contrary, the

law presumes that such services are payable in money. The trial judge, in charging as to this issue, had said to the jury, *inter alia*, that if the plaintiff engaged to take stock, instead of \$25 a month, "it was a legal bargain. Now, which bargain was made? That is what you have to decide"—and added, in response to the plaintiff's request, "that, if the defendant claims a different contract [than for money], he must prove it, and the burden is on him." This was correct. The implication and presumption of the law, as the common counts of the present and of every declaration in assumpsit declare, is that a promise is made by the defendant to pay money for the price and value of work done and services performed at the latter's request. Such presumption was the defendant's burden to overcome by evidence. When the defendant sought to rebut this presumption, and attempted to show that the services were to be paid for by something other than money, it assumed the affirmative upon that question, and, of course, the burden of proof. The defendant's counsel, in his brief, argues that the onus probandi generally was erroneously by the charge taken from the plaintiff's shoulders and placed upon the defendant, but this is a misconception of the meaning of plain language. The bill of exceptions shows that the judge, in response to the defendant's requests to charge the jury, further expressly instructed them that "the plaintiff was bound to prove his case by a preponderance of proof," and that "the weight of evidence must be on the plaintiff's side. * * *" and that, "if the proof was equal (in weight), the defendant was entitled to a verdict." Other explicit expressions in the judge's charge are to the same effect, and no jury, of even the most moderate claims to intelligence, could have been misled by the expression upon which error has been assigned. The charge to the jury clearly and correctly placed upon the plaintiff the burden of establishing by a preponderance of proof the terms of the contract, upon which alone his right to their verdict should depend.

The judgment below should be affirmed.

(20 N. J. L. 453)

DE GRAY v. MURRAY.

(Supreme Court of New Jersey. June 15, 1903.)

ANIMALS—VICIOUS DOGS—INJURIES—LIABILITY—NEGLIGENCE.

1. An owner of a dog is not liable for injuries resulting to a person from its bite, in the absence of evidence showing the dog had a propensity to bite, or was vicious, to the owner's knowledge.

2. The owner of a vicious dog known to have a propensity to bite is not liable for injuries inflicted on a person, where the dog was securely locked in a building, and escaped during the night by gnawing away the woodwork about the lock without the owner's knowledge.

¶ 1. See *Animals*, vol. 2, Cent. Dig. § 322.

Error to Circuit Court, Hudson County.

Action by Ella De Gray against Donald Murray. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Argued February term, 1903, before GUMMERE, C. J., and FORT, HENDRICKSON, and PITNEY, JJ.

Charles W. Parker, for plaintiff in error.
Cowles & Carey, for defendant in error.

GUMMERE, C. J. This was an action to recover for injuries resulting to the plaintiff in error (the plaintiff below) from the bite of a dog, owned by the defendant in error, which attacked her while she was walking on the public street. At the close of the testimony the trial judge directed a verdict for the defendant, and the plaintiff seeks to review the judgment entered upon that verdict.

It is the settled law that the owner of a dog will not be held responsible for injuries resulting to another person from its bite, unless it be shown that the dog had previously bitten some one else, or was vicious, to the knowledge of the owner. *Smith v. Donohue*, 49 N. J. Law, 548, 10 Atl. 150, 60 Am. Rep. 652, and cases cited. In the present case, although the dog had been kept on the defendant's premises for several years, and must have been well known in the neighborhood, the only evidence tending to show viciousness on its part, prior to the time when the plaintiff was bitten by it, was that, on two or three occasions, it had "flown at" a policeman whose duty required him to daily pass by the premises of the defendant; and that, on another occasion, it had "sprung at" a boy who was passing by along the street, and made two little holes, or spots, upon his leg. It is admitted that the policeman was never bitten, and it is left in uncertainty whether the marks on the boy's leg were made by the teeth of the dog or by its claws. Assuming that this evidence, meager as it is, was sufficient to make the character of the dog a jury question, it was necessary, as has already been stated, in order to fix upon the defendant liability for the plaintiff's injury, to show that he had knowledge of his dog's vicious propensity. But the case utterly fails in this regard. So far as the occurrence in which the boy figured is concerned, the defendant heard from his wife that she had been told by the boy's mother that the dog had jumped upon her son, but had merely scratched his leg. The experience of the policeman he never heard of at all.

But even if the evidence submitted would support the conclusion that the dog had a propensity to bite, and that what the defendant heard about its attack on the boy charged him with knowledge of that propensity, the direction of a verdict in his favor was not erroneous. In England, and in some of our sister states, it is held that the owner of an animal which has a propensity to attack and bite mankind, who keeps it with the knowl-

edge that it has such a propensity, does so at his peril, and that his liability for injuries inflicted by it is absolute. A leading case is that of *May v. Burdett*, 9 Q. B. 112, in which it is stated that: "The conclusion to be drawn from all the authorities appears to be this: that a person keeping a mischievous animal, with knowledge of its propensity, is bound to keep it secure at his peril, and that, if it does mischief, negligence is presumed, without express averment. The negligence is in keeping such an animal after notice." Subsequently the Court of Exchequer Chamber, adopting as accurate the principle underlying the decision of *May v. Burdett*, and referring to the opinion in that case, among others, as an authority for its conclusion, declared, in the case of *Fletcher v. Rylands*, L. R. 1 Exch. 285, that "one who, for his own purposes, brings upon his land, and keeps there, anything likely to do mischief if it escapes, is prima facie answerable for all damage which is the natural consequence of its escape." The application of this principle led the court to fix liability upon the owner of land, who had stored water in a reservoir built thereon, for injury done to adjoining property by water escaping from the reservoir, notwithstanding that such escape was not due to any negligence on the part of the owner. Ten years after the decision of *Fletcher v. Rylands*, the rule laid down in that case was applied in this state, at circuit, in the case of *Marshall v. Welwood*; and the owner of a steam boiler which blew up and wrecked adjacent property was held liable for the damage done, notwithstanding the fact that the bursting of the boiler was not due to any negligence on his part. The case was subsequently reviewed here on rule to show cause, and this court, in a masterly opinion by the late Chief Justice Beasley, expressly disapproved of the doctrine laid down in *Fletcher v. Rylands* (which, as I have already stated, is rested, among other decisions, on *May v. Burdett*), and declared that no man is in law an insurer that the acts which he does, such acts being lawful and done with care, shall not injuriously affect others, and that an injury which results from a lawful act, done in a lawful manner, and without negligence on the part of the person doing the act, will not support an action. Applying that principle to the case in hand, this court then held that the owner of a steam boiler, which he has in use on his own property, is not responsible, in the absence of negligence, for the damages done by its bursting. 38 N. J. Law, 339, 20 Am. Dec. 394. The principle laid down in *Marshall v. Welwood* was reiterated by this court in the case of *Ulshowski v. Hill*, 61 N. J. Law, 375, 39 Atl. 904.

The right of a man to keep a vicious dog for the protection of his home and property is conceded in the case of *Roehrs v. Remhoff*, 55 N. J. Law, 479, 26 Atl. 860. He is, of course, bound to exercise a degree of care,

commensurate with the danger to others which will follow the dog's escape from his control, to so secure it that it will not injure any one who does not unlawfully provoke or intermeddle with it. *Worthen v. Love*, 80 Vt 285, 14 Atl. 461. But if the owner does use such care, and the dog nevertheless escapes and inflicts injury, he is not liable. In the case now under consideration the undisputed evidence makes it clear that the defendant fully discharged the duty of using due care to prevent the escape of his dog from his premises, and that the plaintiff's injury was not due to any neglect in that regard upon his part. She was bitten in the early morning, between half past 6 and 7 o'clock. On the preceding evening the defendant shut the dog in his carpenter shop (which adjoined his dwelling), and locked him in. During the night the dog gnawed away the woodwork from around the lock of the door to such an extent that the lock became detached, thus permitting the door to open and the dog to escape. That a reasonably prudent man would not have anticipated any such occurrence must be admitted.

The judgment under review should be affirmed.

(90 N. J. L. 284)

HEIDECAMP v. JERSEY CITY, H. & P. ST. RY. CO.

(Court of Errors and Appeals of New Jersey. June 17, 1908.)

ADOPTED CHILD—NEXT OF KIN.

1. The next of kin of a child adopted under our act concerning infants (2 Gen. St. p. 1714) are the next of kin by blood, and not the adopting parents.

(Syllabus by the Court.)

Error to Circuit Court, Hudson County.

Action by John Heidecamp against the Jersey City, Hoboken & Paterson Street Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

James F. Minturn, for plaintiff in error.
Wm. D. Edwards, for defendant in error.

VAN SYOKEL, J. This suit is brought by John Heidecamp, administrator of Annie Heidecamp, deceased, under our death act, for the benefit of the next of kin. Previously to the injury which caused her death, Annie had been adopted as the daughter of the plaintiff, under the act concerning the adoption of infants, with the written consent of the mother. The trial court held that the adopting father was not the next of kin, and that the natural mother could recover nominal damages only, and a verdict was directed accordingly. The plaintiff below is the plaintiff in error. The question to be reviewed is whether this instruction of the trial court is correct.

Our death act, under which this suit is prosecuted, provides that the action shall be for the exclusive benefit of the widow and

next of kin of such deceased person, and the sum recovered shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate. The "next of kin," in this act, must be held to mean the next of kin by blood, unless the act concerning the adoption of infants impresses upon the term a different meaning, as applicable to this case. Our act concerning adoption (2 Gen. St. p. 1714 pl. 17) provides "that upon the entry of the decree of adoption, the parents of the child, if living, shall be divested of all legal rights and obligations due from them to the child or children or from the child or children to them; and the child or children shall be free from all legal obligations of obedience or otherwise to the parents; and the adopting parent or parents of the child or children shall be invested with every legal right in respect to obedience and maintenance on the part of the child or children as if said child or children had been born to them in lawful wedlock; and the child or children shall be invested with every legal right, privilege, obligation and relation in respect to education, maintenance, and the rights of inheritance to real estate or to the distribution in personal estate on the death of such adopting parent or parents as if born to them in lawful wedlock." The statute expressly invests the adopting parents with every legal right in respect to obedience and maintenance on the part of the child, as if the child had been born to them in lawful wedlock, but it wholly fails to bestow upon the adopting parents any right to inherit the estate of the adopted child. That the draftsman of the act did not intend to confer any such property right upon the adopting parent is emphasized by the immediately succeeding provision that the adopted child shall be invested with every legal right, privilege, obligation, and relation in respect to education, maintenance, and the rights of inheritance to real estate, or to the distribution in personal estate, on the death of the adopting parents, as if born to them in lawful wedlock. The statute further provides that on the death of the adopting parent, and the subsequent death of the adopted child without issue, the property of such adopting deceased parent shall descend to and be distributed among the next of kin of said parent, and not to the next of kin of the adopted child. The adopting father is therefore excluded from inheriting as the next of kin of the adopted child, not only by the failure of the statute to invest him with such right, but also by the declaration that, in determining who are the next of kin of the adopted child, regard is not to be paid to the fact of adoption. The next of kin of the adopted child are his next of kin by blood. I have found no authority which will justify a different interpretation of our statutes. *Barnes v. Allen*, 25 Ind. 222, holds that adopted children are the heirs of adopting

father in the degree of children, and are entitled to inherit from him. No other construction could be given to the Indiana statute, which provides that the adopted child shall have the same interest in the estate of adopting parent, by descent or otherwise, as if the natural heir of such parent. The question whether the adopting father could inherit from the child is not involved or discussed in the case. In *Barnhizer v. Ferrell*, 47 Ind. 335, the court expressly declares that, as between the adopted child and the lawful children of the adopting parent, the legal relation, as to inheritance, is not changed or affected by the adoption; that, on the death of the adopted child, his next of kin by blood take from him. In *Davis v. Krug*, 95 Ind. 1, it appears that in 1883 the Indiana statute was amended by providing that property, real and personal, which came to the adopted child by gift, devise, or descent from the adopting parent, should on the death of the child go to the heirs of the adopting parent, the same as if such child had not been adopted. The right of adopting parent to succeed as next of kin to the child was not in this case. In *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802, the Missouri court expressly ruled that on the death of the adopted child his estate will go to his relations by blood, and not to those by adoption. This interpretation was based by the court upon the fact that the statute of that state does not provide who shall inherit from the adopted child, but only that the adopted child shall inherit from the adopting parent. *Delano v. Bruerton* (Mass.) 20 N. E. 308; *Warren v. Prescott*, 84 Me. 483, 24 Atl. 948, 17 L. R. A. 435, 30 Am. St. Rep. 370, and *Hartwell v. Tefft* (R. I.) 35 Atl. 882, 34 L. R. A. 500, give no support to the claim of the adopting parent. *John Heldecamp*, therefore, cannot be regarded as the next of kin, and the action can be maintained only in the right of the natural mother of the deceased child, who is, under our law, the next of kin. She had abandoned her child and released all claims to her services, and was therefore legally entitled to no substantial damages. If it was error to direct a verdict for nominal damages, the plaintiff in error cannot complain.

There is no error in the direction of the trial court which was injurious to the plaintiff, and the judgment should therefore be affirmed.

(69 N. J. L. 420)

RANDOLPH v. NEW YORK CENT. & H. R. CO.

(Court of Errors and Appeals of New Jersey.
June 15, 1903.)

INJURY TO SERVANT—DUTY OF MASTER.

1. The duty of the master to inspect apparatus and appliances is a duty to exercise rea-

sonable care, only, in making the inspection, and requires only the making of such tests and examinations as are reasonably practicable.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Ernest S. Randolph against the New York Central & Hudson River Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Vredenburg, Wall & Van Winkle, for plaintiff in error. Horace Allen and Warren Dixon, for defendant in error.

SWAYZE, J. The plaintiff's action is brought to recover damages caused by the sudden stopping of a freight train upon which he was employed as a brakeman. The sudden stopping was due to the bursting of a piece of hose connecting the air brakes between the cars. The train started from Weehawken, and the accident happened about 50 miles away. The train had made four stops, at each of which the air brakes had been successfully applied. The negligence complained of was the failure of the company to make a proper inspection of the hose. It appeared that the inspector at Weehawken had made the usual inspection before the train left, except, perhaps, a failure to handle the hose couplings between the cars. This inspection consisted in passing along the train to see that it was equipped with air brakes and that nothing was broken, and, after the air was turned into the train line, opening the relief valves on each car, to learn if the air was passing through and if each car was being charged; then opening the angle cock at the rear end, and blowing the air through; then passing back to the head end of the train, and having the engineer apply the air, to see that the brakes were working, at the same time listening and watching for leaks, to see if any hose showed signs of weakness. We are satisfied by the testimony of Colson that this train was inspected in this manner before leaving Weehawken. His testimony was criticised as testimony not of the facts of the case, but of his general custom as required by the rules of the company, but we think such is not a fair construction of the language used by the witness. This method of inspection was the ordinary method used by the railroads having their termini in Jersey City, except that the chief car inspector of the Central Railroad testified that the inspector on that railroad takes hold of the hose before he couples it. It does not appear in the case that the actual handling of the hose would have disclosed the defect which caused the accident, and we think this difference is immaterial. The only evidence upon the part of the plaintiff that any other inspection was necessary, or that the defect in the hose could have been discovered by inspection, was the testimony of the witness Olsen, a mechanical engineer and a professional tester of materials. He admitted that

1. See *Master and Servant*, vol. 34, Cent. Dig. § 231.

he could not speak with authority as to the inspection made by railway companies. He testified that an examination would show, to a person who understood how to examine, and was thoroughly familiar with the subject, whether a hose would be likely to break or not; and, when asked what kind of an examination would show that, he answered, "By means of a glass [evidently meaning a magnifying glass], by means of water, by means of pressure;" and his testimony indicates that the pressure to which he refers is a pressure of several hundred pounds. The ordinary train pressure is 70 pounds. The hose itself in this case was a standard hose, made by manufacturers of good repute, and was their best brand. It was made originally in October, 1898, apparently for the Baltimore & Ohio Railroad Company. The ordinary life of a hose of this character is shown to have been from three to four years. The accident happened May 14, 1901.

The duty of the employer is to exercise reasonable care and skill in making inspections and tests at proper intervals. *Steamship Co. v. Ingebregsten*, 57 N. J. Law, 400, 31 Atl. 619; *Atz v. Manufacturing Co.*, 59 N. J. Law, 41, 34 Atl. 980, approved in *Baldwin v. Atlantic City R. Co.*, 64 N. J. Law, 232, 45 Atl. 810. This duty is satisfied if the master uses "such reasonable precaution as a man of ordinary prudence would use for the safety of himself and his workmen under the circumstances." The master is not bound to exercise extraordinary care or the highest diligence. We think this duty is satisfied if the master exercises the same care that is ordinarily exercised in the same matter, and that one engaged in practical operations is not bound to make either the inspections or the tests which may be possible in a laboratory, or upon a small scale, and outside of the practical conduct of affairs. The evidence leads us to the conclusion that the ordinary and reasonable inspection did not require the examination with a glass or by means of water suggested by Olsen, nor do we think that it required that the hose be subjected to the extraordinary pressure which he suggested. It is only when the hose appears doubtful that the test of extraordinary pressure is applied in actual practice. Olsen examined the hose at the trial with a glass which magnified three or four hundred times, and discovered cracks in the outer coating of the hose, which indicated to him that the hose had become of so doubtful a character that it ought to have been further tested by subjecting it to great pressure; but there is no proof that the ordinary practice of railroads requires the use of a magnifying glass to discover cracks in the hose. Such a test seems to us too stringent to expect in actual practice. This hose was subjected to the highest pressure expected to be applied to it in ordinary use, and no better practical test is suggested than the actual application of the train pressure to the hose. It would be manifestly impracticable on each

occasion to subject the hose to the test suggested by Olsen as likely to lead to the discovery of the particular defect existing in this hose. Moreover, the accident to the hose which happened in this case was one which was liable to happen unexpectedly; and, to guard against such accidents, it was the duty of the trainmen themselves, of whom the plaintiff was one, to make inspections as often as possible during the trip. For the purpose of replacing hose which might become defective during the trip, extra pieces were supplied, and kept in the caboose at the end of the train. If the defect was discoverable by reasonable inspection with the naked eye, then the trainmen ought to have discovered it at one of the several stops before the accident, and to have replaced the hose with one of the extra pieces from the caboose. The failure to do so was the negligence of a fellow servant, for which the defendant is not responsible to the plaintiff. If, however, the defect was not discoverable by reasonable inspection with the naked eye, then there is a failure to establish negligence in the inspector at Weehawken. In either view, the plaintiff cannot recover.

The judgment is reversed, and the record must be remitted for a new trial.

(60 N. J. L. 432)

FIELD v. DELAWARE, L. & W. R. CO.

(Court of Errors and Appeals of New Jersey
June 22, 1903.)

CARRIERS—INJURY TO PASSENGER—IMPEACHMENT OF WITNESS.

1. A passenger on a railroad train, as he approached his destination, prepared to alight; and while standing inside of the car near the rear door, which was open, a violent jerk or start of the train threw him out of the car to the ground, and he was seriously injured.

Held, that it was not error to refuse a nonsuit at the close of the plaintiff's case, nor to refuse to direct a verdict at the close of the defendant's evidence.

2. A written statement signed by a witness, if submitted to the jury, cannot be considered by it as affecting the credibility of any witness other than the subscriber.

(Syllabus by the Court.)

Error to Circuit Court, Essex County.

Action by John K. Field against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bedle, Edwards & Lawrence, for plaintiff in error. Benjamin M. Weinberg and Samuel Kalisch, for defendant in error.

VOORHEES, J. This suit was brought to recover damages for injuries received by John K. Field from a fall from the rear end of the train of the railroad company. The real questions to be reviewed on this writ of error are, should the plaintiff have been nonsuited at the close of his evidence? and

¶ 1. See *Carriers*, vol. 8, Cent. Dig. §§ 1224, 1225.

should the court have ordered a verdict for the defendant at the close of the whole case?

The facts proved were that on the evening of the 4th of July, 1902, the plaintiff, with his wife and three children, entered a train of the defendant company in Hoboken to be transported to Harrison. They secured seats in the last car of the train, the plaintiff being near the rear door of the car. As they approached their destination, he arose, walked forward to his wife and children, and notified them to prepare to alight. He then returned to the rear of the car, and, just as he reached the door, which had been left open, there was a violent jerk or start of the train, which threw him out of the door, and over the chain which connected the two iron guards on the last platform. He landed on his head between the rails of the track, received a cut six or seven inches in length, extending through the scalp to the cranium. The fall also produced concussion of the brain, and he was otherwise seriously injured. The plaintiff's testimony is the only direct evidence as to how the accident happened. His wife and two children confirmed his statements as to the violent start or jerk of the train. The railroad employees deny such start or jerk. No passengers other than the plaintiff and his family were produced as witnesses.

At the conclusion of the plaintiff's case, the counsel for the defendant moved for a nonsuit on the grounds that no negligence had been proved against it, and that the evidence produced would not justify submitting the case to a jury. This motion was properly refused. The defense offered by the defendant was that it was impossible for the plaintiff to have been injured in the way described by him; that its employees did not notice any jerk or violent start of the train; that a lantern was standing on the rear platform, under the chain over which the plaintiff claimed that he was thrown; and that this lantern was not displaced or moved. No witness was produced who saw the accident. The only positive evidence thereof was the plaintiff's testimony. When the whole evidence was in, the defendant's counsel moved for a verdict on the ground that there was no negligence proved against it, and that the plaintiff was guilty of contributory negligence. An issue of fact had been raised by the plaintiff's evidence, which made the submission to a jury necessary. It was clearly a jury case, and the motion for a verdict was properly refused, and we find no error in the ruling of the learned judge. *Consolidated Traction Company v. Thalheimer*, 59 N. J. Law, 474, 37 Atl. 132; *Burr v. Pennsylvania Railroad Co.*, 64 N. J. Law, 80, 44 Atl. 845.

The only other assignment of error to be considered in the determination of this case is to the charge of the court as to a written statement signed by the wife a few days

after the accident—that she thought her husband had, in attempting to alight from the train, miscalculated the distance in the darkness. She denied having known the contents of this paper when she signed it, and also denies the truth of the matter therein contained. The learned judge allowed this statement to go to the jury, but charged that it could only be considered in connection with the testimony given by the wife, but that it could not in any way affect the credibility of the husband's testimony. There was no error in this ruling.

The jury returned a verdict of \$2,500, which, on a rule to show cause, was reduced to \$1,500, and this writ of error is brought to set aside the judgment of the circuit court. No error appears in the record, and the judgment must be affirmed.

(88 N. J. L. 331)

McGRATH v. DELAWARE, L. & W. R. CO.
(Court of Errors and Appeals of New Jersey.
June 15, 1903.)

MASTER AND SERVANT—INSPECTION OF APPLIANCES.

1. With respect to the condition of implements furnished to his servants, a master must make such inspection as ordinary prudence requires, including the use of such tests as are known to him to be called for, or as are so commonly employed in such inspections that he might reasonably be deemed to have known of them.

Dixon, Bogert, and Vroom, JJ., dissenting.
(Syllabus by the Court.)

Error to Supreme Court.

Action by Daniel McGrath against the Delaware, Lackawanna & Western Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Warren Dixon, for plaintiff in error. Bedle, Edwards & Lawrence, for defendant in error.

GARRISON, J. This case was tried originally in the court of common pleas of Hudson county, where the plaintiff recovered a verdict for damages for personal injuries. Upon a writ of error taken to the Supreme Court, the judgment of the common pleas was reversed and set aside. From this judgment of the Supreme Court the present writ of error was taken.

The opinion of Chief Justice Gummere, delivered in the Supreme Court (88 N. J. Law, —, 53 Atl. 207), fully states the facts upon which the legal questions in the case arise. We concur with the view expressed in that opinion that the defective condition of the coal car was the occasion, only, of the injury to the plaintiff, and not a proximate cause of it. The proximate cause was the condition of the wooden tool called a "sprag," which caused it to break in the hands of the plaintiff. In the opinion cited, conclusive effect was given to the statement

¶ 1. See *Master and Servant*, vol. 34, Cent. Dig. §§ 235, 240.

of one of the plaintiff's witnesses that the defective condition of the sprag could have been readily detected by a casual examination of it; and, proceeding from this premise, the conclusion reached was that the plaintiff himself was guilty of negligence in failing to observe what a casual observation would have discovered. We think that this conclusion gave, perhaps, undue weight to the expression of the plaintiff's witness, to the exclusion of inferences more favorable to the plaintiff that might have been drawn by the jury from other parts of the testimony. It is not clear that the defective condition of the wooden tool in question might not have escaped such observation as was incident to the use of it by the servant, and yet have been detected by the master, either in the course of its manufacture, or by the exercise of reasonable care in its inspection before placing it in the hands of the servant. The case has therefore been examined with regard to the duty of the master in these respects.

The implement called a "sprag" is shown by the testimony to be a triangular block of wood, 2 inches wide, 5 inches at its base, and with a perpendicular of about 12 inches; representing, therefore, less than half a cubic foot of wood exposed to observation upon five of its aspects. If any of these aspects presented to the observer evidences of rottenness, the rule as to master and servant is the same, and in such case, as was held in the court below, the servant could not recover from the master. To entitle the servant to such recovery, the defect must have been at once hidden from ordinary observation, and yet detectable by such ordinary inspection or tests as the master was bound to use. This raises the legal question in the case, namely, what was the duty of the master in these respects? Since the rendition of the opinion in *Atz v. The Manufacturing Co.*, 30 N. J. Law, 41, 34 Atl. 980, the rule therein laid down by Mr. Justice Magie has been accepted, namely, that, with respect to the condition of implements furnished to servants, a master must make such inspection as ordinary prudence requires, involving the use of such tests as are known to him to be called for, or as are so commonly employed in such inspections that he might reasonably be deemed to have known of them.

Applying this rule to the case in hand, the question is whether any tests were omitted by the master which he knew to be called for, or ought to have known. One only is suggested, namely, what is called the "hammer test," which is described in the testimony as "sounding, which is a usual method of testing to find out whether a piece of wood is solid to the core when it appears to be solid on the outside." The concrete question, however, is whether this method is shown by the testimony to have been in ordinary use with respect to small blocks of wood, such as was the sprag in question.

The testimony is silent upon this point, and it may well be that where the core of a piece of timber is at a distance from its exposed surface a different rule would obtain from that which would be reasonable when, in the process of manufacture, the wood had been reduced to a block containing a few cubic inches. In its bearing upon the master's duty, it is immaterial whether the intimate structure of a given piece of wood is disclosed as the result of a test, or as a necessary step in the process of manufacture. In either case the required disclosure is obtained. If, in the present case, the master, for the sole object of a test, had caused the block to be sawed in five separate dimensions—i. e., with the grain, across the grain, and obliquely, besides two lateral cuts but two inches apart—without disclosing any defect, it could scarcely be said that he had not used ordinary care to acquaint himself with the structure of the material he was using. This, however, was just what was done in the making of the sprag, according to the testimony. Giving, therefore, to the abstract testimony in the case its fullest import, it entirely fails to show that, in respect to the subject-matter of this suit, the master either failed to use ordinary care, or that he neglected any reasonable test of whose existence he either knew or ought to have known.

Upon this ground, and not upon the ground of the contributory negligence of the plaintiff, the judgment rendered in the Supreme Court is affirmed.

BOGERT and VROOM, JJ., dissent.

DIXON, J. (dissenting). The opinion of the court in this case rests upon an assumption which I think is unwarranted—that the exposed surfaces of the sprag presented no indications of unsoundness. The fact that the sprag was unsound, as shown by the rottenness of the wood fibers when examined after the accident, was proved and scarcely disputed at the trial; and the opinion before mentioned demonstrates the great probability, if not the certainty, that such unsoundness would be disclosed by the various sections to which the material had been subjected in making the sprag. This being so, two questions remained: First, whether it could reasonably be decided that the maker of the sprag, who was the alter ego of the defendant, and a worker in wood, would have perceived the defect and discarded the material if he had exercised due care in the process of manufacture, and a due regard for the safety of those who were to use the sprag; and, second, whether it could reasonably be decided that the defect might have escaped the observation of the plaintiff, even though he exercised due care in using the sprag. Considering, on the one hand, the ample opportunity for examination afforded

to the manufacturer, and the high degree of care required of him, in view of the serious danger incurred by the use of a rotten sprag, and, on the other hand, the right of the user to presume that sound material had been employed, and the slight opportunity for observation afforded to him as he picks up the sprag to stop an advancing car, I think it was lawful to submit each of these questions to the jury, and that the jury had legal right to decide both of them in favor of the plaintiff.

(65 N. J. E. 714)

SIBELL v. WEEKS et al.

(Court of Errors and Appeals of New Jersey.
June 17, 1903.)

MORTGAGE—FORECLOSURE—RES JUDICATA—INTERVENTION.

1. The holder of a mortgage not recorded when a bill is filed to foreclose another mortgage upon the premises is bound by the decree in such foreclosure suit, as if he was a party and had appeared to the suit.

2. He cannot file an original bill upon the unrecorded mortgage, but must seek his rights by applying to intervene in the first suit, in accordance with the provisions of section 78 of the chancery act (Revision, p. 118), now section 58 of the chancery act of 1902 (Laws 1902, p. 531, c. 158).

(Syllabus by the Court.)

Appeal from Court of Chancery.

Action by Lela S. Sibell against Caroline C. Weeks and John H. Weeks. Decree for defendants, and plaintiff appeals. Affirmed.

Edward Q. Keasbey, for appellant.

VAN SYCKEL, J. This bill was filed to foreclose a mortgage given by Carlton Betts and wife to Hiram Betts, and by him assigned to complainant, Mrs. Sibell. The title to the property at the time this mortgage was given was in the wife of Carlton Betts. There was a prior mortgage upon the premises, given by Ruth Dean, then owner of the mortgaged premises, to the Mutual Life Insurance Company. In June, 1892, the Mutual Life Insurance Company filed a bill to foreclose its mortgage, to which only Carlton Betts and his wife were made parties. The mortgage now held by the complainant had not at that time been recorded. The Mutual Life obtained a final decree in November, 1892, and caused a *fi. fa.* to be issued thereupon the same month. Shortly after the decree was made, the dwelling house upon the property was destroyed by fire. It was insured by the Royal Insurance Company of Liverpool, and the policy was held by the Mutual Life as collateral security for the mortgage debt. In February, 1893, the insurance company paid the Mutual Life as much of the insurance money as was necessary to pay the full amount of the decree and costs, exclusive of sheriff's fees, and took an assignment of it. The sheriff continued to adjourn the sale of the property under the *fi. fa.* until the 7th day of the following June,

when it was sold to Carlton Betts, who acted as agent for his wife, for the sum of \$100. The deed was not delivered until February, 1894, at which time Carlton and his wife executed a deed for the same premises to Caroline C. Weeks, the defendant, for the consideration of \$1,225, which was actually paid. After taking title, Mrs. Weeks built a house upon the foundation of the one destroyed by fire, at a cost of over \$2,000, and otherwise expended upon the property an additional sum of over \$2,000. The present foreclosure suit was commenced by Mrs. Sibell on the 28th of August, 1895—a year and seven months after the sale to Mrs. Weeks, during which time she made the expenditure above stated. At the sale under the *fi. fa.* issued on the decree of the Mutual Life, the property was struck off by the sheriff to Carlton Betts in June, 1893. Carlton then gave to the sheriff a check for the purchase price, payment of which check was refused. In November of the same year the sheriff applied for a resale, and an order was made to resell, on a sworn petition, which stated that the decree had been assigned, not paid. In January, 1894, upon the application of Mrs. Betts, who had then secured a purchaser in Mrs. Weeks, the order to resell was rescinded, and a new order, dated February 2, 1894, was made by the chancellor: "That the said sale be and the same is hereby ratified and confirmed as valid and effectual in the law, and the said sheriff is hereby directed to execute a good and sufficient conveyance to the said purchaser Carlton H. Betts." In pursuance of this order a deed was made by the sheriff to Carlton H. Betts, and a deed by Carlton and his wife to Mrs. Weeks, before set forth.

Section 78 of the chancery act (Revision, p. 118) provides that in any suit for the foreclosure of a mortgage upon, or which may relate to real or personal property in this state, all persons claiming an interest in, or an encumbrance or lien upon such property by or through any conveyance, mortgage, assignment, lien or any instrument which, by any provision of law could be recorded, registered, entered or filed in any public office in this state and which shall not be so recorded, registered, entered or filed at the time of the filing of the bill in such suit, shall be bound by the proceedings in such suit so far as the said property is concerned in the same manner as if he had been made a party to and appeared in such suit, and the decree therein made against him as one of the defendants therein; but such person upon causing such conveyance, mortgage, assignment, lien, claim or other instrument to be recorded, registered, entered or filed, may cause himself to be made a party to such suit by petition, in the same manner as is by this act provided in the case of persons acquiring an interest in the subject matter of a suit after its commencement; the petition in such case must set forth such instrument at length, and the title

and interest of such party in such a manner as to show that he has an interest in the subject matter, and is a proper party in that suit. Mrs. Sibell's mortgage being unrecorded when the bill for foreclosure was filed by the Mutual Life, she, as holder of the unrecorded mortgage, was subject to the following express provisions of the said seventy-eighth section: (1) She was bound by the proceedings in the said foreclosure suit, so far as the property is concerned, in the same manner as if she had been made a party to and appeared in that suit, and the decree had been made against her as one of the defendants therein; (2) by causing her mortgage to be recorded, she could, upon petition, have procured an order making her a party to that foreclosure suit. Mrs. Sibell is now seeking by her bill of foreclosure to establish her mortgage as a lien paramount to the title of Mrs. Weeks, by imputing to Carlton Betts and his wife a fraudulent scheme to cut off her mortgage, and charging Mrs. Weeks with a knowledge of such facts as should have put her upon inquiry, which would have led to the discovery of it. But upon the assumption of such a situation, she cannot maintain an original bill to foreclose her mortgage. By force of the statute above recited, and under the order of the chancellor confirming the sale, the legal title to the mortgaged premises passed to the purchaser at the sheriff's sale, clear of the mortgage of Mrs. Sibell, until otherwise decreed in that suit. In view of the force to be attributed to the adjudications of courts of general jurisdiction, her only remedy was to intervene in that suit by petition. So far as the present litigation is concerned, she must be regarded as having been a party to the Mutual Life foreclosure, in which her rights as mortgagee were settled, without being subject to be reviewed in her subsequent foreclosure suit. She occupied the same position as if she had been actually a party to the prior suit, and had appeared thereto and set up the claim she now makes in right of her mortgage. If she had interposed with reasonable promptness in the prior suit, she could have secured such equitable relief as she was entitled to. By reason of her delay for 19 months to prosecute her claim, during which Mrs. Weeks purchased the property and expended a large sum of money upon it, she is justly chargeable with laches.

The evidence chiefly relied upon to charge Mrs. Weeks with knowledge of the complainant's rights is that her attorney, before she employed him in this transaction, had acquired such knowledge. Whether the principal is affected only by such knowledge of his agent as the agent acquires in the business in which he is employed, or whether knowledge previously acquired by the agent can be imputed to the principal, has been the subject of discussion in two cases, which are not in accord, in this court. *Sooy v. State*, 41 N. J. Law, 394; *Willard v. Denise*,

50 N. J. Eq. 488, 26 Atl. 29, 35 Am. St. Rep. 788. It is unnecessary, in the decision of this case, to express any opinion on this question.

The decree of the Court of Chancery should be affirmed, with costs.

(80 N. J. L. 413)

MILLER v. CENTRAL R. CO. OF NEW JERSEY.

(Court of Errors and Appeals of New Jersey.
June 15, 1903.)

INJURY TO EMPLOYE—NEGLIGENCE OF FELLOW SERVANT.

1. Where a flagman of a stalled railway train, whose duty it is to signal an approaching train, fails to perform that duty, the railway company is not responsible to a fellow servant of the flagman for such neglect.

2. A flagman of one train and the engineer of another train of the same company are engaged in a common employment, and are fellow servants, within the rule exempting the master from liability.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Elizabeth Miller, executrix of William Miller, deceased, against the Central Railroad Company of New Jersey. Judgment for defendant, and plaintiff brings error. Affirmed.

Irwin W. Schultz, for plaintiff in error.
George M. Shipman, for defendant in error.

SWAYZE, J. This is an action by the executrix of William Miller to recover damages for his death. The decedent was the engineer of a passenger train upon the Central Railroad, and was injured by a collision with the rear end of a coal train. The collision occurred about 6 a. m. December 3, 1900, near Stocker's Crossing, about three miles from Phillipsburg. The coal train had been running very slowly, apparently on account of a wet and slippery rail. It had taken over an hour to travel the three miles between Phillipsburg and the point of collision. There was testimony to show that it was going at the rate of about two miles an hour when the collision took place. Just before the collision the engineer gave the signal for the flagman, who was riding on the pusher engine of the coal train, to go back for the purpose of flagging the approaching train, and this signal was repeated. The flagman did not respond promptly to the signal, and the conductor of the coal train found him, after the second signal had been given, in the tank of the engine, and, in the witness' own language, "chased him back." He had gone some 7 or 8 rail lengths—the estimates of distance vary from 100 to 160 feet—when Miller's train came in sight. It was then too late to avoid the collision. It appeared that the train dispatcher of the company at Jersey City had been anxious about

¶ 2. See *Master and Servant*, vol. 34, Cent. Dig. §§ 508, 509.

the coal train, and had inquired frequently, just prior to the accident, of the telegraph operator at Bloomsbury, where the coal train was to run on a siding, if the coal train had been seen.

The trial judge ordered a nonsuit, holding that the proximate cause of the accident was the negligence of the flagman to signal Miller's train, and that the flagman was a fellow servant. We agree with the trial judge. It can make no difference in the case to what cause the stalling of the coal train is attributable. Such stalling was an ordinary occurrence. It was to provide against such accidents as happened in this case that the flagman was required to go back, to signal an approaching train.

The counsel for the plaintiff in error argued that the company was negligent (1) because it failed to have a sufficient number of officers at its managing headquarters in Jersey City to conduct its business; (2) because it failed to notify the decedent when he left Phillipsburg that the coal train had not reached Bloomsbury, 12 miles distant, so that he might run around the coal train or look out for it; and (3) because the flagman was an ordinary brakeman, only.

As to the first allegation of negligence, it is enough to say that there is no evidence to show that the company did not have the ordinary force necessary for the conduct of its business. The train dispatcher at Jersey City is shown to have been alert, and to have made frequent inquiries for the location of the coal train.

As to the second allegation of negligence, we think it would be impossible to sustain a verdict based upon the idea that reasonable care on the part of the railroad company required it to notify the decedent before he left Phillipsburg that the coal train had not yet reached Bloomsbury. The system of warning signals which had been adopted by the railroad company seems, from the evidence, to have been known, and must necessarily have been known, to the decedent. That system made no provision for signals at the early hour in the morning at which this accident happened, between Phillipsburg and the first telegraph station east, at Bloomsbury, other than the ordinary system of warning by sending back a flagman from the train in advance a sufficient distance to warn the engineer of the approaching train. It was argued that this flagman was not bound to go back if his own train was moving even at as slow a rate as two miles an hour, but the evidence shows clearly that it not only was his duty to go back, but that he disregarded the repeated signal for that purpose from the engineer, and finally was "chased back" by the conductor. The evidence leaves no room for doubt that, if he had performed his plain duty, the accident would not have happened.

While it is the duty of the railroad company to exercise reasonable care in providing

a system of signals, the duty to carry out the system by giving the signals is the duty of the employé, incident to his employment, and for the failure of the employé to perform that duty the employer cannot be held responsible by another employé engaged in the common employment.

The weight of authority in other jurisdictions holds that the employés of a railroad company on different trains are engaged in a common employment. *Northern Pacific Railroad Co. v. Charles*, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; *Oakes v. Mase*, 165 U. S. 363, 17 Sup. Ct. 845, 41 L. Ed. 746; *Martin v. Atchison, Topeka & Santa Fé R. Co.*, 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051; *Northern Pacific Railroad Co. v. Poirier*, 167 U. S. 48, 17 Sup. Ct. 741, 42 L. Ed. 72; *Peaslee v. Fitchburg Railroad Co.*, 152 Mass. 155, 25 N. E. 71; *Healy v. N. Y., N. H. & H. R. R. Co. (R. I.)* 37 Atl. 678. We think this is a correct application of the general rule exempting the master from liability for the negligence of a fellow servant.

It is urged that the railroad company was negligent in employing an incompetent flagman, or in imposing the duties of a flagman upon a rear brakeman. The answer is that there is no evidence in this case that the flagman was incompetent, except this single act of negligence, and there is nothing to show that it was improper to intrust the rear brakeman with the duty of the flagman. On the contrary, the evidence shows that that was the ordinary course of business. The duty of a flagman required fidelity only, and not special skill.

The judgment should be affirmed.

(69 N. J. L. 306)

HANCOCK v. SUPREME COUNCIL CATHOLIC BENEVOLENT LEGION.

(Court of Errors and Appeals of New Jersey.
June 15, 1903.)

EVIDENCE OF AGE—HEARSAY—BURDEN OF PROOF.

1. The testimony of a person as to the approximate age of his older brother is not necessarily based on hearsay, and may be legitimate original evidence, if the brothers passed their childhood together.

2. The question whether a party, who seeks to overcome such testimony by an entry of baptism in a church registry indicating that the brother was about six years older than he was according to the testimony, has borne the burden of proof, is a question of fact for the jury.

Magie, Ch., dissenting.

(Syllabus by the Court.)

Error to Circuit Court, Essex County.

Action by Mary Hancock against the Supreme Council Catholic Benevolent Legion. Judgment for plaintiff, and defendant brings error. Affirmed.

Thomas J. Lintott, for plaintiff in error.
Samuel Kalisch, for defendant in error.

DIXON, J. This suit was brought to recover the amount of a benefit certificate is-

sued by the defendant to Peter Hancock on his becoming a member of the legion. At the trial in the Essex circuit the question in dispute was whether Peter Hancock was on November 22, 1888, over 55 years of age. He having shortly before that day presented to the defendant his application for membership, declaring himself to be between 51 and 52 years of age, and the defendant having accepted that application and received him as a member, the burden was cast upon the defendant to overcome the force of the declaration, under the rule that he who charges wrong upon his adversary must establish it. The proof offered by the defendant was the registry of baptisms kept in the Roman Catholic Church of Tallow, Ireland, stating that Peter Hancock was baptized in that church on June 30, 1833, coupled with the testimony of Robert Hancock, proving the identity of that Peter Hancock with the Peter first above mentioned, who was Robert's elder brother. To meet this evidence, the following cross-examination of Robert, who testified on July 20, 1901, appears: "Q. How old are you? A. I suppose, about 57 or 58. Q. How much older was your brother Peter than you? A. Well, I suppose he might be two or three years. Q. So if he had lived until to-day he would be about 62, would he? A. I suppose about 61, or something like that, maybe. Q. Don't you know what year you were born in? A. I could not tell you that. It never bothered me a bit." According to this testimony, Peter, at the time of his application, was less than 50 years old. On this testimony two questions are raised by the defendant: First, whether it was legitimate evidence; and, second, whether it was of such force as to warrant its submission to the jury.

The objection made to the legitimacy of the testimony was that it must have been based solely upon hearsay. But this objection evinces some misapprehension of the nature of the testimony. The testimony of a person as to his own age, if it relates to his birthday, must necessarily rest on hearsay; but, if it relates to his approximate age, it may rest on observation. One may count the years covered by his memory, and they, with the addition of a small number that have passed into oblivion, will inform him of his approximate age. In like manner, one who has spent his childhood with another person in childhood, as do children of the same household, acquires by observation some knowledge of the comparative ages of himself and the other, and by this comparison obtains some knowledge of the approximate age of the latter. The testimony in this case related to the approximate, not the exact, age of Peter, and therefore does not appear to rest on hearsay. We think, also, that it was of such force as to present a question for the jury. While the witness was manifestly uncertain as to the ages of himself and his brother, yet his testimony

cannot be reconciled with the claim of the defendant unless we assume an error of at least six years in his approximation. Assuming an error of one year in the church registry would take away all support from the position of the defendant. Which of these errors was the more probable, or, to speak with precision, whether accuracy in the registry was so much more probable as to overcome both the testimony of the witness and the declaration of Peter in his application, is a question on which minds may rationally disagree, and hence was for the jury.

We find no error in the record, and the judgment should be affirmed.

MAGIE, Ch. I find myself unable to agree with the majority of the court in affirming the judgment in this case. In my view, there was manifest error in the mode of submitting the case to the jury. When the case was here before, we declared that certain entries of baptisms contained in the register of the parish in Ireland were competent and admissible evidence, and that under a return to a commission issued from the court, and under the stipulation of counsel, certain copies of such entries were admissible as examined and verified copies, having the probative force which the register itself would have had if produced. *Hancock v. Supreme Council*, 52 Atl. 301. Upon that decision, I think it plainly erroneous to instruct the jury that the accuracy of that testimony depended upon not only whether the parish priest who made the entries in the register made them correctly, but also whether the parish clerk who read the entry when it was transcribed in the copy read it correctly, or whether the one who transcribed the entry transcribed it correctly. This permitted the jury to speculate as to the accuracy of copies, which, under the stipulation as construed by us, were admissible as verified copies of the original entries. Whether the jury could properly be permitted to judge of the accuracy of the entry by the parish priest is not necessary to decide. Such an entry is concededly *prima facie* correct. The jury should not be permitted to ignore it, except on some evidence raising the question of accuracy. My associates who vote to affirm find a question of that sort raised by the evidence of Robert Hancock, brother of the Peter Hancock whose age was in question. This witness testified that he supposed he was 57 or 58 years of age when he was examined in July, 1901. By the copies of the entries, he appears to have been baptized September 14, 1839; and, unless that entry was inaccurate, he was 62 years of age in 1901. He further testified that he supposed his brother Peter might be 2 or 3 years older than himself. The copies of the entries show that Peter was baptized June 20, 1833, nearly 6 years before Robert was baptized, and that there was a female child of the same parents who was baptized November 29, 1835.

Giving to the evidence of Robert its full force, it was, in my judgment, insufficient to justify the instruction that a jury might infer that an entry in the register by the parish priest had been inaccurately made.

(69 N. J. L. 288)

SMITH v. ELIZABETHPORT BANKING CO.

(Court of Errors and Appeals of New Jersey.
June 17, 1903.)

BANKS—LOSS OF DEPOSITOR'S SECURITIES—LIABILITIES.

1. In a suit against a bank, a gratuitous bailee, to recover the value of securities left with it, and which have been stolen by one of its employes, a want of ordinary care on the part of the bank not appearing, the bank is not liable for the loss of the plaintiff.

Dixon, J., dissenting.

(Syllabus by the Court.)

Error to Circuit Court, Union County.

Action by Thomas J. Smith, administrator of Peter H. Wyckoff, against the Elizabethport Banking Company. Judgment for defendant, and plaintiff brings error. Affirmed.

C. Addison Swift and Geo. R. Brisbor, for plaintiff in error. P. H. Gihoooley and R. V. Lindabury, for defendant in error.

VAN SYCKEL, J. This suit was instituted to recover of the defendant bank the value of three \$1,000 government bonds which it is alleged were deposited by the plaintiff's intestate with the bank for safe-keeping. The bonds were purchased by Wyckoff through Walter O. Smith, the defendant's cashier, and paid for by Wyckoff's check, payable to the order of Smith as cashier. At the request of Wyckoff, the bonds were placed by Smith in the safe of the bank in March, 1895, in a sealed envelope. Wyckoff died in August, 1898, and soon thereafter Thomas J. Smith, his administrator, called at the bank and looked at the bonds, and at his request they were left at the bank. No charge was made for keeping the bonds in the safe of the bank, and no coupons were cut from the bonds before they disappeared. These bonds were the only securities ever taken on deposit for any one. The cashier never reported to the directors or to any officer of the bank that he had deposited these securities in the safe, and they had no knowledge of such deposit. The bank was organized in 1889, and never did a safe deposit business until its charter was amended in July, 1900. Prior to 1900 there was no express authority contained in the charter of the bank to receive valuables for safe-keeping, either for hire or gratuitously; and no such authority was expressly given to the cashier, or known to have been exercised by him. Prior to July, 1900, the bank had

no vault, and only one safe. These bonds were placed by the cashier in the burglar-proof compartment of the safe, where the securities and money of the bank were kept. This compartment was required to be kept open during business hours, and therefore the employes of the bank could not be excluded from access to it. After July, 1900, when the bank was moved to new quarters, the clerks did not have access to the vault. One Schrieber, an employe of the bank, went on his vacation in August, 1900. He failed to return to the bank, and this led to the discovery that he had stolen \$108,000 of its funds, together with the plaintiff's bonds. Schrieber had been in the service of the bank for 11 years, and, so far as appears, the officers of the bank had no cause to question his integrity. Whether the bank, while these bonds were in its safe, had authority to take such securities for safe-keeping, or whether the cashier, as the representative of the bank, could receive them, without express instructions from the directors of the bank, so as to charge the bank with the liability of a gratuitous bailee, are questions in regard to which no opinion is intended to be intimated. Conceding that the bank was a gratuitous bailee, we think that the evidence fails to show on the part of the bank any want of the ordinary care which the law exacted of it in that relation. The bonds were deposited in the most secure place in the banking house. When they were stolen does not appear, but manifestly it was before removal to the new banking house, and it may have been the first speculation of Schrieber. There was, so far as appears, no circumstance to lead the bank to distrust him; and the depositor, with respect to his bonds, equally with the bank as to its funds, assumed the risk of loss by dishonesty of the clerk.

The case was bare of testimony from which the jury could infer negligence, and therefore a verdict for the defendant was properly directed by the trial court. The judgment below should be affirmed.

DIXON, J. (dissenting). The testimony in this case makes it quite clear that if the bonds were in possession of the defendant after the bank was moved to new quarters in July, 1900, then they were not kept in the vault where the defendant kept its own securities, and should have kept these bonds. As Schrieber, the defendant's employe who stole the bonds, did not leave the bank until about the middle of August, 1900, I think it is inferable that he did not steal them until that time; and the question whether such an inference should be drawn ought to have been submitted to the jury. If drawn, a verdict for the plaintiff would have been lawful.

(69 N. J. L. 417.)

ZOLPHER v. CAMDEN & S. RY. CO.

(Court of Errors and Appeals of New Jersey.)

June 18, 1903.)

STREET CAR—COLLISION—NEGLIGENCE—EVIDENCE.

1. Whether there is negligence in the operation of an electric street car which collides with another vehicle ahead of it upon the track depends upon the speed of the car, and the distance which the car had to go at the time the motorman saw, or ought to have seen, the vehicle upon the track.

2. If the distance between the car and the vehicle is in dispute, the existence of negligence is a question for the jury, unless the distance is, in any view of the evidence, so small that the motorman could not stop a car running at a reasonable rate of speed.

3. It is not necessarily negligent for a traveler upon a bicycle to stop upon the track in front of an approaching car, without looking behind him, when the usual audible warning of its approach, by bell or gong, is not given by the motorman.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Anton Zolpher against the Camden & Suburban Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Joseph H. Gaskill, for plaintiff in error.
Howard Carrow, for defendant in error.

SWAYZE, J. The plaintiff, while riding a bicycle upon the track of the defendant in advance of an approaching car, was struck by the car and injured. He had been riding on the right-hand side of the street until he came to a pile of stones which obstructed his passage. He then turned on the track. There was a high wind and considerable dust. While he was on the track the wind came against him so strong, as he testified, that he had to get off. He did not then look around. As he put his foot on the ground, the car struck him, and dragged him, he says, for about 40 feet. There was testimony that no warning was given of the approach of the car. He was a few feet in advance of the car when he went on the track. The estimates vary from 12 to 20 feet. There was testimony to the effect that the car was going quite fast. A motion to nonsuit was refused.

Taylor, a witness for the defendant, testified that he was on the front platform; that he shouted to the motorman, "Look out! there is a man," and the motorman immediately gave two sharp sounds of the gong; that the plaintiff was not over 12 feet from the car when he went on the track; and that the car, when it struck him, was going at the rate of 5 miles an hour. He was asked on cross-examination why it was necessary for him to call the motorman's attention to the fact of the plaintiff's being on the track, and he answered: "Why, what would I do—stand there and let him run over him?"

The relative rights of the plaintiff and

defendant in the use of the highway are settled. *Camden, Gloucester & Woodbury Railway Co. v. Preston*, 59 N. J. Law, 284, 35 Atl. 1119; *Consolidated Traction Co. v. Haight*, 59 N. J. Law, 577, 37 Atl. 135; *Hughes v. Camden & Suburban Railway Co.*, 65 N. J. Law, 203, 47 Atl. 441.

The question is whether the motorman, if he had been running his car at a reasonable rate of speed, could, by the exercise of ordinary care, have stopped it in time to avoid the collision. The answer must depend upon the distance which the car had to go at the time the motorman saw, or ought to have seen, the bicycle upon the track in front of him. If that distance is so small that the motorman could not, by the exercise of ordinary care, have stopped the car, if he was running at a reasonable rate of speed, the defendant is not liable. If that distance was sufficient to allow the motorman, by the exercise of ordinary care, to stop a car running at a reasonable rate of speed, the failure of the motorman to stop subjects the defendant to liability. In the present case the jury had the right to believe the testimony of the plaintiff that he had gone 20 feet along the track before he was struck. If so, the motorman had at least that distance in which to check, and, if necessary, stop, his car. We think it was a question for the jury whether a failure to stop in that distance established negligence. Even if the motorman did all that he could to stop the car when he saw the bicycle on the track, there would still be evidence of negligence, if his failure to stop was due to the fact that he had been running at an unreasonable rate of speed. That he was running at an unreasonable rate of speed could properly be inferred from the testimony of the plaintiff that he was dragged 40 feet. Whether the estimate of the distance traversed by the car after the collision was 40 feet, as the plaintiff said, 20 feet, as Welsh said, or 6 or 8 feet, as the motorman said, or 3 feet, as Taylor said, was a question depending on the credibility of the witnesses, and to be determined by the jury. The greater the distance, the stronger the inference that the car was running at an unreasonable rate of speed prior to the effort made by the motorman to stop it.

The greatest difficulty in the case arises from the fact that the plaintiff stopped in the car track, and it is forcibly argued that the motorman could not anticipate this action of the plaintiff. If this case had rested on the plaintiff's case alone, I should have difficulty on this score; but, in my judgment, the testimony of Taylor justified the inference that the motorman was inattentive, and that if he had given proper attention the accident might have been avoided. Greater care and attention is necessarily required of the motorman when a vehicle is on the track in front of him than when he has a clear road.

The question whether the plaintiff himself was not negligent in failing to look around before stopping his wheel is also one of difficulty, but we think it was a question for the jury whether the motorman gave warning by the usual audible signal of gong or bell; and if no warning was given, such as would naturally be given by a car overtaking a vehicle, and approaching so close, then it was also a question for the jury whether the plaintiff was negligent in stopping. The case differs from cases where the traveler undertakes to cross directly in front of an approaching car. In this case it is proved that the plaintiff got safely on the track at least 12 feet in advance of the car. He was not bound to look behind him after he was fairly on the track. It then became the duty of the motorman to give warning, and to exercise reasonable care to avoid a collision.

The only errors assigned are the failure to nonsuit and the failure to direct a verdict. The duty of the trial judge, as this court has said in *Newark Passenger Railway Co. v. Block*, 55 N. J. Law, 806, 27 Atl. 1067, 22 L. R. A. 374, is to say whether any facts have been established from which negligence may be inferred. "If none, there is no case to go to the jury; but if, from facts established, negligence may reasonably and legitimately be inferred, it is for the jury to say whether from those facts negligence ought to be inferred." Applying this rule to the present case, we think the facts fairly presented a question for the jury, and we find no error in the refusal to nonsuit and to direct a verdict.

The judgment should be affirmed, with costs.

(69 N. J. L. 300)

HICKS v. LONG BRANCH COMMISSION et al.

(Court of Errors and Appeals of New Jersey.
June 15, 1903.)

LONG BRANCH COMMISSION—SPECIAL APPROPRIATIONS—PROCEDURE—STANDING RULES.

1. When the chairman of a legislative board refuses to put to vote a motion which is properly before the board for its action, the motion may be legally put by a temporary chairman selected at once by the board.

2. The standing rules of the Long Branch commission, adopted under authority of the statutes by which the commission is organized, are obligatory on the commission, so that its action in disregard of them is illegal.

3. According to the standing rules of the Long Branch commission, in every vote relating to a special appropriation the yeas and nays must be taken and recorded. *Held*, that a resolution directing the execution of a contract which would bind the municipality to make payments that could be met only by special appropriations could not be lawfully passed without taking and recording the yeas and nays.

(Syllabus by the Court.)

Error to Supreme Court.

Certiorari by Alfred O. Hicks against the Long Branch commission and others. Judg-

ment for defendants (54 Atl. 568), and plaintiff brings error. Reversed.

Robert H. McCarter, for plaintiff in error. Thomas P. Fay, for defendant in error Long Branch commission. Corbin & Corbin, for defendant in error Tintern Manor Water Co.

DIXON, J. On November 17, 1902, the finance committee of the Long Branch commissioners submitted to the commission a proposed contract between the body and the Tintern Manor Water Company, by which the company was to have the exclusive privilege of supplying the commission with water for municipal purposes during a period of 10 years at stated annual rentals to be paid by the commission. At a meeting of the board of November 24th, Commissioner Van Note offered a resolution directing the president and clerk of the commission to sign and seal the contract as the act and deed of the commission, which was seconded, and moved that the roll be called on its adoption. Thereupon the president stated that he was opposed to the resolution, and declared it out of order, from which ruling an appeal was duly taken, and the ruling was reversed. The president then declined to put the question on the adoption of the resolution, whereupon Commissioner Van Note moved that Commissioner Parker act as temporary chairman, and this motion, being seconded, and put by the clerk, was carried. Commissioner Parker then put the question on the adoption of the resolution, and it was carried. On none of these motions were the yeas and nays taken and recorded. On certiorari to review this action of the commission, the Supreme Court adjudged it legal, and the present writ of error is brought to reverse this judgment.

The first claim of the plaintiff in error now open for consideration is that, although the permanent chairman refused to put the proposed question to a vote, yet while he was present it was unlawful for the commission to adopt any other method of obtaining a vote on the question, without first formally trying the chairman for malfeasance and removing him from office. Under the act to establish the Long Branch police, sanitary, and improvement commission (P. L. 1867, p. 976), and its supplements (P. L. 1869, p. 998; P. L. 1875, p. 477), the board of commissioners is directed to "organize by electing a chairman from among themselves," and is empowered to determine the rules of its own proceedings. Various powers are given to the commissioner chosen as chairman, who in respect to those powers is styled "president," but none of these powers relate to his functions as chairman of the board. By the standing rules and orders of the commission, enacted by ordinance June 2, 1890, it is provided that the commissioners shall elect one of their number, "who shall be president of the board and also mayor of the city for

the ensuing year"; that "in the absence of the president from any meeting of the board the members shall choose a temporary president to preside until the president appears"; and that "it shall be the duty of the president to preside at all meetings of the board, preserve order and decorum therein, and enforce at all times the provisions of the charter, of the by-laws and the rules of debate." Inasmuch as the statutes give to the commissioner chosen by the board to preside at its meetings no powers or rights in those meetings other than such as are implied in his designation as chairman, and as the provisions of the standing rules are equally limited, it is evident that we must test the legality of the conduct by which he was temporarily superseded as chairman by the general rules applicable in such a juncture. This eliminates from consideration the decision in *Billings v. Fielder*, 44 N. J. Law, 381, which resulted from the peculiar authority conferred by statute upon the director at large in his function as chairman of the board of freeholders. The general doctrine regarding the authority of one chosen to preside over a deliberate body was vividly stated on a memorable occasion, when, in 1642, the King entered the House of Commons to compel the arrest of the five members whom before the peers he had accused of treason. To his demand whether they were present in the House, addressed to Speaker Lenthall, the latter answered, "I have neither eyes to see nor tongue to speak in this place, but as the House is pleased to direct me, whose servant I am here." The same metaphors had previously been used by Speaker Glanville, who declared himself to be "the mouth—indeed, the servant—of all the rest of the members of the House, to collect faithfully and readily the vote and genuine sense of a numerous assembly," and also in the House itself, where the speaker was designated as "but the servant to the House, and not a master or a master's mate." This view is approved by writers on parliamentary law. 2 Hats. P. P. 230; Cush. Legis. Ass. § 294. It appears reasonable, when it is remembered that the authority of a chairman is derived wholly from the assembly itself, and that he is only a means provided for enabling the body to exercise its powers in an orderly way. His functions are utterly unimportant, save as they are auxiliary to that end. When, therefore, his conduct in any particular case has no other aim and effect than to thwart the purpose which his office is designed to assist, there must reside in the assembly a right to pass him by and proceed to action otherwise. This right is but a branch of the power which assemblies exert in choosing temporary officers when the permanent officers are absent. It is not their absence which justifies the exercise of the power, but the fact that they are not performing the duties necessary for the proper fulfillment of the functions of the assembly. Inability or

refusal to perform those duties has the same effect as absence, in suspending the ordinary functions of the convention, and equally warrants the selection of a temporary chairman. The power is inherent and inseparably attached to the right of the body to convene and act. It is exercisable, when not restrained by some extrinsic law, at the will of the body. Jeff. Man. 36; Cush. Legis. Ass. § 299. In *Billings v. Fielder*, *ubi supra*, Mr. Justice Van Syckel said, "When the director is necessarily or willfully absent from the meetings of the board, then, ex necessitate, the general rule of parliamentary law which governs legislative bodies must apply, so far as to enable the board to elect a presiding officer pro tempore to conduct its deliberations in due and orderly form"; and in a subsequent clause he coupled with the absence of the director his refusal to act in his official capacity at a meeting of the board. Similarly, in *State v. Lasher*, 42 Atl. 636, 44 L. R. A. 197, the Supreme Court of Connecticut recognized the right of a deliberate board to have any member act in place of its regular chairman, when the latter attempts to thwart its will. For the purpose of thus selecting a temporary chairman the clerk of the body usually puts the necessary questions. Cush. Legis. Ass. § 315. We therefore are of opinion that it was lawful for Commissioner Parker to act as chairman of the meeting on the occasion in question.

It remains to consider whether the action of the board in the adoption of the resolution was legal. Its legality is denied because the yeas and nays were not taken and recorded. The standing rules, adopted by ordinance under the express authority of the charter, as before stated, provide that "on every vote relating to any special appropriation the yeas and nays shall be taken and recorded." This rule was as binding upon the commission and its members as any statute or other law of the commonwealth. *Hopkins v. Mayor of Swansea*, 4 M. & W. 621; *Heland v. Lowell*, 3 Allen, 407, 81 Am. Dec. 870; *Presb. Church v. N. Y. City*, 5 Cow. 538; *Bradshaw v. Camden*, 39 N. J. Law, 416; 1 Dill. Mun. Corp. (4th Ed.) § 308. Its importance is manifest. It is designed to secure, in matters relating to the public funds, deliberate action on the part of each commissioner, and immediate as well as permanent public evidence thereof, readily accessible to the voters of the municipality, on which their representatives may be held responsible. 1 Dill. Mun. Corp. (4th Ed.) § 291; 20 Am. & Eng. Enc. Law (2d Ed.) 1214. It cannot be dispensed with, except in accordance with the standing rules, and no attempt was made to set it aside. Indeed, compliance with it was called for when the resolution was put fully before the board. Nor can the testimony of the commissioners or of bystanders be accepted as a substitute for it, because such testimony cannot completely supply its place. *Morrison v. City*

of Lawrence, 98 Mass. 219. We regard this resolution as coming within the terms of the rule. Although it did not directly make a "special appropriation" of public moneys, yet, if carried out, it bound the municipality to payments which could be met only by special appropriation, and thus, in a fair sense, related to such appropriations.

For failure to take and record the yeas and nays, we think the resolution was not lawfully passed, and should be set aside. Let the judgment of the Supreme Court be reversed, and a judgment be entered in accordance with the foregoing opinion.

(90 N. J. L. 335)

HACKNEY v. DELAWARE & A. TELEGRAPH & TELEPHONE CO.

(Court of Errors and Appeals of New Jersey.
June 15, 1903.)

DEATH BY WRONGFUL ACT—DAMAGES—TRIAL—ARGUMENTS OF COUNSEL.

1. It is error to instruct the jury, in a suit by an administrator for the benefit of the widow and next of kin, that they may consider what the deceased, had he lived, would probably have been able to give to the widow or next of kin, from his earnings, during his life, and to foot up that amount as the damages to be thus awarded.

2. Such an instruction fails to take into account the fact that the widow and next of kin will come into present possession of the fund, with the future income thereon.

3. What the plaintiff is entitled to recover is a "capital fund," so to speak, which will represent the present value of all the pecuniary loss which will fall upon the widow and next of kin by the premature taking off of the intestate.

4. Where there are two counsel engaged in a cause for the plaintiff, and one of the counsel, when the evidence is in, opens for the plaintiff, and the defendant's counsel states to the court that he does not desire to reply, and a second counsel is then permitted further to address the jury for the plaintiff, against objection, it is error.

5. The same counsel who has opened may, in the discretion of the court, after the defendant has stated he has no reply, be permitted to make a further opening under the circumstances stated in *N. Y. & L. B. Railroad Co. v. Garity*, 42 Atl. 842, 63 N. J. Law, 50.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Bertha Hackney, administratrix of Alfred Hackney, against the Delaware & Atlantic Telegraph & Telephone Company. Judgment for plaintiff. Defendant brings error. Reversed.

E. A. Armstrong, for plaintiff in error.
Henry S. Scovel and William T. Boyle, for defendant in error.

FORT, J. This was a suit by an administratrix, under the death act, to recover, for the widow and next of kin, the pecuniary loss sustained by them by the death of the intestate. The injury resulted from a horse becoming frightened while attached to a carriage in which the plaintiff's intestate was riding along a public highway. The cause

of the fright was alleged to be the negligent use of a wagon containing coils of wire, which were being unwound and strung by the defendants upon poles upon or adjacent to the highway. There was a verdict for the plaintiff, and the defendant sues out this writ of error, and assigns two grounds for reversal: First, an erroneous statement in the charge as to the rule of damages in such cases; and, second, that the court permitted a second counsel to address the jury for the plaintiff after one of the plaintiff's counsel had opened, and the counsel of the defendant had stated he would not reply or address the jury.

The learned trial justice charged the jury as to the measure of damages, as follows: "You must form your judgment as best you can, in a reasonable way, in finding out what this man would have earned if he had lived up to the time you conclude he would have been liable to live and to have been useful in earning money. As I understand it, you are to get at your estimate upon these lines, and these alone. Then, footing the matter up, if you find a verdict for the plaintiff, you foot up what the amount is, and so state in your verdict, if you find a verdict in favor of the plaintiff, and for such a sum as you think will be the pecuniary loss, estimated on the basis that I have stated." The attention of the justice was called to this statement by counsel by an exception, and the jury, upon being recalled, because of some other matters, for further instruction, the justice on this question then further said: "Take the conditions, and judge the best you can as to how he would live, in that respect, and how much he would earn, and be able to contribute to the widow and next of kin, and how much they would lose by his death, from these contributions—his earnings. That is left entirely to the jury upon the evidence." A trial judge is compelled to state the principles of law applicable to the case immediately at the conclusion of the testimony, and he is held in these days, by a learned and watchful profession, to the closest accuracy in so doing. The wonder is that, in the haste of a trial, errors are so infrequent. In reading the charge as a whole (the extracts above quoted being but a part), it is difficult to escape the conclusion that the jury may have gathered from the language employed that they were to "foot up" or "sum up" the whole amount the intestate, had he lived, would "have been able to contribute to the widow and next of kin," and return that amount as their verdict. That was giving to the widow and next of kin, as a present value, the whole amount which the jury might find, the intestate, had he lived, would have given to the widow and next of kin, in installments, at future periods, during the whole of his life. Such an instruction does not take into account the fact that the widow and next of kin will come into the present possession of the fund, with the future in-

come thereof. What the plaintiff is entitled to recover is a "capital fund," so to speak, which shall represent the present value of all the pecuniary loss which will fall upon the widow and next of kin by the premature taking off of the intestate. That fund is to be ascertained by taking into account all the possibilities. The intestate might have died by the course of nature shortly after the accident. He might, had he lived, have suffered financial reverses. The wife, had he lived, might have died long before he did. So might his next of kin. Nothing is to be added "for loss of society, or wounded feelings, or anything else which cannot be measured by money and satisfied by a pecuniary recompense." *Tiffany on Death by Wrongful Act*, c. 10, § 153. Mr. Justice Magle, speaking for the Supreme Court in *Demarest v. Little*, 47 N. J. Law, 28, says as to damages in this class of cases: "They are to be determined exclusively by reference to the pecuniary injury resulting to the widow and next of kin of deceased by his death. The injury to be thus recovered for has been defined by this court to be 'the deprivation of a reasonable expectation of a pecuniary advantage which would have resulted by a continuance of the life of the deceased.' Compensation for such deprivation is therefore the sole measure of damages in such case." Citing *Paulmier v. Erie Railway Co.*, 34 N. J. Law, 151. In *Telfer v. Northern Railroad Co.*, 30 N. J. Law, 188, Chief Justice Beasley says: "It is manifest, from the structure of this section, that it was not designed to vest an arbitrary discretion in the jury, to give what damages they may think fair and just, without reference to any fixed standard by which to estimate them. The important qualifying words are added, referring to the pecuniary injury resulting to the widow or next of kin. The injury forming the basis of calculation must be pecuniary. 'Nothing else can enter into the estimate.' In none of the cases cited has it been in express language set forth that it is the present value of the pecuniary loss which the jury is to find, although such an expression is usually found in the charges of the trial judges at the circuit. In the charge before us, the jury were permitted to consider the whole amount of the possible pecuniary benefits which the widow and next of kin would have received from time to time during the life of the intestate, had he lived, and to sum that up as the measure of damages. That instruction did not require the taking into account of the present possession of the whole fund, and the resultant benefit therefrom, and the future accretions thereon, and hence was erroneous. The error assigned on this part of the charge is sustained."

Upon the testimony being closed, the record before us, upon which error has been assigned, is as follows, "(Mr. Boyle opens the case to the jury for the plaintiff. Mr. Armstrong states that he has nothing to state in

reply. Mr. Scovel proposes to address the jury on the part of the plaintiff, and Mr. Armstrong objects.) Mr. Scovel: If your honor please, I think I should be allowed to address this jury for the plaintiff. If there is such a rule, I would like to see it, and have counsel produce it. The Court: Mr. Armstrong, do you desire to argue the case to the jury? Mr. Armstrong: I do not. The Court: Now, Mr. Scovel asks to be permitted to add additional remarks in behalf of the plaintiff. Is there any objection to that? Mr. Armstrong: I object to that, there being nothing to reply to. I have not addressed the jury, and one of the counsel for the plaintiff has addressed the jury, and there is nothing to reply to; counsel for the defendant not having addressed the jury. The Court: I think that inasmuch as Judge Armstrong did not announce his intention not to participate in the argument to the jury before the close of Mr. Boyle's remarks, and counsel for the plaintiff expresses surprise at that, and desires to be further heard, I think it proper, under the circumstances, to allow Mr. Scovel, one of the counsel for the plaintiff, to address the jury, if he desires to. Mr. Armstrong: Will your honor allow me an exception? The Court: No; I don't think I will, unless I have to under the rule. Mr. Armstrong: Then may I ask your honor to grant an exception to that ruling? The Court: Oh, yes; it is on the record, and you may have an exception, if it is lawful. I think it is in the discretion of the court. (Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed. Thereupon Mr. Scovel addressed the jury on the part of the plaintiff.) We think this assignment of error is well founded. It was not within the discretion of the court to permit a second counsel to address the jury, on the same side as that of the counsel who had opened. It may be in the discretion of the court to permit the same counsel who had already addressed the jury to make a fuller opening, in case he shall so request; but to permit other counsel to do so, or to further address the jury for the plaintiff, when no reply has been made by the counsel for the defendant, is not discretionary. In *N. Y. & Long Branch R. Co. v. Garrity*, 63 N. J. Law, 50, 42 Atl. 842, the Supreme Court, speaking through Justice Gummere, says: "Ordinarily a plaintiff who makes a mere nominal opening does so at his peril, and, if the defendant then submits his case without argument, the plaintiff will not be allowed to make a second argument. But although this is the customary practice, it is always within the discretion of the court, when such a case arises, to permit the making of a second argument by the plaintiff, or, rather, to state it more accurately, to make a fuller and more complete opening; and such permission will usually be granted when it appears that plaintiff has been led into making mere-

ly a formal opening by the action of the defendant. When a second and more extended opening is permitted, however, the defendant is entitled to reply to it, if he so desires; and, if he does so, the plaintiff then has a right to make the closing argument." The forty-eighth rule of the Supreme Court, which by rule 89 is made applicable in the practice at the circuits, declares: "(48) When there shall be more counsel than one on the affirmative side, one only shall be heard in the opening and the other in reply, but both shall not be heard either in the opening or reply." The permitting of a second counsel to address the jury in the face of objection was error, as it conferred upon the plaintiff a substantial benefit, to which by law and the practice of our courts he was not entitled. In Delaware it is held that if the plaintiff opens the argument, and the defendant submits his case without argument, the plaintiff may not make a concluding speech. *Tyre v. Morris*, 5 Har. 3. In the case before us the defendant in error relies upon section 936 of volume 1 of Thompson on Trials to sustain the permission granted to the second counsel to be heard after the defendant's counsel had stated he had no reply to make. To sustain the text, Judge Thompson cites but a single case—that of *Barden v. Briscoe*, 36 Mich. 255. We do not think the argument of Judge Campbell in the Michigan case is sound. There is no authority for it in the English practice, nor, so far as I have been able to find, in the decisions of the several states. But in our state, under the rules of our Supreme Court, there can be no question. On principle, it should not be so. In all the books, the right to reply is rested upon the theory of the right to answer—to have the last word—by the one who holds the affirmative. But it is solely a right to reply. If there is nothing to reply to, and the opening argument is full, as it may be, upon what principle is it justifiable to permit a second counsel to re-argue the case? It is practically permitting a second opening. We think the true rule is stated in the case of *N. Y. & L. B. Railroad Co. v. Garrity*, 63 N. J. Law, 50, 42 Atl. 842, and that the error complained of in this regard in this case must be sustained.

For these errors, there must be a reversal of the Supreme Court, and a venire de novo awarded.

(69 N. J. L. 424)

ADAMS v. CAMDEN & SUBURBAN RY. CO.

(Court of Errors and Appeals of New Jersey.
June 15, 1903.)

STREET RAILROADS—INJURY TO PERSON ON TRACK—DIRECTING VERDICT—RIGHTS IN HIGHWAY.

1. Plaintiff's driver was driving at midnight a team of horses, attached to a loaded truck wagon, along the public road, upon the left-hand track of defendant's street railway, when he was met by one of defendant's cars moving

on that track. In turning to his right to avoid that car, he drove upon defendant's right-hand track, where another of defendant's cars, approaching from the opposite direction, overtook and ran into the back of his wagon, causing injury. He testified that when he "pulled off" on the right hand track he looked back, and there was no car in sight, and that no bell was sounded, nor notice given, before the collision. The motorman in charge of the colliding car, in his testimony, made contradictory statements respecting the distance from him at which he first saw the horses "pulling over" on the track in front of him, and admitted that he gave no signal.

Held, that the trial judge properly refused to direct a verdict for the defendant.

2. The right of street railway companies to use the highways by their cars is not superior to the rights of others in the customary use thereof, and it is not an act of negligence, per se, for the driver of a carriage, whether of burden or pleasure, in passing over the public roads of this state where the tracks of any street railway company may be laid, when either met or overtaken by the cars of such company, to keep to the right, upon other tracks of said company, even though such carriage, by turning to the left, might have avoided both meeting, and being overtaken by the company's cars.

3. The defendant was bound to take notice that the law required other carriages or vehicles using the parts of the highway covered by its car tracks, upon meeting its cars coming from an opposite direction, to keep to the right, except it was perilous to do so, and to control its overtaking cars, in anticipation that such other carriages might so turn upon its car tracks, in obedience to the law, at any instant; and it was the duty of the motorman of the colliding car in this case to use reasonable care to observe any vehicle ahead of him, and to govern his car so as to prevent collision. Whether he used such care, or not, was a question for the jury to determine from the evidence.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Samuel T. Adams against the Camden & Suburban Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Joseph H. Gaskill and Nelson B. Gaskill, for plaintiff in error. Henry S. Scovel and William T. Boyle, for defendant in error.

VREDENBURGH, J. The injury for which the plaintiff recovered a verdict below for compensatory damages to his property resulted from a collision with defendant's passenger car. The plaintiff's driver, who was in charge of his team of horses, attached to a loaded truck wagon, was proceeding slowly upon the public highway called the "Moorestown Turnpike," in the direction of Camden City, at midnight on October 15, 1901, along the left-hand track of defendant, when he was met by a passenger car of defendant coming towards him on that track. In turning to his right to avoid that car, he drove upon defendant's right-hand track, and his wagon had, to use his expression, "just dropped" in that track, when another of defendant's passenger cars, moving on the latter track in an opposite direction, came swiftly up behind him, overtook him, and ran into the back of his wagon. The wagon

was badly broken, one of the horses was killed, and other damage was done, as the result of the collision. The driver testified that when he "pulled off" he looked back, and there was no car in sight, and that no bell was sounded, nor notice given, before the car struck him.

The principal ground taken by the plaintiff in error (and, indeed, the only one deserving attention) for a reversal of the judgment entered upon the verdict is that the trial court should have directed a verdict for the defendant below. This contention assumes either that the evidence had demonstrated that the driver of the team was guilty of such contributive negligence as to legally defeat a right of recovery, or that defendant had been guilty of no negligence in the operation of the colliding car, productive of the injury. As to the question of the contributive negligence of the driver, it is argued by the plaintiff in error that his act in driving upon the right-hand track of defendant was conclusive evidence of such negligence. But I think his act in following the "law of the road," by turning to the right, instead of to the left, in the absence of notice of particular danger on his right, cannot be said to have been negligent per se. On the contrary, he but followed the express direction of our statute. The explicit command of our road law upon that head seems to have escaped general observation. Its pertinent language is that "drivers of carriages * * * whether of burthen or of pleasure, using any of the turnpike or public roads in this state, when met by another carriage * * * shall keep to the right, and when overtaken by a carriage * * * shall likewise keep to the right, so as in both cases to permit such carriages * * * either met or overtaken to pass free and uninterrupted." Gen. St. p. 2823, § 91. A subsequent part of this law subjects the person disregarding its command to a money forfeiture in addition to an action of damages. The more specific insistence of the counsel for the plaintiff in error in this regard is that this driver was guilty of negligence, because, having room on his left hand to pass the car he met (that being an assumed place of safety), he was bound to drive there, instead of to the right (that being an assumed place of danger, because of the existence of the right-hand track). But this contention seems groundless, in view of the above-quoted law and of the decisions of our courts. If the driver had turned to the left, he would have taken the risk of other carriages, which in the night he might have been unable to discern, meeting and colliding with him while they were rightfully on that side. The recent decision of this court of *Hughes v. The Camden & Suburban Railway Company*, reported in 65 N. J. Law, 203, 47 Atl. 441, where the facts resemble the case at bar, makes extended reasoning upon this subject here uncalled for. There the driver, who was on the right-hand track when over-

taken by a car on that track, turned to the left, instead of to the right, and was struck by an inbound car and injured, and a judgment of nonsuit below had been rendered against the injured plaintiff. This court, upon error brought, reversed that judgment, and, in the opinion written by the present chancellor, in dealing with this feature of the case, he said: "If it was perilous to go to the right, and reasonable prudence required, he could go to the left, notwithstanding the inbound track of the defendant was there maintained. For reasons of safety, a traveler may use any part of a highway. * * * If he uses a highway, he may assume that others using it, including trolley car companies, will use it with a due regard to his rights. Upon the evidence, it was for a jury to say whether there was danger in turning to the right, such as a traveler, in the exercise of reasonable prudence, would avoid." In the case at bar the trial judge committed no error in leaving the question to the jury. In giving expression to this rule—so important to the public under the dangerous conditions of travel now existing—he instructed the jury as follows, viz.: "Each user of the highway must use reasonable care to avoid accidents. * * * Therefore the plaintiff, or his son, who was driving this team, was also obliged to use reasonable care to avoid this or any other accident. Whether that implies that he should turn out to the left or to the right; whether it implies that he should have stopped and looked around to have seen the motor car; whether it was coming; whether he would be apt to get in the way of it—are all matters of fact to which you must apply the law." The plaintiff in error certainly has no reason to complain of this instruction. It was, it seems to me, more favorable to the company than the judge might, without error, have expressed it. The motor car company was bound to take notice that the law required other carriages using the parts of the highway covered by its tracks, upon meeting its cars coming from an opposite direction, to keep to the right, except it was perilous to do so, and to expect that such other carriages might so turn upon its right-hand tracks at any moment, in obedience to the law. It was the duty of the motorman to use reasonable care to govern the speed and motion of his car in accordance with the necessities which such a situation might at any instant create. The relative rights of the users of the public roads, in which street cars are liable to be swiftly propelled by electricity, were fully and learnedly considered by the present chancellor in this court in the case of *Newark Passenger R. Co. v. Block*, 55 N. J. Law, 611, 27 Atl. 1067, 22 L. R. A. 374, and he there concludes that the right of such street railways to use the highway by their cars is not "paramount to the rights of others in the customary use thereof," and that such use must be "in a manner consistent with such

rights of others." Under these and other approved deliverances of this court, and the directions of our statutes, the plaintiff's driver was justified in keeping to the right, upon the unoccupied tracks of defendant, after exercising reasonable prudence to observe and avoid any overtaking car moving so dangerously near to him that it could not be controlled effectively by a motorman using reasonable care in its operation. See, also, cases of Camden, etc., Ry. Co. v. Preston, 59 N. J. Law, 266, 35 Atl. 1119; Consolidated Traction Co. v. Haight, 59 N. J. Law, 580, 37 Atl. 135; Shelly v. Brunswick Traction Co., 65 N. J. Law, 644, 48 Atl. 562. It is evident that this part of the case belonged to the province of the jury, and that the judge properly left it there.

As to the second branch of the contention of the plaintiff in error, it will be sufficient to add that it is clear that the question of the negligence of this company was also properly left to the jury to determine. The long-settled rule of law in this state is that if, from the facts established, negligence may reasonably and legitimately be inferred, it is for the jury to say whether from these facts negligence ought to be inferred, and that if the real facts have not been established by the evidence, but remain in substantial dispute, the trial judge must submit them, and the inferences to be drawn from those which the jury find established, to the determination of the jury. The motorman who had charge of the colliding car, in one portion of his evidence, admitted that he first saw the team of horses "pulling over on the track in front of him when they were a square away" from him. Subsequently he testified that he was about a "car and a quarter's" length away when he first saw the horses, and that he gave no signal at any time before the collision, because he had not time to give any signal. Which of these two contradictory statements should be relied upon was a problem for the jury alone to decide. If the jury believed the former, they were justified in finding that he had been negligent not only in failing to give a signal of the coming of his fast-moving car, but also, and whether he signaled or not, had been clearly negligent in not keeping his car under efficient control when he first saw the team ahead of him, a square distant, turning up on his track.

The judgment below should be affirmed.

(69 N. J. L. 532)

KENT v. PHENIX ART METAL CO.

(Supreme Court of New Jersey. June 8, 1903.)
STATUTE OF FRAUDS—ORAL CONTRACT—SALE OF REALTY—PAYMENT OF COMMISSIONS—PLEADING—BILL OF PARTICULARS—AMENDMENT.

1. An indivisible contract for employment of a broker in the sale of both real and personal property, and for payment of commissions upon the price, the contract not being in

writing, is totally void, under the statute of frauds (Gen. St. p. 1604, § 10).

2. A verbal promise to pay compensation for services rendered in negotiating a sale of real estate, whether made before or after the services are performed, is void, under the statute of frauds (Gen. St. p. 1604, § 10).

3. A bill of particulars annexed to a declaration or delivered pursuant to demand, under section 236 or section 237 of the practice act (Gen. St. p. 2572), limits, for the purposes of the trial, the generality of the pleading.

4. Where the issue as made up on the pleadings and bill of particulars has been fully tried and correctly settled, no amendment having been applied for in the court below, the court of review will not permit the plaintiff in error to amend the bill of particulars in order to bring about a reversal of the judgment, and a new trial upon a different issue.

(Syllabus by the Court.)

Error to Circuit Court, Middlesex County.

Action by Henry B. Kent against the Phenix Art Metal Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Argued February term, 1903, before GUMMERE, C. J., and FORT, HENDRICKSON, and PITNEY, JJ.

Voorhees & Booraem, for plaintiff in error.
George Berdine, for defendant in error.

PITNEY, J. This action was brought to recover commissions alleged to be due to the plaintiff for services rendered to the defendant in negotiating a sale of certain real and personal property, constituting its manufacturing plant and stock of goods, situate at New Brunswick, in this state. The declaration contains two counts, the first of which sets up a special agreement made between the parties on February 4, 1901, entitling the plaintiff to a commission of 3 per cent. upon the purchase price, followed by averments showing that in pursuance of the agreement the plaintiff procured a purchaser at the price of \$70,000, that the sale was carried through, and that the defendant received the consideration money from the purchaser. The second count was the usual combination in short form of the common money counts, averring an indebtedness to the amount of \$5,000 owing by the defendant to the plaintiff (inter alia) "for work, labor, care, diligence, journeys, and attendance on the part of the plaintiff before that time done, performed, and bestowed as the agent of and for the said defendants, and on their retainer, and for certain commissions and rewards due and of right payable from the defendants to the plaintiff in respect thereof"; continuing with averment of a promise by the defendant to pay the indebtedness upon request, and a breach of that promise. Pursuant to section 236 or 237 of the practice act (Gen. St. p. 2572), the plaintiff delivered (or filed with the declaration) a bill of particulars of his demand, of which the following is a copy: "The following is the bill of particulars of

§ 2. See Brokers, vol. 8, Cent. Dig. § 44; Frauds, Statute of, vol. 22, Cent. Dig. § 131.

the demand upon which the plaintiff's declaration in the above-entitled cause is founded, to wit: The sum of two thousand one hundred dollars due the said plaintiff for commissions, at the rate of three per cent., which the said defendants on or about the 4th day of February, 1901, agreed to pay the said plaintiff on the purchase price in case he, the said plaintiff, should procure for the said defendants a purchaser for certain property belonging to the said defendants, constituting their manufacturing plant and stock of goods, situate in the city of New Brunswick, in the county of Middlesex, which said commissions became due and payable to the said plaintiff on the sale of said property of the said defendants to one D. Wylie McCaughey through the agency of the said plaintiff, as broker, in pursuance of said agreement, for the sum of seventy thousand dollars, which said sum remains due and unpaid by the said defendants to the said plaintiff." The printed book does not disclose what plea was filed by the defendant. Therefore, presumably, it was a plea of the general issue. At the trial the jury rendered a verdict in favor of the defendant, in obedience to the direction of the trial judge. To review the consequent judgment, this writ of error is brought. The exceptions challenge the legal propriety of the direction of a verdict for defendant, and also question the correctness of certain propositions that were laid before the jury in explanation of the binding instructions, and the refusal of the judge to submit certain questions for the jury's determination. If the judge was justified in directing a verdict in defendant's favor, the other exceptions must fall, for they relate merely to the grounds upon which that direction was based. Error is also assigned upon the admission and exclusion of evidence, but there are no exceptions to support these assignments.

To deal, therefore, with the direction of a verdict: The evidence on the part of the plaintiff tended to show that through his instrumentality the property of the defendant was sold out to a so-called trust, known as the American Can Company; the actual transfer being made to D. Wylie McCaughey, as the representative of that company. Plaintiff testified that he was employed for the purpose on or about February 4, 1901, by a Mr. Whitfield and a Mr. Johnson, who were said to represent the defendant. They, or one of them, told the plaintiff that, if he could sell the property to the trust for \$40,000 or \$50,000, they would gladly pay him a 3 per cent. commission. Afterwards, and before the transaction was closed, the plaintiff expressed a willingness to reduce the commission to $1\frac{1}{2}$ per cent. The plaintiff introduced Mr. Johnson to a Mr. Norton, who represented the purchaser, and the negotiation between Johnson and Norton was commenced in the plaintiff's presence. Subsequently it was continued in his absence, and resulted in

the sale being carried through April 13, 1901, in pursuance of an option given by the defendant to Norton on February 11th. At or about the time of the conclusion of the transaction, a conversation took place between the plaintiff and Johnson in which the latter objected to paying the plaintiff 3 per cent. upon the amount realized by the defendant upon the sale, but verbally promised to pay \$500, which the plaintiff agreed to accept. The sale in question included a piece of real estate upon which the defendant's factory was situate, and the stock of goods and other personal property pertaining to its business. The testimony of the plaintiff renders it clear (and there is nothing to the contrary in the case) that the agreement between him and Messrs. Whitfield and Johnson contemplated the negotiation of the sale of the entire property, together, for a single consideration, and the payment to the plaintiff of a commission upon the entire consideration. Such was the plaintiff's case. There was nothing in writing to show that the plaintiff was authorized to negotiate the sale, nor to show the rate of commission to which he was entitled. The defendant called as witnesses both Johnson and Whitfield, and they denied that the plaintiff had been employed to negotiate the sale in behalf of the defendant, denied that he had been promised any commission, denied that either of them was authorized to employ the plaintiff or to agree to pay him commissions, denied that the plaintiff negotiated the sale, and denied that he had been promised \$500, or any sum, in settlement of his claim. In order to prove the sale made by the defendant to the representative of the American Can Company, the plaintiff offered in evidence a written stipulation signed by the attorneys of both parties, of which the following is a copy: "It is hereby stipulated by and between the counsel of the respective parties, the plaintiff and the defendant, that the following facts are hereby agreed upon and taken as true in the trial of this cause, to wit: The Phenix Art Metal Company sold and conveyed their manufacturing plant, to wit, the land and premises on Spring street, in the city of New Brunswick, New Jersey, the stock of goods manufactured and in process of manufacture therein contained, and the good will of their business, all together, to one D. Wylie McCaughey, for the sum of sixty-four thousand dollars (\$64,000), on March 30, 1901, in pursuance of a certain option executed and given to one Edward Norton on February 11, 1901. Production of evidence showing such option, sale, and conveyance is hereby waived." Plaintiff also introduced in evidence the deed from the defendant to McCaughey, dated March 13, 1901, conveying the real estate in question, with the factory, manufacturing plant, machinery, and fixtures therein, for a consideration, as expressed, of "one hundred dollars, lawful money of the United States, and other valu-

able considerations." The court directed a verdict for the defendant on the ground that the alleged agreement between the plaintiff and the representatives of the defendant for a commission of 3 per cent. upon the purchase price, the offer to accept $1\frac{1}{2}$ per cent., instead of 3 per cent., and the alleged promise by the defendant's representatives to pay \$500 for the services performed, alike related to a sale of both real and personal estate, as a single transaction and for an entire consideration, not apportioned by the parties, and not capable of apportionment, under the evidence, and that since, under section 10 of the statute of frauds (Gen. St. p. 1604), an agreement for commission upon the sale of real estate, not being in writing, is void, the statute vitiated the entire agreement.

This view of the matter was undoubtedly correct, so far as respects the claim of the plaintiff for a recovery upon the alleged contract. In 1 Par. on Contracts, bk. 2, c. 1, § 11 (5th Ed.) p. 455, it is said: "Where the consideration is entire and incapable of severance, then it must be wholly good or wholly bad. If the agreement be entire, and not in writing, and a part of it relate to a matter which by the statute of frauds should be promised in writing, such part, being void, avoids the whole contract." And in 3 Par. on Contracts, pt. 2, c. 5 (5th Ed.) p. 17, it is said: "If a contract be in its nature entire, and in one part it satisfies the statute, and in others does not, then it is altogether void." The circumstances of this case render it clear that the contract was indivisible, and the contract an entire one. Counsel for the plaintiff claimed below, and claims here, that, as the deed of April 13th mentioned \$100 as the consideration for the conveyance of the real estate, the balance of the \$64,000 must, as against defendant, be taken to be the price at which the personalty was sold. This view is untenable, for the land was conveyed in consideration of "\$100 and other valuable considerations." The effect of section 10 of the statute of frauds is to vitiate the alleged verbal promise to pay \$500, made after the services were rendered, as well as the contract for a percentage alleged to have been made in advance. The supposed consideration for the subsequent promise was the performance of an entire service, of which a material and inseparable part was of a kind that by the express terms of the statute did not entitle the plaintiff to compensation in the absence of a written agreement. There was at most, therefore, a mere moral obligation to pay; and such an obligation, as an executed consideration, is not sufficient to support a subsequent express promise. *Freeman v. Robinson*, 38 N. J. Law, 383, 20 Am. Rep. 399. But even if we could assume a legal consideration, the question remains, by what evidence is the subsequent promise to be proved? Here, again, comes in the express prohibition of the statute of frauds, declaring that the bro-

ker shall not be entitled to any commission unless he have written authority to sell, specifying the rate of commission. It would be a manifest evasion of the statute to permit a plaintiff to rely upon a subsequent verbal promise, instead of an antecedent verbal promise. In our view, section 10 must be enforced according to its plain letter and spirit; and a verbal promise, whenever made, will not confer a right to compensation, since the statute prescribes that it shall require a written engagement to create such a right.

In support of the validity of the verbal promise to pay \$500, the plaintiff in error cites the case of *Griffith v. Daly*, 56 N. J. Law, 466, 29 Atl. 169. But the facts of that case were essentially different from those here presented. There the plaintiff happened to be a real estate broker, but it was not for a broker's services that he sued. The bargain in that case was not to pay the plaintiff for selling the property, or for negotiating a sale. He was a mere intermediary of the defendant in employing an auctioneer to make a public sale, and for these services there was a promise to pay him 2 per cent., including the services of the auctioneer. The defendant, by a private sale, negotiated before the date set for the auction, prevented the plaintiff from carrying out his contract; and this court held that upon that breach the plaintiff became entitled to damages, and that this furnished an adequate consideration for defendant's express verbal promise to pay to the plaintiff 2 per cent. of the price realized at the private sale.

Nor can the plaintiff succeed at this time upon the assertion of his right to be rewarded according to a quantum meruit for the value of his services so far as they related to the negotiation of the sale of the personal property. It is true that the second count of his declaration was broad enough to have enabled him to claim a quantum meruit on the theory that the alleged contract was void. But by the express terms of his bill of particulars he limited the general averments of the declaration in such a manner as to confine his claim, for the purposes of trial, to a recovery upon the contract. By the terms of section 237 of the practice act, as uniformly construed, the plaintiff is bound by his bill of particulars, unless he be permitted to amend it. No amendment was made, nor was application for the purpose made at the trial. On the contrary, the case was tried solely on the theory that the verbal contract was the basis of the action, and upon the plaintiff's insistence that that contract was either valid in toto, or, if not, that it was divisible, and that a recovery could be had under it for commissions upon sale of the personal property. Not only was the proof of the plaintiff wholly directed to this issue, but no evidence was introduced tending to show the value of his services in nego-

tiation for sale of the personal property. Upon the conclusion of the case, plaintiff's counsel requested the trial judge to submit to the jury the question of the validity of the contract, whether the sale was consummated as the result of it, what moneys were realized from that sale for the personal property, and what commission the plaintiff was entitled to thereon. Plaintiff presented seven additional requests in writing, all of which related either to the validity of the contract so far as it pertained to personal property, or to the apportionment of the consideration obtained for the personal property and for the realty, respectively, in order that a recovery might be had under the contract for commission upon the personalty. No foundation having been laid in the evidence for an apportionment of the consideration, the court was not called upon to comply with those requests; much less to submit the case to the jury, in the absence of a request so to do, on the theory that there could be a recovery upon a quantum meruit. In short, the plaintiff brought the defendant into court to answer to a claim made upon an express contract, and upon that alone; that was the issue tried below; that issue was properly adjudicated; and, on familiar principles, we are prohibited from reversing the judgment upon the theory that, if another issue had been presented and tried, it might have resulted in favor of the plaintiff. Amendments of the proceedings are made at the instance of the parties in the cause. A trial judge is not permitted, much less required, to make such amendments in the absence of a motion. Under our liberal statutory provision (Gen. St. p. 2556, § 138), it is common practice for the court of review to make such amendments as may be necessary to sustain the conclusion reached by the court below, if it appear that the real question in controversy has been fully and fairly tried and correctly settled. *Price v. N. J. R. & Transp. Co.*, 31 N. J. Law, 229, 233, 234; *American Life Ins. Co. v. Day*, 39 N. J. Law, 89, 23 Am. Rep. 198; *Ware v. Millville Fire Ins. Co.*, 45 N. J. Law, 177; *Excelsior Electric Co. v. Sweet*, 57 N. J. Law, 224, 30 Atl. 553; *Id.*, 59 N. J. Law, 441, 31 Atl. 721. But it is another and a very different matter to grant an amendment in the court of review in order to lay the foundation for a reversal and venire de novo, and thereby enable a party who was properly defeated upon the issues as made up and tried to frame a new issue, in the hope of a result more favorable to him. To permit such an amendment in the present case, no application to amend having been made in the court below, would, we think, be quite unjustifiable. If, therefore, the argument of counsel for the plaintiff in error in this court may be deemed to imply a request for an amendment negating the validity of the contract, to answer which he brought the defendant to trial, and thereupon setting up a claim on quantum

meruit that depends upon the nonexistence of such a contract, we are constrained to deny the request.

The judgment under review must be affirmed.

(65 N. J. E. 258)

GALLAGHER et al. v. ASPHALT CO. OF AMERICA.

(Court of Chancery of New Jersey. June 22, 1903.)

INSOLVENT CORPORATIONS—ACTIONS TO RESTRAIN EXERCISE OF FRANCHISE—NATURE OF SUIT—FEDERAL COURTS—JURISDICTION.

1. Where a corporation, by pledging its stocks and securities to a trust company, procures the issuance of certificates based on its assets, and agrees to pay a sum semiannually to the trust company for distribution among the certificate holders, such holders are creditors of the corporation, entitled under Insolvent Corporation Act 1829, relating to the prevention of fraud by incorporated companies, to institute proceeding to enjoin it from exercising its franchises.

2. A bill by a creditor, under Insolvent Corporation Act 1829 (P. L. p. 58), entitled "An act to prevent fraud by incorporated companies," to enjoin a corporation from the exercise of its franchise, will not be dismissed on the ground that it shows proceedings in the United States Circuit Court in New Jersey, instituted by a creditor against the corporation, based on diversity of citizenship, in which the federal court has taken full jurisdiction and control over the assets of the corporation, and has placed them in the hands of a receiver for distribution among the creditors, since the action under the insolvent corporation act is essentially a proceeding to fix the status of a corporation with reference to the exercise of its franchises, and the matter in dispute is not pecuniary in its nature, so as to confer jurisdiction on the federal court because of diversity of citizenship.

Bill by Hannah V. Gallagher and others against the Asphalt Company of America to enjoin defendant from exercising its franchise. Motion to dismiss bill denied.

Carrick & Wortendyke, Julien T. Davies, and A. H. Wintersteen, for the motion. Charles E. Hendrickson, Jr., John Griffin, and James W. M. Newlin, opposed.

STEVENSON, V. C. There are two grounds specified as the basis of the motion to dismiss the bill. The first ground is that the complainants have not the necessary qualification under our statute to maintain this suit. The bill is filed under our insolvent corporation act—the old act, first passed in 1829, entitled "An act to prevent fraud by incorporated companies" (P. L. p. 58). It sets forth, as I recall it now, with sufficient distinctness, the two jurisdictional facts, namely, that the defendant corporation, the Asphalt Company of America, is insolvent, and that it is not about to resume its business with advantage to the stockholders and safety to the public. It prays for a decree or decretal order that the corporation be enjoined from the exercise of its franchises; and the bill also contains the usual prayer in such cases, which may or may not be

granted, that a receiver be appointed to collect and administer the assets of the corporation. The bill contains other important allegations, which constitute an independent ground, the second ground upon which the defendants base their motion to dismiss the bill; but I shall refer to those allegations further on.

Now, the first objection, as I have said, is that the complainants are not shown by the bill to have the necessary capacity under our statute to institute the suit—to maintain the suit. It is claimed that the bill fails to show that they are what they call themselves, namely, creditors of the Asphalt Company of America. Without the documents before me, and without having looked at them for several weeks now, I shall not undertake to deal minutely with the arguments and reasons which have led me to the conclusion that this objection is not well taken. I think that the bill does disclose that the complainants, who invoke this jurisdiction of the court, stand as creditors of the Asphalt Company of America, according to their own showing in their bill. The meaning of the word "creditor," as used in our statute in defining the classes of persons who are authorized to maintain this statutory proceeding, has been discussed in several cases. *Rosenbaum v. U. S. Credit System Co.*, 61 N. J. Law, 543, 40 Atl. 591; *Fort Wayne Electric Co. v. Franklin Electric Light Co.*, 57 N. J. Eq. 16, 41 Atl. 217; *Spader v. Mural Decoration Mfg. Co.*, 47 N. J. Eq. 18, 20 Atl. 378; *Bolles v. Crescent Drug Co.*, 53 N. J. Eq. 615, 32 Atl. 1061. See, also, *N. J. Ins. Co. v. Meeker*, 37 N. J. Law, 282. It is settled that the word "creditor" is not used in our statute in a narrow, technical sense. It is used in a broad sense; and I think it is safe to say that the general intention is that, if a party is so related to the corporation and its assets as to be entitled to a share of what is divided among creditors—if the party can come into the proceedings as a claimant, and prove his claim, so as to be entitled to a dividend—it must be generally true that he is qualified as a creditor to institute the proceedings which result in the distribution of the assets in part to himself.

But in this case it is not necessary to lay down so broad a rule as that in order to find that the complainants are qualified as creditors. The Asphalt Company of America entered into direct contract obligations with the Land Title & Trust Company of Philadelphia, a corporation under the laws of Pennsylvania—the company which issued \$30,000,000 of trustee certificates based upon the assets of the Asphalt Company of America pledged to it. I say the Asphalt Company of America entered into direct contract obligations with the Trust Company, for the benefit of these certificate holders, and the complainants are certificate holders. I recall one of these pecuniary obligations, which of itself alone seems to me is sufficient to

make it clear that the status of the certificate holders is that of creditors within the purview of this act. The Asphalt Company of America, in their contract with the Trust Company, in which provision is made for the pledging of these stocks and bonds and securities of the Asphalt Company, and the issuing by the Trust Company of certificates to the extent of \$30,000,000, secured by these stocks and bonds, covenants with the Trust Company to pay an amount of money, which is about \$750,000, semiannually, to the Trust Company, for distribution among the certificate holders. Here is a contract made by the Asphalt Company with the Trust Company solely for the benefit of the certificate holders, and the Trust Company agrees, on its part, that it will send out checks semiannually distributing this fund. The Asphalt Company has broken this covenant. The money due to the complainants is unpaid. Here we have, therefore, the certificate holders not only holding a claim which is plainly provable by them in the insolvency proceedings, so as to entitle them to a dividend from the assets of the Asphalt Company, but we have that claim based directly upon a contract obligation of the corporation made solely for their benefit with their trustee.

Now, an examination of the decisions to which I have referred, I think, will establish beyond question that these certificate holders, holding this sort of a claim, based upon this sort of a contract of the corporation, are creditors within the meaning of the act, and have a right to institute this proceeding. I may add, in concluding this part of the case, that technicalities are disregarded in dealing with the relation of the assets of an insolvent corporation to the persons who are entitled thereto. As a rule, the persons entitled can come into the court in their own names and take possession, and have control, rather, of their own property, and receive directly the dividend that is due. The objection under consideration may, I think, be disposed of briefly by the proposition that the complainants, as equitable creditors of the corporation, are as safely within the meaning of the term "creditor," as used in our statute, as if their debts were recoverable in an action at law.

The second objection made to this bill is that it sets forth proceedings in the United States Circuit Court for the District of New Jersey, instituted by the Land Title & Trust Company of Pennsylvania against the Asphalt Company of America, the suit being based upon diversity of citizenship, in which suit the Circuit Court of the United States has taken full jurisdiction of the parties, and full jurisdiction and control over all the assets of the Asphalt Company of America, and has placed those assets for distribution among the creditors of the Asphalt Company of America in the hands of a receiver appointed by it, the United States Circuit Court,

The objection is made that the entire jurisdiction of the court of chancery of New Jersey, which is exercisable under our statute, has already been exercised by the United States Circuit Court, and that, therefore, this court is as powerless to act as if a month ago, or three months ago, this corporation had been found by this court to be insolvent, and not about to resume its business with advantage to the stockholders and safety to the public, and thereupon a decree had been made for this very same statutory injunction.

The question is whether the United States Circuit Court has, in fact, undertaken to exercise the jurisdiction of the court of chancery under this particular statute, basing its power to exercise such jurisdiction upon diversity of citizenship. This subject has been argued at great length, with great learning and acuteness on both sides. The subject, perhaps, can be considered under two headings: First, whether the United States Circuit Court in fact is clothed with jurisdiction under our statute, where there is diversity of citizenship; and, second, whether in fact the United States Circuit Court has undertaken to exercise our statutory jurisdiction in this particular case.

It is argued on behalf of the complainants that the United States Circuit Court has no jurisdiction—can acquire none—based upon diversity of citizenship, to administer the relief provided for in our act. I regret that I have no notes, and that my grasp of the details of this argument has been now so much relaxed; but I think I can indicate for present purposes the main reasons for the conclusion which I have reached on this very important question. I call it an important question, although I do not think it has the practical importance in this particular case which counsel on each side have supposed.

The record from the United States Circuit Court, which is exhibited by the amended bill, shows that the complainant in that case, the Land Title & Trust Company, came into that court as a creditor of the Asphalt Company of America, the defendant corporation. The bill contains the necessary allegations under our act to found the jurisdiction of the court of chancery. It prays for an injunction restraining the corporation from the exercise of its franchises. It also prays for a receiver. The record shows that upon the presentation of that bill the corporation voluntarily appeared in the United States Circuit Court and presented an answer, admitting the allegations of the bill, and that the corporation consented to the appointment of a receiver. The record further shows that a decree was made by the United States Circuit Court upon this bill and answer and this consent—a decree which is wholly by consent, and which may have derived all its force from the consent of the defendant corporation—adjudging the corporation insolvent, directing an injunction forbidding it to exercise its franchises, and appointing a receiver; and in respect of

the details and form of this decree it is precisely such a decree as would be proper in the exercise of the jurisdiction created by our New Jersey statute. The decree even directs that the receiver shall take the oath prescribed by our statute.

But the form of the decree is a matter of very little consequence in this case, in endeavoring to ascertain precisely what the United States Circuit Court undertook to do—what it intended to do. The decree presumably was drawn by counsel for complainant, was consented to by the defendant, was signed as a matter of course by the learned judge of the United States Circuit Court. If the defendant corporation saw fit to consent that it should be enjoined from the exercise of its franchises, there was no reason why the court should hesitate to sign such a decree. If the party complainant, for whom the decree was drafted, inserted therein a provision that the receiver should take an oath prescribed by the New Jersey statute, and if the defendant corporation assented to that feature of the decree, as it did in this case, there was no reason why the learned judge should examine the decree minutely, and determine whether it was strictly proper and germane to the real proceedings in his court to have such a provision inserted. The decree would be signed as a matter of course. We are obliged, therefore, to go beyond the form of the decree, in order to ascertain precisely what jurisdiction the United States Circuit Court exercised in this case. After giving the subject the very best attention that was possible on my part, aided by the exhaustive and learned and satisfactory briefs and arguments to which I have referred, I have reached the conclusion that the United States Circuit Court did not undertake to exercise the jurisdiction conferred by the New Jersey statute upon the court of chancery, but undertook to exercise, and did exercise, an entirely distinct jurisdiction, which has been evolved by the decisions of the federal courts during a series of years. And this peculiar jurisdiction seems to be unlike any equitable jurisdiction—general equity jurisdiction—that exists in the state of New Jersey.

The doctrine is established in a series of federal decisions that the assets of an insolvent corporation constitute a trust fund for creditors. This doctrine was announced a great many years ago by Judge Story. It has been very much criticised. Prof. Pomeroy refers to the doctrine as one based upon analogy and metaphor. 2 Pom. Eq. § 1046. But this theory that the ordinary general assets of an insolvent corporation are a trust fund for creditors has been worked out in the federal courts so as to establish a somewhat unique branch of equity jurisdiction. And this is the peculiar situation to which the doctrine has been applied, and which is fully illustrated in this case in the United States Circuit Court for the District of New Jersey: A general creditor, who presumably

would be regarded as a beneficiary of the trust fund, has no power to come into a federal court with a bill in order to have the trust fund, the assets of the insolvent corporation, of which he is a beneficiary, administered for his protection. He has no power to file a bill to prevent the corporation from dissipating the assets, and to get a trustee, who will act for him and his co-beneficiaries, installed and placed in the possession of the trust fund. The doctrine that the assets are a trust fund is not sufficiently potent to enable the beneficiary to get such relief. But he can come into court as a creditor who has exhausted his remedy at law, alleging his judgment, his execution, the return of the execution unsatisfied, and thereupon, through a creditors' bill, the court will, of course, take cognizance of his grievance and seize the assets of the corporation. But here the peculiarity of the doctrine as worked out comes in: that although that sort of a creditors' suit is generally maintainable for the benefit of the complainant, and the common allegation in the complainant's bill that he files his bill for the benefit of all other creditors is mere surplusage, as Vice Chancellor Pitney recently pointed out—the case is *lauch v. De Socarras*, 58 N. J. Eq. 524, 39 Atl. 381—I say, although, according to the equitable theories that we recognize here, a creditor coming into a court of equity with such a bill would act for himself, and would be protected and preferred by the decree of the court, such is not the case as this trust fund doctrine has been wrought out in the federal courts. The court undertakes to seize and sequester the assets of the corporation, but it does it then for the benefit of all the creditors of the corporation. Mr. Justice Brewer points out this peculiar feature, or indicates it, in a recent opinion in the United States Supreme Court. The whole efficiency of the doctrine that these assets are a trust fund for creditors is found only when a creditor has come in, not directly as a beneficiary of the trust fund, but in a different capacity, in the guise of a creditor who has exhausted his remedy at law and who is seeking to get a preferential payment, for that is what it amounts to—getting a sequestration of the assets for the payment of his debt, to the exclusion of anybody else. But right at this point the federal court stops the creditor, and says: "You have now qualified yourself to come into court in one capacity, but you are confronted by the trust fund doctrine, and while you can get some relief, the same relief—equal relief—will be accorded to all your co-beneficiaries, all the creditors."

One of the most interesting features of this application of the theory that, unlike the case of a natural person, when a corporation becomes insolvent, immediately some sort of a trust is fastened upon its assets for the equal benefit of its creditors, is exhibited in the essential basis of this novel suit, which recognizes and enforces the so-called trust.

The complainant cannot come into court as a beneficiary, as I have heretofore remarked. He must come in as a judgment creditor, who has exhausted his own personal remedy at law. If by judgment, execution, and levy upon all these assets of the insolvent corporation—this so-called trust fund—he can satisfy his debt in preference to all his co-beneficiaries, and even to the exclusion of them all, then he is turned out of the court of equity. The court of equity has no jurisdiction. The court of equity says to him: "You cannot have this trust fund administered for the equal benefit of yourself and your co-beneficiaries, because you have not proceeded at law to absorb all that part of the trust fund which is leviable, and appropriate it to yourself as you might have done by a judgment and execution." So far as I am aware, we do not recognize in New Jersey any original principle of equity jurisprudence which fastens upon the assets of a corporation, upon its becoming insolvent, eo instante, a trust for the equal benefit of all the creditors of the corporation. We do have, however, certain statutes which provide in certain instances and under certain conditions for the equal distribution of the assets of an insolvent corporation, and prevent creditors of the corporation from obtaining preferences; but this result has been wholly reached by legislation which brings about a condition of things, a relation of the assets of the insolvent corporation to its creditors, which by metaphor and analogy, as Prof. Pomeroy says, may be called a "trust." A trust does not produce, however, the equality among creditors as beneficiaries of the trust. The statutory provision produces equality, from which a result is reached which is in effect the same as if a trust existed.

In 1825 the Legislature of New York passed an important statute, to which I shall refer again, regulating in many different respects the rights and liabilities of banking and other corporations of that state. One section of this long statute regulates the creditors' bill filed in aid of execution against a defendant corporation, and enacts the very rule which the federal courts have evolved with reference to the distribution of the assets of the corporation which the court in such a suit is asked by the complainant to sequester. In the case of *Morgan v. N. Y. & Albany Railroad Co.*, 10 Paige, 290, 40 Am. Dec. 244, decided in 1843, eight years after this New York statute was enacted, Chancellor Walworth held that the section above referred to "adopted the principle as to insolvent corporations that equality among creditors is equity." The New York chancellor does not intimate that, apart from this statute, any such principle of equality, growing out of the idea that the assets of an insolvent corporation were a trust fund, would restrain the diligent creditor from appropriating those assets to the preferential payment of his debt.

In New Jersey an insolvent corporation, in the absence of express statutory prohibition, has the same dominion over its assets that an insolvent natural person possesses. It can exercise its power by preferring creditors, which seems to be inconsistent with the proposition that the assets of an insolvent corporation are impressed with a trust for the equal benefit of all its creditors. The Legislature at the present time prohibits such preferences, and creates a condition which under some circumstances yields to all the creditors the same advantages as if a trust for their equal benefit were impressed upon the assets. But, nevertheless, to-day (as well as at all times heretofore) the diligent creditor of a corporation can recover a judgment against it, and have all its leviable assets, which, perhaps, would include all its assets, sold for his benefit. This same diligent creditor, in case he fails to satisfy his debt through an execution upon his judgment, can file a bill in the court of chancery under its general equity jurisdiction to reach leviable assets fraudulently conveyed or concealed, and thus he can get a preference out of the so-called trust property.

When the jurisdiction of the court of chancery in aid of execution was extended by a statute passed in 1845 (Laws 1845, p. 141), so as to permit a creditor who had exhausted his remedy at law to come into equity and secure the appropriation of the nonleviable assets of the judgment debtor, the suit was for the benefit of the complainant, the judgment creditor, and he obtained a preference thereby. This act was meager and did not expressly authorize a receivership. A supplement was passed in 1864 (Laws 1864, p. 704), greatly enlarging the remedies of the judgment creditor, and providing, among other things, that it should be lawful for the chancellor to make an order requiring the judgment debtor to appear and make discovery on oath concerning his property and things in action before a master, etc. These statutes were combined in subsequent revisions of the chancery act, and in the case of *Mallory v. Kirkpatrick* (1895) 54 N. J. Eq. 50, 58, 33 Atl. 205, the opinion is expressed that at the present time the statute as a whole "applies only to natural persons as defendants who may be called upon to be examined under oath, and has no application to a corporation." Assuming this to be the correct construction of the act in its present form, the inability of a judgment creditor of an insolvent corporation to reach the nonleviable assets of the corporation by a creditors' bill under the act is not the result of any trust theory which stands in his way, but merely results from the fact that the machinery of the statute is not applicable to the particular case of a corporation defendant. It may be conceded that this situation is created, or rather left, by the statute, if such is the situation, in order to encourage the equal distribution of the assets of insolvent

corporations under the statute provided specially for that case.

In 1850 the Legislature provided for summary proceedings in our courts of law in aid of execution. Laws 1850, p. 801. In regard to this statute, however, there could be no question. An essential part of the machinery which it provided was an order "requiring the judgment debtor to appear and make discovery on oath concerning his property and things in action" before a judge or Supreme Court commissioner. In the case of *Conner v. Todd*, 48 N. J. Law, 361, 7 Atl. 477, the Court of Errors and Appeals decided in 1886 that the statute, which by that time had been incorporated into the act respecting executions (Revision, pp. 389, 393, § 23), was "adapted to the case of judgments against natural persons," and not to the case of corporations. The Legislature, however, soon after amended the statute, so as to expressly bring within its operation the case of a corporation defendant. Laws 1893, p. 450; 2 Gen. St. p. 1423, § 41. Here we have the Legislature of the state distinctly receding from the general policy and trend of its prior enactments. "The principle, as to insolvent corporations, that equality among creditors is equity," is abandoned, and the diligent creditor is aided in getting a preferential payment of his debt.

There are instances, as I have intimated, where statutes of New Jersey operate to procure an equal and pro rata distribution of the assets of an insolvent corporation among its creditors. This equality, however, is the creation of the statute, not of any trust theory. The condition which by metaphor and analogy can be described as a trust is the direct result of positive legislation. The most conspicuous illustration of this sort of legislation is the statute under which the bill in this case is filed—our present insolvent corporation act, first passed in 1829. Creditors of an insolvent corporation may get preferences in various ways, as I have heretofore stated, to the utter destruction of any condition of affairs which could properly be deemed to include a trust for the benefit of all the creditors. If, however, no preference is obtained—if a creditor or stockholder has recourse to the statute under which this present suit is brought—then equality among all the creditors is rigidly prescribed in respect of the distribution of the corporate assets, and the creditors of the corporation practically have the same result as if there had been a trust. In the case of the liability of stockholders on their unpaid subscriptions, our statute creating or defining that liability was held by the Court of Errors and Appeals, in the leading case of *Wetherbee v. Baker* (1882) 35 N. J. Eq. 501, to produce equality among the corporation creditors, because the liability under the statute could not be enforced without an administration of all the assets of the corporation, their application to the payment of the entire mass of corporate in-

debtedness, and the ascertainment of the deficiency for which the stock subscribers should respond. Here, again, the condition of equality which gives the creditors an advantage similar to that which a trust would give them is the creation of a statute, and not an application of any general principle of equity jurisprudence.

I think it is safe to say that in New Jersey, apart from the direct effect of statutes, an insolvent corporation has the same dominion over its assets, and its creditors have the same power to reach those assets for the payment of their claims, that we find exhibited in the case of an insolvent natural person. The modifications and limitations of this dominion of the corporation over its property, and of this power of the creditors to reach that property preferentially, are derived from our statutes, and not from any theory that, immediately upon the insolvency of a corporation, anything that can properly be described as a trust is created in respect of the corporation assets. Of course, when by reason of insolvency, or of the dissolution of a corporation, or from any other cause, the assets of the corporation are placed in the possession of a receiver, or have become vested in him by law, a trust of a high character at once is created. But neither the insolvency or other condition of the company, nor the commencement of a suit to establish a receivership and the trust connected therewith, has the effect to establish such trust. I am not undertaking to criticise the equity jurisprudence which has been evolved by the federal courts. My object is simply to point out that this record from the United States Circuit Court, if construed as based upon the laws of New Jersey, must, of necessity, it seems to me, be deemed to present the statutory suit under our insolvent corporation act—precisely the same suit as the one now before this court. The delicate question would then arise whether the court of chancery of New Jersey would inquire whether the United States Circuit Court had exceeded its jurisdiction, and had assumed to take jurisdiction of a statutory suit or proceeding under the laws of New Jersey, exclusively within the cognizance of the New Jersey courts. No such question, however, is necessarily presented, because, as we have seen, the federal court had ample jurisdiction to sequester by means of a receiver all the assets of this insolvent corporation and distribute them equally among its creditors, and in aid of that jurisdiction to control the corporation by means of any appropriate injunction.

It may be noticed that the record from the United States Circuit Court does not disclose any judgment at law recovered by the complainant, or any unsatisfied execution to prove that the complainant had exhausted its remedy at law. But this only illustrates the very last touch, the final development, of the federal doctrine under which the federal courts of equity get jurisdiction to distribute

the assets of an insolvent corporation equally among all its creditors. The fact that the complainant has not exhausted his remedy at law through judgment and execution is held by the federal courts to be a matter of defense which the defendant corporation may waive. It is optional with the insolvent corporation to defeat the effort of its creditor to procure an equal distribution of its assets among all its creditors until he (the moving creditor) shall have appropriated to himself by judgment and execution at law all the leviable assets. In this instance the waiver, under the authority of the federal decisions, was absolute and complete when the defendant corporation came into court, in answer to a bill which did not allege either a judgment or unsatisfied execution, and by answer failed to set up this defense, but admitted its insolvency, and then afterwards in open court consented to the decree for an injunction and a receiver, which was thereupon entered. One of the latest cases, and perhaps now the leading case, in the United States Supreme Court, which sustains the principles of federal equity jurisprudence to which I have referred, and most amply sustains the jurisdiction of the Circuit Court of the United States in this case of *Land Title & Trust Company v. Asphalt Company of America*, is the case of *Hollins v. Brierfield Company* (1893) 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, in which many prior cases are cited and discussed. These decisions show that the United States Circuit Court had most absolute and complete jurisdiction on the bill and answer presented to it, accompanied by the consent and waiver of the defendant, to sequester all the assets of this insolvent corporation by means of a receiver, and to distribute those assets equally and ratably among all the creditors of the corporation, and, of course, to enjoin the corporation from dissipating these assets, or doing anything which would interfere with their administration under the direction of the court.

The fact that no jurisdiction over the assets of an insolvent corporation, as distinguished from a natural person, apart from our statutes, is vested in the court of chancery of New Jersey, if such be the case, as I believe it to be, does not in any way affect the jurisdiction of the federal equity court. Long ago the federal courts abandoned the idea that, where their jurisdiction is based upon diversity of citizenship, the sole object of the Constitution of the United States in conferring such jurisdiction was to provide an impartial tribunal for the administration of precisely the same law which the state courts otherwise would administer under temptations to favor their own citizens. Over a wide field of jurisprudence the federal courts exercise their judicial powers, unrestrained by the law of judicial decision evolved through the instrumentality of the state courts. Thus we oftentimes have this

very curious result: that in a suit between a citizen of New York and a citizen of New Jersey, if the suit is tried in the Supreme Court of New Jersey, the decision may be one way, and if tried in the Supreme Court of New York the decision may be precisely the same, and yet, if it is tried in the United States Circuit Court, either in New York or in New Jersey, the decision may be in an opposite way. But with this we have nothing to do. The federal equity courts have distinctly established the jurisdiction which I have endeavored to describe; and in the arguments in this case all these federal cases were cited to sustain the jurisdiction of the United States Circuit Court in this suit of *Land Title & Trust Co. v. Asphalt Co. of America*. But it is plain that these cases sustain the jurisdiction, not because the same is based or can be based upon our New Jersey insolvent corporation law, but because the facts of the case—the essential facts, apart from the mere color given to those facts in the pleadings and decree—bring the case directly within the operation of this trust fund theory, and call for the exercise of this unique and peculiar jurisdiction of the federal court of equity over the assets of an insolvent corporation.

In regard to those features of this record of the United States Circuit Court which belong only to a suit under our insolvent corporation act, and are not proper or germane to a creditors' suit under the trust fund theory, it is enough to say that it seems apparent that the counsel for the complainants supposed that he was invoking the jurisdiction created by our statute, and not the jurisdiction which has been set forth and defended in the argument before this court, and upon which the defendants in this case have largely depended in order to maintain their position. The form of the proceedings in the United States Circuit Court was of course determined by the counsel for the complainant in that case. If the corporation defendant saw fit to consent to a wider injunction than the requirements of the case demanded—an injunction in the form prescribed by our New Jersey statute, restraining it from the exercise of its franchises—there is no reason why the United States Circuit Court should have declined to allow the injunction to go in that form.

It must be conceded that the question whether the United States Circuit Court for the District of New Jersey can take jurisdiction of our statutory action for winding up an insolvent corporation is a federal question, to be settled by the decisions of the federal courts, and ultimately by the Supreme Court of the United States. If the learned judge of the United States District Court in this case had by a written opinion or otherwise manifested that he consciously intended to exercise in the case before him the jurisdiction created by our New Jersey statute, instead of exercising the perfectly plain

jurisdiction which the federal decisions have wrought out and thoroughly founded, his opinion would be entitled to the greatest degree of respect, and might be regarded by this court as controlling the situation here. But he made no such deliverance, and I cannot impute any such opinion to him. He had a wide enough jurisdiction for the requirements of the case before him based upon these decisions of the federal courts, especially the United States Supreme Court, to which I have referred, and in my opinion he exercised that jurisdiction, and no other. This court cannot find, because of the insertion of certain provisions in this decree by consent, that the learned judge went beyond the perfectly plain jurisdiction which he could exercise, and entered into an unknown field, and undertook to exercise a special jurisdiction under a statute of New Jersey passed over 70 years ago, which, so far as the combined researches of counsel and of the court have disclosed, has never been attempted by any other federal judge.

I shall now endeavor as briefly as possible to state some of the reasons why, as it seems to me, notwithstanding the form of this record from the United States Circuit Court, the true conclusion is that that court has no jurisdiction of the suit in equity provided by our statute against an insolvent corporation, and consequently the learned judge of that court in the case above referred to did not undertake to exercise such jurisdiction. My conclusions on this subject were reached after careful consideration, with the aid of the exhaustive and able arguments of counsel; but I regret that many matters of detail have now gone from my mind.

The first subject which calls for attention is the exact nature of the proceeding under our statute, under the act of 1829 (P. L. p. 58), entitled "An act to prevent fraud by incorporated companies." Both sides, I think, conducted their argument somewhat under a misconception in regard to the nature of this act, or, at least, upon the idea that the suit brought under that act is an action for a receiver—an action necessarily to reach assets and effect their distribution through a receiver. I do not find that that is the main purpose and object of our statute, and the history of our statute strongly indicates that that view is erroneous. In my opinion, our statute, originally passed, as I said, in 1829, provides for a proceeding more in the nature of a *quo warranto* than of a creditors' bill. It provides for a proceeding which can be pursued to a finish, even though the corporation has no assets whatever. Whether a receiver shall be appointed under our statute, or not, is wholly discretionary with the court, and the receivership is not the essential object of the suit. The discretionary power to appoint a receiver can only be exercised at the time the injunction is ordered, or at some time thereafter. The receivership is purely ancillary

to the principal relief, and in the original act of 1829, as in our present corporation act, is provided for in a subsequent section to that which provides for the injunction as the principal object of the suit.

Our statute of 1829 was modeled largely upon the New York statute passed in 1825, to which I have already referred. This act was entitled "An act to prevent fraudulent bankruptcies by incorporated companies, to facilitate proceedings against them, and for other purposes" (Sess. Laws N. Y. 1825, c. 325, p. 448), and it embraced a variety of provisions of very great importance affecting various classes of corporations. One section of this act (section 5 [2 Rev. St. pt. 3, c. 8, tit. 4, §§ 36, 37]) I have already referred to as regulating the special case of a creditors' bill in aid of execution filed against a corporation defendant, establishing the principle of equality of distribution in that particular case. Another section (section 17 [2 Rev. St. pt. 3, c. 8, tit. 4, §§ 39, 40]) of this New York statute is evidently the origin of those provisions of our act passed four years later, in 1829, which create the statutory action against an insolvent corporation for an injunction disabling it from exercising its franchises, and in some, or in most, cases including the ancillary proceeding of a receivership for the distribution of the corporate assets. This section, however, of the New York law, was applicable only to incorporated banks. It provided that it should be the duty of the Attorney General of the state, when a bank became insolvent, to apply to the court of chancery for an injunction to restrain the bank from exercising any of its franchises, and from collecting debts, or paying out or transferring moneys or other assets of the corporation. The injunction is in substance precisely the same as that prescribed in our New Jersey act. The section also gave power to the court to appoint a receiver to collect and distribute the assets of the bank among its creditors, such power manifestly being exercisable only when there were assets to collect and distribute, which generally would be the case. But it is noticeable that this New York act, which is the kernel of our New Jersey act, was applicable only to incorporated banks, and the duty was placed upon the Attorney General of the state of enforcing its provisions. However, this law expressly gave the power to any creditor of the bank to maintain the suit, although the relation of the proceeding to the government of the state and the welfare of the whole people is indicated by the imposition upon the Attorney General of the duty to institute it. When this law was revised and embodied in the Revised Statutes of New York—the famous revision and codification of 1829—this special remedy remained confined to the case of banking corporations, but the suit was allowed to be brought either by the Attorney General, on

behalf of the state, or by any creditor or stockholder of the corporation.

The framers of our act in 1829, while no doubt they had the New York act before them as a model, gave a far wider operation to their statute than that which the New York act possessed. They made their statute applicable, not only to insolvent banks, but to all insolvent corporations, excepting a few special kinds. They allowed any stockholder or any creditor to institute a suit. While they failed to impose upon the Attorney General of the state the duty of instituting the suit in a proper case, nevertheless they recognized the interest of the state in the affair by requiring as a jurisdictional fact, not only that the corporation defendant should be insolvent, but that it should be found that the insolvency was of such a character that the corporation was not about to resume its business in a short time thereafter "with safety to the public" as well as advantage to the stockholders. As in the New York act, the direct object of the suit is accomplished by an injunction placing the corporation under disabilities—restraining it from the exercise of any of its franchises. As in the New York act, the receivership is purely discretionary, and, when created, follows the decree for an injunction. A decree for an injunction might go, although there were no assets. The order appointing the receiver could never be made, unless the decree passed at the same time, or had already passed, disabling the corporation by the injunction.

The decree in our statutory suit, as I have stated, is based upon two jurisdictional facts to be found by the court, viz.: First, insolvency of the corporation—I. e., common-law insolvency, not any other kind of insolvency, such as that defined by the United States bankrupt act; and, second, that the corporation is not about to resume its business with advantage to the stockholders and safety to the public. Now, we have got in the habit of calling the decree based on these two jurisdictional facts a decree of insolvency. This seems to me to be a misnomer. It is not a decree of insolvency. Insolvency is one of the jurisdictional facts upon which the decree goes. The decree itself is that the corporation shall be enjoined from the exercise of its franchises. That is the decree. It is often said that our statutory suit is a proceeding in rem—that the status of the corporation is permanently fixed by this decree. True enough. But the status is not the status of a corporation as insolvent. It is the status of a corporation with respect to the exercise of its franchises. The status that is determined and fixed by the decree is that of a corporation under disabilities, enjoined from exercising its franchises. This status corresponds very nearly with that which is established by the ordinary decree or order in the case of proceedings *de lunatico inquirendo*, or in relation to drunkards, spend-

thriffts, etc., which results in placing a natural person under disabilities. This decree under our statute places the corporation under disabilities, and that is the direct object of the suit, and in large numbers of instances of necessity might be the sole result of the suit, although practically a stockholder or creditor of an insolvent corporation would hardly be induced to prosecute a somewhat expensive suit in equity unless, after the direct object of the suit had been obtained, he saw as an incidental result some advantage to himself.

Now, I think it will be perceived that our statutory suit is a proceeding more in the nature of a quo warranto than a creditors' bill for a receivership. In the case of a creditors' bill, the direct object is the sequestration of the assets by a receiver, and any injunction is ancillary to that object. If there are no assets, and consequently no receivership, it would be a strange case which would afford any function for an injunction. On the other hand, in the case of a quo warranto suit, the direct object is to procure a forfeiture of the corporate franchises, practically corporate death; and a receivership, in those states where there can be a receivership in a quo warranto case, is purely ancillary and dependent upon the necessities of the particular case—dependent upon the existence of assets to be received and distributed. That the appointment of a receiver is not the direct object of our statutory suit against an insolvent corporation—that such appointment is purely ancillary, and may or may not be made according to circumstances—follows, it seems to me, from the fact that our statutory suit may be maintained against a corporation which has not a dollar of assets and has no expectation of ever having any.

Take the class of cases of which *Wetherbee v. Baker* is the type, where a creditors' suit is maintained against an insolvent corporation to reach unpaid stock subscriptions. Insolvency, although practically existing in every case, is not a jurisdictional fact. The status of the corporation in respect of the exercise of its franchises is not affected further than some ancillary injunction issued in pursuance of the main object of the suit may have a temporary effect in that direction. But what I want to point out is that, after the whole jurisdiction has been exercised in a case like that of *Wetherbee v. Baker*, the corporation still lives, and is in possession of its franchises, and is liable to this statutory suit to place it under disabilities, and any stockholder or any creditor has power to institute and maintain such a suit, even though there are no assets, all having been distributed in the prior creditors' suit. Suppose a New Jersey corporation is adjudged bankrupt, and all its assets become vested in a trustee in bankruptcy for distribution under the bankruptcy law. The bankruptcy court cannot touch the life of the corporation, or permanently enjoin it from the exercise of its fran-

chises. The jurisdiction of the court of chancery under our statute still remains, and can be exercised against this bankrupt corporation at the instance of a stockholder, or, strange to say, even at the instance of a creditor, although the corporation does not possess and may never possess a dollar of assets, so as to make a receivership proper or necessary. Where a federal court, as in the case which I think is presented by this record from the United States Circuit Court, has sequestered for distribution the entire assets of an insolvent corporation under this trust fund theory which we have been considering, no permanent effect is produced upon the status of the corporation with respect to the exercise of its franchises. The situation is the same as in the case of a corporation after it has been stripped of its assets at the suit of a creditor of the kind illustrated in *Wetherbee v. Baker*.

The essential character of our statutory suit against insolvent corporations, as something affecting the status of the corporation in respect of the exercise of its franchises—the status of the corporation with respect to the state of New Jersey, from whom the grant of corporate franchises was derived—and not necessarily relating to the administration of corporate assets, is further indicated by the series of statutes which the Legislature has passed in regard to the dissolution of the corporation as a part of or result from this statutory suit. The last statute of this kind gives the court of chancery discretionary power to make an order dissolving the corporation, and the constitutionality of this act, so far as I know, has never been questioned. Gen. Corp. Act 1896 (P. L. p. 300, c. 185) § 69. Would the United States Circuit Court have the power, at the end of the administration of the assets of an insolvent New Jersey corporation, to make an order dissolving the corporation? Has such a jurisdiction ever been exercised?

It has often been said that our legislation for winding up insolvent corporations amounts practically to a state bankrupt act. I do not question the general accuracy of this description of the ordinary practical operation and result of our statutory action. Any action against an individual or a corporation, solvent or insolvent, which results in the sequestration of all the defendant's property and the distribution of it among his or its creditors, partakes of the nature of a bankrupt act. This feature is exhibited in quo warranto cases, where they can be accompanied by a receivership. But a bankrupt act in some important respects is radically different from our insolvent corporation act. The bankrupt act distributes the assets, but in large numbers of cases leaves the former owner of the assets, not only in full possession of all his rights and privileges, including the opportunity of acquiring assets, but also discharged from all his former debts. The discharge of the bankrupt is a distinct object,

and to many minds appears to be the main object of bankruptcy proceedings. On the other hand, our statutory action puts the defendant corporation practically to death, and then begins, and then only can begin, to distribute the assets of the practically defunct corporation among its creditors.

It is true that actions at law or suits in equity to disable or dissolve a corporation in the great majority of instances would not be brought if there were not assets to be distributed as the result of the practical extinction of the corporate life by the decree for an injunction or the judgment of ouster. But there is no essential relation between a condition of insolvency and the maintenance of these actions at law or in equity which attack the life of the corporation. A quo warrant proceeding, with a resulting distribution of the corporate assets, may be conducted to a conclusion against a solvent corporation. A state may enact that entirely solvent corporations shall be dissolved or perpetually enjoined from exercising their franchises (which is practically the same thing as dissolution) whenever the capital has been impaired to the extent of 50 per cent. Every state has a wide range for the exercise of its discretion to permit its corporations to continue in business—continue the exercise of their franchises which the state has conferred upon them, or to withdraw or suspend the power to exercise those franchises. Where the state sees fit to disable or dissolve its corporations, distribution of assets necessarily follows, and must be provided for in case there are assets to distribute. According to any correct legal theory, however, it seems to me that the object of the suit to dissolve or suspend the corporate existence, whether instituted by the Attorney General of the state or by a stockholder or creditor of the corporation, is not to take the assets from the corporation for such distribution. The object of the suit, it seems to me, is to disable or dissolve the corporation, while the distribution of assets is an incidental result, which may, but does not necessarily, follow.

If the views which I have indicated are correct, the true conclusion would seem to be that the suit in equity under our insolvent corporation act to-day has for its primary object the relation of the corporation to the state of New Jersey, which gave it corporate existence, and the distribution of the assets of the corporation among its creditors through a receiver is a mere incident, something ancillary to the principal relief sought, which may or may not be a part of the proceedings. With this analysis of our statutory suit in mind, the question whether the United States Circuit Court has jurisdiction to entertain it when there is diversity of citizenship, it seems to me, is less difficult to answer.

Counsel for the complainants insisted strenuously that the federal courts do not get jurisdiction under the Constitution of the

United States and the federal judiciary act of novel legal and equitable actions which were not recognized when the federal judiciary act was established more than a century ago. This view, it seems to me, is not sustained either by authority or principle. Many decisions were cited on both sides of this question, to which I cannot now refer. The sole object as I have always believed of the framers of the Constitution in creating this jurisdiction in the federal courts, based upon diversity of citizenship, was, as I have said before, to provide an impartial tribunal, for the administration, however, of precisely the same law which the state court otherwise would enforce. We all know how far away from this idea the federal law of judicial decision has gone. It seems to me that the true theory of the origin of this federal jurisdiction, based on diversity of citizenship, requires that, as fast as new legal and equitable actions are created by statutes of the states, they become cognizable in the federal court, where there is diversity of citizenship—a condition of things which to the minds of "the fathers" called for special care in the provision of an impartial tribunal. If, therefore, this suit under our New Jersey insolvency act is a suit in equity of a civil nature, wherein the "matter in dispute" is measurable in money and exceeds in value \$2,000, it seems to me that the jurisdiction of the United States Circuit Court to entertain it is beyond dispute, even though this statutory suit is an extension of the jurisdiction of the court of chancery and is a suit of a kind unknown to equity jurisprudence in this country 100 years ago.

The difficulty in the way of maintaining the jurisdiction of the United States Circuit Court of our statutory suit against an insolvent corporation, appears to me to be that "the matter in dispute" is not measurable in money. It is perfectly well settled by a series of decisions in the United States Supreme Court that the judiciary act confers jurisdiction upon the United States Circuit Court, where there is diversity of citizenship, only where the controversy—"the matter in dispute"—is pecuniary in its nature, and capable of estimation in money, and exceeds the amount stated, \$2,000. *Barry v. Mercein*, 46 U. S. 103, 12 L. Ed. 70; *Kurtz v. Moffitt*, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458; *Perrine v. Slack*, 164 U. S. 462, 17 Sup. Ct. 79, 41 L. Ed. 510. No doubt, under the Constitution of the United States, it is competent for Congress to vest in the United States Circuit Court jurisdiction in a great variety of cases in which no jurisdiction has been conferred, and in respect of which the policy of the national Legislature for a century has been to withhold jurisdiction.

If there is a "controversy" between citizens of different states of such a character as to be a proper subject of the exercise of what is called in the Constitution "judicial power," then it follows that the judicial pow-

er of the United States may be exercised by the courts of the United States to the extent that Congress sees fit. The Constitution defines the "judicial power" of the United States, not of the courts of the United States, except to a limited extent in the case of the Supreme Court. To what extent, therefore, the granted judicial power shall be exercised, depends wholly upon the legislation of Congress. The question in every case is simply one of statutory construction: Has Congress provided for the exercise of "the judicial power of the United States" in this particular case? In endeavoring to answer that question for the purposes of the present case, the narrow question is, as we have seen, whether our statutory action against an insolvent corporation is one in which the matter in dispute is pecuniary in its nature—is measurable in money. If it is, then in this case, although I understand the fact was not alleged in the bill filed in the United States Circuit Court, it seems to be conceded that the assets of the Asphalt Company of America, the defendant corporation, exceed in value \$2,000. In determining whether the "matter in dispute" in our statutory action is pecuniary in its nature or not, it is manifestly necessary that a correct idea should be entertained of the essential nature of this action. If the action is essentially a proceeding for a receivership, to take assets from a defendant and distribute them among a class of creditors or stockholders, of whom the complainant is one—if, in other words, the action is in substance a creditors' suit for a receiver, with an incidental injunction—then the matter in dispute is plainly pecuniary in its nature. If, on the other hand, the action is essentially in the nature of a quo warranto—a proceeding to fix the status of a corporation with reference to the exercise of its franchises, which ordinarily can only be brought by the Attorney General or other official representing the state—while a receivership and distribution of assets to creditors or stockholders are incidental and contingent, and may in fact never take place in any degree, then the "matter in dispute" does not seem to me to be pecuniary in its nature or measurable in any way in money.

In the case of *Lee v. Watson* (1864) 68 U. S. 337, 17 L. Ed. 557, Mr. Justice Field says: "By 'matter in dispute' is meant the subject of litigation, the matter for which the suit is brought, and upon which issue is joined, and in relation to which jurors are called and witnesses examined." The case was an action at law for damages. In an equity case the issue is presented by the pleadings and is decided in the decree. The pleadings and decree in a suit under our statute, as we have seen, show that the issue is whether or not the defendant corporation is insolvent to such an extent that it is not about to resume its business "with safety to the public and advantage to the stockholders,"

The "matter for which the suit is brought," however, is not merely to establish such condition of insolvency, but to place the corporation under the disabilities of an injunction. A complete record of all the proceedings in the suit prior to the decree and subsequent thereto may fail to show that there were any assets or any receivership. The final decree necessarily only fixes the status of the corporation with respect to the exercise of its franchises. Even if the bill alleges that the defendant corporation has assets which exceed in value \$2,000, and prays for a receiver, and the decree appoints a receiver, the receivership is not "the matter in dispute" in the suit. It is not a distinct juridical controversy, capable of being litigated by itself in a separate suit, as a separate object of contention between the parties. A separate suit cannot be maintained under our statute to effect the distribution of the assets of an insolvent corporation through a receiver. The suit under our statute must always be for an injunction—for a decree disabling the corporation from exercising its franchises. Practically it would seem that the question whether a pecuniary controversy which is litigated in a suit or a pecuniary result which flows from a suit is or is not "the matter in dispute" in the suit—"the matter for which the suit is brought"—would generally be tested by the question whether a separate suit could be maintained for the purpose of litigating this controversy. There are many matters which are disputed in actions at law and suits in equity which are altogether pecuniary in their nature, and involve large sums of money and large values, but nevertheless they do not constitute the matter in dispute in the litigation, and no separate actions or suits might be maintainable for the determination of any of them. The matter in dispute in a divorce suit is not pecuniary in its nature or estimable in money, although the bill may pray for alimony and the decree may award alimony. Neither the distribution of the assets of an insolvent corporation nor the allowance of alimony in a divorce suit can be made the matter in dispute under the respective statutes upon which the proceedings are based.

Act Cong. Aug. 13, 1888, c. 866, 25 Stat. 433 (1 Supp. Rev. St. 611), contains the last revision of the provisions of the judiciary act (Rev. St. § 629 [U. S. Comp. St. 1901, p. 508]), giving jurisdiction to the United States Circuit Courts in cases of diversity of citizenship. The phraseology of the statute is inapt and confused. Counsel for the defendants have not intimated that any change in the law upon the point under consideration in this case was intended. I have not found a decision of any court suggesting that any change in fact was made. Taking the words of the statute as they now read, and without reference to their history and prior use, in my opinion the definition

of Mr. Justice Field above quoted stands practically unaffected. There must still be found "a controversy" in which "the matter in dispute" exceeds in amount or value \$2,000, in order to bring the suit at law or in equity within the jurisdiction of the federal court. This means, it seems to me, that there must be a complete legal controversy susceptible of being the object of a suit, as distinguished from an incidental or collateral controversy arising in a suit brought for some other object. In many jurisdictions declarations or complaints may contain many different counts or paragraphs setting up distinct causes of action of a widely different nature. The present case, however, is not one where the pecuniary controversy over the assets of the insolvent corporation can be made the subject of a separate suit under our statute, as we have seen.

It has not been suggested in this case that the object of our statutory action, so far as it relates to disabling and dissolving a corporation, can properly be deemed pecuniary in its nature. It has not been argued that the right of a corporation to exercise its franchises must be deemed to have a pecuniary value within the meaning of the federal judiciary act. Without undertaking to discuss this subject, it may be disposed of for present purposes by the proposition that the right of the Asphalt Company of America, this hopelessly insolvent corporation, to exercise the franchises which it acquired under our general corporation act, is apparently without any pecuniary value whatever, and no pecuniary value has been attributed to it, either in the bill filed by the Land Title & Trust Company in the United States Circuit Court or in the bill filed in this case in this court. In *Durham v. Seymour* (1895) 161 U. S. 235, 16 Sup. Ct. 452, 40 L. Ed. 682, the United States Supreme Court considered the essential nature of a suit in equity to authorize the United States Commissioner of Patents to issue a patent to the complainant. The court unanimously held that "the matter in dispute" was not pecuniary in its nature notwithstanding that the patent, if obtained, might be worth a large sum of money. Chief Justice Fuller says: "Whether the alleged invention was patentable or not was the question, and that question had no relation to its value in money. If the invention were not patentable, Durham [the appellant] had suffered no loss. If the invention were patentable, it was not material whether it had or had not a money value." If a corporation is insolvent to the extent defined by our statute, it is not material whether it has or has not assets, or, if it has assets, what their value may be. The suit proceeds to final decree in any case. I cannot find that it was the intention of Congress to give jurisdiction to the federal court to determine practically the continued existence of a New Jersey corporation merely because any stock-

holder or any creditor has been intrusted by the state with the power to bring this statutory action—what is practically an action of quo warranto. Chancellor Walworth, in one of the early cases under the New York statute upon which our act was modeled, holds that the statute gave to a stockholder the power to maintain an action "to enforce forfeiture of the franchises of the corporation." *Verplanck v. Mercantile Ins. Co.* (1831) 2 Paige, 437, 451. This seems to me to be a substantially accurate statement of the object of the suit—of the matter in dispute between the parties litigant.

It may be worth while to note that, if the accidental fact that one of the stockholders or one of the creditors of a New Jersey corporation is a citizen of another state gives the federal court jurisdiction of this New Jersey statutory action to determine the status of a New Jersey corporation, such jurisdiction would be removed at any time whenever the Legislature of New Jersey saw fit to confine the institution of the proceedings to the Attorney General of the state. Is it not plain that the real function of the suit under our statute is to accomplish an object which the state controls, and which the state has seen fit, as an exception to ordinary principles applicable to such cases, to permit a private individual, who has a special relation to the objects and results of the suit, to institute as effectually as ordinarily would be done by the Attorney General of the state? If the view which I have expressed is erroneous, it follows that, where the United States Circuit Court obtains jurisdiction of our statutory action by reason of diversity of citizenship, that court could control the existence of a New Jersey corporation, practically suspend its life by the injunction which is the principal object of the suit, and then afterwards could restore it to life by vacating the injunction. The status of the corporation, the creature of the state of New Jersey, as existent or practically nonexistent, is thus determined by the decree of the federal court.

It seems to me that there are more reasons for holding that the "matter in dispute" in our statutory action against an insolvent corporation is not pecuniary or measurable in money than to hold that the "matter in dispute" in guardianship proceedings, lunacy proceedings, and similar proceedings against spendthrifts and drunkards is not pecuniary in its nature. Counsel for the defendants in this case boldly declared that a citizen of New York, being, for instance, the son of a citizen of New Jersey, could maintain proceedings in the United States Circuit Court, based on this diversity of citizenship, to have the citizen of New Jersey adjudged a lunatic, provided the result of this adjudication would be to transfer property exceeding in value \$2,000 from the lunatic to his guardian or committee. Not a decision was cited to sustain this proposition. Let us suppose that

the necessary changes in our legal system were made to permit the maintenance of a quo warranto action in the Supreme Court for the forfeiture of the franchises of a corporation, including, as an ancillary incident, a receivership for the distribution of the corporate assets; and let us further suppose that this action were made maintainable by any stockholder or any creditor. Precisely the same question might then arise in the Supreme Court which is now presented in the court of chancery, viz., whether the "matter in dispute" was the status of the corporation or the assets of the corporation. If the former, then the action would be confined to the Supreme Court of the state of New Jersey; if the latter, then any stockholder or creditor, being a citizen of another state, could bring the action in the United States Circuit Court, and that court would have full jurisdiction.

Suppose a divorce suit is brought under a state statute, the husband and wife being citizens of different states. That such diversity of citizenship can exist at the present day is beyond argument. A husband and wife in these days may be voters and high office holders in different states. If the wife brings the suit, she may demand alimony exceeding \$2,000. If the husband brings the suit, the direct result, if he succeeds, may be to destroy an inchoate right of dower of a value far in excess of \$2,000. Could, in such case, a federal court take jurisdiction of the whole divorce suit because of this result, which involved a property stake over \$2,000 in value? When the husband brings a divorce suit against his wife, "the matter for which the suit is brought and upon which issue is joined" is not the inchoate right of dower which the husband's suit, if successful, directly destroys. This right of dower which may be worth many thousands of dollars—may supply the motive which actuates the suit or the defense. The preservation or destruction of the dower right is a result, and only one result, as distinguished from the object of the suit. Another result is the continuance or the discharge of the husband's duty to support the wife, which may be of great pecuniary value. The status of corporations, married persons, infants, and lunatics has been carefully left by Congress exclusively within the control of the state courts, although under the Constitution Congress plainly has the power to give the federal courts jurisdiction of these matters wherever a "controversy" involving any of them of a kind to be a proper subject of "judicial power" arises between citizens of different states.

I shall not, however, undertake to discuss this subject further. If I am in error, and the true construction of the federal judiciary act and of our New Jersey corporation act gives jurisdiction of our statutory action to disband and practically dissolve a corporation to the federal court, where the actor who

institutes the proceeding is a citizen of another state, it is probable that before very long the federal judiciary will make a deliverance on the subject which will correct my mistake. In dealing with a question like this, a state court can only determine what the federal courts have decided, or conjecture as to what they probably will decide. In the absence of any controlling federal decision, I cannot hold that a federal court, which has jurisdiction, based on diversity of citizenship, to sequester and distribute the assets of a New Jersey insolvent corporation, has also the power to act directly upon the very existence of the New Jersey corporation, and exercise the important public function vested by our statute in the court of chancery, and to be discharged by that court with the safety of the public in view. The result, therefore, is that the motion to dismiss this bill is denied. The bill will be retained (in spite of the fact that all the assets of the corporation are in the possession of a receiver of the federal court, and at present there seems to be no reason why any receiver should be appointed by this court) for the accomplishment of the statutory object of the suit, which has no essential relation to the sequestration or distribution of assets. At any time when assets may be discovered of which the receiver of the federal court has not taken possession, or which cannot be reached through him, it may be advantageous to the creditors to have a receiver appointed by this court. Of course, no receiver appointed by this court will raise any contest with the federal receiver over the administration of assets which the federal receiver is administering in execution of his trust.

Technically the next thing in order would be the summary proceeding to ascertain whether the facts are proved which are required by our statute as the basis of the order that an injunction issue restraining the corporation from the exercise of its franchises. I shall, however, not hear that matter for a reasonable time, in order that, if counsel for the defendant desire to carry the order of this court to the Court of Errors and Appeals for review, they may have abundant opportunity to do so.

(89 N. J. L. 253)

KOCH v. BAMFORD BROS. SILK MFG. CO.

(Court of Errors and Appeals of New Jersey.
June 15, 1903.)

SALE—CONTRACT—CONSTRUCTION—PERFORMANCE.

1. Plaintiff, doing business in Germany, had furnished the defendant corporation certain heddles—articles used in weaving silk. The last lot furnished consisted of 100,000 heddles. By letter, defendant notified plaintiff that it had paid to plaintiff's bankers the price of that lot, and ordered plaintiff to make and ship to it 1,000,000 heddles, in lots of 100,000, as made. By the same letter defendant notified plaintiff of certain defects in the lot last received, and

requested plaintiff to avoid such defects in the next lot made. By reply letters, plaintiff accepted the order for the 1,000,000 heddles at the price of \$1.25 per 1,000. By a subsequent letter, plaintiff requested defendant to furnish samples of heddles such as desired. After that letter would have been received by defendant in the usual course of mail, defendant telegraphed plaintiff, "Make same as last." *Held*, that the contract between the parties was properly construed as only binding the plaintiff to furnish heddles, under the order, of the character and quality of the lot of 100,000 last furnished, and that it did not oblige plaintiff to furnish heddles that were perfect, or heddles that were satisfactory to the defendant, or heddles that were adapted to the use for which defendant wanted them.

2. The 1,000,000 heddles were made and shipped by plaintiff to defendant in eight lots. Three of them were received and used by defendant. The remaining five were rejected. The trial judge charged that if the whole of the shipments were proved to be of the character and quality required by the contract, the plaintiff was entitled to recover the price of all of them. He further charged that, if the shipments were not of the character and quality required, plaintiff could not recover for the last five lots shipped, but might recover the price of the three lots received and used by the defendant, less a reasonable deduction because of defects. An assignment of error based on an exception to the instruction respecting the three lots is presented in argument as ground for reversal, and it is contended that the trial judge erred in not submitting to the jury the question whether the three lots had been accepted by defendant so as to bind it to pay for them. *Held*:

That this contention will not be considered, because, the jury having found that all the heddles furnished were such as required by the contract, the error in the instruction, if it was erroneous, was innocuous, and afforded no ground for reversal.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Emma Koch against the Bamford Bros. Silk Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wayne Dumont, for plaintiff in error.
William I. Lewis, for defendant in error.

MAGIE, Ch. The assignments of error in this case are confined to four exceptions to as many portions of the charge of the trial judge to the jury. The record and the evidence contained in the bill of exceptions disclose that the action was brought by the plaintiff, doing business at Hohenlimburg, in Germany, to recover the price of 1,000,000 heddles (an article used in the weaving of silk) ordered by defendant to be made and shipped to it, and that the defense was that the heddles shipped by plaintiff under the order were not such as were required by the order, and that defendant was not liable to pay for them, for that reason.

The first exception was to the following excerpt from the judge's charge: "The contract, so far as the present purposes are concerned, was expressed in a telegram which was sent by the defendant to the plaintiff in September, 1895. That telegram was, 'Send same as last.'" It is obvious that the trial judge did not intend to be, and

could not be, understood as charging that the contract between the parties was wholly expressed by the four words of the telegram mentioned. The evidence had disclosed that on December 10, 1894, the defendant had ordered of plaintiff 100,000 heddles, which had been forwarded to and received by the defendant. By a letter from defendant to plaintiff dated August 7, 1895, defendant informed plaintiff of a payment to the bankers of the plaintiff for the 100,000 heddles received by it, and therein also directed plaintiff to make 1,000,000 heddles, and forward the same to the defendant in 100,000 lots, as made. This order contained this language: "The last lot received are a little rough at the eyes and different parts of the heddles. Please avoid this in the next lot you make." Letters from plaintiff to defendant bearing date August 21, August 24, and August 30, 1895, acknowledge the receipt of the order for 1,000,000 heddles, and inform defendant that it will be filled. One of these letters fixes the price of the heddles at \$1.25 per 1,000. On September 8, 1895, plaintiff sent to defendant a letter containing the following language: "To avoid any inaccuracy in the making of the heddles you recently ordered, I enclose two samples, which please examine and return as soon as possible. Should these patterns be in any way incorrect, kindly send us one of those you are now using as soon as ever possible." After the time at which that letter would have been received by defendant in the usual course of the mail, on September 25, 1895, defendant sent to plaintiff a telegram containing these words: "Make same as last." All the heddles ordered were made and shipped to defendant in eight lots. Three of these were received by defendant, opened, and used, and the remaining five lots were rejected by defendant without inspection or examination. The first information of the dissatisfaction of defendant with the heddles sent by plaintiff was obtained from a letter under the date of February 6, 1895, which was after the last shipment. By that letter defendant declared that it must stop receiving any more heddles from plaintiff, because made imperfectly, and because they stained the light-colored ribbons in the weaving. From this evidence, the contract between the parties is plainly to be found in the order contained in the letter of August 7, 1895, and the acceptance of the order at a specified price contained in the letters of August 21st-30th; the request to be furnished with samples or patterns contained in the letter of September 8, 1895; and the direction of the telegram of September 20, 1895. The contract thus discoverable was to be construed by the court. For the purpose of the trial, the term of the contract which stipulated for the character and quality of the heddles was undoubtedly fixed by the words of the telegram. Nor is this exception capable of being supported upon the mis-

quotation of the telegram in the charge of the trial judge. The language was, "Make same as last." The trial judge quoted it as, "Send same as last." Read with the rest of the charge and with the evidence, this misquotation must have been wholly innocuous.

The second and third exceptions are addressed to portions of the charge in which the trial judge, in construing the contract, declared that it did not oblige the plaintiff to furnish to the defendant perfect heddles, or heddles satisfactory to the defendant, or heddles which would be adapted to the use for which defendant wanted them, but that the plaintiff's obligation was only to furnish heddles of the same character and quality as those heddles which were furnished by plaintiff to defendant under the preceding order for 100,000. It is impossible to discover any error in this construction of the contract, or in the instruction thereupon given to the jury by the trial judge. The telegram expressed the character and quality which the defendant required the ordered heddles to have. There was therefore no room for implication as to the fitness or adaptability for use. Both parties knew what had been the quality and character of the heddles previously ordered and received. The defendant had complained to plaintiff in respect to defects in them. When, therefore, without returning a sample as requested by the plaintiff, defendant directed, by the telegram, the heddles ordered by the letters to be made the same as the last, it was content to take them if made with no other or greater defects.

The remaining exception is directed to a portion of the charge relating to the liability of defendant for the three cases or lots of heddles which it actually received and used. The judge had carefully pointed out to the jury that, if they found that the 1,000,000 heddles shipped were of the same character and quality as the 100,000 previously shipped, the plaintiff was entitled to recover the specified price for all of the heddles, whether accepted or not. The trial judge then proceeded to instruct them that, if the heddles were not up to the standard required by the contract, the plaintiff could not recover for the five lots rejected by the defendant, for the defendant would have been justified in such rejection. But as to the three lots actually received and used by the defendant, he charged that plaintiff could recover the contract price, less such deduction as was reasonable because of the defects. It is to that part of the charge that the exception is addressed, and the contention in support of it is that the trial judge thereby determined that the three lots had been accepted by the defendant, while he ought to have left the question of acceptance to the jury. In view of the fact that the jury found that all the heddles ordered were up to the standard fixed by the contract, and therefore that defendant had no right to reject any of them, it would be superfluous to use time and labor to deter-

mine whether the charge erred in that respect or not. Upon the verdict arrived at, the jury could not have considered the question of liability arising from the acceptance of the three lots in question, and any error in respect thereto would have been entirely innocuous.

No error being discovered, the judgment must be affirmed.

(69 N. J. L. 327)

HUEBNER v. ERIE R. CO.

(Court of Errors and Appeals of New Jersey.
June 18, 1903.)

PRINCIPAL AND AGENT—DECLARATIONS OF AGENT.

1. A principal is bound by the acts and concomitant declarations of an agent touching such matters only as are within the scope of his general employment, or have been specially intrusted to his agency by the principal. Acts and declarations not falling within this rule are not within the exception to the rule excluding hearsay testimony.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Sarah Huebner, administratrix of William Huebner, against the Erie Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

See 58 Atl. 545.

This suit was brought to recover damages for the death of William Huebner, son of the plaintiff, caused by the alleged negligence of the defendant. At the time of the injury the plaintiff's intestate was employed by the defendant as a fireman, and was, in the performance of his duty upon his engine, standing at a point where the engine was coupled to the tender. The engine and the tender parted, and he fell between the two, and was run over and killed.

The coupling between the engine and tender consisted of a drawbar, with a pin through it, at the center of the engine and the center of the tender. To provide for the contingency of the breaking of this pin, the engine had on each side of it a safety chain, running from a hook in the bottom of the engine to a hook in the bottom of the tender.

In order to carry the strain upon the chains, if, by reason of the breaking of the pin, they are called into use, there should be a lip or lug at the back of the hook, which projects upward and takes hold of the cross-beam of the locomotive.

One of the questions submitted to the jury by the charge of the trial judge was whether the hook upon the engine in question was defective, in that it was not made with such a lip or lug. The propriety of submitting this question to the jury is raised by exceptions to the admission of the testimony tending to show such defect in construction, and also by exceptions to the refusal of the court below to exclude such testimony, and the issue to which it related, from the consideration of the jury. The

contention of the defendant is that there was no legitimate testimony bearing upon the alleged defect.

Corbin & Corbin, for plaintiff in error.
Warren Dixon, for defendant in error.

GARRISON, J. (after stating the facts). Upon this writ of error it must be assumed that the jury found that there was no lug upon the hook that parted from the engine when the drawbar pin broke. If there was no legal testimony from which this fact could be found, or, what is the same thing, if the only testimony upon that point was illegally admitted, it was error to submit the question to the jury.

The testimony to which this degree of importance attaches came into the case in this way: Ten days after the accident, Jacob H. Vreeland, at the request of the mother of the decedent, undertook to investigate the circumstances that had led to the death of her son. In pursuance of this object, he called, in company with a brother of the decedent, at the office of the division superintendent of the defendant, and told him that he had come to see the parts that were on the tender that parted from the engine. The superintendent said, "They are not here;" and, upon Mr. Vreeland's saying, "Yes, sir; I believe they are here," a clerk was called, and asked if the parts were there. The clerk said, "Yes, sir," and produced a book, concerning which the witnesses Vreeland and Huebner testified that it had no lug. All of this testimony was specifically objected to on the ground that it was not competent or binding upon the defendant unless it was shown that "the railroad people who made the statements to the witnesses were authorized to make statements on behalf of the railroad company in that regard." To the admission of the testimony over this objection an exception was duly sealed.

I think that in the admission of this evidence legal error was committed. The statement of the superintendent that the parts were not in his office was the only proof bearing upon his authority to act for the defendant in the premises, and it does not in any wise tend to show that such authority had been conferred upon him. There is nothing in the case to show that such authority had been reposed in the clerk who produced the book, and nothing to suggest that what either of these agents did or said was within the scope of his general employment. The question presented, therefore, is whether a principal is bound by acts or statements of his agents with respect to matters not within the scope of their employment, or committed to their agency. This question, which from time to time recurs, is an important one, and has received hitherto a uniform treatment in the reported decisions of our courts. In the early case of *Runk v. Ten Eyck*, 24 N. J. Law, 756, the rule is thus laid down: "Declarations and doings of a third person, act-

ing in the capacity of an agent, are exempt from the general rule respecting hearsay testimony. They are admitted in evidence against the principal as the representations or acts of the principal himself, whom the agent represents, while engaged in the particular transaction to which the declarations or acts refer. They must constitute a part of the *res gestæ* in the course of his employment about the matter in question. They must accompany the doing of the business or making of the contract, and must be within the scope of the delegated authority."

This rule has since been consistently applied in our decisions, both in cases in which testimony was admitted and in those in which it was rejected. Among the more recent applications of this rule may be cited *Little v. Kerr*, 44 N. J. Eq. 267, 14 Atl. 613, in which it is said that such testimony, "while proof of the statement of a fact, is not evidence of the truth of the fact."

In another case (*Agricultural Insurance Co. v. Potts*, 55 N. J. Law, 163, 26 Atl. 27, 537, 39 Am. St. Rep. 637) the rule laid down is that "a statement made by a general agent of a corporation in the course of his employment as to a fact within his official knowledge, touching the status of a matter intrusted to him, is admissible in evidence on behalf of a party with whom the corporation was dealing."

In *Smith v. Delaware & Atlantic Telegraph & Telephone Co.* (N. J. Err. & App.) 53 Atl. 818, the testimony of an agent was admitted when it was satisfactorily shown that it was "made in the conduct of business intrusted to him."

And in *Blackman v. West Jersey & Seashore R. Co.* (N. J. Sup.) 52 Atl. 370, where the testimony was rejected, the present Chief Justice said, "It is only words which are spoken or acts which are done by an agent in the execution of his agency which are admissible in evidence against the principal."

These citations suffice to show the correct rule, and to demonstrate that, if applied in the present case, it would have led to the exclusion of the testimony of Vreeland and Huebner as to all that occurred at the office of the superintendent. In legal effect, therefore, this testimony must be regarded as excised from the case. Thus regarded, it is evident that the parts of the charge to which exception was sealed, in which the trial court left it to the jury to say whether the hook produced in court by the defendant was the hook which Vreeland and Huebner testified had been shown to them in the superintendent's office, and of deducing from this comparison a verdict as to whether the hook that was on the engine had or had not a lug, involved a fallacy. The basis for the supposed comparison had no legal existence.

These judicial errors were not cured by the testimony of the superintendent that the hook that he showed to Vreeland and Huebner at his office had a lug on it, for, with the tes-

timony of Vreeland and Huebner out of the case, this testimony of the superintendent was opposed by no testimony to the contrary, and hence could not form the basis of a verdict against the defendant on this point.

From these considerations, it results that there must be a reversal of the judgment rendered in the court below, without reference to the other grounds relied upon by the defendant, which, as they may be varied on a new trial, cannot with any effectiveness be made the subject of present decision.

The judgment is reversed.

(69 N. J. L. 263)

HEWES v. HURFF.

(Court of Errors and Appeals of New Jersey.
June 15, 1903.)

LIMITATION OF ACTIONS—ACKNOWLEDGMENT—EVIDENCE—ADMISSIBILITY—POWER OF ADMINISTRATOR TO REMOVE BAR.

1. Letters written to the holder of a note by the administrator of the deceased maker before the note was outlawed, referring to the money owing to the holder by the writer as administrator, and requesting the holder to wait for a time, and containing expressions which might be construed to be promises to pay the note, were admissible to prove a written acknowledgment of the debt, so as to avoid the statutory bar existing at the commencement of the action.

2. Under the express provisions of Gen. St. p. 1976, § 17, a sole administrator may remove the bar of the statute of limitations by an acknowledgment and new promise.

Error to Supreme Court.

Action by Sarah G. Hewes against Aaron L. Hurff, administrator of the estate of William Hurff, deceased. Judgment for plaintiff, and defendant brings error. Affirmed.

T. J. Middleton and Jonas S. Miller, for plaintiff in error. David O. Watkins, for defendant in error.

GUMMERE, C. J. This action was brought by Mrs. Hewes, the plaintiff below, to recover from the defendant, as sole administrator of the estate of his father, William Hurff, deceased, the principal and interest of a certain promissory note held by the plaintiff, and signed by the defendant's intestate. The note matured in September, 1892, and suit was not brought until May, 1901. The defendant set up the bar of the statute of limitations, and the plaintiff at the trial sought to avoid that bar by showing an acknowledgment of the indebtedness, and a promise to pay it made in writing by the administrator within six years after the note fell due, and less than six years before the commencement of the suit. To prove this acknowledgment and promise, she produced and offered in evi-

dence certain letters written by the defendant to her, the first of which was dated on September 8, 1897, and the last on October 13, 1900. The admission of these letters was objected to by the defendant on the ground that they did not any of them contain any such acknowledgment or promise, and on the further ground that "an administrator cannot, either by express terms or by implied promises, remove the bar of the statute." The overruling of the objection and the admission of the letters is assigned for error.

The first ground of objection is unwarranted by the facts. The letter first in date refers to "the money owing to you by me as Adm'r of father's estate," and requests the plaintiff "to consent to wait until next fall for this money due you." Both this and the letters written subsequently contain expressions which may fairly be construed to be promises to pay this indebtedness. They were therefore clearly admissible, as tending to prove a written acknowledgment of the debt and a promise to pay it.

The second ground of objection is equally untenable. In the case of *Shreve v. Joyce*, 36 N. J. Law, 44, 13 Am. Rep. 417, decided by the Supreme Court at the November term, 1872, it was held that a sole executor (and, if there was more than one, then either of them) had the power, by a new promise, to remove the bar of the statute of limitations. A year and four months later the Legislature, in revising the "act for the limitation of actions," recognizing this power in an executor, modified its scope by enacting that no acknowledgment or promise by words only should be deemed sufficient evidence of a new or continuing contract whereby to take a case out of the operation of the act, unless such acknowledgment or promise be in writing, and that, where there shall be two or more executors or administrators, "no executor or administrator shall lose the benefit of this act, so as to be chargeable in respect or by reason only of any written acknowledgment or promise, and signed by any other or others of them." Gen. St. p. 1976, § 17. The right of a sole administrator to remove the bar of the statute by an acknowledgment and new promise is clear.

The only other assignment of error is directed at the instruction of the court to the jury that the only question for them to determine was "whether the administrator made the promise, within six years, that the estate would pay this note. If so, he bound the estate." The ground of this assignment is stated to be that "an administrator cannot, by a new promise, obligate or charge the estate of an intestate so as to deprive it of the benefit of the statute of limitations." This assignment is disposed of by what has already been said.

The judgment under review should be affirmed.

¶ 2. See *Executors and Administrators*, vol. 22, Cent. Dig. §§ 750, 1754; *Limitation of Actions*, vol. 22, Cent. Dig. § 582.

(69 N. J. L. 279).

CAMPBELL v. T. A. GILLESPIE CO.(Court of Errors and Appeals of New Jersey.
June 17, 1903.)**INJURY TO EMPLOYE—DUTY OF MASTER—
PROPER TOOLS—ASSUMPTION OF RISK—
—BURDEN OF PROOF.**

1. It is the duty of the master to use reasonable care to furnish proper tools to his workmen.

2. If the master has proper tools within reach of the workmen, and they, through negligence or lack of judgment, select the poor ones, the master will not be liable for any resulting injury to them.

3. When the defect in the tool taken by the servant is obvious, the servant who takes it, although it is the only one on the premises, assumes the obvious risk of danger to himself, but he cannot assume an obvious risk in such case for a fellow servant who does not know of the danger.

4. As to a fellow servant, it will not be presumed that his co-servant would have selected an obviously imperfect tool, when he might have chosen a good one.

5. Where the negligence of the master concurs with that of the servant in producing injury to a fellow servant, the master is liable; and therefore the burden is on the master to show that he had furnished proper tools, which the servant might have used.

Garrison, J., dissenting.
(Syllabus by the Court.)

Error to Circuit Court, Passaic County.

Action by James Campbell against the T. A. Gillespie Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Corbin & Corbin, for plaintiff in error. A. M. Ward and John M. Ward, for defendant in error.

VAN SYCKEL, J. James Campbell, the plaintiff, was in the employ of the defendant company, engaged in calking a four-foot steel water pipe, in February, 1902. His brother William was working on the opposite side of the pipe, driving rivets, and one John McClurg was inside the pipe. To bring the ends of the pipe together so that the rivet holes in one would be over the holes of the other, the riveters used "drift pins," which are round pieces of steel about seven inches long, small at one end and larger at the other. These pins were driven into the holes to draw them together for the insertion of the rivets. While William was driving a drift pin, a small piece of the frayed head of it flew off and struck the plaintiff in the eye, and destroyed its sight. This suit is brought by the plaintiff to recover damages for the loss of his eye. The negligence imputed to the defendant company is its failure to provide proper drift pins for the work, the claim being that those which were provided were battered and frayed on the head by the hammering incidental to their use. The judgment recovered by the plaintiff is the subject of review.

The drift pin used at the time of the ac-

cident, with others of less size, had been turned into the shop of the company by the workmen two or three months before the plaintiff was injured. John McClurg, a witness for the plaintiff, testified that on the day of the accident he was sent by the superintendent of the company to get these riveting tools, and that he brought the best drift pins he could find, only one of which was a seven-eighths pin. William Campbell testified for the plaintiff that when he started to work the superintendent came around and inquired how it was, and he said, "We have a poor lot of tools," to which the superintendent replied, "They are the best we have got, and there is no blacksmith on the job. Go ahead and work with them." William testified further that the pin was in the same condition when the accident happened as it was when he first used it, that it was absolutely necessary to use a seven-eighths pin, and that there was no other seven-eighths pin in the place where the pins were kept. There was further evidence that the pin was not fit to work with, unless the head was dressed down by a blacksmith.

The duty of the master to use reasonable care to furnish proper tools to his workmen is not controverted. *Maier v. Thropp*, 59 N. J. Law, 187, 35 Atl. 1057; *Steamship Company v. Ingebregsten*, 57 N. J. Law, 400, 31 Atl. 619. If therefore it is true that the pin, when furnished, was imperfect, and that no other pin fit for the work could be found upon the premises, the defendant was chargeable with actionable negligence. In the case last cited this court held that if the master selects an agent to perform the duty of inspection for him, and the agent fails to exercise reasonable care and skill in its performance, the master is liable for the fault of the servant, but if the servant's duty to inspect or repair apparatus is incidental to his duty to use the apparatus in a common employment with fellow servants, then the master is not responsible to the fellow servants for the default of the co-servant. In *Coyle v. Griffing Iron Co.*, 63 N. J. Law, 611, 44 Atl. 666, 47 L. R. A. 147, this court in its opinion delivered by the present Chief Justice, said: "Although the master is charged with the duty to his servant of providing reasonably, safe and proper machinery and appliances for the latter to work upon, and of using due care in keeping such machinery and appliances in repair, and of making inspection thereof at proper intervals, the servant who operates a machine or mechanical appliance is, on his part, chargeable with certain duties with relation to such machinery and appliances. * * * Where machinery becomes defective during use, and consequently more dangerous to operate, and such defect is an obvious one, which might have been discovered by the servant by the use of reasonable diligence, he is presumed to have taken upon himself the risks incident to its further use while out of repair, and, if

¶ 5. See *Master and Servant*, vol. 24, Cent. Dig. § 515.

injury results to him from such use, the master is not liable."

Drift pins are obviously subject to deterioration in their use, and thereby to become, to some extent, dangerous; and if the pin used in this case was, when furnished to William Campbell, reasonably safe for the work of riveting, the duty of inspection fell upon him, to see whether it became imperfect during his use of it, and for his neglect to make such inspection the master will not be liable. But if the drift pin at the time it was taken by him was unfit for use, and there was not a reasonable supply of safe pins upon the premises accessible to him, and from which he might have selected a good one, the master is in fault.

It is true that, if the defect in the pin taken was an obvious one, the servant who took it, although it was the only one to be had, assumed the obvious risk of danger to himself in its use, but he cannot assume an obvious risk in such case for a fellow servant who does not know of the danger. As to a fellow servant, it will not be presumed that his co-servant would have selected an obviously dangerous implement, when he might have chosen a good one.

Where the negligence of the master concurs with that of the servant in producing injury to a fellow servant, the master is liable; and therefore the burden is on the master to show that he had provided proper tools, which the servant might have used. *Paulmier v. Railway Co.*, 34 N. J. Law, 151; *N. Y., L. E. & W. R. R. v. Steinbrenner*, 47 N. J. Law, 161, 54 Am. Rep. 128; *Cole v. Warren Mfg. Co.*, 63 N. J. Law, 628, 44 Atl. 647.

On the trial of this cause in the court below, Mr. Justice Dixon instructed the jury: (1) If the company had exercised reasonable care to furnish drift pins and safe tools, there was no liability for the injury to the plaintiff; (2) that if the company had proper tools within reach of the workmen, and they, through negligence or lack of judgment, selected the poor ones, the company was not liable. The case was properly submitted to the jury with these instructions.

There was no error in law, and the judgment should therefore be affirmed.

GARRISON, J. (dissenting). With respect to hand tools such as the "pin" in this case, furnished to servants for what may be termed "destructive use," from their known liability to become impaired in the hands of him who uses them, the duty of such inspection as is incident to use is upon the user, carrying with it the duty either of discarding an unsafe tool if ordinary prudence so requires, or of delivering it to the proper representative of the master for repair, or at least of reporting its unsafe condition.

An injury resulting to a servant of a common master from the failure of a fellow servant to perform his duty in these respects is admittedly not due to any neglect on the part

of the master. Where servants thus neglectful have, in continued disregard of this duty, housed their tools during a temporary cessation of work without reporting their condition, so that work upon the same job is resumed with them, the negligence of the servant is not thereby terminated, but is still operative, as the efficient cause of any injury that may result from it.

To say that this actual neglect on the part of the servant is transmutable, by verdict, into the theoretical neglect of the master, seems to me to create an illogical rule, impracticable as to masters and dangerous as to servants.

I find in the facts of the present case only this negligence of a fellow servant, and vote to reverse the judgment.

(60 N. J. L. 357)

ENRIGHT v. OLIVER & BURR.

(Court of Errors and Appeals of New Jersey.
June 15, 1903.)

INJURY TO EMPLOYE—FELLOW SERVANTS—SAFE APPLIANCES—DUTY OF MASTER—ASSUMPTION OF RISK.

1. As a general rule, employes of a common master, who are engaged in the common employment of erecting a building or other structure, are all fellow servants, and the rule is not altered because such employes may be engaged in different departments of the common business. In their contract of hiring they assume the risk of each other's negligence, and cannot look to the master for damages for an injury resulting therefrom.

2. This rule extends also to a foreman in charge of such employes, who is a fellow servant with them, while giving directions with regard to, or assisting them in the performance of, the duties of the common employment. And the master is not liable to the employe for injuries arising out of the negligence of such foreman, except when his acts relate to the personal duties which the master owes to the servant, and from which he cannot escape responsibility by delegating them to another.

3. It is one of the personal duties of the master to exercise reasonable care to furnish safe appliances to the employe for use while engaged in such work; but where the master furnishes proper and sufficient materials, and the employe, as a part of his work, undertakes the construction of such appliances, but the employe, by negligence in putting the materials together or in selecting them, constructs an unsafe appliance, which results in injury to another, the master is not liable.

4. Where an employe seeks to hold the master liable for an injury growing out of the negligence of a fellow servant, and it appears that such negligence resulted from the incompetent acts of such fellow servant, for which the master would ordinarily be held responsible, if it further appears that the conditions created by such incompetency, and which would expose the employes to increased danger, and from which the accident arose which caused the injury, were known to such injured employe, or should have been known to him by the exercise of due care, and yet, without giving notice thereof to the master, or seeking to remedy such conditions, he continues in the employment, and thereby suffers the injury, he will be held to have assumed the risk, as an obvious one, and cannot recover.

(Syllabus by the Court.)

¶ 3. See *Master and Servant*, vol. 34, Cent. Dig. §§ 392, 456.

Error to Supreme Court.

Action by Thomas Enright against Oliver & Burr, a corporation. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Warren Dixon, for plaintiff in error. Bedle, Edwards & Lawrence, for defendant in error.

HENDRICKSON, J. The plaintiff, who is a carpenter, was engaged, with other carpenters and with laborers, in constructing center panels within the spaces made by the iron crossbeams of a large refrigerator building in Jersey City, then in course of erection, which were for the temporary support of a concrete floor then being laid in the several stories of the building. The work had progressed until the fourth floor had been reached, and while the plaintiff was engaged in nailing the corners of a center panel, and in nailing and fitting together the sheathing boards that had been laid down thereon, a defective support gave way under his weight, so that he fell through the sheathing to the floor below, and sustained injuries thereby, for which he brought suit against his employer, the defendant corporation. The gravamen of the action was negligence in failing to provide proper support to the floor or sheathing upon which the plaintiff was working, and in failing to provide competent and skillful employes to lay and construct such flooring, and in failing to properly inspect and maintain the same in a reasonably safe and sound condition while the plaintiff was working thereon in discharge of his duties.

At the close of the plaintiff's evidence at the trial, motion was made for a nonsuit upon the ground, among others, that the accident was the result of the negligence of a fellow servant. The learned trial judge ordered a nonsuit, observing that the case was either within the principle of *Curley v. Hoff*, 62 N. J. Law, 759, 42 Atl. 731, or within that of *Saunders v. Eastern Hydraulic Company*, 63 N. J. Law, 554, 44 Atl. 630, 76 Am. St. Rep. 222. We have not stopped to determine as to the applicancy of these cases, for we can more appropriately, we think, invoke in support of the nonsuit the doctrine of fellow servant. It is contended for the plaintiff that the defendant failed in the duty to use reasonable care to provide for him a reasonably safe place in which to work. But this duty of the master does not apply where the place of work is one that the servants themselves undertake to erect and provide as one of the duties and undertakings of their common employment. In such a case, if any injury occurs to an employe by reason of negligent construction, caused by the carelessness of a co-employe, the master is not liable. This principle is clearly laid down by the Supreme Court in *Maier v. McGrath*, 58 N. J. Law, 469, 33 Atl. 945, and in this court in *Olsen v. Nixon*,

61 N. J. Law, 671, 40 Atl. 694. The only liability that could fall upon the master in such case would be for negligence in the selection of the workmen. And the general rule is also well established that employes of a common master, who are engaged in the common employment of erecting the same structure, are all fellow servants. 12 Am. & Eng. Enc. 1015, and note 2, where cases are cited. The same principle is recognized in *Maier v. McGrath*, ubi supra, where the plaintiff was a laborer, who sued the master for injuries received from the fall of a scaffold while attending upon masons engaged in constructing the walls of a brick building.

One of the questions to be considered in this case is, was the plaintiff injured through the fault of a co-servant, and not through the fault of the master? Some further statement of the facts may be helpful. The panel referred to, as to form of construction, is aptly described in the case as being like a box without top or bottom. It was about 20 feet by about 6 feet in dimensions, and had a depth of 18 inches. It rested upon hangers secured upon the beams. Upon the sides of the panel were also hangers or clips, in which were laid putlogs, spoken of in the case as "putlocks" or "footlocks," across the panel, upon which the sheathing was laid. The putlogs were five in number, and the sheathing was in two sections. In one section the boards were about 15 feet in length, and were met by the boards in the adjoining section, having a length of about 5 or 6 feet. The boards of the two sections were made so as to meet upon the fourth putlog. It is assumed that this putlog, by reason of the junction thereon of the two sections of the sheathing, would naturally be subjected to the greater weight or strain from any incumbrance put upon it. The putlogs were out of 3 by 4 inch timber, 13 feet long; and, in order make three putlogs out of one piece of timber, the third one in some cases had to be cut an inch short. To supply this deficiency in length, furring strips of the required dimensions were nailed at the end with three or four nails. In placing the putlogs into the hangers or clips, it was found that one out of the five was a short one that had been pieced; and that was the fourth in order, upon which the two sections of the sheathing met. It was found after the accident that it was this fourth putlog which gave way under the plaintiff's weight, and, while the putlog proper fell below, the furring strip had split off, and was found in the hanger. It is contended by the plaintiff that the master was negligent in furnishing imperfect and defective putlogs, and was also negligent in employing unskillful workmen, in the persons of ordinary laborers, who were attending upon the carpenters, to lay them down, whereby the defective putlog was placed in such a position as to cause the accident to the plaintiff, which otherwise

would not have been at all likely to occur. And, first, as to the alleged negligence of the master in furnishing some putlogs which were pieced at the end, and alleged to be thereby rendered defective. The putlogs were being made by some of the carpenters at work on the job. They had cut a number of them an inch short, in the way before stated, piecing them at the end, under the direction of the foreman; and then the president of the defendant company came along and stopped the cutting of any more short putlogs, and thereafter the practice was abandoned. The short putlogs continued to be used, but, as fast as the concrete flooring laid upon the sheathing was set, the temporary construction underneath was withdrawn, and the lumber that remained fit was used again in other centers, so that, as the case shows, there were plenty of putlogs for use, and a sufficient number at all times of the putlogs that were not pieced to select from, without using the imperfect ones. These putlogs were selected by one or more of the carpenters, of whom there were at least six at work at the time of the accident, and they were carried by the laborers, as were the boards and other materials used, and placed alongside the panel for which they were intended. Now, regarding the putlog as an appliance which it was the duty of the master to furnish, that would be reasonably safe for the purpose designed—a duty that could not be delegated—still it is well settled that, where the master has furnished a sufficiency of safe appliances to select from, the master is not liable for an injury to an employé arising from the selection by a co-servant of an imperfect appliance not furnished by the master for the purpose. This principle was laid down by this court in *Maier v. Thropp*, 59 N. J. Law, 186, 35 Atl. 1057, and in *Guggenheim Smelting Company v. Flanigan*, 62 N. J. Law, 354, 41 Atl. 844, 42 Atl. 145. As before shown, the corporation had, by its president, plainly condemned the use of the pieced putlogs, by directing the carpenters in charge of that work, and upon whom the duty of selection rested, to stop cutting and piecing putlogs in that way.

But upon another principle the master cannot be held to be negligent because there were imperfect putlogs upon the premises that might be brought into use. This was an appliance which the carpenters were to prepare, and did prepare, out of materials furnished by the master, in the course of their general work. It is not disputed but that the material furnished for the putlogs was of the proper quality and was sufficient in quantity. It therefore follows, upon the principle already stated, that any injury to a co-employé by reason of faulty construction does not fall upon the master. *Maier v. McGrath*, *ubi supra*. The fact that they acted under the direction of the foreman in charge of the men in doing what they did does not

affect the question of liability. The foreman was, under the circumstances, a fellow servant with the other employés engaged in the common employment.

The rule upon this subject is correctly laid down by the Supreme Court in *O'Brien v. American Dredging Company*, 53 N. J. Law, 291, 21 Atl. 324. The decision has been approved by this court in *Maier v. Thropp* and *Olsen v. Nixon*, *ubi supra*. This rule was again very fully discussed and approved by the Court of Errors and Appeals in the recent case of *Knutter v. New York & N. J. Tel. Co.*, 52 Atl. 565, 58 L. R. A. 808. But perhaps the better and more complete answer to the alleged ground of liability on the part of the defendant by reason of its alleged negligence in connection with the cutting, making, and use of the imperfect putlog may be found in this: That it plainly appears that such negligence, if any, was not the proximate cause of the injury. It was proven by one of the carpenters, who was the plaintiff's witness, that he had been a carpenter for 50 years; that he was employed upon this work, and, under instructions from the foreman, he cut and prepared putlogs, and was so engaged when stopped by the president; that they were pieced in a proper way; that this was often done, but they did it for the prevention of lateral motion, not for bearing; that the bearing of the short putlog would be one inch, without the furring strip; that the pieces were nailed on with eight-penny nails; that they used three or four nails in each piece, which together would stand a strain of eight or nine hundred pounds. This was not contradicted, and there was no evidence tending to show that the pieced putlogs were not reasonably safe for use in any other of the places designated for the putlogs, except the fourth place, where the boards of the two sections of the sheathing joined. It was the improper placing of the one pieced putlog at the point where there would be the greatest strain in the whole panel that was, as it seems to us, the proximate cause of the accident.

This being the situation, the only question remaining is, was the faulty arrangement of the putlogs a breach of any duty that belonged to the master, or was it the fault of a fellow servant, or of the plaintiff himself? The evidence does not show that the master was present or participating in any way in the construction and sheathing of the panels. Under the principles already stated, he had furnished the proper and necessary materials for this work that was in charge of the carpenters and laborers under the direction of the foreman. He owed them no duty thereafter in the conduct of this work. The only liability that could attach to him for an injury to an employé so engaged would be where it arose from his failure to exercise reasonable care in the employment of a co-servant whose negligence caused the injury. And this is the chief, if not the only, point

of attack by the plaintiff in this part of the case. His contention is that the ordinary laborers were directed or permitted to not only carry the putlogs to the panel in question, but to lay them down in the clips—a duty which belonged to the carpenters, and for which the laborers were incompetent; that, if they had known how to do their work, and had been properly instructed, the accident, in all probability, would not have happened. It will be perceived that it is not claimed that the master employed incompetent men, having regard to the particular work required of them, but, rather, that the ordinary laborers, employed as attendants to wait upon the carpenters, were ordered to do certain acts which it is alleged they were not qualified to perform. The laying down of the putlogs was only the work of a helper, whose duty it was also to lay down the boards loosely upon the putlogs preparatory to the work of the carpenters, whose duty it was to adjust, secure, and complete the structure, for which all the appliances and materials had been prepared by them. As before stated, it was the duty of the carpenters to select the putlogs to be carried to the panel; and the case shows that when the sides of the panel were in place, and the putlogs and sheathing boards were laid down, the carpenters proceeded to nail the sides and ends together, and to arrange the putlogs so that the fourth should be in place, so that the sheathing boards would properly meet upon it. The loose boards upon both sections had to be adjusted, made tight, and nailed, so as to prevent any leakage of the concrete. The case shows, and it is apparent from the situation, that, in performing the details of the work thus outlined, the carpenters must have seen the putlogs and the clips containing them. And it was clearly their duty to see that the putlogs were in good condition, suitable in character, and properly placed to give the support intended.

But even conceding that the conditions of danger which precipitated the plaintiff's injury grew out of negligence of the co-servant as the result of his incompetency, since it plainly appears that these conditions were known to the plaintiff, or should have been known to him, by the exercise of ordinary care, before exposing himself to the danger complained of, and yet that, without notice thereof to the master, or seeking in any way to remedy these conditions, he continued in the employment which resulted in the injury, he must be held to have assumed the risk, as an obvious one, and cannot recover. The principle involved in the proposition is so well established that the citation of authorities will be unnecessary.

An effort has been made by the plaintiff to escape this result of his own negligence and that of his co-servants upon the ground that, though he was engaged at the time of his injury in doing this detail work on or about the panel, he did not know of

the placed putlogs, and had no knowledge as to who were employed to lay down the putlogs—a work that some time before the accident was performed by the carpenters. But the rule which governs under such circumstances is this: That servants employed by or under the control of the same master, in a common employment, obviously exposing them to injury from the negligence of others so employed or controlled, although engaged in different departments of the common business, are fellow servants, who assume the risk of each other's negligence, and cannot have recourse to the master for any injury resulting therefrom. *O'Brien v. American Dredging Co.*, ubi supra.

We think the plaintiff failed to show any actionable negligence of the defendant, as causing the injury complained of, and therefore the judgment of nonsuit must be affirmed, with costs.

(69 N. J. L. 534)

In re JERSEY CITY PAPER CO.

(Supreme Court of New Jersey. June 24, 1903.)

CORPORATIONS—ELECTIONS—SETTING ASIDE

1. Where, on an application to set aside a corporate election, petitioners claimed that the directors had rendered themselves ineligible to re-election by the refusal to produce the books containing the names of stockholders, as required by section 33 of the corporation act (P. L. 1896, p. 288), and defendants claimed that the demand for the production of the books, if made at all, was not made until after the election was over, the only course open was to order a new election to be held.

In the matter of the election of directors of the Jersey City Paper Company. Application to set aside the election granted.

Argued June term, 1903, before Justices GARRISON, GARRETSON, and SWAYZE.

Gilbert Collins, for the application. Charles D Thompson, for defendants.

PER CURIAM. This is a summary proceeding, brought under the forty-second section of the corporation act (P. L. 1896, p. 291), to review a corporate election at which the then existing directors were declared to be re-elected. The contention of the petitioners is that the directors in office at the time the election was held rendered themselves ineligible to re-election by their neglect or refusal to produce the books containing the names of the stockholders, as required by the thirty-third section of the act. The claim of the petitioners is that prior to the election they required such production, and that they at no time waived their right in this respect; while the defendants insist that such demand, if made at all, was made after the election was over, and that the conduct of the petitioners amounted to a waiver of the production of the books. Each contention is supported by the oaths of the parties interest-

¶ 1. See *Corporations*, vol. 12, Cent. Dig. § 1220.

ed. The testimony, which is thus diametrically variant upon the precise point at issue, can be reconciled only by the conclusion that the petitioners did require the production of the books, but that the defendants did not understand that the production of the books was insisted upon until after the election had been held. Reaching this conclusion, we think that the election of the defendants cannot stand, because of their personal ineligibility. It would, however, be manifestly unfair to the voting stockholders to declare that the petitioners had been elected. Justice can be done only by order that a new election be held. This is the order of the court.

(80 N. J. L. 436)

STOUT v. HUMPHREY.

(Court of Errors and Appeals of New Jersey.
June 15, 1908.)

STATUTE OF FRAUDS—AUTHORITY TO SELL LAND—RIGHT TO COMPENSATION.

1. The tenth section of the statute of frauds, which provides that no broker or real estate agent selling lands on account of the owner shall be entitled to receive any commission for such sale unless the authority for selling is in writing signed by the owner or his authorized agent, is aimed at and applies to any person who acts as broker or real estate agent in the very transaction out of which the claim for compensation arises.

2. In the absence of a written contract for the sale or exchange of real estate, there is an absence of right to compensation for services; and where there is no written contract a subsequent express promise to pay is without consideration and void, under the statute of frauds (Gen. St. p. 1604, § 10).

(Syllabus by the Court.)

Error to Circuit Court, Hunterdon County.

Action by Harry L. Stout against Lambert Humphrey. Judgment for defendant, and plaintiff brings error. Affirmed.

The action was on contract, and brought by the plaintiff, an attorney at law, against the defendant, a hotel proprietor in Flemington, to recover the sum of \$1,175. The declaration contained the common counts only, and annexed thereto was the following bill of particulars:

"The following is a bill of particulars of the demand whereupon the annexed declaration is founded: For legal advice and services, traveling expenses, and disbursements done, performed, and expended by plaintiff as attorney for defendant in and about the sale of the property of the defendant known as the Union Hotel, situated in the village of Flemington, in the county of Hunterdon, and state of New Jersey, between the first days of May and August, A. D. 1899...\$1,200 00

Or.

August, 1899, by cash paid on account 25 00

Balance due..... \$1,175 00"

¶ 2 See Brokers, vol. 3, Cent. Dig. §§ 44, 79.

It appears from the testimony at the trial that some time in the month of March, 1899, the plaintiff had a conversation with the defendant, in which conversation the defendant said that he desired to sell his hotel property, and the plaintiff testified that "Mr. Humphrey, in the conversation in reference to the disposition of his property, wanted to know what would be the best thing to do in order to dispose of the property; and he talked about the price; what he wanted for it; what the receipts were per day; the manner in which the hotel was being run; that his wife was down to his residence, and was unable to get to the hotel, and he had to devote part of his time there, and had to look after the entire management and control of the hotel; and I said to him the property had better be advertised in the New York papers; that I knew of no one in the market here, and I advised him to advertise in the New York papers; and he said, 'Will you advertise that property for sale and look after the correspondence?' and I told him it would be considerable work; and he said, 'How much will you charge?' and I said, 'If you get \$45,000 for this hotel it is a big price, and I may have to go away some, and there is considerable work attached to it, and you ought to give me \$1,500.' He said, 'That is too much.' He said, 'If you will keep me straight in this transaction, and I sell the property, I will give you \$1,000 and the lot on Elwood avenue.' I says, 'Under the circumstances, I will undertake it,' and he said, 'Understand, if I don't sell it you don't get anything.'" The plaintiff then detailed the services performed by him. It then appeared that in August following the defendant sold the property. Subsequently the plaintiff had a conversation with the defendant, after he had given possession of the property to the purchaser, in which the defendant said that the deal was changed a little, and that the purchaser was to take three years to pay for it, and that he had not received much money. Then, to quote the testimony of the plaintiff: "Now," he says, "to pay you now would be giving you a good deal of money." He says, "Mr. Chamberlain might not make a success of the business; he may die; then I would be that much money out;" but he says, "I will give you some on account." Then he says, "When Chamberlain takes his deed I will pay you the balance;" * * * and he then gave me \$25.00 on account; and I said, "Give me a paper to show the balance due me;" and he said, "My word is as good as my bond;" and I says, "All right, Mr. Humphrey;" and he said, "I will pay you when he takes the deed." After the delivery of the deed the plaintiff demanded of the defendant the balance he claimed to be due in cash and the transfer of the lot, when the defendant refused to pay him anything. At the close of the plaintiff's case, Pitney, J., directed a nonsuit on the ground that the contract sued on was void so far as it related to services ren-

dered by the plaintiff as a real estate broker, because the contract was not in writing, and so was in violation of section 10 of the statute of frauds and perjuries.

Willard C. Parker and H. B. Herr, for plaintiff in error. George H. Large, for defendant in error.

VROOM, J. (after stating the facts). The plaintiff in error relies upon the following assignments of error: (1) That the said justice before whom the said cause was tried nonsuited the plaintiff on the ground that under section 10 of an act entitled "An act for the prevention of frauds and perjuries," approved March 27, 1874 (Revision, p. 446), the action of the plaintiff could not be sustained, and therein erred in law; (2) that the said justice sustained the motion of nonsuit made by the defendant, when the judgment should have been to overrule said motion, and to give judgment thereon in favor of the plaintiff, and therein erred in law.

The tenth section of the statute of frauds and perjuries first became a part of our statute law in 1873, and the act then passed was entitled "An act to regulate the commissions of brokers and real estate agents in the sale of land," and as passed was in the following words: "That no broker or real estate agent, selling land on account of the owner, shall be entitled to receive any commission for the sale or exchange of any real estate, except the authority for selling is in writing and signed by the owner or his authorized agent, and the rate of commission on the dollar shall have been stated in such authority." P. L. 1873, p. 50. In 1874 that act was included in the statute "for the prevention of frauds and perjuries," in the Revision of that year (Revision, p. 446), constituting section 10 of that act, and is substantially identical with the statute above quoted.

The meaning of this section, in so far as it prescribes that there must be a written authority to entitle the broker or real estate agent to commissions upon the sale or exchange of property and the object of such requirement, is too plain for contention; the question raised is as to whom do the provisions of the act apply. The insistence of the plaintiff in error is that this section is expressly confined to real estate agents or brokers, and to contracts authorizing them to dispose of lands of owners, and that an attorney at law, not carrying on commonly a real estate business, and who is employed, in part, at least, by reason of his being such attorney, to render legal services in and about the sale of real property, is not within the meaning of this section.

The learned trial judge, we think, tersely and correctly interpreted this section of the statute when he said: "But as I read the statute, both in its letter and manifest policy, it is aimed at any person who acts as

broker or real estate agent in the very transaction in question out of which the claim to compensation arises. It would be a very narrow construction of the statute to say that it applied only to him who ostensibly and usually carried on the business of brokerage, or a real estate business so-called."

A "broker" is defined to be "a middleman or agent, who, for a commission or rate per cent. on the value of the transaction, negotiates for others the purchase or sale of stocks, bonds, commodities, or property of any kind, or who attends to the doing of something for another." Century Dictionary. It is a well-known fact that the business of a broker and that of a real estate agent is often carried on by many who never hold themselves out or advertise as such, and under the name of insurance agents, justices of the peace, and even attorneys, are constantly "engaged in selling or exchanging land for or on account of the owner," and to give a construction to this statute which would except them from its provisions would be a clear violation of the policy which caused its enactment.

It was contended on the part of the plaintiff in error that an attorney does not cease to be such because his employment requires services not strictly professional together with other services which are professional, and the case of *National Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621, was cited as authority for this proposition. I do not understand that this was involved in the decision of that case. What was there decided was that in an action against an attorney for negligence proof of employment and the want of reasonable care and skill in the performance of the stipulated services are prerequisites to the maintenance of the action, and that these matters must be alleged and proved. But conceding that the attorney does not cease to be such when his employment is a service not strictly professional, and, as in this case, was that of a broker or real estate agent, the mere fact that he is an attorney will not relieve him from the provisions of the statute which require the written authority of the owner for the sale or exchange of land before he will be entitled to any commissions for such sale or exchange.

Again, the plaintiff contends that the defendant in this case did not give his attorney any power or authority to sell his property; that his only employment was to aid him in making a sale of the property. The effect of this would be to limit the operation of the section to those who have the authority to sell the property, and bind the defendant by the contract. That would be, indeed, but a narrow construction of the terms "selling or exchanging," and exclude all who negotiate sales, seek purchasers, and secure them, as is customary with real estate agents and brokers, and for which services commissions are always charged and allowed. I concur with the views of the trial judge that "a

construction which would take out of the statute all persons who are empowered to sell, in the sense of carrying the sale into effect, would defeat the purpose of the statute."

But the plaintiff insists that, conceding that the contract is within the statute, the defendant has waived any benefits by a subsequent promise to pay, made verbally to the plaintiff, and detailed in the statement prefixed to this opinion. He further insists that thereby the defendant acknowledged his liability, agreed to pay the commissions demanded, and that contract renders him liable in this action. The difficulty with this contention is that the subsequent promise to pay for the services is entirely without consideration, and therefore void. The tenth section of the statute of frauds does not merely say that "no action shall be maintained," but that "no broker or real estate agent selling or exchanging land for or on account of the owner, shall be entitled to any commission for the sale or exchange of any real estate, unless the authority for selling or exchanging such land is in writing signed by the owner," etc. It therefore follows, as correctly held by the trial judge, "the statute declared a public policy, viz., in the absence of written contract there shall be an absence of right to compensation for services; and so, where there is no written contract, a subsequent express promise to pay for the services is entirely devoid of consideration."

This principle was fully considered in the early case of *Loyd v. Lee*, 1 Str. 94. There "a married woman gave a promissory note as a feme sole, and after her husband's death, in consideration of forbearance, promised to pay it; and in an action against her it was insisted that, though she being under coverture at the time of giving the note, it was voidable for that reason, yet by her subsequent promise, when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration." But the Chief Justice (Hardwicke) held the contrary, and that "the note was not barely voidable, but absolutely void; and forbearance, where originally there was no cause of action, is no consideration to raise an assumpsit."

And again, in the later case of *Cockshot v. Bennett*, 2 T. R. 763, where it was held that "if all the creditors of an insolvent consent to accept a composition for their respective demands upon an assignment of his effects by a deed of trust to which they are all parties, and one of them, before he executes, obtains from the insolvent a promissory note for the residue of his demand by refusing to execute till such note be made, the note is void in law as a fraud on the rest of the creditors, and a subsequent promise to pay it is a promise without consideration, which will not maintain an action."

In commenting on these cases the author of the well-known and elaborate note to *Wen-*

nell v. Adney, 3 B. & P. 247, says: "It is clear that if a contract between two parties be void, and not merely voidable, no subsequent express promise will operate to charge the party promising, even though he has derived the benefit of the contract. Yet according to the commonly received notion respecting moral obligations, and the force attributed to a subsequent express promise, such a person ought to pay. An express promise, therefore, as it should seem, can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision."

In the case of *Beaumont v. Reeve*, 8 Q. B. 483, the rule is thus stated, and it is quoted by Mr. Chitty in the text of his work on Contracts (volume 1, p. 54), "that an express promise cannot be supported by a consideration from which the law would not imply a promise, except where the express promise does away with a legal suspension or bar of a right of action which, but for such suspension or bar, would be valid."

In *Freeman v. Robinson*, 38 N. J. Law, 383, 20 Am. Rep. 399, Mr. Justice Depue, after a learned discussion of the question, says "that the principle enunciated in the note above cited to *Wenell v. Adney*, and adopted by the judges of the Queen's Bench in *Beaumont v. Reeve*, supra, may now be considered as the settled law in the English courts," and "that it has also been approved and made the basis of judicial decision quite generally in the courts of this country"—citing cases.

The exceptions to the rule are only these where there was originally a consideration of benefit to the promisor from which a promise would have been implied capable of legal enforcement, if some statutory provision or positive rule of law had not debarred the party from legal remedy, and under these are promises to pay debts the recovery of which is barred by the statute of limitations; a promise by a man after he becomes of age to pay a just debt contracted during minority, but not for necessities; a promise by a bankrupt after his certificate to pay his debts in full; and a promise to perform a secret trust, or a trust void for want of writing under the statute of frauds. *Freeman v. Robinson*, supra. The contract here sued upon, therefore, having been in contravention of the statute, was not voidable, but void; no subsequent promise could operate to change the party promising therewith.

The case of *Griffith v. Daly*, 56 N. J. Law, 466, 29 Atl. 169, is relied upon by the plaintiff as an interpretation of this statute adversely to the views above expressed; but the opinion of Mr. Justice Dixon distinctly

states that the plaintiff "did not sue to recover a commission for the sale or exchange of any real estate, nor was the defendant's agreement, on which the suit rested, one to pay him for such services." This being the case, and the present suit being admittedly brought for services "in and about the sale of the property of the defendant," it is difficult to perceive the pertinency of the insistence that the decision in this case should be considered as an interpretation of this statute.

The plaintiff further insists that he was entitled to immediate payment for his services so far as the sale of the personal property was concerned and for legal services. The trial judge properly held that so far as those services, they being of a character not obnoxious to the statute of frauds, were joined together in an indivisible contract with services that were obnoxious to the statute, the whole contract would be void; that there could be no recovery under the bill of particulars in the case, for the bill of particulars is inconsistent with a recovery on a quantum meruit. The bill of particulars being based on the contract, in the absence of an amendment there could be no recovery. The plaintiff declined to ask for an amendment.

There was no error in the ruling of the trial judge, and the plaintiff was properly nonsuited. The judgment below should be affirmed.

(68 N. J. B. 776)

McMULLIN v. DOUGHTY.

(Court of Chancery of New Jersey. June 23, 1903.)

COSTS—ATTORNEY'S FEES—EQUITY CASES—STATUTES—CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS.

1. Chancery Act 1902, § 91 (P. L. p. 540), authorizing an allowance of counsel fees to complainants in equity cases to be included in the taxed costs, is not unconstitutional as denying equal protection of laws, in that no such allowance is authorized to successful defendants.
2. Such act is not invalid as a local or special law granting an exclusive benefit to an individual.

Action by Mary B. McMullin against Sarah U. Doughty. On application for decree. Granted.

J. D. McMullin, for the motion. H. A. Drake, opposed.

MAGIE, Ch. Vice Chancellor Grey, to whom this case was referred, has advised a decree therein, containing a blank space for the amount of an allowance to complainant of a counsel fee to be included in the taxed costs, and has reported to me that \$400 is a reasonable sum to be allowed. This course has been pursued by him under suggestions made by me to all the vice chancellors as to the practice under the provisions of section 91 of the chancery act of 1902. By the terms of that section, I have concluded that the

Legislature has intended to confer on the Chancellor discretionary power to make certain allowances, to be included in the complainant's taxed costs, and that it is my duty to consider the application for the exercise of that power. In respect to causes heard by vice chancellors, I think the application should be primarily made to the vice chancellor, and that he should report whether any allowance should be made, and what would be a reasonable sum to allow. In order to preserve uniformity in the exercise of such discretion as is conferred on the Chancellor, the parties will be heard by me, if desired, in respect to the allowance reported. In this case the parties have been heard, and defendant's counsel objects to any allowance.

The objection is first put on the ground that the legislation in question is obnoxious to constitutional restrictions, either that of the Constitution of the United States forbidding any state to deny to any person in its jurisdiction the equal protection of the laws, or that of our Constitution forbidding any general law to include any provision of a private, special, or local character, or that forbidding the passage of any private, local, or special law granting to any individual any exclusive benefit. His contention is that, by section 91, a benefit is conferred on successful complainants in chancery suits which is not conferred upon successful defendants. He supports his contention by numerous cases in the state and federal courts in which legislation conferring power to award allowances to parties in actions against certain corporations, such as railroad companies, or in actions against such corporations for certain tortious acts, have been pronounced invalid. But the legislation under consideration is capable of being distinguished from that dealt with in the cases cited. It affects a whole class of litigants, viz., complainants. It does not distinguish among them by reason of the nature of the action or the character or conduct of the defendants. Why defendants who might be successful in equitable suits are not included in the benefit of this legislation cannot be considered, if complainants in such suits form a proper class for such legislation. That they are improperly classified by this act does not seem to me to be so clear that a court of primary jurisdiction would be justified in pronouncing the legislation for their benefit wholly invalid.

It is further contended that the circumstances do not warrant the allowance recommended. My examination of the case, and my consideration of the reasons given by Vice Chancellor Grey, satisfy me that the discretionary power conferred on the Chancellor should be exercised, and that the amount allowed is not excessive.

The blank in the advised decree will be filled with the sum reported, and the decree signed.

(65 N. J. E. 176)

SPENGLER v. SPENGLER et al.

(Court of Chancery of New Jersey. June 23, 1908.)

INSURANCE — BENEFIT SOCIETIES — CERTIFICATES — BENEFICIARIES — CHANGE — VESTED RIGHTS — PAYMENT OF PREMIUMS — RECOVERY — NEW CERTIFICATES — ISSUANCE.

1. A benefit certificate provided that a certain lodge agreed to pay complainant a certain sum, in accordance with its laws, on the member's death, provided the certificate should not have been surrendered by the member or canceled at his request and another certificate issued. The order's constitution declared that, if a benefit certificate of a member be lost or beyond his control, the member might surrender all claim thereto, and direct that a new certificate be issued to him, payable to the same or some other beneficiary, and that the issuance of such new certificate should cancel all previous certificates. *Held*, that complainant, by reason of being named as beneficiary in such certificate, acquired no vested rights which would preclude the member from changing the beneficiary.

2. Where a member of a mutual benefit society was entitled to change the beneficiary in his certificate, at his election, the fact that he gave his original certificate to complainant, to whom it was payable, and told her that she could keep it up if she chose, that he had no more money to pay on the same, and that she thereafter paid the premiums as they matured, did not prevent such member from thereafter changing the beneficiary, and taking out a new certificate.

3. Complainant, having voluntarily paid such premiums with knowledge that the certificate authorized the member to change the beneficiary at will, was not entitled to recover them on the happening of such event.

4. Where the constitution of a benefit society provided that, if the benefit certificate of a member be lost or beyond his control, he might obtain a new certificate payable to the same or another beneficiary, the fact that a member who seven years before had given a certificate to his wife, to whom it was payable, on desiring to obtain another payable to a different beneficiary, stated that it was lost, did not invalidate a subsequent certificate issued, such certificate being properly issuable, on the ground that the old certificate was beyond the member's control.

Action by Anna Spengler against Charles Spengler and others to set aside a benefit certificate. Bill dismissed.

Mr. Rupprecht and Mr. Anderson, for complainant. Mr. Osborne, for defendants.

STEVENS, V. C. Contrary to my first impressions, based upon an erroneous idea that under the benefit certificate issued August 13, 1894, there had been acquired a vested right such as was held to exist in *Locomotive Association v. Winterstein*, 58 N. J. Eq. 189, 44 Atl. 199, and such as may arise under an ordinary life insurance policy (*Brown v. Murray*, 54 N. J. Eq. 594, 35 Atl. 748), I have come to the conclusion that that certificate has been annulled, and that the certificate issued November 15, 1901, payable jointly to complainant and the three children of Adolph Spengler, is the one now in force. The adjudicated cases in this state appear to me

to show this beyond question. In *Golden Star Fraternity v. Martin*, 59 N. J. Law, 207, 35 Atl. 908, it is said by the Court of Errors: "The beneficiary may be changed by the mere will of the member and without the beneficiary's consent. In such case the right of the beneficiary is not property, but a mere possibility or expectancy, dependent on the will of the member to whom the certificate is issued. For this reason the beneficiary's interest in the certificate and contract evidenced thereby differs totally from the interest of a beneficiary named in an ordinary life insurance policy containing no provision for the designation of a new beneficiary."

The contract contained in the certificate upon which complainant bases her claim reads as follows: "And said Supreme Lodge hereby agrees to pay * * * [to complainant] the sum of \$1,000 in accordance with and under the laws governing this order, upon satisfactory evidence by the beneficiaries of the death of said member, and * * * upon the surrender of this certificate; provided, that this certificate shall not have been surrendered by said member or canceled at his request, and another certificate issued in accordance with the laws of the order."

The second section of article 9 of the constitution of the order provides that, "if the benefit certificate of a member be lost or beyond his control, the member may in writing surrender all claim thereto, and direct that a new certificate be issued to him, payable to the same or other beneficiary, in accordance with the laws of this order. * * * The issuing of such new benefit certificate shall cancel and render null and void any and all previous certificates issued to such member."

Adolph Spengler, shortly before his death, made affidavit of the loss of the certificate issued in 1894, and complied with the other regulations of the constitution. Thereupon the lodge issued the new certificate attacked by the complainant's bill.

It must be conceded that, as between the new beneficiaries and the company, the legal right of recovery is complete. It is said, however, that as between them and the complainant the case is different; that the prior certificate was given to complainant by her husband in the year 1894, shortly after her marriage, and that upon the strength of that gift she paid the premiums up to the time of her husband's death. The testimony of complainant's daughter is that in August, 1894, her stepfather handed the certificate to her mother, and said: "Anna, I make you a present of this paper; it is yours; do with it what you please; I have no money to keep it up, so you pay it if you choose." The proof is that this certificate had itself been substituted for a prior certificate on which Adolph had paid the premiums from the year 1882. Now, if the certificate assert-

¶ 2. See *Insurance*, vol. 23, Cent. Dig. § 1943.

ed to have been given to the complainant was in terms payable to her, its mere delivery did not change the right. In *Landrum v. Knowles*, 22 N. J. Eq. 594, Chief Justice Beasley, speaking of an ordinary life insurance policy, says: "The interest in this policy was effectually transferred to these appellants, for by its very terms it is made payable to them, and it is difficult to perceive what ceremony or fact is wanting to the perfection of the gift to them." So here, the certificate being made payable to complainant, her custody of the paper was not improper while she continued to be the sole beneficiary. The delivery to her was in accord with her expectancy. But what did she get by the so-called gift? Evidently the contract as it was embodied in the paper itself—"the expectancy dependent on the will of the member." But there is this obvious distinction to be kept in mind: As between the member and the lodge, the contract embodied in the certificate continues to be the contract until varied in some lawful way by mutual consent. But there seems to be no reason why the member may not, by contract founded on valuable consideration, effectually assign his certificate to one or more of the class of persons who he may under the laws governing the lodge designate to it as beneficiary, and why in favor of such person he may not covenant to make no new designation. If he does so assign, as between him and the assignee, the assignment may be valid and enforceable. It may prevail as against any subsequent voluntary beneficiary named by him. It is on this distinction that such cases as *Smith v. National Ben. Soc.*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616, appear to be founded.

In the case in hand the question then is, may the so-called gift be deemed to possess the elements of a binding contract? Does the evidence warrant the inference of an agreement of this sort: "If you pay the premiums up to the time of my death, the money due on the certificate is yours absolutely?" Does it show payments made on the faith of this promise? It may be doubtful whether it does, but, if it does, there is this fatal defect in it: It appears to have been a contract made on Sunday, and, under the well-settled course of decision in this state, absolutely void. *Gennert v. Wuestner*, 53 N. J. Eq. 302, 31 Atl. 609; *Reeves v. Butcher*, 31 N. J. Law, 224; *Cannon v. Ryan*, 49 N. J. Law, 314, 8 Atl. 293.

The case, then, is this: Mrs. Spengler pays on an expectancy dependent on the will of the member. The certificate of which she has possession itself so declares. She pays on a contract which expressly reserves to the member the right to make a new designation. She has notice that her husband may at any time change the beneficiary, and she has no lawful agreement binding him not to

do so. If he does what he has a right to do, and what she knows he has a right to do. I do not see how, in a legal sense, she can complain. Her payments are referable to the papers as we find it and to nothing else.

It is said, however, that the change was effected by fraud; that Adolph Spengler made an affidavit that the policy was lost, and that this was false to his knowledge. I do not think the evidence justifies the inference that he knowingly asserted a falsehood. The delivery of the certificate to his wife occurred seven years before. He may easily have forgotten it. The clause I have quoted from the ninth article uses the language "lost or beyond his control." He could just as easily and with perfect truth have sworn to the latter of these alternatives. By the language of the articles the legality of the issuance of a new certificate is made to depend upon the fact of loss or want of control, and not upon an evidence of the fact. The new certificate was issued, and its issue is warranted by the undisputed fact that it was beyond his control. Besides, the fraud, if any, was perpetrated upon the association, and it does not object to pay.

The final contention is that Mrs. Spengler is entitled to a return of the premiums paid before there is any division of the money between herself and the other beneficiaries. If the beneficiary first named pays premiums after the original certificate has been canceled and a new one issued in favor of another, in ignorance of the cancellation, or if, as in the case of *Tepper v. Supreme Council*, 59 N. J. Eq. 322, 45 Atl. 111, the beneficiary ignorantly paying cannot claim the benefit because he is not included in the class of persons to which, according to the law of the association, payment may be made, I can see why such premiums should in equity be returned. But in the case at bar all the payments were made while complainant was the nominee. They were made on a contract whose very essence was that it was subject to change at the will of the member. She is herself suing upon it and asking for its enforcement. Upon what principle can she recover the money? As well might the legal representatives of a joint tenant obligee claim to have back money to be repaid with the chance of survivorship. It seems to me that *Fisk v. Eq. Aid Union (Pa.)* 11 Atl. 84, is founded on principle, and that the decision is applicable to this case. *Leslie v. French*, 23 Ch. Div. 552. A defendant in equity may sometimes claim an allowance to which he would not be entitled as plaintiff on the principle that the latter, asking equity, must do equity. Mrs. Spengler is not in a position to say that she should have the benefit of this maxim. She is plaintiff, asking for the enforcement of what she considers to be her legal right. I think, therefore, the bill must be dismissed.

(69 N. J. L. 670)

KNOWLDEN v. GUARDIAN PRINTING & PUBLISHING CO.(Court of Errors and Appeals of New Jersey.
June 22, 1903.)**LIBEL—LACK OF ILL WILL OR MALICE—MITIGATION OF COMPENSATORY DAMAGES—INSTRUCTIONS.**

1. Where, in an action for libel, compensatory damages only were claimed, evidence of lack of ill will or malice was inadmissible in mitigation.

2. Where, in an action for libel, it appeared that a libelous publication had appeared in three issues of defendant's newspaper, having a large circulation in the vicinity of plaintiff's former residence, and such publication falsely charged her with adultery, it was not error for the court to charge that the court would feel the same sense of shame and mortification as plaintiff would, when the publication was made, if the jury rendered a verdict in her favor for but six cents damages, that such verdict would be an utter disgrace to the administration of law, and that it was the jury's duty to see that plaintiff had substantial compensation for the grievous wrong done her.

Error to Circuit Court, Passaic County.

Action by Jennie Fields Knowlden against the Guardian Printing & Publishing Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Michael Dunn, for plaintiff in error. Edward Luce, for defendant in error.

PER CURIAM. This was an action whereby a married woman sought to recover damages resulting from three publications in the newspaper of plaintiff in error, charging her with adultery. The trial judge instructed the jury that plaintiff was not entitled to recover punitive or vindictive damages, but was entitled to recover such damages as would compensate her for injury done to her reputation and feelings by the three publications made by defendant, and conceded to be untrue. A claim for punitive damages may be defended against by proof of lack of ill will or malice, and the damages sought may be mitigated if the publication was made in good faith, with honest belief in its truth. But when damages are sought which are compensatory only, such evidence of mitigation is not admissible, the compensation depending not upon the motive or intent, as in the case of punitive damages, but solely on the actual injury done by the publication to reputation and feelings. It was conceded that it appeared at the trial that the plaintiff was of unblemished reputation, of mature age, with a grown son, that the publications were made in defendant's newspaper, published in a city in which she had formerly lived, and circulating there and in the vicinity of her residence at the time of the publication, and that the circulation was large. The trial judge called the attention of the jury to the three publications, which occurred on August 22, August 23, and August 25, 1900, and to the fact that no retraction was claimed to have been made until April, 1901.

Upon these conceded facts, we find no error in the following portion of the charge, which was excepted to: "That is the case before you. If, with that case before you, you give this lady, as counsel for the defendant urges, six cents, the courts of justice should feel the same sense of shame and mortification Mrs. Knowlden must have felt when the publication was made. It would be an utter disgrace to the administration of law to say that such a publication, such a damage to reputation, such an invasion of feelings, was to be compensated for by six cents. It is your duty in this case to see that she has substantial compensation for this grievous wrong."

(69 N. J. L. 266)

MUTH v. BOOYE.(Court of Errors and Appeals of New Jersey.
June 22, 1903.)**ARBITRATION AND AWARD—SUBMISSION—CONSTRUCTION—FILING AWARD—TIME—SCOPE—EVIDENCE—REVIEW—OBJECTIONS NOT MADE AT TRIAL—ENFORCEMENT OF AWARD—EXECUTION—CONTEMPT PROCEEDINGS.**

1. Where an arbitration agreement signed on the 14th day of April, 1902, after providing that the award should be ready to be delivered to the parties on or before the 19th day of April, fixed that date for the first meeting of the arbitrators, and authorized them, if necessary, to meet at such subsequent times as they should appoint, the award was not invalidated by the fact that it was not made until the 20th day of August, 1902.

2. Where, after reciting that differences had arisen as to the amount due and owing by one party to another for work done and material furnished, the parties submitted the amount which should be paid, as well as all matters of difference between them concerning the property described, to arbitration, an award that there was due to one of the parties from the other, for work done and materials furnished, a certain amount on each of the buildings described, which sum the debtor should pay, and that the same should be in full discharge only of the demands by either of the parties against the other respecting the claim for work done and materials furnished for the premises described in the award, was properly within the terms of the submission.

3. In the absence of corruption or partiality of arbitrators or fraud practiced by one of the parties to the arbitration, the award cannot be reviewed as not justified by the evidence submitted to the arbitrators.

4. Where a writ of error was issued to review proceedings had on a rule to show cause why an award of arbitrators should not be set aside, and the writ commanded the circuit court to send the record, evidence on the rule considered, and proceedings aforesaid to the Court of Errors and Appeals, an assignment that the circuit court illegally permitted execution to be issued on the award could not be reviewed, the issuance of such writ not being a part of the proceedings had on the rule to show cause.

5. Under Gen. St. p. 69, § 1, authorizing the enforcement of an award by contempt proceedings, such award cannot be properly enforced by *fi. fa.*

6. Assigned errors not presented to the circuit court cannot be reviewed by the Court of Errors and Appeals.

¶ 2. See Arbitration and Award, vol. 4, Cent. Dig. § 441.

Error to Circuit Court, Atlantic County.

Action between Frank Muth and Rufus Booye. From an order dissolving a rule to show cause why an award in favor of the latter should not be set aside, the former brings error. Affirmed.

J. J. Crandall, for plaintiff in error.
Thompson & Cole, for defendant in error.

GUMMERE, C. J. In this case the parties submitted matters in dispute between them to arbitrators for settlement, and, by their agreement, their submission was made a rule of court, in accordance with the statute. The arbitrators having made their award, Muth, the plaintiff in error, moved the circuit court to set it aside for certain reasons which he then specified. The court, on the hearing of the application, considering that none of the reasons assigned were meritorious, denied the motion, and confirmed the award. The rule entered pursuant to this adjudication is brought here for review.

The first ground upon which the validity of the award is attacked is that it was not made until the 20th day of August, 1902, whereas, by the terms of the agreement of submission, the arbitrators were required to render it on or before the 19th day of April of that year. An examination of the agreement shows that it was signed by the parties on the 14th day of April, 1902, and that, after providing that the award of the arbitrators should be ready to be delivered to the parties on or before the 19th day of April, it fixed the first meeting of the arbitrators for April 19th, and authorized them, if necessary, to meet at such subsequent times as they should appoint. That the arbitrators met on the day fixed by the agreement for their first meeting is shown by the fact that the jurat to the oath which they took bears that date. Why they did not make their award on that date is immaterial. Having power to adjourn, after their first meeting, from time to time as they deemed necessary, the fact that they exercised this power affords no ground of complaint to either of the parties.

It is further contended, on behalf of the plaintiff in error, that the award is not within the terms of the submission. The agreement to arbitrate, after reciting that differences had arisen as to the amount due and owing by the plaintiff in error to the defendant in error for work done and material furnished in and upon the tenements known as "Boscobel," Nos. 125, 127, and 129 South Kentucky avenue, and upon No. 132 South St. James Place, and upon No. 18 South Kentucky avenue; and upon the Catholic parsonage, Nos. 1417 and 1419 Pacific avenue (all in Atlantic City), proceeds as follows: "The parties do submit the amount which first party [the plaintiff in error] shall pay to second party [defendant in error] for his work done and materials furnished upon the

aforesaid premises for the first party, as well as all matters in difference between them concerning the properties aforesaid, to an award and final determination," etc. The award of the arbitrators is that "there is due to the said Rufus Booye from said Frank Muth, for work done and materials furnished to and for the use of said Frank Muth on the Boscobel, the sum of \$1,788.84; and for work done and materials furnished at 132 South St. James Place, the sum of \$336.83; and for work done and materials furnished on the premises 18 South Kentucky avenue, \$344.72; and for work done and materials furnished on the Catholic parsonage, the sum of \$709.08—in all, the sum of \$3,178.47." The award then goes on to declare that the said Frank Muth shall pay this sum to the said Rufus Booye, and that the same shall be "in full discharge and satisfaction only of the demands by either of said parties against the other respectively, respecting a claim for work done and materials furnished by the said Booye to the said Muth in and for the premises described in this award." On its face the award is plainly within the four corners of the agreement. It is contended, however, that the conclusion reached by the arbitrators is not justified by the evidence submitted to them. But in the absence of corruption or partiality in the arbitrators, or fraud practiced by one of the parties to the arbitration, the award is final as to the facts; and this court will not review the testimony for the purpose of determining whether the conclusion of the arbitrators thereon is right or wrong. *Bell v. Price*, 2 Zab. 578. To review the case on the merits would be to turn this proceeding into an appeal from the judgment of the arbitrators.

Another assignment of error is that the circuit court illegally permitted execution to be issued against the property of the plaintiff in error for the collection of the moneys found due from him to the defendant in error by the arbitrators. But this matter is not before us for determination. The writ of error issued out of this court brings here nothing but the record, evidence, and proceedings on the rule to show cause. This clearly appears from an inspection of the writ itself. After reciting that "in the record and proceedings, and in giving judgment, upon the rule to show cause why the award of arbitration should not be set aside, manifest error has intervened," the writ commands the circuit court to "send the record, evidence on the rule considered, and proceedings aforesaid, with all things touching the same, to our Court of Errors and Appeals," etc. The execution, which, although not called for by, was returned with, the writ of error, shows on its face that it is no part of the proceedings had on the rule to show cause, but was issued for the enforcement of the award itself. For this reason, the assignment of error must fall.

We deem it proper, however, as the question was argued somewhat at length before this court, to add that the only proper method by which an arbitration award, which has been made a rule of court, can be enforced, is that pointed out by the statute, namely, by proceedings taken to punish the party who refuses to perform the same, as for a contempt of court. Gen. St. p. 69, § 1. A writ of *fi. fa.* sued out for that purpose will be quashed, on motion, by the court out of which it purports to be issued.

Other errors have been assigned, but, as they set out matters which were not presented to the circuit court as grounds for setting aside the award of arbitrators, they cannot be considered here. The rule is entirely settled that, in a court of review, a party shall not be heard upon a matter not raised and considered in the court below. *Trent Tile Co. v. Fort Dearborn Nat'l. Bank*, 54 N. J. Law, 599, 25 Atl. 411.

The proceedings under review should be affirmed.

(89 N. J. L. 445)

McDONALD v. STANDARD OIL CO.

(Court of Errors and Appeals of New Jersey.
June 22, 1903.)

INJURY TO EMPLOYE—DANGEROUS PREMISES —ASSUMPTION OF RISK.

1. It is accepted law in this state that, under the contract of employment, it becomes the master's duty to take reasonable care to provide a proper and safe place in which the servant may work, to furnish suitable tools and implements with which he may work, to inspect and repair the apparatus at reasonable intervals, and to select and employ competent workmen.

2. It is also accepted law in this state that, under the same contract, the servant, on his part, assumes the risks incident to his employment, including such as arise from the negligence of a fellow servant engaged under the same master in the common employment; also those plain and obvious dangers which are apparent to one of ordinary skill and understanding.

3. Where an adult workman, of ordinary intelligence, who had been engaged for four or five weeks in cutting the heads from the rivets of an old tank, lost an eye by injury from a flying metallic chip—the flying of the chips being frequent and easily observable—

Held, that the doctrine of assumed obvious risk obtains with full force, and a judgment of nonsuit will not be reversed.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Thomas McDonald against the Standard Oil Company. Judgment for defendant, and plaintiff brings error. Affirmed.

This was an action of tort, brought by the plaintiff against the defendant corporation. The plaintiff's declaration alleged that the defendant was the possessor of certain tanks, made of iron or steel plates fastened to-

gether with rivets; that the plaintiff was a general workman or laborer in the defendant's employ; that the particular duty assigned to him was to hold a cold-chisel upon the edges of the rivets while another workman struck the chisel with a hammer, so as to cut the heads from the rivets and separate the plates; that the plaintiff was without knowledge of the dangers of the employment, and was unacquainted with the necessary tools and necessary shields to be used therein; that the defendant did not provide suitable tools or chisels, or any shield whatsoever to protect the plaintiff, and did not warn him of the dangers of the business, by means whereof, while the plaintiff was at work on a certain day, a piece of the tank or of a rivet was chipped off, and thrown with great force against the plaintiff's left eye, and thus the sight thereof was permanently destroyed, and the sight of the right eye endangered, which injuries were sustained by the plaintiff solely through the defendant's negligence. The defendant pleaded not guilty of the supposed grievances, and the issue joined thereupon was sent down to the Hudson circuit for trial.

The plaintiff's own testimony at the trial showed that the plaintiff was a laborer, never having learned any trade; that about the middle of August, 1900, he, with other men, was employed by the defendant to take down certain metal tanks at Bayonne, which had been injured by an oil fire; that a foreman gave them tools, and showed them what to do; that the men worked in pairs, and to the plaintiff and his companion were given a sledge hammer and a "set," described as a chisel with a blade about six inches wide and a handle about a foot long; that the foreman showed the plaintiff how to hold and use the set; that he and his companion worked on the side of a tank between three and four weeks, and then, a little more than a week, on the bottom of a tank, and during all this time the plaintiff never saw or heard of a "stopper" (a primitive contrivance to keep chips from flying), but he observed that the pieces of rivets flew according to the way in which the set was held and the sledge was struck (that is to say, in the general line of the blow); and that on Friday, September 14th, while he was holding the set against a bottom rivet, and his associate was striking, a "shave of the rivet" flew into his left eye, causing him to undergo 11 weeks of hospital treatment, great physical pain, and the ultimate loss of the eye. From other witnesses, sworn by the plaintiff, it appeared, according to the experience of a practical boiler maker, that the cutting of iron or steel with a chisel is dangerous; that, in shops in which he had worked, swabs (little sticks with rags or cotton waste about them) were held in front of the rivets, when cut, to prevent them from hitting anybody, that chipping is common, and that it is hard to tell in what direction a

¶ 1. See Master and Servant, vol. 34, Cent. Dig. § 610, 622.

chip might go, for, as he said, "you might hold the set a little cater-cornered, and it would go to me, or hold it this way, and it would go to you"; and, according to the observation and experience of a professor of mechanical engineering, that, in cutting rivets, fragments fly off in a constant bombardment; that this fact is discoverable after the first few blows; and that it is customary to require students to protect their faces by holding over the hand and over the chisel a handkerchief, or something like it.

At the close of the plaintiff's proofs, the trial justice took the case from the jury, and ordered a nonsuit. This direction is the subject of the only assignment of error.

F. E. Kellogg, D. Emery, and Flaacke & Ryan, for plaintiff in error. Charles W. Fullner, for defendant in error.

The opinion of the court (the foregoing statement having been made) was delivered by GREEN, J.

The facts in the case, and the arguments made thereon, bring to view two legal principles which are fully recognized in the jurisprudence of this state:

1. The Master's Undertaking. Under the contract of employment, it becomes the master's duty to use reasonable care to provide a proper and safe place in which the servant may work, to furnish suitable tools and implements with which he may work, to inspect and repair the apparatus at reasonable intervals and with ordinary prudence, and to select and employ competent workmen. This rule of duty was stated at least as early as the case of *Harrison v. Central Railroad Co.*, 31 N. J. Law, 293 (1865), and in this form: "An employer contracts with his employé to use reasonable diligence to protect him from unnecessary risks, and, for negligence or want of care, he will be answerable for all the damages which may ensue." Page 300. In the form herein set forth, its several parts may be drawn from the case just cited. *Maher v. Thropp*, 59 N. J. Law, 186, 188, 35 Atl. 1037; *Atz, Adm'r, v. Newark Lime & Cement Co.*, 59 N. J. Law, 41, 45, 34 Atl. 980; *McAndrews v. Burns*, 39 N. J. Law, 117, 119. This is settled law in this court. *Maher v. Thropp*, supra; *The Steamship Co. v. Ingebregsten, Adm'r*, 57 N. J. Law, 400, 31 Atl. 619; *West Union Tel. Co. v. McMullen*, 58 N. J. Law, 155, 33 Atl. 384, 32 L. R. A. 351; and later cases, including *Campbell v. Gillespie Co.* (decided at the present term) 55 Atl. 276. The rule has also been negatively defined in this court thus: The master "is not bound to adopt the latest improvements in machinery. Neither is he liable for an accident which would not have occurred if such improvements had been adopted. He is not required to furnish the best appliances possible to be obtained, but they must be reasonably safe, and kept so." *Fenderson v. Atlantic City R. Co.*, 56 N. J.

Law, 708, 712, 31 Atl. 767. See *Randolph v. N. Y. Cent. & H. R. R. Co.* (decided at the present term) 55 Atl. 240.

2. The Servant's Assumption. Under the same contract of service, the servant, on his part, assumes the risks ordinarily incident to his employment, including such as arise from the negligence of a fellow servant engaged under the same master in the common employment; also those special dangers which are plain and obvious to one of ordinary skill and understanding. This principle also appeared in the discussion in *Harrison v. Central Railroad Co.*, supra, and at page 297 was thus stated: It is "every way reasonable that the servant should take upon himself the usual perils of the employment." In the more modern dress in which it is now set forth, it may be found in *McAndrews v. Burns*, supra; *O'Brien v. American Dredging Co.*, 53 N. J. Law, 291, 292, 21 Atl. 324; *Foley v. Jersey City E. L. Co.*, 54 N. J. Law, 411, 412, 24 Atl. 487. This principle is accepted law in this court. *Smith v. Irwin*, 51 N. J. Law, 507, 508, 509, 18 Atl. 852, 14 Am. St. Rep. 699; *West Union Tel. Co. v. McMullen*, 58 N. J. Law, 158, 33 Atl. 384, 32 L. R. A. 351. It also has its negative definition in this court. Although a servant is entitled to assume that the master has exercised reasonable care and skill in providing for the servant's safety (*Carroll v. Tidewater Oil Co.* [N. J. Err. & App.] 52 Atl. 275), and in so doing is not guilty of contributory negligence (*The Steamship Co. v. Ingebregsten, Adm'r*, 57 N. J. Law, 404, 31 Atl. 619), nevertheless, if the servant is warned or notified of a danger arising from the master's negligence, or if the danger becomes so obvious that a reasonable, prudent servant, under the circumstances, would observe it, no action will lie against the master for an injury to the servant (*Smith v. Erie R. Co.* [N. J. Err. & App.] 52 Atl. 635, 637, 59 L. R. A. 302).

3. The Principle of Obvious Risk Applied. The two principles thus stated are not inconsistent with each other, but are complementary, although one or the other may obtain more strongly as the facts of the given case may vary. The proofs in the case in hand show that the servant who lost his eye was not an infant, to whom the dangers of work should be explained in terms suited to youthful comprehension (*Smith v. Irwin*, supra), but an adult, seemingly of average intelligence; that he had received instruction as to modes of working; and that, according to his own words, the tools were all right, excepting, perhaps, the swab or stopper, which, as a mere stick and bit of rag, might easily have been provided by the servant himself. The proofs also show that the flying of the metal chips was common and frequent; that the direction of flight was not absolutely uniform, but variable, within certain limits; and that these facts might be observed after a few blows; furthermore that the injury

did not occur in the first hours of employment (if it had, there might have been a question for a jury, under the ruling in *Pierce, Adm'r, v. C., G. & W. Railway Co.*, 58 N. J. Law, 400, 408, 35 Atl. 286), but after four or five weeks of regular employment. The danger was not latent, as it was touching the strength of the railroad trestle in *Paulmier, Adm'r, v. Erie R. Co.*, 34 N. J. Law, 151, or in the use of a new and powerful explosive compound in *Smith v. Oxford Iron Co.*, 42 N. J. Law, 467, 36 Am. Rep. 535, or in the unexpected flow of an invisible electric current in *West Union Tel. Co. v. McMullen*, supra; but the danger was open and apparent to a man of ordinary intelligence. The source and nature of the risk were as easy to be seen and understood as they were in *Foley v. Jersey City E. L. Co.*, 54 N. J. Law, 411, 24 Atl. 487. In such a state of facts, we think that the principle of assumed obvious risk obtains with full force. Even though it be conceded that the master might have supplied a swab or stopper, the principle is not excluded, because the duty of self-protection should have led the servant to make and use some simple shield, or to observe the danger of working without one. *McGrath v. D., L. & W. R. Co.* (N. J. Sup.) 53 Atl. 207. In our view, we are not unduly extending the doctrine of obvious risk, either in theory or illustration. In *Coyle v. Griffing Iron Co.*, 63 N. J. Law, 609, 44 Atl. 665, 47 L. R. A. 147, this court said (page 612, 63 N. J. Law, and page 666, 44 Atl.), "The servant assumes all the risks and perils usually incident to the employment, and included therein are those which it is a part of his duty to take knowledge of by observation." In *Hesse v. National Casket Co.*, 66 N. J. Law, 652, 653, 52 Atl. 384, the facts were that a boy of 16 years was accustomed, while at work, to stand upon a foot bench beside a circular saw, and that on a certain day, by the tipping of the bench, he was thrown upon the saw table and injured. A majority of this court affirmed a judgment of nonsuit, saying, "the fact that a bench would tip over, if a person standing upon it should move beyond its center of gravity, was perfectly obvious, and the plaintiff, although a minor, was chargeable with notice of that fact." In this general connection, *Kenney v. Hingham Cordage Co.*, 168 Mass. 278, 47 N. E. 117, at least in respect of the language used at page 282, 168 Mass., 47 N. E. 118, is pertinent.

In the foregoing discussion, no allusion has been made to the fact that the flight of the hurtful chip was in part due to the co-operating blow of the plaintiff's companion in labor. No such allusion is needed, inasmuch as, if the companion were negligent, the two men were evidently co-servants engaged under one master in a common employment.

Finding no legal error in the record, we affirm the judgment of nonsuit, with costs.

DIMICK v. METROPOLITAN LIFE INS. CO.

(Court of Errors and Appeals of New Jersey.
June 22, 1903.)

LIFE INSURANCE—POLICY—APPLICATION—WARRANTIES—AUTHORITY OF INSURANCE AGENT.

1. Where a policy of life insurance makes the answers and statements contained in the application warranties, and constitutes them a part of the contract, an untrue statement concerning a matter of fact that is or ought to be within the personal knowledge of the applicant constitutes a breach of the warranty and renders the policy void.

2. A paid-up policy calling for unconditional payment of a certain sum to the executors, administrators, or assigns of the insured at his death, with reservation to the insurer of the right to pay the money to any person who has incurred expense on behalf of the insured, *held* to constitute "insurance in force upon his life," within the meaning of an application calling for information upon that point.

3. Appended to the policy in suit was what purported to be a copy of the application upon which it was issued, but the copy was not referred to in the body of the policy. There being a variance between the original application and the copy, *held*, that the original application must control.

4. A policy of life insurance made the answers and statements contained in the application a part of the contract, and declared them warranties. One part of the application declared that the answers and statements contained in it, together with those made to the medical examiner and contained in a separate part, should be the basis of the contract of insurance, and become part of the contract. *Held*, that the statement to the medical examiner, signed by the applicant, is to be deemed a part of the application referred to in the policy, and made a part thereof.

5. The application contained a declaration and warranty "that the answers and statements contained in it, and those made to the medical examiner, are full and true, and are correctly recorded, and that no information or statement not therein contained, received, or acquired at any time by any person shall be binding upon the company, or shall modify or alter the declarations and warranties therein contained; that the persons who wrote in the answers and statements were and are our agents for the purpose, and not the agents of the company, and that the company is not to be taken to be responsible for its preparation, or for anything therein contained or omitted therefrom; that any false, incorrect, or untrue answer, or any suppression or concealment of facts in any of the answers, shall render the policy null and void."

Held: Assuming, but not deciding, that with respect to the insurance solicitor and medical examiner, employees of the company who wrote the answers, the stipulation was inefficacious to constitute them agents of the applicant, yet the clauses quoted constituted a plain limitation upon the authority of the company's agents, of which the applicant was required to take notice, and by which he was bound.

6. In such a case, untrue answers entered by the solicitor and by the medical examiner, and signed by the applicant, constitute a breach of warranty and render the policy void, provided the answers are of such a character as by the contract are made warranties.

7. The common law of New York is not otherwise, at least so far as answers written by the insurance solicitor are concerned, the answers being such as the applicant himself was at liberty to insert.

(Syllabus by the Court.)

¶ 1. See *Insurance*, vol. 22, Cent. Dig. §§ 567, 568.

Error to Supreme Court.

Action by Bridget Dimick against the Metropolitan Life Insurance Company. Judgment for plaintiff. Defendant brings error. Reversed.

Robert H. McCarter, for plaintiff in error.
John P. Stockton and Warren Dixon, for defendant in error.

PITNEY, J. This is an action upon a policy of insurance issued December 4, 1899, by the defendant below (now plaintiff in error) upon the life of John W. Dimick, payable in case of his death to his wife, Bridget, who was the plaintiff below. The insured died January 24, 1900. After a trial and verdict upon pleadings held insufficient for the purpose of raising the real defense (*Dimick v. Metropolitan Life Ins. Co.*, 67 N. J. Law, 367, 51 Atl. 692), a new trial was had upon amended pleadings, and resulted in a verdict in favor of the plaintiff rendered pursuant to the direction of the trial judge. A writ of error brings the consequent judgment here for review, and with it is returned a bill of exceptions sealed upon the direction of a verdict.

The declaration embodies a copy of the policy of insurance with its conditions, and avers, generally, the performance of all conditions, pursuant to section 126 of the practice act (Gen. St. p. 2554). The defendant pleaded the general issue, and in a special plea set up a breach of conditions precedent, because of false answers alleged to have been given by the insured in response to certain inquiries contained in the application for the insurance, which application, by the terms of the policy, is made a part of it; among others, the false answer "None" in reply to the question, "State amount of insurance you now carry on your life"; the false answer "None" in reply to the question, "Is there any other insurance in force on your life?" and the false answer "No" in reply to the question, "Have you ever been an inmate of an asylum or hospital; if so, when and for what?"

The policy sets forth that the engagements of the defendant company are undertaken "in consideration of the answers and statements contained in the printed and written application for this policy, all of which answers and statements are hereby made warranties and are hereby made part of this contract"; that the contract is "subject to the conditions set forth on the reverse side hereof, all of which are hereby made part of this contract, and are accepted by the insured and assured as part thereof as fully as if herein recited." Among the conditions thus indorsed are the following, viz.: "Third. If any answer or statement in the application herein referred to is not true * * * this policy shall be void, and all premiums paid shall be forfeited to the company, except as provided below" (none of the exceptions has

any bearing upon this case). "Sixth. Proofs of death shall be made in the manner and to the extent required by planks furnished by the company, and shall contain answers to each question propounded to the claimants. * * * The proofs of death shall be evidence of the facts therein stated in behalf of, but not against the company." "Ninth. The contract between the parties hereto is completely set forth in this policy and the application therefor taken together, and none of its terms can be varied or modified, nor any forfeiture waived or premiums in arrears received except by agreement in writing signed by either the president, vice president, secretary or actuary, whose authority for this purpose will not be delegated; no other person has or will be given authority."

The application referred to in the policy was made prior to the date of the latter, and passed into the possession of the company. It was made upon printed forms, and consists of three parts, designated respectively "A," "B," and "C." Part A is entitled "Application to the Metropolitan Life Insurance Co.," is dated November 19, 1899, and signed by the insured and the beneficiary. It contains a statement of the name and residence of John W. Dimick, the amount and kind of insurance applied for, the date and place of his birth, his present occupation, etc. The information is in the form of written replies to printed questions. Among the questions is this: "E. State amount of insurance you now carry on your life, with name of company or association by whom granted, and the year of issue. (Enumerate each.)" To this the answer was "None." Then follow two questions, bracketed together, and lettered "F." The first is: "If insured in this company, in ordinary, industrial or intermediate, give policy numbers." To this there was no reply. The second question is: "Is there any other insurance in force on your life?" to which the answer is "None." At the foot of this part of the application is the following declaration, above the signatures of the beneficiary and insured: "It is hereby declared, agreed and warranted by the undersigned that the answers and statements contained in the foregoing application and those made to the medical examiner, together with this declaration, shall be the basis and become part of the contract of insurance with the Metropolitan Life Insurance Company; that they are full and true and are correctly recorded, and that no information or statement not contained in this application, and in the statements made to the medical examiner, received or acquired at any time by any person, shall be binding upon the company or shall modify or alter the declarations and warranties made therein; that the persons who wrote in the answers and statements were and are our agents for the purpose and not the agents of the company; and that the company is not to be taken to be responsible for its preparation or

for anything contained therein or omitted therefrom; that any false, incorrect or untrue answer, any suppression or concealment of facts in any of the answers, any violation of the covenants, conditions or restrictions of the policy, any neglect to pay the premium on or before the date it becomes due, shall render the policy null and void, and forfeit all payments made thereon." Part B is entitled: "Statement made to the medical examiner by John W. Dimick in connection with application on reverse side of this sheet. To be fully completed by the examiner before the applicant affixes his signature. The medical examiner will impress upon the applicant the importance of full and truthful answers to every interrogatory." Then follow numerous questions that are intended to develop the history of the applicant in all matters pertaining to his health; he is asked specifically whether he has ever had certain enumerated diseases; whether he is ruptured; to give full particulars of any illness he may have had since childhood; to state when he was last confined to the house by illness, etc. One of the questions is this: "Have you ever been an inmate of an asylum or hospital? If so, when and for what?" and the answer is "No." At the foot is printed the following: "I hereby declare that the application to the Metropolitan Life Insurance Company for an insurance on my life, was signed by me, and that I renew and confirm my agreements therein as to the answers given above to the medical examiner, and I hereby declare that said answers are correctly recorded." It is dated November 23, 1899, and signed by John W. Dimick, but not by the beneficiary. Part C is entitled as follows: "Medical examination and report (no part of the declaration of the applicant)."

At the trial there was introduced in evidence a paid-up policy for \$219 upon the life of John W. Dimick, issued by the Prudential Insurance Company, February 22, 1897, which was in force at the time the present application was made. That it was in force at John W. Dimick's death was admitted by the plaintiff in the written proofs of death signed by her and submitted to the defendant company in compliance with the condition indorsed upon the policy in suit. It was also in evidence that in the year 1893 John W. Dimick was for two weeks an inmate of a hospital at Englewood, in which town he resided, undergoing treatment for injuries received in a runaway accident, and that he was conscious during the whole of the time that he spent in the hospital. Notwithstanding this evidence the learned trial justice (in view of certain rebuttal testimony introduced by the plaintiff, which will be mentioned below) directed a verdict for the plaintiff, on the ground that no breach of warranty was shown.

We are inclined to agree with the contention made in behalf of the plaintiff (now defendant in error) that the negative reply

to the question "State amount of insurance you now carry on your life," etc., is not applicable to the paid-up policy in the Prudential Insurance Company. If the question had stood alone it would have permitted, and perhaps required, the word "carry" to be construed in its colloquial sense, as equivalent to "possess" or "hold"; a meaning probably derived, however, from the custom of holding property that has been paid for with borrowed money (Cent. Dict. verb trans. "carry," pl. 14), and so hardly applicable to a paid-up policy that has ceased to be a burden to the insured. But the question did not stand alone; it was immediately followed by the two questions printed under the letter "F" viz.: "If insured in this company give policy numbers," and "Is there any other insurance in force on your life?" Certainly the second of these questions would not have been required if the former question was intended to apply to all insurance in force. Therefore, in aid of the validity of the contract, it is fair to ascribe to the word "carry" a limited sense, as applicable only to such policies of insurance as constituted a burden by requiring the continued payment of premiums.

With respect to the answer of the applicant that there was no other insurance in force on his life, counsel for the plaintiff first contends that the paid-up policy is not within the meaning of "insurance," because it constitutes simply an unconditional agreement to pay a certain sum of money upon the death of John W. Dimick to his executors, administrators, or assigns, irrespective of the question of insurable interest, or any question of indemnity against loss. This point, we think, is quite untenable. The paid-up policy was in the form ordinarily known as an "insurance policy"; John W. Dimick is therein designated as the "insured," and is frequently referred to under that designation. Moreover, the policy reserves to the company the right to "pay the sum of money insured hereby to any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense in any way on behalf of the insured for his or her burial, or for any other purpose."

The next contention of the plaintiff is this: that while, in the original application, a negative reply is given to the second inquiry bracketed under the letter F, and no reply is given to the first inquiry, yet there is attached to the policy itself what purports to be a copy of the application, and in the copy the negative reply is appended to the first question, and the second question appears as if unanswered. It is insisted that inasmuch as this copy of the application was furnished to the insured by the company, and represented by it to be a true copy, it is for all purposes of the policy to be treated as the application referred to in the contract,

so that the question of breach of warranty must be determined by reference to the copy of the application that is attached to the policy, and not by reference to the original application. But this contention is overthrown by reference to the plain terms of the policy itself, and to what is attached thereto. The body of the policy in no wise refers to the copy of the application thereunto attached. The policy does say that it is "subject to all the conditions set forth on the reverse side hereof, each and all of which are hereby made part of this contract." The body of the policy fills the first page of a four-page document. Upon the second page, which is literally the "reverse side" of the policy, there are printed in bold type the conditions already quoted, and sundry other conditions now immaterial, and these are headed: "Conditions referred to on the face of this policy as a part of this contract." On the third page is found what is declared at the head to be "Copy of application referred to in this policy." The change of phraseology is significant, and is, we think, when taken together with the statements contained in the body of the policy, conclusive against the contention of the plaintiff. It is the original application, not the copy, that is made a part of the contract. The copy was furnished, doubtless, for the information and convenience of the insured, and was intended to be an accurate copy, but it is not certified to be such, and in the event of a variance the original application must govern. If it was essential for the insured to have an accurate copy, he was at liberty to retain one at the time of making the application, or he might have examined the copy attached to the policy in order to detect and correct errors.

The final contention of the plaintiff upon this branch of the case is rested upon the uncontradicted testimony of one Freedman, to the effect that at the time the policy was written he was soliciting insurance for the defendant company; that he negotiated the policy in question; that he made out the application; that at that time he knew there was a paid-up policy in the Prudential Company upon John W. Dimick's life, but did not consider a paid-up policy as being a policy; that, before Dimick signed the application now in question, Mrs. Dimick told Freedman about the Prudential policy; and that he told her there was not enough protection in it, and that she ought to have more insurance upon her husband's life.

With respect to the false answer contained in part B, in answer to the question whether the applicant had ever been an inmate of an asylum or hospital, the first contention of the plaintiff is that the answers contained in part B are not warranties, because they are not made such by the contract of insurance. This contention is disposed of by an examination of the contract itself. The policy makes the answers and statements contained

in the application a part of the contract, and expressly treats them as warranties. Part A of the application declares that the answers and statements in part A contained, and also those made to the medical examiner, together with this declaration, shall be the basis and become part of the contract of insurance, and that no information or statement not contained in this application and in the statements made to the medical examiner shall be binding upon the company. Part B contains the declaration, signed by the applicant: "That I renew and confirm my agreements therein [that is, in part A contained] as to the answers given above to the medical examiner, and I hereby declare that said answers are correctly recorded." And part C, the medical examination, contains in its title line the statement that it is "no part of the declaration of the applicant." From all this it conclusively appears that part B is a part of the application, and the answers and statements therein contained are made warranties by the contract.

The sole remaining contention of plaintiff with respect to the breach of warranty contained in part B is based upon the testimony of the medical examiner to the effect that he examined the applicant at the request of the company; that he had no personal knowledge that Dimick had been in the hospital; that he had no recollection of having asked him whether he had been in the hospital, and that his impression was that he failed to ask Dimick that question, and as he (the examiner) had no knowledge that Dimick had ever been in a hospital, he therefore wrote a negative reply to the question.

It will thus be seen that, upon our interpretation of this policy of insurance (and the same interpretation was adopted by the trial judge), the answer to the question concerning other insurance in force, and the answer to the question concerning hospital treatment, were alike made warranties by the letter of the contract. But that fact is not necessarily controlling, if they are not warranties within its fair meaning and spirit. With respect to questions that relate to matters which the insurer must know are not within the personal knowledge of the applicant, and with respect to those that call not for definite statements of fact, but for statements of belief or opinion (as, for instance, whether the applicant has ever had a certain obscure disease), the letter of the contract is to be controlled by its spirit and purpose, and the answers will be deemed warranties only of the bona fide belief and opinion of the applicant. *Henn v. Metropolitan Life Ins. Co.*, 67 N. J. Law, 310, 51 Atl. 689; *Anders v. Knights of Honor*, 51 N. J. Law, 175, 17 Atl. 119. See, also, for cases illustrative of the distinction, the following: *Metropolitan Life Ins. Co. v. McTague*, 49 N. J. Law, 587, 592, 9 Atl. 763, 60 Am. Rep. 661; *Glutting v. Metropolitan Life Ins. Co.*, 50 N. J. Law, 287, 13 Atl. 4; *Lippincott v. Royal Arcanum*, 64 N. J. Law,

309, 45 Atl. 774; *Finn v. Metropolitan Life Ins. Co.*, 67 N. J. Law, 17, 50 Atl. 589. But this distinction will not avail the present plaintiff. The inquiries under consideration related to matters that, within the contemplation of the contract, were or ought to have been within the personal knowledge of the applicant. Both related to definite matters of fact. By the undisputed evidence, the recorded answers were in both instances untrue to the knowledge of the applicant.

The contentions of the plaintiff are therefore reduced to this: that the consequences of these manifest breaches of warranty are to be evaded by showing that the untrue answers were inserted by agents of the company through error of judgment, negligence, or stupidity. And the facts were attempted to be proved, not by any writing, authentic or otherwise, but by the testimony of witnesses as to what transpired verbally before the contract was reduced to writing and signed by the parties. The learned trial justice adopted the view that, as Freedman was in fact the agent of the defendant company for the purpose of soliciting the insurance, the recitals contained in the application, to the effect "that the persons who wrote in the answers and statements were and are our agents [that is, agents of the applicant and beneficiary for the purpose], and not the agents of the company, and that the company is not to be responsible for its preparation or for anything contained therein or omitted therefrom," etc., could not be taken advantage of by the defendant; that the defendant could not enjoy the benefits of the agency and repudiate the acts of the agent; and that, since Freedman knew of the existence of the Prudential policy, and with that knowledge purposely and honestly, and on his own understanding of the situation, wrote the negative reply to the inquiry respecting other insurance in force, the company was bound thereby for reasons of public policy.

As to the negative reply to the question whether the applicant had been an inmate of a hospital, the trial justice treated the medical examiner as the agent of the company, and held that he had waived that question. But he did not waive it; he wrote in an answer that was precisely contrary to the fact. And so the false answer in the medical examination must stand upon the same basis with that contained in part A, unless a distinction can be found between the functions of the medical examiner and the functions of the insurance solicitor with respect to the preparation of the application. It may simplify the discussion of the question of law thus presented to assume at the outset (without conceding the proposition) that, if the insurance solicitor and the medical examiner were in truth in the employ of the company and acting in its interest in all matters relating to the negotiations of the contract, including the preparation of the application, the express declara-

tion of the applicant that for certain purposes they should be deemed his agents, and not the agents of the company, is an entire nullity; and that, notwithstanding this declaration, they remained for all purposes the agents of the company, and not of the applicant. Even so, the company was certainly at liberty to limit the powers and authority of its own agents, and third parties dealing with the agents, with express notice of the limitations thus imposed, cannot bind the principal by any act done by the agents in excess of the bounds of their authority. *Catoir v. Am. Life Ins. & Trust Co.*, 33 N. J. Law, 487; *Metropolitan Life Ins. Co. v. McGrath*, 52 N. J. Law, 358, 19 Atl. 386; *McClave v. Mutual Reserve Fund Life Assn.*, 55 N. J. Law, 187, 26 Atl. 78; *Dwelling House Ins. Co. v. Snyder*, 59 N. J. Law, 18, 34 Atl. 931. Such limitation, and such express notice, are set forth plainly upon the face of this application. The applicant was thereby plainly given to understand that, if he desired to use that instrument as the basis of a contract of insurance with this company, he must himself assume sole responsibility for the truth and correctness of the replies made to the questions therein contained; that Freedman and the medical examiner, though they were agents of the insurance company, were without power to bind the company by any modification or alteration of the declarations made therein, such power being expressly denied to them; and that any false, incorrect, or untrue answer, or any suppression or concealment of facts in any of the answers, would render the policy null and void. If persons seeking insurance, and insurance companies, are to be left free to enter into such contracts as they please with reference to life insurance, it is difficult to find any ground on which we can ignore the force of such stipulations. If a similar question were raised concerning a contract relating to any other subject-matter, not the slightest doubt would be entertained with respect to the answer that should be given. But by reason of the extreme hardship that seems to result in certain instances from avoiding contracts of insurance for reasons such as are here presented, courts have sometimes sought to escape from the force and effect of the plain letter of the instrument by an appeal to a supposed public policy. We are not aware of any public policy that prohibits such stipulations. Insurance companies have the right to say that they will not insure lives until they are made aware of the past history and present financial standing of the applicant by a written declaration signed by himself and made upon his own responsibility. If it is considered essential to inquire as to the amount of insurance outstanding upon his life, they have a right to insist upon a correct reply to such an inquiry as a condition precedent to the issuance of a policy. One who is largely insured may for that reason be more strongly tempted

to end his own life, in case of being overcome by disasters in business. One largely insured may be more liable to assassination at the hands of those who are to receive the benefit upon his demise. And so with respect to the inquiry whether the applicant had ever been an inmate of an asylum or hospital. It may often be the case that this fact itself has no bearing upon the expectancy of life of the applicant. In the present case it appears that Dimick's treatment in the hospital was for the results of a not very serious accident, and that this accident had nothing to do with producing his death. But it is matter of common knowledge that while a patient is confined in a hospital he is subjected to rigid scrutiny by physicians and nurses, and that in some cases a record is kept of his general physical condition. Such a record might disclose important matters respecting the constitution of the patient, although not connected with the disease or injury for which he underwent treatment. It is therefore not unreasonable for insurance companies to require a full disclosure from applicants concerning any hospital treatment that they have undergone in the past, in order that a full investigation of everything relating to the expectancy of life may be conducted.

It is sufficient, however, to say that the parties to this contract have themselves treated these replies as material for the purpose of the contract. We are aware of no rule of law that prevents them from doing so. If there be any public policy to the contrary, it is for the Legislature, and not for the courts, to declare it. With respect to fire policies, our Legislature has thought fit to enact (Gen. St. p. 1766, §§ 121, 122, etc.) that property in this state shall not be insured excepting under a standard form of policy. No similar provision exists with respect to life insurance.

There is a principle of public policy that we find imbedded in the common law, and that furnishes the underlying reason for the rule of evidence that written contracts are not to be varied or altered by parol testimony. It was well expressed by the late Chief Justice Beasley, when he said (*Deweese v. Manhattan Ins. Co.*, 35 N. J. Law, 366, at page 375): "That the common good requires that it shall be conclusively presumed in an action at law, in the absence of deceit, that the parties have committed their real understanding to writing. Hence it necessarily follows that all evidence merely oral is rejected, whose effect is to vary or contradict such expressed understanding. Such rejection arises from the consideration that oral testimony is unreliable in comparison with that which is written. It is idle to say that the estoppel, if permitted to operate, will prevent a fraud or inequitable result; most parol evidence contradictory of a written instrument has the same tendency; but such evidence is rejected not because, if true, it ought not to be received,

ed, but because the written instrument is the safer criterion of what was the real intention of the contracting parties." It may be added that while fraud or deceit, proved by word of mouth merely, may render void a written contract, and leave the parties where they stood, it will not in a court of law be accepted as making for the parties a different engagement from that which they have deliberately expressed in writing. Nor can a material part of an entire contract be avoided, leaving the residue of the stipulations to stand.

In this state the elementary principle now declared has been uniformly applied to contracts of fire insurance. In *Franklin Fire Ins. Co. v. Martin*, 40 N. J. Law, 568, 29 Am. Rep. 271, where the insurance was obtained through an agent of the company, who inspected the premises at the time of taking the proposal and knew the manner in which they were used, the trial judge left to the jury the determination of the question whether the parties themselves did not knowingly use the term "boarding house" for the purpose of describing what was in truth a country tavern. This court held that such evidence was not admissible to vary the terms of the written contract, and that it could not be received to raise an estoppel in pais, and thereby conclude the insurer from setting up the defense that the policy was void by reason of a breach of the conditions upon which it was written. In *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584, the Supreme Court held that a stipulation in a policy that "no agent of this company is authorized in any respect to change the terms and conditions of this policy, and they shall neither be changed nor waived except in writing, signed by the president and secretary," did not apply to a condition that was to be performed after the loss had occurred, such as the furnishing of proofs of loss, and that a condition of this character might be waived by parol; but the decision recognized that the stipulation did apply to those conditions and provisions in the policy which relate to the formation and continuance of the contract and are essential to its binding force while it is running. In *Bennett v. St. Paul Fire & Marine Ins. Co.*, 55 N. J. Law, 377, 27 Atl. 641, the policy declared that it should be void if the assured at the time had any other insurance upon the premises. The defendant pleaded that there was such other insurance. The plaintiff replied that, at the time the policy was made and the premium paid, the defendant knew of the existence of other insurance, and with this knowledge issued the policy sued on. Upon demurrer to the replication, the Supreme Court gave judgment for the defendant. And in *Ellison v. Gray*, 55 N. J. Eq. 581, 37 Atl. 1018, the attempt was made to obviate the force of a stipulation contained in a policy, requiring a renewal premium to be paid before the expiration of the term of

the original insurance, on the ground of a verbal representation made by an employé of the insurer, in the presence and without the dissent of the general agent, to the effect "that the contract would hold just the same as though it had been paid for prior to the expiration of the contract." This court held the insurers bound by the terms of the policy, upon the authority of the *Deweese* and *Martin* Cases.

These cases related to policies of fire insurance; but the fundamental principle applies to all contracts in writing. The Supreme Court of the United States at one time expressed a somewhat contrary view. *Insurance Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617. But even that case does not go to the extent that would sustain the present action, for there it did not appear that any limitation of the agent's authority was brought to the notice of the applicant for insurance, and the opinion expressly bases the decision on that ground. This case was cited, and its reasoning overthrown, by Mr. Justice Depue in the *Martin* Case. And the later decisions in the federal Supreme Court are in accord with the rule as established in this state. *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, where the court distinguished the *Wilkinson* Case on the ground just mentioned; *Northern Assurance Co. v. Grand View Bldg. Ass'n*, 188 U. S. 308, 22 Sup. Ct. 138, 46 L. Ed. 213. The almost universal enforcement, in other jurisdictions, of the rule that we have adhered to in this state, will become apparent by reference to the numerous cases, from the English reports and from state reports, which are cited and exhaustively reviewed in the learned opinion of Mr. Justice Shiras in the case last cited.

But counsel for the plaintiff insists that the contract here in suit was made in the state of New York, and was to be there performed, and that its validity and construction must therefore be determined according to the law of that state. 1 Chitt. Contracts, p. 128 et seq. The trial, however, seems to have proceeded upon the theory that the law of this state should control. As to the place of making, the proofs render it at least doubtful whether the contract was made in New York, and so the direction of a verdict for the plaintiff cannot be sustained on that ground. Dimick and his wife resided at Englewood, in this state, and he there followed his trade as a carpenter. The application was there made out, signed, and delivered to defendant's agent. There is no specific proof to show where the policy itself was actually delivered, outside of its own recitals. In the absence of anything to show that Dimick or his wife departed from their home to receive it, the presumption would be that it came to their hands where they resided. The recital, in the body of the policy, that it was signed and delivered at the office of the company in the city of New York, is

perhaps evidential to the contrary, but is certainly not controlling. The place of performance is likewise obscure. The contract was of the form known as an endowment policy, and in it the company agreed to pay the sum therein specified to the insured, at its home office in the city of New York, upon surrender of the policy at the expiration of 20 years from its date, and did further agree, in case the insured should die prior to that date, to pay said sum to Bridget Dimick, if living, otherwise to the legal representatives of the insured; upon the receipt by the company at its home office, and its approval, of the proofs of death, and upon the surrender of the policy. It therefore is not clearly expressed that, in the event of the death of the insured, payment was to be made to the beneficiary at the home office. As both she and her husband lived in this state at the time the policy was written and at the time of his death, and as a debtor under ordinary circumstances is obliged to seek out the creditor for the purpose of making payment, in the absence of a stipulation to the contrary, it becomes a matter of doubtful construction, upon the terms of the contract, whether it was to be performed in this state, or in the state of New York, in the event that has transpired. Upon this question we at present express no opinion.

But since the plaintiff has raised the question of the law of New York, and since we have reached the conclusion that a *venire de novo* is necessary, we think it proper to express our views upon the question. By force of our revised act concerning evidence (P. L. 1900, p. 370, § 26), "the reports of the judicial decisions of other states and countries may be judicially noticed by the courts of this state as evidence of the common law of such states, and the usual printed books of such reports shall be plenary evidence of such decisions." We have found ourselves much embarrassed in this inquiry by reason of the great contrariety of the views that have found expression in the reports of our sister state upon the topic, owing doubtless in large part to the fact that in their system the legal and equitable jurisdictions are consolidated, and the appropriate remedies, perhaps, sometimes confounded. We commence, however, with the reasonable presumption that so fundamental and salutary a rule as that which requires that a written contract shall speak for itself, and that engagements which the parties have deliberately chosen to embody in that form are not to be varied or controlled by the verbal declarations made at and before the execution of the contract, resting as this rule does upon fundamental principles of general public policy, is not to be considered as nonexistent in a given jurisdiction until clear evidence to that effect is adduced from its reported decisions. Indeed, the New York reports furnish abundant evidence that, with respect to contracts in general, the rule is fully recognized and enforced. Do they,

show that it is not recognized, or not enforced, with respect to contracts of insurance, under circumstances such as here presented? The precise question is whether a false answer in writing to a material inquiry contained in an application for insurance is there held out to be a breach of the warranty, although the application and the policy alike makes these answers warranties; and whether this is so held in an action at law, brought, not for the purpose of reforming or setting aside the agreement, but for the purpose of a recovery upon it according to its terms; the sole ground for sustaining the action, in spite of the apparent breach of warranty, being this, that the truth was known to and was ignored by an agent of the insurer, who acted in the preparation of the application; the application itself in effect declaring that the applicant shall be responsible and solely responsible for the truth of the answers therein made, and for their correct recording, and that the agent of the company, if permitted by the applicant to write down the answers, has no authority to bind the company by entering an incorrect answer. For the latest authoritative decision in New York we are referred to *Sternaman v. Metropolitan Life Ins. Co.*, 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625, a case decided a little over one year ago. This appears to have been an action at law brought to recover upon a contract similar to the one now in suit. The defendant set up a breach of warranty, consisting of a false answer to one of the questions contained in part B of the application, which was signed by the applicant and witnessed by the medical examiner. Upon the trial, plaintiff's counsel offered to prove that the answers in this part of the application were filled in by the physician in his own handwriting; that the insured stated to him his medical history, including an account of numerous illnesses, more or less important, from which he had suffered, and described the treatment he had undergone, and that the medical examiner said they were not of enough importance to be inserted in the application. The evidence thus proffered was excluded as incompetent, immaterial, and in violation of the contract, on the ground that the plaintiff could not by parol vary the terms of the application and contract. The Court of Appeals reversed the judgment, Judge Vann delivering the opinion of the majority, and Judge Gray a dissenting opinion, with the concurrence of Chief Justice Parker. Although the reasoning of the judges covered the whole topic that we have discussed, the precise question decided was quite narrow. It will be observed at once that it related to an answer contained in part B of the application, and has no bearing upon part A, out of which a part of the present controversy arises. Vann, J., in his opinion, states expressly: "The parties to the policy in question might agree that the person who filled out part A of the application was the agent

of the insured, and not of the company. There is a difference in the nature of the work of filling out the blank to be signed by the insured, and that of filling out the blank furnished for the use of the medical examiner. The former is the work of the insured, and may be done as well by one person as by another. He may do it himself, or appoint an agent to do it for him. It is quite different, however, with the work of the medical examiner, because that requires professional skill and experience, and the insurer permits it to be done only by its own appointee. The insured can neither do that work himself, nor appoint a physician to do it, because the insurer very properly insists upon making the selection itself." That decision is not controlling upon the present case, because of the distinction that the court itself pointed out. But, again, the *Sternaman* Case was decided after the making of the contract now in suit, and the rule there enunciated may be said not to have entered into the contemplation of the present contracting parties. We have therefore examined the earlier New York cases, among others the following: *Chase v. Hamilton Ins. Co.* (1859) 20 N. Y. 52; *Rohrbach v. Germania Fire Ins. Co.* (1875) 62 N. Y. 47, 20 Am. Rep. 451; *Alexander v. Germania Fire Ins. Co.* (1876) 66 N. Y. 464, 23 Am. Rep. 76; *Van Schoick v. Niagara Fire Ins. Co.* (1877) 68 N. Y. 434; *Sprague v. Holland Purchase Co.* (1877) 69 N. Y. 129; *Whited v. Germania Fire Ins. Co.* (1879) 76 N. Y. 415, 32 Am. Rep. 330; *Flynn v. Equitable Life Ins. Co.* (1879) 78 N. Y. 568, 34 Am. Rep. 561; *Grattan v. Metropolitan Life Ins. Co.* (1880) 80 N. Y. 281, 36 Am. Rep. 617; another of the same name (1883) 92 N. Y. 274, 44 Am. Rep. 372; *Fowler v. Metropolitan Life Ins. Co.* (1889) 116 N. Y. 389, 22 N. E. 576, 5 L. R. A. 805; *O'Brien v. Home Benefit Society* (1889) 117 N. Y. 310, 22 N. E. 954; *Berry v. American Central Ins. Co.* (1892) 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548; *Cross v. National Fire Ins. Co.* (1892) 132 N. Y. 133, 30 N. E. 390; *Quinlan v. Providence Washington Ins. Co.* (1892) 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645; *Baumgartel v. Providence Washington Ins. Co.* (1893) 136 N. Y. 547, 32 N. E. 990; *McNally v. Phoenix Ins. Co.* (1893) 137 N. Y. 389, 33 N. E. 475; *Moore v. Hanover Fire Ins. Co.* (1894) 141 N. Y. 219, 36 N. E. 191; *Forward v. Continental Ins. Co.* (1894) 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637; *Wood v. American Fire Ins. Co.* (1896) 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; *Robbins v. Springfield Fire Ins. Co.* (1896) 149 N. Y. 477, 44 N. E. 159. These cases show that the Court of Appeals of New York has not adhered with entire consistency to any definite rule. In most cases, however, where the insured acted with express notice of limitations upon the authority of the insurer's agent, he was not permitted to bind the insured by the acts of the agent done outside of such limitations. None of the cases is strictly in point

with the present. The one most nearly so is the Sternaman Case, already distinguished. Our review satisfies us that by the common law of the state of New York the plaintiff in an action at law upon a life insurance policy may not avoid the effect of a warranty contained in the application, on the ground that an agent of the company knew the facts and incorrectly entered them in the application, where the instrument itself contains an express limitation upon the powers of the agent, such as is contained in the application before us. At least, this is true so far as answers written by the insurance solicitor are concerned, the answers being such as the applicant himself was at liberty to insert.

The judgment of the Supreme Court should be reversed, and a venire de novo awarded.

IN RE MARSH'S ESTATE.

(Prerogative Court of New Jersey. June 16, 1908.)

EXECUTOR — REMOVAL — APPEAL — POWER OF PREROGATIVE COURT TO PREVENT WASTE — DETERMINATION OF NECESSITY — APPOINTING ADMINISTRATOR PENDENTE LITE.

1. Pending the determination of an appeal from a decree of the orphans' court removing an executor, the prerogative court has the power to make proper orders to protect the estate from waste.

2. The prerogative court can resort to the evidence in the transcript in order to determine whether the particular case before it requires the exercise of the power.

3. Pending the determination of an appeal from a decree removing an executor, the prerogative court may appoint an administrator pendente lite.

4. Where, on an appeal from a decree removing an executor, it appears that the estate consists of securities and cash deposited in a bank, and that an order made by the lower court restraining the removed executor from disposing of the estate during the pendency of the proceedings has not been appealed from, and there is no claim that the estate has been diminished in value since the appeal was taken, the prerogative court will not appoint an administrator pendente lite on a motion based on the misconduct for which the executor was removed.

Appeal from Orphans' Court, Essex County.

In the matter of the estate of Stewart O. Marsh, deceased. From a decree removing the executor of the estate, he appeals. Pending appeal motions were made to appoint an administrator pendente lite, or to require the former executor to give security for the estate in his hands. Motions denied.

Edward D. Duffield, for the motions.
Thomas Anderson, opposed.

MAGIE, Ordinary. On behalf of appellant, a preliminary objection is made to the consideration of these motions on two grounds: (1) That there are no facts before the court on which the action can be taken, it being contended that the evidence contained in the transcript sent up from the

orphans' court cannot be used; and (2) that the motions require the court to consider and determine the very question presented by the appeal, it being contended that it is irregular to require the court to anticipate its decision on that question.

It is not urged by the appellant that, upon an appeal of this nature, this court is without power to protect the estate from waste, pending the determination of the appeal, by the proper orders. I think the existence of such a power is free from doubt, and I should not hesitate to exercise it in any proper case. Nor can I admit that I could not resort to the evidence in the transcript to discover whether or not a case existed calling for the exercise of that power.

Whether, upon such an appeal, the removed executor may be required to give security, I do not think clear, and do not perceive how such an order could be practically enforced. But the appointment of an administrator pendente lite may, in my judgment, be always made in a proper case in this court. This view was expressed by Chief Justice Kirkpatrick in *Bloomfield v. Ash*, 4 N. J. Law, 314.

The intervention of the court by the appointment of an administrator pendente lite, which will occasion expense to the estate, ought not, however, to take place, unless there is some reasonable ground to apprehend that, if no such appointment be made, there will be loss to the estate.

It is not contended on behalf of the motions that any facts appear in the evidence justifying such an apprehension, except that the alleged delinquencies and misconduct of appellant, upon which the decree removing him was based, permit the inference that the estate in his hands is in danger. Upon this contention, it is obvious that I must first determine that appellant was guilty of the delinquencies and misconduct, and so anticipate the determination of this appeal. The court ought not to be required to do this under the circumstances in this case. There is no claim that the estate has been diminished in value, and, although it seems that this result may be due to incidental causes rather than to the mismanagement of appellant, yet it is a fact to be considered that there has been no actual loss. It was admitted in the argument that, while the matter was pending in the orphans' court, an order was made restraining the appellant from disposing of any part of the estate in his hands during the pendency of the proceeding, which order has not been appealed from. The estate consists of securities and cash deposited in bank. If the restraining order of the orphans' court is thought to have spent its force (as to which no opinion is expressed), such an order may be applied for here, and would insure the safety of the fund without additional expense.

For these reasons these motions will be denied, but without prejudice to a renewal

of the motion for administrator pendente lite upon any proof of any risk of loss to the estate, or to a motion restraining appellant from withdrawing the funds deposited, or assigning or disposing of any of the securities of the estate, pending the determination of this appeal, without the order of the court.

(65 N. J. E. 709)

HALL v. HALL.

(Court of Errors and Appeals of New Jersey.
June 15, 1903.)

DIVORCE—DESERTION—EFFORTS TO INDUCE RETURN.

1. A husband is only entitled to a divorce for desertion of his wife, without efforts on his part to induce her to return, when the wife's desertion occurred under such circumstances that it is manifest from the facts of the case that any efforts made to induce her to return would be unavailing.

Appeal from Court of Chancery.

Action by Howard L. Hall against Mary M. Hall. From a judgment in favor of plaintiff (53 Atl. 455), defendant appeals. Affirmed.

James F. Minturn, for appellant. John L. Weller, for respondent.

GUMMERE, C. J. The appeal in this case is from a decree of divorce granted upon a petition filed by a husband against his wife for desertion. The facts are fully set forth in the opinion of the Vice Chancellor (53 Atl. 455), and entirely justify the conclusion that there was a willful, continued, and obstinate desertion of the respondent by the appellant, within the meaning of the statute. We concur not only in the conclusion reached by the Vice Chancellor, but in the opinion rendered by him, except that we find therein a somewhat inaccurate statement of a rule of divorce law, which we think should not be passed without notice. That statement, in effect, is that when the facts show that the action of a wife, in leaving her husband, is the result of a settled determination on her part to separate from him, the husband is not bound to seek her out and endeavor to induce her to return to him; that it was only when the wife left her husband on the impulse of the moment, without premeditation, that this duty rested on the latter. In the case of *Hall v. Hall*, 60 N. J. Eq. 469, 48 Atl. 866, the rule was stated by this court to be that, when the circumstances under which the wife's desertion took place were such as to impose upon the husband the duty of using active efforts to terminate it by making such advances or concessions as might reasonably be expected to induce her to return to him, he was only excused from making such effort when it was manifest, from the facts in the case, that to do so would be unavailing.

The decree appealed from should be affirmed.

(60 N. J. L. 349)

BELLIS v. VILLAGE OF FLEMINGTON.

(Court of Errors and Appeals of New Jersey.
June 15, 1903.)

MUNICIPAL CORPORATIONS—CHANGE OF GRADE—DAMAGES—LIABILITY OF VILLAGE.

1. Section 71 of an "Act concerning roads" (Gen. St. p. 2820), providing for an action by a person owning a house or other building standing and erected upon any street or highway the grade whereof shall have been altered by virtue of the ordinance, resolution, or other proceeding of any "city, borough or town corporate" in this state, to recover from said "city, borough or town corporate" all the damages which said owner shall suffer by reason of the altering of any such grade, will not authorize such an action against a village.

(Syllabus by the Court.)

Error to Circuit Court, Hunterdon County.

Action by Theodore Bellis against the village of Flemington. Judgment for defendant, and plaintiff brings error. Affirmed.

Willard C. Parker and H. B. Herr, for plaintiff in error. C. Van Syckel, for defendant in error.

GARRETSON, J. It is set forth in the bill of exceptions: First. That plaintiff was, and for — years had been, the owner and occupant of a dwelling located on a lot of land fronting on Mine street, in the village of Flemington, Hunterdon county, New Jersey. Second. That said village of Flemington was incorporated as a village in the month of July, 1894, under the provisions of an act of the Legislature of New Jersey entitled "An act for the formation and government of villages," approved February 23, 1891 (P. L. 1891, p. 33), and amendment thereto, approved April 8, 1892 (P. L. 1892, p. 416). Third. That said village, by its governing body and board of village trustees, on September 21, 1896, passed an ordinance which fixed and established the side lines and grades of said Mine street in front of the lot and dwelling of the plaintiff. Fourth. That the surface of Mine street was by said ordinance required to be elevated above the previous level of said street in front of the lot and dwelling of plaintiff. Fifth. That within a year prior to the bringing of this action the said board of village trustees, under and in accordance with said ordinance, caused the surface of Mine street to be raised in front of plaintiff's lot and dwelling, thereby causing damages to the said plaintiff. Sixth. That said action was brought to recover the damage sustained by plaintiff by aforesaid change of grade. Seventh. That thereupon, the court being of opinion that sufficient evidence had been introduced to sustain plaintiff's right of action if the defendant corporation was within the provisions of sections 70-74 of the general road law of this state, approved March 27, 1874, at the suggestion of the court the plaintiff rested his case for the purpose of permitting the defendant to interpose a motion to non-

suit; whereupon the defendant by its attorneys moved for judgment of nonsuit to be entered against the plaintiff on the ground that the provisions of the general road law of 1874, sections 70-74, do not apply to villages such as defendant corporation; which motion was granted, and the judgment of nonsuit thus entered is brought up by this writ of error.

This action is brought under legislative provision which first appeared in our laws as an act entitled "An act to define the rights of parties whose property is damaged or taken for public use in case of the alteration of the grades of streets or highways," approved March 17, 1858 (P. L. 1858, p. 415). This act is in seven sections, and the first six sections (the last only declaring when the law shall take effect) appear as sections 70-75 of "An act concerning roads." Revision, approved March 27, 1874 (Gen. St. pp. 2820, 2821).

It is provided by section 71 of the road act, *supra*, "that an action upon the case doth and shall lie in behalf of any person owning any house or other building standing and erected upon any street or highway the grade whereof shall be or shall have been altered by virtue of the ordinance, resolution or other proceeding of the legislative authority of any city, borough or town corporate in this state, to recover from said city, borough or town corporate all the damages which such owner shall suffer by reason of the altering any such grade." This section provides for the recovery from a "city, borough or town corporate" of damages caused by alteration of the grade of a street or highway by legislative authority of "any city, borough or town corporate"; villages are not mentioned. While it may be that in 1858, when the original act was passed, there were no villages having any body with legislative authority, and they existed only as aggregations of inhabitants and houses, and for that reason were not included in that act, yet when the road act was considered by the Legislature in 1874 villages then existed as municipal organizations with legislative bodies. The Legislature, however, did not then see fit to include them by name among the municipalities which might become liable to damages for taking the municipal action indicated. The motives which controlled the Legislature in so enacting are not a matter for the consideration of the courts, but must remain within the legislative discretion entirely. It was here legislating for certain municipalities as subsequently classified by the Constitution in article 1, par. 19, and the reason for including some and excluding others was clearly within its powers. *Boorum v. Connelly*, 68 N. J. Law, 197, 48 Atl. 955, 88 Am. St. Rep. 469.

In *Hermann v. Guttenberg*, 63 N. J. Law, 616-625, 44 Atl. 758: "The question, therefore, is settled that it is for the Legislature, not the court, to characterize the municipali-

ties of the state, and the courts cannot inquire whether the municipality or class of municipalities is titular only. The classification of the Legislature in that regard is conclusive." As the learned judge in his reason for nonsuit says, the cases of *Hermann v. Guttenberg* and *Boorum v. Connelly* adopt an intelligent and intelligible rule for the guidance both of the members of the Legislature and of persons concerned in the construction and interpretation of the laws; and it seems to be the only safe rule, because if it is to be a question of inquiry, in any and every given instance, as to whether the Legislature mean more than what they state they meant, that a certain statute should be applicable to other municipal corporations than those designated, we will be in endless doubt and confusion.

When the Legislature has subjected certain classes of municipalities to certain regulations, it thereby excludes all not named from such regulations, and it is not within the power of the courts to say that by using the names of certain classes it intended to include those of other classes named possessing similar powers. In the case in hand the classes named were cities, boroughs, and towns corporate, neither villages nor townships were mentioned, and while some villages, such as those organized under the village act, and some townships, may have legislative authority, they can only be brought under this legislation by saying that the Legislature intended, by using the general designation of certain municipalities as classified by the Constitution, at the same time to affect others also named as classes, without specifying them, and without the use of any general words which might include them. We do not consider that this is within the power of the courts to declare.

Judgment of nonsuit will be affirmed.

(60 N. J. L. 353)

REISCHMANN et al. v. MASKER.

(Court of Errors and Appeals of New Jersey.
June 15, 1903.)

CONDITIONAL SALE—UNRECORDED CONTRACT
—VALIDITY—DISTRESS—WARRANT.

1. An unrecorded contract for the conditional sale of goods and chattels, accompanied by an actual delivery, and followed by an actual and continued change of possession of the things contracted to be sold, wherein it is provided that the ownership of such goods and chattels is to remain in the person so contracting to sell the same until the same are paid for, or until the occurring of some future event or contingency, is valid, and may be enforced against ordinary creditors of the person contracting to buy the same. The recording act of 1889 (P. L. p. 421), as amended by the act of 1895 (P. L. p. 302), Gen. St. p. 891, voids such instruments when not recorded only as against judgment creditors of the person so contracting to buy the same and subsequent purchasers and mortgagees thereof in good faith.

2. A landlord who has caused a distress to be levied upon such goods and chattels in possession of the person so agreeing to buy, for ar-

rears of rent of the premises occupied by him, is not a judgment creditor, within the meaning of said amended act.

(Syllabus by the Court.)

Error to Circuit Court, Hudson County.

Action by Michael Reischmann and others against John H. Masker. Judgment for defendant, and plaintiffs bring error. Reversed.

Cowles & Carey, for plaintiffs in error.
Potts, Midlige & Higgins, for defendant in error.

HENDRICKSON, J. This writ brings up for review a judgment of the Hudson circuit in favor of the defendant in an action of replevin. The case was tried by the judge, a jury being waived, upon facts stipulated. The question in controversy is as to the legal effect of an unrecorded agreement of conditional sale in the form of a lease where the possession of goods has been given thereunder as against a distress of the goods of the lessee. The facts giving rise to the controversy, briefly stated, are these: The plaintiffs in the instrument referred to, signed by the lessee and delivered to plaintiffs, rented to one Pandededis, with place of business at 127 Newark avenue, Jersey City, certain mahogany tables and certain chairs therein described, valued at \$215, for the use of which the latter agreed to pay rent as follows: \$115 immediately upon receipt of the chattels as payment for the rent of the first month only, and then at the rate of \$25 per month, payable in advance at a specified date in each month named, for four months, at plaintiffs' office in New York, without notice or demand. The lessee further agreed that until all of the rent was fully paid the chattels specified were to remain the exclusive property of the plaintiffs, and that upon default in any of the payments he would return and deliver the same to plaintiffs at their office or wherever they might direct, in good order, etc. It was also agreed therein that when the payments of rent should have amounted to \$215 the chattels should become the property of the lessee, and a bill of sale for the same should be given by plaintiffs. Shortly after the making of the lease the chattels were delivered, in pursuance of the agreement therein, to Pandededis at his place of business, the latter having paid the sum reserved for the rent of the first month. After default had been made in the further payments of the rent, but before the expiration of the time limited for the final payment, Mayer Bros. issued a landlord's distress warrant for the recovery of \$200 due to them by Pandededis for rent of his place of business. The defendant, who was a constable, by virtue of the distress warrant levied upon the tenant's personal property, and included with his levy the chattels in possession of Pandededis under the lease. The plaintiffs in this suit thereupon demanded of the defendant the delivery to them of the said chattels,

but such demand was refused, and thereupon plaintiffs brought their said action to recover the possession thereof. The defendant by his plea avowed the taking of the chattels, under and by virtue of the distress warrant, as the property of Pandededis. By an oversight the plaintiffs failed to have the lease recorded, as an agreement of conditional sale, in the register's office of Hudson county; so that the sole question for the determination of the court below, as the parties expressed it in their stipulation, was "whether on account of the failure of the plaintiffs to file or record the lease in said office, pursuant to the provisions of chapter 271 of the Laws of 1889, p. 421, etc., as amended by chapter 144 of the Laws of 1895, p. 302, the defendant, by virtue of his levy under said distress, acquired a lien upon the chattels mentioned superior to the title of the plaintiffs." The court below found in favor of the defendant, and gave judgment accordingly. One of the grounds expressed in the judge's finding is that the intention of the statute above cited, as amended, is "that if the lessor or vendor intends to claim the property as his own against creditors, purchasers, or mortgagees of the vendee he must give notice of that fact by recording his contract of sale or agreement pursuant to the above-mentioned statute." By section 1 of the act of 1889 above referred to, such contracts of conditional sale are declared to be "absolutely void as against subsequent purchasers and mortgagees in good faith." Gen. St. p. 891. By the Supplement of 1895, the first section of the original act was amended so that such unrecorded contracts of conditional sale are declared to "be absolutely void as against the judgment creditors of the person so contracting to buy the same, and subsequent purchasers and mortgagees in good faith." Gen. St. p. 891, § 191. It must be observed that from the express words of this section of the statute as amended it follows that such unrecorded contract of conditional sale is good against all the world, except "judgment creditors of the person so contracting to buy, subsequent purchasers and mortgagees thereof in good faith." The learned trial judge, it would seem, construes the statute so as to include also ordinary creditors. He has failed to give his reasons for such conclusion, and has cited no authority in its support. Such a contention was made in *Woolley v. Geneva Wagon Co.*, 59 N. J. Law, 278, 35 Atl. 789, where an attaching creditor claimed preference by its levy over the owner who had made such a contract of conditional sale of wagons with the debtor, which was also unrecorded. It was there based upon the ground that by the sixth section of the act of 1889 it is declared that such contracts of sale should be "valid against the creditors of the person contracting to buy, and against subsequent purchasers and mortgagees, from the times of the recording thereof until the same be

canceled of record," etc. The argument was that the declaration in this section that if the contract of conditional sale shall be recorded it shall be valid against creditors implies that if it be unrecorded it shall be invalid against such creditors. Chief Justice Beasley, in speaking for the Supreme Court, in the course of a most satisfactory answer to such a suggestion said: "Such a construction would operate in amplification of the language of the first clause of the act above recited, but, as that language is unambiguous, it is, upon the plainest principles, unalterable by implication." We entirely concur with the view of the Supreme Court in that case as to the proper interpretation of the act in question. See, also, *Behn v. National Bank of N. J.*, 65 N. J. Law, 591, 48 Atl. 527.

Another ground upon which the trial judge rested his decision was that the landlord's right to his rent was superior even to the lien of a levy under an execution, and that the distress warrant was as effective against a tenant as an execution upon a judgment. This is also a contention of the plaintiff in error here. It may be said in reply that such process can only affect the tenant's goods that may be on the premises at the time, or that may have been removed therefrom within thirty days. It has not the force of a personal judgment followed by an execution, which extends to the defendant's property anywhere within the jurisdiction of the court. Nor can a levy under a distress warrant affect goods in the tenant's possession that belong to another. But the all-sufficient answer is that the landlord under such circumstances is not a judgment creditor, within the plain meaning of the statute, and, as already shown, its meaning cannot be extended by implication. Such statutes are restrictions upon common right, and must be construed strictly. *Woolley v. Geneva Wagon Co.*, *ubi supra*.

Upon the stipulated facts contained in the record the judgment for the defendant below will be reversed, and final judgment entered in favor of the plaintiffs, with costs. *Sullivan v. Visconti* (N. J. Sup.) 53 Atl. 598.

(69 N. J. L. 347)

SNYDER v. J. S. ROGERS CO.

(Court of Errors and Appeals of New Jersey.
June 15, 1903.)

MASTER AND SERVANT — APPLIANCES — INSPECTION — MASTER'S LIABILITY — ACTION FOR INJURIES — NONSUIT.

1. The plaintiff was a painter in the employ of the defendant company, which had a contract for painting the inside of a building. In order to paint the ceiling of a room, it was necessary to construct a scaffolding below the ceiling, upon which the painters could stand. The plaintiff was assisting in constructing this scaffolding, which was to consist of a ladder supported at either end and a plank laid upon the rungs. After the ladder had been placed in position, but before the plank had been put upon it, the plaintiff stepped upon the ladder to see

if it was at a proper height to enable the painters to work upon the ceiling, and, as he was stepping back off of the ladder, the ladder broke, and the plaintiff fell and was injured. *Held*, in an action against the master to recover damages for the injury, the plaintiff was properly unsuited for failure to show that the defendant had been guilty of any breach of duty by not causing reasonable inspection of the ladder to be made, and for failure to show that reasonable inspection would have discovered any defect in the ladder.

Vroom, J., dissenting.

(Syllabus by the Court.)

Error to Supreme Court.

Action by George W. Snyder against the J. S. Rogers Company. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Samuel K. Robbins and John W. Wescott, for plaintiff in error. El. A. Armstrong, for defendant in error.

GARRETSON, J. The writ of error brings up a judgment of nonsuit. The plaintiff was a painter in the employ of the defendant company, which was engaged in painting the ceiling and side walls of a room within a building. This room occupied in height two stories of other parts of the building. In order to paint the ceiling, it was necessary to erect a scaffolding for the painter to stand upon. The scaffolding was to be made of a ladder below and nearly parallel with the ceiling, and a board or plank laid on the rungs between the sides to distribute the weight. One end of the ladder was to be laid on a trestle, and the other end on the sill of a window opening from the second story of the other part of the building into a room where the painting was to be done. One end of the ladder had been placed on the trestle, and the plaintiff placed the other end on the sill of the window. The sill of the window was lower than the top of the trestle, so that the ladder was not exactly level. After the ladder had been placed in this position, but before any plank had been placed on it, the plaintiff stepped upon it and raised his hand toward the ceiling to see whether the scaffolding was at a proper height to enable the painters to reach the ceiling, and just as he was about to step back the ladder broke, and he was precipitated to the floor and injured.

It seems from the evidence that it was a customary thing to use ladders in this way, and that the plaintiff had assisted in so using them in the construction of the scaffolding. If it was a dangerous mode of using such ladders, the plaintiff was as familiar with that danger as the master. He was a painter of many years' experience, accustomed to use ladders in his business, and must be considered to have had knowledge whether or not any ordinary ladder could be safely used in the manner in which the ladder was used in this case. If the ladder broke because of any incompleteness of the scaffold, the plank on it being lacking where-

by the weight would be distributed, then it was the plaintiff's own negligence in attempting to use the scaffold before it was completed, he being engaged in building it.

This ladder was one of several similar to it provided by the master to be used in the business, and was selected and brought to the job by the foreman. It consisted of two side pieces, with rungs in holes in the side pieces. It had been painted. There is nothing to indicate that the ladder was defective, rotten, or unsafe. To all outward appearance it was strong and sufficient for the purpose to which it was put. When it broke, one side broke square off, and the wood was at the point of fracture "brittle, like chalk." It does not appear that this was a structural defect, or that it was a defect that a reasonable inspection would have disclosed. *Henggler v. Cohn* (N. J. Sup.) 52 Atl. 280. There is no evidence whatever as to the failure of the defendant to cause reasonable inspection to be made of this ladder, and if the fracture could raise an inference of neglect of duty, on the principle of *res ipsa loquitur*, this is not that case, for the evidence is that there was nothing to indicate that the ladder was defective, rotten, or unsafe. To all appearance it was strong and sufficient for the purpose to which it was put, and no reasonable inspection would have disclosed any defect. *Electric Company v. Kelly*, 57 N. J. Law, 100, 29 Atl. 427. We are unable to find any negligence or failure of duty of the defendant subjecting it to liability to damages.

The judgment of nonsuit will be affirmed.

VROOM, J., dissents.

(65 N. J. B. 711)

DOREMUS et al. v. MAYOR, ETC., OF CITY OF PATERSON.

(Court of Errors and Appeals of New Jersey. June 15, 1903.)

WATERS AND WATER COURSES—POLLUTION—RIPARIAN AND NONRIPARIAN OWNERS—RIGHTS—INJUNCTION—PARTIES—MISJOINDER OF COMPLAINANTS.

1. Owners of land abutting a river above tide water are entitled to an injunction restraining the pollution of the river by a city in draining sewage into it above their lands, unless the city has condemned the right to so pollute the water, and made just compensation to such owners for the diminution of their property occasioned thereby.

2. The rights of nonriparian lessees and grantees of the privilege to take and use water from a canal into which water flowed from a river above the flow of the tide, and was returned to the river below such flow, are subordinate to the rights of a city located on the river above the intake of the canal to vent its sewage into the stream.

3. Since the rights of such lessees and grantees were subordinate to the rights of the city, they were improperly joined as complainants with riparian owners in a suit against the city to restrain the pollution of the river.

Hendrickson and Pitney, JJ., dissenting.

Appeal from Court of Chancery.

Bill by Henry W. Doremus and others against the mayor and aldermen of the city of Paterson. From a judgment in favor of complainants (52 Atl. 1107), defendants appeal. Reversed.

Michael Dunn and George S. Hilton, for appellants. Lindabury, Depue & Faulks, for respondents.

GUMMERE, C. J. The appeal in this case is from an order overruling a demurrer to the bill of complaint filed by the respondents. The object of the bill is to restrain the appellant from polluting the Passaic river with its sewage, unless and until it makes compensation to the respondents for the injury resulting therefrom to their respective property rights. The respondents are 43 in number. Some of them are the owners of lands bordering upon the river above the ebb and flow of the tide therein. Others are the owners of lands bordering, not upon the river, but upon the artificial canal which opens out of, and draws its waters from, the river, at a point above tide water, and returns them into it again at a point some distance below. Others still do not own property bordering either on the river or the canal, but take water from the latter, under leases, for the purpose of supplying power to mills operated by them. The demurrer attacks the right of the respondents, or any of them, to the relief sought by the bill.

The right of a riparian owner, above tide water, to an injunction restraining the pollution of the river by the appellants, unless the latter make just compensation to him for the diminution in the value of his property occasioned thereby, has already been affirmed in this court. *Simmons v. Paterson*, 60 N. J. Eq. 385, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642. The conclusion reached by the vice chancellor in the court below was that the respondents who own land bordering on the canal referred to, and those who lease water power supplied by it, were also entitled to the same relief. This conclusion, in our opinion, is not well founded. The bed of the Passaic river, above tide, is private property, the proprietorship of which is in those who own the lands bordering on the stream. *Attorney General v. Delaware & Boundbrook R. Co.*, 27 N. J. Eq. 631. And not only the bed of the river, but the waters flowing over it, until they reach tide, are the private property of such owners. *Cobb v. Davenport*, 3 Vroom, 369, 378; *Simmons v. Paterson*, 60 N. J. Eq. 389, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642. And this is so because the waters are part and parcel of the land itself. The bed of the stream belongs to the riparian owners in severalty; each owner owning the land under water, in front of his ripa, to the middle of the stream. Each owner is entitled to have the waters flow past his lands undiminished in quantity and unimpaired in quality by the act of any of the other

owners thereof. Each owner is entitled, as against the others, to use the passing water, in a reasonable manner, for domestic uses, and for the irrigation of his lands. He may also divert the flow thereof for his own purposes, provided he returns the waters again to the stream, unpolluted, and in the same volume, at a point above the lands of lower owners. More than this, he is entitled to abstract them permanently as against all his co-owners except those whose lands lie further down the stream. *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538. Generally speaking, each riparian owner has a right to devote the waters to any use which he may see fit, provided that in doing so he does not injuriously affect the rights of any of the other proprietors therein. *Miner v. Gilmour*, 12 Moo. P. C. 158. And this right cannot be restricted by the act of any other of the proprietors. A proprietor may grant to third persons, who are not riparian owners, rights in the waters; he may permanently abstract the waters for their use, or he may permit them to do so, without the consent of the owners above him; but he cannot by such action impose an additional burden upon, or create a new liability against, such owners. It was upon this ground that the Court of Exchequer, in the case of *Stockport Water Co. v. Potter*, 8 H. & C. 800, decided that an action would not lie in favor of the water company, which was taking water from the river Mersey under a grant from a riparian owner, against the defendant, Potter, who owned lands bordering upon the river above the intake of the plaintiff company, for polluting the stream to its detriment. The case of *Butler Rubber Co. v. Newark*, 61 N. J. Law, 32, 40 Atl. 224, referred to in the opinion of the vice chancellor, and relied upon in the brief of the respondents, is not opposed to the principle underlying the decision of *Stockport Water Co. v. Potter*. In that case the city of Newark, conceding that the rubber company had a property right in the use of the water, sought to condemn that right, and the matter came before the court on an appeal from the award of commissioners. The only question presented was what sum of money the city should pay to the company as compensation for the deprivation of that right. Mr. Justice Depue, who delivered the opinion, points out that the case is to be distinguished from the *Stockport Water Co.* Case by reason of the fact that "the defendants [the city of Newark] are not asserting rights as riparian owners, but are taking property under the power of eminent domain." In the case now under consideration, the city of Paterson is not seeking to acquire any right of the lessees or grantees of a lower riparian owner. They concede that such lessees and grantees have rights, and do not deny that they are property rights, but they contend that those rights are subordinate to the city's right to vent its sewage into the stream. This contention, in our opinion, is sound.

There being a misjoinder of complainants, and this having been specified as a ground of demurrer, the order overruling the demurrer should be reversed.

HENDRICKSON and PITNEY, JJ., dissent.

(39 N. J. L. 246)

S. E. CROWLEY CO. v. MYERS.

(Court of Errors and Appeals of New Jersey.
June 15, 1903.)

REAL ESTATE AGENT—COMMISSIONS—ACCEPTANCE OF OFFER.

1. A real estate agent or broker, upon whom an owner of lands confers authority to sell, under the provisions of section 10 of the statute of frauds, earns his commissions if he procures a purchaser for the lands on the terms fixed by the owner.

2. When the authority conferred is to sell at the price of \$70,000, the owner may decline to accept a proposing purchaser whose offer is to buy the lands at the price fixed to be paid, not all in cash, but in part by the conveyance to the seller of other lands at the price of \$30,000. But, if the owner accepts such an offer, the agent is entitled to his commissions.

3. If the owner, upon receiving such an offer, accepts it on an agreement with the agent that he shall not be entitled to or receive commissions upon the price at which the lands are taken in exchange until the agent has procured a satisfactory purchaser for such lands, and the agent has failed to do so, a defense available in an action for commissions is disclosed upon proof of the agent's failure. Whether the acceptance of the owner was upon such a condition, if contested, presents a mere question of fact.

4. Where the authority conferred on the agent is limited to a period of time, the agent will be entitled to his commissions if within that time he procures a purchaser with whom the owner enters into a binding contract of sale and purchase, although the conveyance of the lands is not made until after the time allowed had elapsed.

(Syllabus by the Court.)

Error to Supreme Court.

Action by the S. E. Crowley Company against Charles R. Myers. Judgment for plaintiff. Defendant brings error. Affirmed.

The following is a copy of the contract and assignment thereof contained in the bill of particulars annexed to the declaration and referred to therein, and upon which the declaration is founded:

"Atlantic, N. J., Aug. 25, 1900.

"Messrs. S. E. Crowley & Co.—Gentlemen: I hereby empower and authorize you to sell all that certain property now owned by me in the City of Atlantic City, County of Atlantic and State of New Jersey, No. ——— Pierpont Hotel, N. J. Avenue, described as follows:

"The price for which I authorize you to sell the above described property is \$70,000.00. Seventy thousand dollars I will accept \$ ——— in cash and allow ——— to remain on first mortgage at rate of 6 per cent. per annum. On which amount I agree to pay you a commission of 2 per cent., or on any selling price

which may be agreed upon between myself and the purchaser, in case you procure a purchaser for the same.

"Should I, or any agent sell the said property, I will notify you immediately of such sale.

"[Signed] Chas. R. Myers.

"Witness: W. J. Middleton.

"P. S. This agreement is void after 10 days from date. Ch. R. Myers."

"For one dollar and other valuable considerations we hereby sell, assign, transfer and set over unto the S. E. Crowley Company all of our right title and interest in and to the within contract and agreement.

"Dated August 25th, 1900.

"S. E. Crowley & Co."

Clarence L. Cole, for plaintiff in error. ~~Ell~~ Chandler, for defendant in error.

MAGIE, Ch. The judgment brought into review by this writ of error was entered in an action on contract, wherein the S. E. Crowley Company, alleged to be a corporation of this state, declared against the defendant in a declaration containing two counts, framed upon the contract and the assignment set out in the prefatory statement. Defendant, in his pleading, did not question the corporate capacity of plaintiff. The pleas were (1) non assumpsit, and (2) a waiver by plaintiff or its assignor of any commissions in excess of an amount which was admitted to have been paid by the credit given in the bill of particulars. This plea properly concluded with a verification, and called for a replication by plaintiff. No replication to the second plea was filed. Plaintiff, however, noticed the cause, and it was brought to trial as if at issue. Although defendant's counsel knew of the imperfect condition of the record, which was apparent on the transcript, he took part in the trial. Since the defense intended to be presented by the second plea was properly presented and disposed of in the trial, I think the irregularity pointed out cannot now be availed of by the defendant for a reversal of the judgment.

The first question raised by defendant is presented by the assignment in error based on the refusals of the trial judge to nonsuit plaintiff, or to direct a verdict for defendant, which may be considered together. The contract upon which the declaration was founded was one which fell within the provisions of section 10 of the "Act for the prevention of frauds and perjuries" (Revision approved March 27, 1874; 2 Gen. St. p. 1604). By those provisions, such a contract, to be enforceable, must be in writing, signed by the owner of the real estate. It must give authority to the broker or real estate agent to sell, and fix the commissions on the dollar for the services in selling. As the liability is limited to an instrument in writing, the rule that evidence intended to vary or alter the writing relied upon for authority is inadmissible was ap-

plicable. The ground on which the motions to nonsuit and direct a verdict were rested was that the written agreement, properly construed, limited the liability of defendant to pay commissions to a sale procured by the broker or real estate agent for cash only. The trial judge charged the jury that such was the true construction of the contract. He left it to the jury whether the provision for a sale for cash had not been waived by the seller by his acceptance of a purchaser who paid in part in cash, and in part by a conveyance to the seller of other real estate, accepted by the seller as equivalent, to make up \$30,000 of the sale price of \$70,000. The contract of a real estate agent is a contract with the owner to procure a purchaser for the property upon the terms fixed by the owner. If he procures a satisfactory purchaser upon such terms, he earns his commissions. Hedden v. Shepherd, 29 N. J. Law, 334; Vreeland v. Vetterlein, 33 N. J. Law, 247; Hinds v. Henry, 36 N. J. Law, 328; Runyon v. Wilkinson, 57 N. J. Law, 420, 31 Atl. 390. When the consideration is fixed by the owner, in the authority given to the agent, at a certain price in dollars, the owner may reject a purchaser procured by the agent who offers to pay the price, not in dollars, but in other property. But if the owner, having the option to reject such an offer, accepts it, and takes other property as equivalent for so much of the selling price fixed by his authority, I have no doubt that the agent becomes thereby entitled to his commissions. The contract besides contains a provision that the agent would be entitled to a commission on a selling price agreed upon between the seller and a purchaser procured by the agent. This view, however, does not disclose error in the rulings complained of; for while the trial judge left to the jury the question whether the seller had not waived the provision which required the agent to produce a purchaser for cash, this ruling substantially submitted the question whether the seller had not, under his option, accepted the purchaser upon an offer to pay the stipulated price, not in cash, but in what the seller accepted as cash. There was no error in the refusal to nonsuit or direct a verdict.

In the course of the trial defendant contended that when the agent brought to his notice the offer of the intending purchaser to pay the stipulated price of \$70,000 not all in cash, but in part by a conveyance of other lands to be taken at the value of \$30,000, defendant's acceptance of the offer was upon the condition, agreed to by the agent, that the agent should not be entitled to or receive any commissions on the price of the lands taken in exchange until he had effected a sale of said lands, or procured a purchaser therefor satisfactory to defendant. This defense, it will be observed, is precisely that set up by the defendant's second plea. It was treated as, and was, a defense available to defendant under the

general issue; for if defendant, having a right to reject the offer of the procured purchaser on the proposed terms, accepted it on those terms on the condition that no commissions should be paid under the contract upon the price at which the exchanged lands were taken, and that condition was agreed to by the agent, then either a new and substituted contract arose, which would be a defense to the action on the original contract, or at least there was a substitution of terms in the original contract, which would be a defense to the action for commissions in excess of the amount at 2 per cent. upon \$40,000 of the consideration. As the bill of particulars gave credit for \$1,000 paid by defendant, the defense thus set up, in either view, if made out by the evidence, entitled defendant to a verdict. But the fact that such provision was proposed or assented to by the agent was contested. The evidence was conflicting, and the fact was carefully and properly submitted to the jury by the trial judge. The verdict indicates that the defense was not made out. That conclusion is not reviewable, and, in the view I have taken, the result deprives defendant of any right to complain of any irregularity in respect to the plea which was not put at issue.

The authority conferred upon the agent by the contract was limited to the period of 10 days from its date, which was August 25, 1900. In making out the case for the plaintiff, there was proved and received in evidence an agreement in writing, made between defendant and one Bechtel, the purchaser procured by the agent for the sale and purchase of the lands which the agent was authorized to sell. This was dated on the 28th of August, and was, therefore, within the 10 days limited. There was also put in evidence the record of a deed for said lands, made by the defendant to Bechtel, which was not dated until the 15th of the following September. Upon exceptions duly taken, it is now contended that the agent was not shown to have become entitled to his commissions under the contract, because the sale was not effected within the 10 days limited. But this is a misconception. The agent becomes entitled to commissions when he procures a purchaser able and willing to buy on terms satisfactory to the owner. He earns his pay when the owner accepts and contracts with the purchaser procured by him.

Another objection is also disposed of by this view of the liability of a seller to his agent upon such a contract. It was contended that the judge erred in submitting to the jury the question whether the deed put in evidence conveyed the lands in question, there being no evidence aliunde of the identity of the lands conveyed with the hotel mentioned in the contract. But, as defendant's liability arose at the time of the written contract of sale, the deed need not have been put in evidence at all, and the error,

if it was such, was not injurious. Moreover, upon the face of the deed, there are discoverable marks of identification to aid the jury, if it had been necessary to show that the contract of sale had been completed by an actual conveyance.

It was contended below that plaintiff was not entitled to recover upon the contract with the S. E. Crowley Company, assigned to plaintiff. The contention has not been argued here. It is manifestly unavailable to defendant. It is unnecessary to consider whether, under the provisions of the act of 1890 (2 Gen. St. p. 2591, pl. 340), an assignment by an agent employed to sell lands to another person, before a purchaser has been procured, would entitle the assignee who should thereafter procure the purchaser to demand commissions from the seller. But that is not the case here presented. The contract was with one Crowley, who did business under a firm name. The evidence justifies the conclusion that he procured the purchaser, and thereby became entitled to the commissions. Then his right to the commissions became a chose in action, arising on contract, and fell within the terms of the act above cited. The assignment proved was dated on the same day with the contract, but the evidence was that it was not made until after the right to commissions had accrued.

No error having been disclosed, the judgment must be affirmed.

(60 N. J. L. 239)

O'BRIEN v. TRAYNOR.

(Court of Errors and Appeals of New Jersey.
June 15, 1903.)

INJURY TO SERVANT—NEGLIGENCE OF BEL- LOW SERVANT—RIGHT OF ACTION —HARMLESS ERROR.

1. When two persons are working together in a common employment, under circumstances which cast upon each a duty to take care that his acts shall not do injury to the other, for a breach of which duty an action will lie, the fact that both are engaged in the common employment of the same master will not prevent the one injured by the negligent act of the other from maintaining an action therefor.

2. Exceptions were allowed to the exclusion of questions put by defendant's counsel on cross-examination of a witness of plaintiff. The bill of exceptions disclosed that the cross-examination was pursued, and the witness afterward substantially answered the excluded questions. *Held*, that whether the questions were erroneously excluded will not be considered on error.

(Syllabus by the Court.)

Error to Circuit Court, Union County.

Action by Charles J. O'Brien against John Traynor. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles A. Reed, for plaintiff in error.
Craig A. Marsh, for defendant in error.

MAGIE, C. The record brought here by this writ of error discloses an action of tort

tried at the Union county circuit, and resulting in a verdict for plaintiff, upon which the judgment complained of was entered. The declaration set out the plaintiff's cause of action thus, viz.: That defendant, at the time of the injury of which plaintiff complained, was a foreman in the employ of the Pond Machine Tool Company, a corporation of this state, and plaintiff was a workman in the employ of the same company, subject to defendant's orders as foreman; that defendant and plaintiff were both engaged in removing barrels from one place in the company's yard to another place in said yard, and that defendant ordered plaintiff to lift and remove said barrels; that it thereby became the duty of defendant to exercise care that plaintiff should not be injured by the negligence of defendant; and that defendant, disregarding his duty, so negligently moved one of the barrels that it was thrown against plaintiff's hand, which was thereby injured. The cause went to trial on a plea of general issue.

The evidence appearing in the bill of exceptions would justify the jury in finding that the charges of the declaration were made out. At the close of plaintiff's case, counsel for defendant moved for a nonsuit on the ground that, assuming the facts charged and proved, there was no liability on defendant to answer for the injury of plaintiff. The action for negligence rests upon an obligation on the part of the defendant to use care toward the plaintiff, and a breach of that obligation resulting in plaintiff's injury. Leaving out of view the fact of the common employment of the parties in this case by the same master, no doubt can exist that the fact that they were engaged together in the removal of the barrels would cast upon each of them the duty to take care that no act of his in such removal should do injury to the other.

The doctrine of respondeat superior, applied to support a liability on the part of the master for negligent acts of his servant, is admittedly subject to an exception excluding his liability for such acts when they produce injury to a fellow servant of the same master. This exception was supported in our Supreme Court upon the ground that each servant, in accepting employment, stipulated to assume the risks of his employment, including the risks from the carelessness of his fellow servants. *Harrison v. C. R. R.*, 31 N. J. Law, 293. This decision has been generally recognized in our courts as expressing the correct doctrine, and the reasons for it. *Conway v. Furst*, 57 N. J. Law, 645, 32 Atl. 380; *Curley v. Hoff*, 62 N. J. Law, 758, 42 Atl. 731; *Sofeld v. Guggenheim Smelting Co.*, 64 N. J. Law, 605, 46 Atl. 711, 50 L. R. A. 417. Upon demurrer to a declaration to an action by a servant employed by a manufacturing corporation against the superintendent employed by the same corporation, charging defendant with negligence in the management

of the gas apparatus in the mill of the employer, whereby plaintiff was injured by the escape of gas, the Supreme Judicial Court of Massachusetts sustained the demurrer, declaring that a servant is not liable to an action by another servant in the employ of the same master for damages by the negligence of the first in such employment. This conclusion was rested by Judge Merrick, who delivered the opinion, upon two grounds: (1) That the negligence charged was the breach of a duty owed by the defendant only to the master; and (2) that the considerations which led to the adoption of an exception to a master's liability for the negligence of his servant, applied as well to the relation between fellow servants of the same master. *Albro v. Jaquith*, 4 Gray, 99, 64 Am. Dec. 56. It is to be observed that the first of the grounds relied on in that case might not apply in the case in hand, where the dereliction of the defendant is not mere nonfeasance in failing to perform some act which he stipulated with his master to perform, but is actual misfeasance in doing an act which is tortious, and which would entitle plaintiff to an action, unless the relation of fellow servant shields the defendant by an exception to the general rule of liability. The case just stated is the only one which has been brought to my attention or discovered by me expressing that view of the liability of a fellow servant. It is, however, unnecessary to discuss that decision, because in the court in which it was rendered it has been repudiated and overruled.

In *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437, a demurrer to a declaration in an action by one servant against other servants in the same employment, charging them with negligently placing a block and chains upon an iron rail suspended from the ceiling of a room in which plaintiff was called to work, and with negligently suffering them to remain unprotected from falling, whereby they fell on plaintiff and injured him, was overruled. The case presented was an exact counterpart of that considered and reported in 4 Gray, 64 Am. Dec. The opinion was by Chief Justice Gray, and contains a thorough and masterly discussion of the whole question. The conclusions reached were opposite to those of the former decision, which is declared not to be supported by either of the reasons on which it had been rested. It was determined that one servant is liable to another servant in the same employment for damages occasioned by the negligence of the first in such employment. The same case came again before the Supreme Court. After the demurrer had been overruled, the action was tried, and a verdict was directed for defendants, to which the plaintiff, under the practice in vogue in that state, alleged exceptions. It was twice argued. The conclusion reached by the court was that the direction of a verdict was erroneous, and that the case should have been

submitted to the jury. The opinion was delivered by Judge W. Allen. His opinion was that, although the defendants could not be held liable to plaintiff for any negligence which was only a breach of the contract with or duty to the common employer, yet, if the jury found that they had control over the appliance which did the injury to the plaintiff, and knowledge of its dangerous condition, the defendants would be charged with a duty to plaintiff to care for his safety, for a neglect of which duty they would be liable. The case was thereafter again brought to trial against two of the defendants, and a verdict passed for plaintiff against one of them, which, upon exceptions, was sustained by the court. Judge Devens in the opinion delivered, supports the verdict upon the ground that there was evidence that the defendant against whom it passed had control over the appliance which injured plaintiff, and directed the removal by plaintiff of an obstacle which rendered the appliance harmless, when observation would have shown him the hazardous condition in which such removal left it. He held that defendant thereby came under the duty to a fellow servant rightfully in his place, who was injured by the fall of the block and chain. *Osborne v. Morgan*, 137 Mass. 1.

This case has been discussed at a greater length than is essential to the decision of the question before us. My purpose has been to indicate how thoroughly the doctrine of *Albro v. Jaquith*, denying redress to a servant for an injury done by a fellow servant, has been repudiated in the state in which it was promulgated. Whether redress for an injury such as was under consideration in that case was properly permitted, calls for no expression of opinion, for in the case in hand the injury suffered by plaintiff was not the result of defendant's nonfeasance or neglect of any duty which defendant owed to the common master, but was a plain misfeasance and a breach of a duty which defendant owed to plaintiff only. I entirely concur in the conclusion arrived at in the case last cited to the effect that the fact of a common employment does not of itself prevent an injured fellow servant maintaining an action against his fellow servant for an injury inflicted by the negligence of the latter. Such an action will lie for an injury occasioned by such breach of duty as was shown in this case. The nonsuit was rightly refused.

Several assignments of error were directed to objections made in the course of the trial, to which no exceptions were taken when allowed. Of those which are presented upon exceptions allowed, none are deemed to require observation except two, which are directed to the rulings of the trial judge in excluding questions proposed to be put on the

cross-examination of a witness of plaintiff. The witness had testified on direct examination that he was a physician of some years' practice, connected with a hospital; that plaintiff had consulted him about his injured hand; had been sent by witness to the hospital, and had been there treated by him. The first of the excluded questions required witness to say what would have been good surgical treatment of the injury in the first instance. This was objected to on the ground that there had been no direct examination of the witness as an expert, and that the examination on that line was not proper cross-examination. The objection was sustained, apparently for the reasons given. The second of the excluded questions was in these words: "How long after the injury would pus make its appearance as you found it there?" The witness himself objected to answer on the ground that he was not there "as an expert." The question was excluded, the trial judge explaining the ground of his action by saying, "If the witness declines to answer as an expert, I think he is entitled to." It is open to grave question whether the rulings excluding these questions could be supported on either ground. The direct examination of this medical witness seems to have included much evidence which he could only have given from a knowledge and experience not common to all men, but acquired by physicians. Nor is it by any means settled that a witness, when called and examined, may refuse to answer questions which call for such knowledge as he has because he was not attending as an expert. No such distinction has been recognized by the courts of this state as yet. But I do not think the court is called upon to pronounce an opinion upon these questions at this time. Defendant's counsel pursued the cross-examination of the witness, who afterward declared his willingness to answer questions calling for expert knowledge. In answer to questions then put without objection, the witness testified that pus indicated broken down tissue; that pus resulted from inflammation produced by laceration; that such inflammation can be counteracted and arrested by treatment; that the earlier the treatment, the sooner the inflammation would be arrested; and finally he expressed his opinion that, if plaintiff's wound had been treated earlier, plaintiff would have had less serious results. These answers practically covered the field of examination desired, as indicated by the excluded questions. The questions were really answered, and the error of excluding them (if there was error) was cured. For these reasons, there should be no reversal on this ground.

No error being found, the judgment must be affirmed.

(69 N. J. L. 291)

ROSS v. BOARD OF CHOSEN FREE-HOLDERS OF COUNTY OF ESSEX et al.

(Court of Errors and Appeals of New Jersey. June 15, 1908.)

PUBLIC PARKS — SPECIAL ACTS — CONSTITUTIONAL LAW—APPOINTMENT.

The county park act, approved March 5, 1895 (Gen. St. p. 2618), authorizes the appointment, by a justice of the Supreme Court, of commissioners to lay out public parks in any county having a population exceeding 200,000, but provides that the act shall not go into operation in any county unless the voters of the county accept it, and it directs certain county officers to take steps for submitting the question of acceptance to the voters at the next election. *Held:*

1. That the distinction drawn between the more populous counties and the others is legitimate, for the purposes of the act.

2. That the provision for submission at the "next election" is directory only, and the act may be accepted at a subsequent election, and may be accepted in counties which acquire the designated population after the passage of the act.

3. That the Legislature had constitutional authority for conferring upon a justice of the Supreme Court the power of appointing the park commissioners.

(Syllabus by the Court.)

Error to Supreme Court.

Action by James P. Ross against the board of chosen freeholders of the county of Essex and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Henry Young, for plaintiff in error. Joseph L. Munn, for defendant in error, board of chosen freeholders. Charles L. Corbin, for defendant in error Essex county park commission.

DIXON, J. This writ of error brings under review the judgment of the Supreme Court entered on the opinion of Mr. Justice Collins, reported in 53 Atl. 1042, to which reference is made for the facts of the case.

The only questions discussed in argument here relate to the constitutionality of "An act to establish public parks in certain counties in this state and to regulate the same," approved March 5, 1895 (Gen. St. p. 2618).

One of the objections urged against the act is that, because it is limited to counties having a population exceeding 200,000, it is a special regulation of the internal affairs of counties, and thus violates article 4, § 7, par. 11, of the Constitution. But we think the Legislature may divide counties on the basis of their population for the purpose of enabling the more populous to lay out public parks. Densely settled communities have the greater need for these open spaces, to which the inhabitants may resort for refreshment, and hence there is a rational connection between the basis of classification and the purpose of the enactment. As was said in *Paul v. Gloucester County*, 50 N. J.

Law, 585, 592, 15 Atl. 272, 1 L. R. A. 86: "Whether the basis of classification is wise or judicious, or whether it will operate as fairly as some other basis that might be adopted, is a question for the Legislature, and not for the courts. The extreme limit of our inquiry in this direction is, does population bear any reasonable relation to the subject to which the Legislature has applied it? Is it germane to the law?" As this act forms and deals with a legitimate class, it is in this feature general.

Another objection presented is that the act violates the same paragraph of the Constitution, because, according to the words of the statute, it cannot take effect in any county unless the voters of the county accept it at the next election held after its passage, thus practically confining it to counties then having the designated population. If this be the real meaning of the statute, it must be adjudged unconstitutional, under the rule laid down in *De Hart v. Atlantic City*, 63 N. J. Law, 233, 43 Atl. 742. But courts never approve an interpretation of a statute which will defeat its main purpose, if there be any reasonable construction which will uphold it. *Atlantic City Waterworks Co. v. Consumers' Water Co.*, 44 N. J. Eq. 427, 15 Atl. 581. The legislative design fairly expressed by this statute is that to the voters of every county having the required population should be tendered the right of accepting the benefits of the law, and in order to insure the enjoyment of this right the act imposes certain duties upon the county officers, and points out the time for their performance. But there certainly is no clear declaration, and therefore it should not be believed, that the Legislature considered exact compliance with the method provided for securing the right as more important than the right itself. Our construction of the statute is that the provision for submitting the matter at the "next election" is directory; that, in counties having the proper population when the act was passed, the local officers are directed to perform their duties with reference to the first election thereafter, and in counties subsequently acquiring sufficient population those duties will relate to the next election after such acquisition, but that in both cases the duties enjoined continue until performance. They cannot be discharged by neglect. *Albright v. Sussex Lake Commissioners* (N. J. Sup.) 53 Atl. 612, 616.

A further objection to the validity of the act is that, by requiring the appointment of the park commissioners to be made by a justice of the Supreme Court, it violates article 3 of the Constitution, which declares that "the powers of the government shall be divided into three distinct departments—the legislative, executive and judicial; and no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, except as herein ex-

§ 3. See Constitutional Law, vol. 10, Cent. Dig. § 157.

pressly provided." This article contains three clauses: A distributive clause, "the powers of the government shall be divided into three distinct departments—the legislative, executive and judicial"; a prohibitive clause, "and no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others"; and an excepting clause, "except as herein expressly provided." The distributive clause cannot be read as the declaration of an abstract proposition, that the powers of government are naturally divided into legislative, executive, and judicial departments, for the words indicate, not the powers of government generally, but "the powers of the government"—that is, the government then being formed, and a division not already existing, but one about to be made, "the powers of the government shall be divided." Hence we must seek for the scope of the division primarily in the Constitution itself. The intended division is there plainly disclosed. By article 4, § 1, par. 1, "the legislative power is vested in a Senate and General Assembly"; by article 5, § 1, "the executive power is vested in a Governor"; and by article 6, § 1, "the judicial power is vested in" the courts. The division contemplated by article 3 relates, therefore, only to such powers of the government as are to be exercised by the Senate and General Assembly, or by the Governor, or by the courts. But as was said in *Paul v. Gloucester County*, 50 N. J. Law, 611, 15 Atl. 284, 1 L. R. A. 86, "there is a multitude of governmental duties which have never been and cannot possibly be performed, either by the Legislature, or by the Governor, and which are certainly not prescribed by the Constitution to the judiciary." Clearly, the powers appropriate for the discharge of these duties must lie outside of the division intended by this clause of the Constitution. Among the powers thus excluded must be the power of appointing local officers, for it cannot be believed that this power, requiring for its proper exercise such diversity of knowledge respecting local needs, was constitutionally devolved upon either of the departments designated. Nothing in the history of this or of the mother country would suggest such a course. The prohibitive clause of this article calls for some consideration of "the powers properly belonging to" the several departments into which the powers of our government are divided, for the purpose of determining whether they include the power to appoint officers for the management of local concerns. Here it should be noted that the force of this clause is not to confine the Legislature to powers which are legislative, the Governor to powers which are executive, and the courts to powers which are judicial, but merely to forbid each department to encroach upon the powers properly belonging to another. The powers properly belonging to each of these departments, and therefore

forbidden to the others, are those assigned under the general terms "legislative power," "executive power," and "judicial power," and also those specifically delegated by the Constitution to the Senate and General Assembly, or to the Governor or to the courts. But since in these specific delegations of power the appointment of local officers, as distinct from authority to provide for their appointment, is not mentioned, our consideration may be confined to the general terms employed.

The question presented is, can the power of appointing to office be said, in our government, to belong properly to the Legislature, or to the Governor, or to the courts, so that its exercise by any save one of these departments is prohibited? Under the English system of government, it might be said that in a sense the King was the depository of the power of appointing to public office—"the fountain of honor, of office, and of privilege," as Blackstone calls him. 1 Com. 271. But in our system there appears no indication that any single department of the government can be deemed the King's successor in this regard. Although in *State v. Parkhurst* (1802) 9 N. J. Law, 427, Chief Justice Kirkpatrick decided that the Governor, being invested with "the supreme executive power," had authority to fill a vacancy in the office of the clerk of the common pleas arising during a recess of the Legislature, yet he considered this power not as inherent and absolute, but as created and limited by the necessities of the case, so that it would yield to any other provision made by the Legislature. In *Police Commissioners v. Pritchard*, 36 N. J. Law, 110, it was claimed that the Governor of the state had succeeded to this branch of royal authority; but Chief Justice Beasley said, "My consideration of the questions involved in this inquiry has entirely satisfied me that there is not the least propriety in the assumption that the authority of our executive over public offices is at all comparable with that of the English King." An examination of our constitutional and legislative history will dissipate the idea that the power of appointing to office is the peculiar property of any one of the three departments of our government. Under our Constitution of July 2, 1776, the only department on which was directly conferred any power of appointing officers was the legislative, consisting of the Council and Assembly. This was authorized to appoint the Governor, Attorney General, Secretary, and Treasurer of the province, the field and general officers of the militia, and the judges and clerks of the courts. No provision was made for the appointment of other officers, except as it was embraced in the general power of legislation. Between that time and the adoption of our present Constitution, A. D. 1844, many statutes were passed under this general power; some actually appointing officers, some authorizing their appointment by the Council and Assembly in joint

meeting, some by the Governor and Council, some by the Governor alone, and some by the courts. Thus an act passed February 5, 1812, appointed three persons as commissioners to have charge of paving a street in New Brunswick. The Council and Assembly were authorized to appoint the Supreme Court reporter by act of March 12, 1806, the surrogates by act of November 28, 1822 (P. L. p. 29), prosecutors of the pleas by act of December 11, 1823 (P. L. p. 52), the clerk in chancery by act of February 14, 1831 (P. L. p. 121), the chancery reporter by act of March 13, 1832 (P. L. p. 155), and the inspectors of the State Prison by act of February 27, 1838 (P. L. p. 195). The Governor and Council were authorized to appoint commissioners of pilotage by act of February 8, 1837 (P. L. p. 110). By sundry acts passed between January 30, 1799, and December 27, 1826, the Governor was authorized to appoint notaries public, inspectors of various kinds of food, and commissioners of deeds; and by other acts passed between November 12, 1790, and February 27, 1838, he was authorized to fill vacancies in the offices of United States senator, of representative in Congress, of presidential elector, of surrogate, and of State Prison inspector; and by act of November 9, 1822 (P. L. p. 25) the courts of general quarter sessions were authorized to appoint prosecutors of the pleas. In the same interval the Constitution of the United States was adopted, by which the power of appointing officers was conferred partly upon the executive alone, and partly upon the executive and a branch of the Legislature, but with this express reservation—that the Congress might by law vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments.

In view of this situation, it seems improbable that the members of the convention which framed the Constitution of 1844 could have regarded the power of appointing officers as one properly belonging to any of the three departments mentioned; and, when we examine the instrument which they framed, the improbable becomes the incredible. For by it the power to appoint the Major Generals of the militia, the Justices of the Supreme Court, Chancellor, Judges of the Court of Errors and Appeals, Attorney General, Prosecutors of the Pleas, Clerk of the Supreme Court, Clerk of the Court of Chancery, and Secretary of State is vested in the Governor, acting in conjunction with the Senate; the power to appoint the Adjutant General, the Quartermaster General, and some other militia officers, is vested in the Governor alone; the power to appoint the judges of the court of common pleas, State Treasurer, the keeper and inspectors of the State Prison, is vested in the legislative department; and the power to appoint the court reporters is vested in persons belonging to the judicial department. Thus the power of appointment was expressly distributed by the Constitution it-

self among all the departments of the government, and it therefore cannot be believed that, within the meaning of the prohibitive clause of this article, the power properly belonged to any one of those departments.

But there is still another aspect of the matter. If by the unrestrained force of either the distributive or the prohibitive clause of this article the power of appointing officers could be considered as assigned exclusively to any one of these departments, their significance is restricted by the closing words of the article, "except as herein expressly provided." This compels an examination of the rest of the Constitution for express exceptions to the preceding clauses of the article. Such exceptions are readily discoverable. Thus the power of remitting fines and forfeitures and granting pardons, which historically may be deemed a branch of the executive authority, is conferred upon the Governor and certain members of the judicial department; the power to try, convict, and pass judgment in cases of impeachment, which is a judicial function, is conferred upon the Senate. But the exception now directly pertinent is found in article 7, § 2, par. 9, declaring that "all other officers, whose appointments are not otherwise provided for by law, shall be nominated by the Governor and appointed by him with the advice and consent of the Senate." This is an unmistakable recognition of the authority of the lawmaking department to provide for the appointment of all officers whose appointment is not definitely regulated by the Constitution itself.

If, therefore, we had reached the conclusion that the power of appointing officers was, because of its nature, covered by the distributive or prohibitive clause of article 3, we must nevertheless have conceded that by force of the exception in that article, and of the paragraph last above mentioned, the Legislature was authorized to make such different provision for the exercise of that power as it deemed proper, respecting the officers embraced in that paragraph.

There is yet another clause of the Constitution which should be noticed. Article 7, § 2, par. 1, declares that "the Justices of the Supreme Court, and Chancellor * * * shall hold no other office under the government of this state or of the United States." In *Supervisors of Election*, 114 Mass. 247, 19 Am. Rep. 341, the Justices of the Supreme Court of Massachusetts held that a provision in the Constitution of that state forbidding the judicial department to exercise executive or legislative powers prevented the delegation to the Justices of the power to appoint supervisors of election, because that was not a judicial function, and the Justices were not at liberty to hold any other office than that of justice. We cannot apply this view to our constitutional provisions. We have endeavored to show that the power to appoint officers does not properly belong to any single

department of our government, and we cannot regard the right to exercise a new function as the possession of a new office. Such a view would give to the word "office" a broader significance than it should receive in such a context as accompanies it in our Constitution, where it is spoken of as something to be held, not as something to be done. It would imply that, whenever a new duty is cast upon an officer, he receives a new office. It would render unconstitutional the act of a Justice of the Supreme Court in the naturalization of aliens under the United States laws, for such an act is the exercise of a federal function, distinct from the office of a Justice of the state. Indeed, it is difficult to see how it could comport with those numerous statutes passed since 1844 which have increased the powers and burdens of these judicial officers, and have been upheld and enforced in all stages of litigation. But even if we should accept the view of the Supreme Court of Massachusetts on this topic, we are still confronted with the clause above mentioned which empowers the Legislature to provide by law for the appointment of officers; and, reading these two clauses together, we do not find any clear implication that the discretion confided to the Legislature without express limitation is so restricted that it may not vest in the Justices of the Supreme Court or the Chancellor the appointment of officers unconnected with their judicial functions.

It is our duty to adjudge all acts of the Legislature, which are not clearly in violation of the Constitution, valid.

We have not thought it necessary to extend this opinion by discussion of the numerous decisions on cognate subjects in other states, because we think the question turns upon the meaning of our own fundamental law in its entirety, interpreted chiefly by the history of our own commonwealth. Among the adjudications in this state, there are but two which may be said to antagonize the conclusion we have reached. In one (In re Cleveland, 51 N. J. Law, 311, 17 Atl. 772) a contrary view was expressed obiter by Chief Justice Beasley, sitting alone; and in the other (Schwarz v. Dover, 53 Atl. 214) the Supreme Court was largely influenced by the dicta in the earlier case, and the significant feature in article 7, § 2, par. 9, was not noticed.

The county park act of March 5, 1895, is constitutional, and therefore the judgment of the Supreme Court is affirmed.

(97 Md. 545)

WASHINGTON COUNTY NAT. BANK OF WILLIAMSPORT v. MOTTER et al.

(Court of Appeals of Maryland. June 30, 1903.)

WAREHOUSEMEN—CORPORATIONS—INSOLVENCY—STORAGE RECEIPTS—NEGOTIABILITY—RIGHTS OF HOLDERS.

1. An insolvent corporation was organized for the purpose of manufacturing flour and feed

and doing a general milling business, and for the sale and storage of all kinds of grain. Prior to its insolvency the company had been engaged in manufacturing flour only, and wheat stored with it was ground into flour, and was never withdrawn by the depositors. The corporation obtained a loan from plaintiff, for which it gave notes secured by certificates reciting the receipt from plaintiff of certain quantities of wheat, subject to plaintiff's order, to be delivered only on surrender of the certificate. No wheat was in fact delivered by plaintiff, but the wheat so pledged was in the corporation's elevator for manufacture in its business. *Held*, that the corporation was not a warehouseman, or doing a storage business, within Code Pub. Gen. Laws, art. 14, § 1, providing that all warehouse and storage receipts shall be negotiable instruments, so as to entitle plaintiff to a preference to the amount of such receipts in the distribution of the corporation's property.

Appeal from Circuit Court, Washington County; A. Hunter Boyd, Chief Judge.

Action by the Washington County National Bank of Williamsport against Joseph L. Motter and another, as receivers of the Undine Milling Company, and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, PAGE, PEARCE, and SCHMUCKER, JJ.

J. Clarence Lane and John V. L. Findlay, for appellant. Alex. Neill and Edward I. Koontz, for appellees.

BRISCOE, J. The questions in this case arise upon certain exceptions to an audit distributing the assets of the Undine Milling Company, of Carroll county, an insolvent corporation, among its creditors—now in the hands of its receivers, in the circuit court for Washington county. The real contention in the case is between the holders of what are termed warehouse or storage receipts and the receivers, representing the general creditors of the company.

The appellant, the Washington County National Bank of Williamsport, contends that as the holder of 18 warehouse receipts, for 500 bushels of wheat, each, it is entitled to a preference over the general creditors, under section 1 of article 14 of the Code of Public General Laws, which provides that "all warehouse, elevator or storage receipts whatsoever, for goods, chattels," etc., "of any kind stored or deposited," etc., "for any purpose in any warehouse, elevator," etc., "shall be and are hereby constituted and declared to be negotiable instruments and securities unless it be provided in express terms to the contrary on the face thereof, in the same sense as bills of exchange and promissory notes, and full and complete title to the property in the instruments," etc., "shall enure to and be vested in each and every bona fide holder thereof for value." The appellees, on the other hand, contend that the milling company was not a warehouseman, within the meaning of article 14 of the Code, and consequently the receipts issued by it to

the appellant and others are not valid and legal receipts, so as to give the bank priority as claimed.

The facts appear from the record to be as follows: The Undine Milling Company, of Carroll county, was incorporated on the 31st day of May, 1895, under the General Laws of the state, for the purpose of manufacturing flour and feed and doing a general milling business, and for the sale of the products thereof, and for the purchase, sale, and storage of all kinds of grain. Some time prior to 1900 this company had been engaged in the milling business at Williamsport, in Washington county, where its principal place of business was located. Prior to the appointment of the receivers, and at different times during the year 1899, the company borrowed from the appellant bank the sum of \$5,400, on 18 notes, of \$300 each, and gave as collateral security for each of them a receipt which is in form as follows: "Williamsport, Md., Apl. 4, 1899. Received in store from Wash. Co. Natl. Bank Five Hundred bushels of prime milling wheat subject only to the order hereon of Wash. Co. Natl. Bank, and only to be delivered upon the surrender of this receipt. Undine Milling Company, per F. H. Darby, Pres. Certified to by J. W. Crow, Welgher." At the time of the failure of the company there were about 9,185 bushels of wheat in its elevator. These were subsequently sold, and the proceeds of sale were distributed to all of the creditors, whose claims amounted to the sum of \$33,336.48, without allowing any priority to the claim of the bank under the receipts.

The controlling question, then, is whether the Undine Milling Company was a warehouseman, as claimed by the appellant, and, if so, was it authorized to issue the receipts here in controversy? Now, while it is true, as will be seen, that under its charter this company was authorized to engage in the storage of all kinds of grain, yet, as a matter of fact, and according to the evidence in the case, it was at the time the so-called storage receipts were issued simply conducting a general milling business, and did not keep a place for the storage of wheat, to be returned to those leaving it, or to be delivered to others. It was engaged in the business of manufacturing flour, and the wheat was bought by the company and stored in its elevator to be used for this purpose. The witness Dellinger testified that the only difference between what is called the bought and the stored wheat was that one was priced up immediately, and the other was priced up at some future time; that the stored wheat was never withdrawn or taken away by the farmers; it was not kept separate from the bought wheat, but was used by the company whenever needed in the mill for manufacturing flour. It is admitted in the case that the bank did not deliver any

wheat to the company, and the testimony shows that the bank officers had full knowledge that the company was using the wheat in the manufacture of flour.

Under this state of facts, we do not see upon what theory it can be successfully argued that the milling company in this case was a warehouseman, and doing a storage business, within the terms and meaning of article 14 of the Code of Public General Laws, so as to make valid and give legal effect to the receipts issued by it to the bank, as against other creditors. In the case of *State v. Bryant*, 63 Md. 70, this court, in dealing with a somewhat similar receipt, said: "The Legislature never meant to declare that a mere receipt, issued by one engaged in the canning business, for goods canned by him, and which were to remain in his possession, subject to the order of the purchaser, should pass title to the goods as against all other persons, and should also be negotiable in the same sense as bills of exchange and promissory notes. Nor do we see any reason, either of public or private interest, why the act should be so construed by implication. Persons engaged in the canning business have the same right to make sales of goods canned by them by delivery, or by the indorsement of bills of lading, warehouse, or storage receipts, as persons engaged in any other business. And if the act of 1876 is to be construed as embracing receipts issued by them for goods of their own canning, and which are to remain in their possession, upon the same grounds it must be construed to extend to receipts issued by all other persons—to the farmer, for wheat in his barn, and to the manufacturer, for goods in his factory. Such a construction would, in a measure, repeal the well-settled law of this state, which declares that no sale of personal property of which the vendor remains in possession shall be valid, except as between the parties, unless by a bill of sale or mortgage duly executed and recorded, and would destroy the safeguards which the law has wisely thrown around the sales of personal property for the protection of purchasers and creditors. No act ought to be construed as making so sweeping an innovation, unless the intention of the Legislature is expressed in plain and unambiguous terms." It is clear, we think, that as the receipts issued in this case were not warehouse, elevator, or storage receipts, within the terms of the act here relied upon, the appellant was not entitled to any priority or preference in the distribution of the fund, and the circuit court for Washington county was right in so declaring. The case of *Farmers' Packing Company v. Brown*, 87 Md. 1, 39 Atl. 625, is clearly distinguishable from this.

For the reasons we have given, the decree of the circuit court for Washington county, appealed against, will be affirmed. Decree affirmed, with costs.

(97 Md. 370)

B. F. SMITH FIREPROOF CONST. CO. v. MUNROE et al.

(Court of Appeals of Maryland. June 29, 1903.)

COUNTIES—COUNTY COMMISSIONERS—POWERS—CONTRACTS—PRESERVATION OF RECORDS—VAULTS—CONSTRUCTION—LEGISLATIVE AUTHORITY—NECESSITY.

1. Code Pub. Gen. Laws, art. 25, § 1, provides that the county commissioners shall have charge of and control over the property owned by the county, and section 7 declares that they shall levy all needful taxes on the assessable property within the county liable to taxation, and shall pay all claims against the county which have been authorized by law. *Held*, that the county commissioners had power to contract for the erection of a fireproof vault for the preservation of records of the clerk of the circuit court, though not previously authorized by the Legislature to build such vault and levy the tax necessary to pay therefor.

Appeal from Circuit Court, Anne Arundel County, in Equity; Jas. Revell, Judge.

Action by Frank A. Munroe and others against the B. F. Smith Fireproof Construction Company and others. From a judgment in favor of plaintiffs, defendant company appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, and SCHMUCKER, JJ.

James M. Munroe, for appellant. Frank H. Stockett, for appellees.

McSHERRY, C. J. The bill of complaint in this case was filed by certain residents and taxpayers of Anne Arundel county against the county commissioners of that county and the B. F. Smith Fireproof Construction Company, of Washington, D. C. The county commissioners entered into a contract with the fireproof construction company for the erection by the latter of a fireproof vault in which the records intrusted to the custody of the clerk of the circuit court were intended to be kept. The cost of the vault as agreed upon was \$5,900. The relief sought by the bill was an injunction to restrain the county commissioners from making a levy to pay for the structure. The sole ground upon which that relief was asked is the alleged want of power in the county commissioners to levy upon the taxpayers the amount of money required for the purpose named, unless previously authorized by the Legislature to build the vault and to levy the necessary tax to provide for the payment of the stipulated price. The court below decided that the county commissioners did not possess the power to contract for the work or to pay for it, and accordingly granted the injunction for which the plaintiffs asked. From that decree this appeal was taken.

The question thus brought up is exceedingly narrow. By the Code of Public General Laws, art. 25, § 1, it is provided that "the county commissioners of each county in this state * * * shall have charge of and control over the property owned by the county."

By section 7 of the same article it is enacted that they "shall levy all needful taxes on the assessable property within the county liable to taxation, * * * and shall pay and discharge all claims on or against the county which have been expressly or impliedly authorized by law." We do not understand the language just quoted to be so restricted in its meaning as to deny to the county commissioners the power which they undertook to exercise. The public records are the property of the county, and it obviously is as much the duty of the commissioners to protect them from destruction or injury by fire as it is to insure the courthouse against a similar disaster. And if the commissioners may lawfully levy on the taxpayers a sum of money sufficient to keep the public buildings insured—and they certainly may—why should they be prohibited from making a like levy to pay for the construction of a fireproof vault for the safe-keeping of the public records, which, if burned, cannot be completely restored, no matter how heavy the insurance on them might be? It is undoubtedly true that the county commissioners could not issue bonds for the purpose of raising money to do the work unless empowered by the General Assembly to do so. But the want of power to issue bonds is quite a different thing from the want of power to do the act that has been enjoined. It is too constricted a construction of the statute to limit the powers of the commissioners to the literal meaning of the words quoted from the Code. The language of the enactments must be interpreted, not by the aid of a dictionary alone, but by the plain purpose and intention of the Legislature; and the purpose and intention are ascertained by considering the whole situation and surroundings, and by looking to the results which would necessarily follow a construction too literal or too narrow. If the decree appealed against is right, then no change, however urgent, could be made by the county commissioners in any public building under their control unless such change were first authorized by appropriate legislation. If the heating plant should prove inadequate, they would be powerless to augment it. If the ventilation were defective, they could not improve it. If the sanitary condition of the courthouse were such as to be injurious to health, they could not remedy it. And they could do none of these things because none of them falls within the literal signification of the terms "charge of and control over the property owned by the county." It is perfectly clear that each of the things just indicated could be done without antecedent legislative authorization, because they are all within the general and necessary powers of the local governmental body. Debts contracted for the preservation of the property owned by the county are undoubtedly claims "impliedly authorized by law." To that category belongs the debt incurred for the construc-

tion of a fireproof vault wherein the public records are to be kept. The county commissioners had the power to enter into the contract, of which a copy was filed with the answer of the county commissioners; and they have the power to levy such a tax as may be necessary to raise the sum of money stipulated to be paid to the appellant. We therefore reverse the decree appealed against, and dismiss the bill of complaint.

Decree reversed, with costs above and below, and bill dismissed.

(97 Md. 659)

**MAYOR, ETC., OF BALTIMORE et al. v.
SAFE DEPOSIT & TRUST CO.
OF BALTIMORE.**

(Court of Appeals of Maryland. July 1, 1903.)
**TAXATION—PROPERTY HELD IN TRUST—PLACE
OF TAXATION—VALIDITY OF STATUTE
—CONSTRUCTION.**

1. Acts 1902, p. 711, c. 486, providing that all corporate bonds, certificates of indebtedness, or evidence of debt, in whatever form, and all personal property, not exempt from taxation, held in trust, shall be assessed to the equitable owner in the county in which he resides, is not in conflict with Bill of Rights, art. 15, declaring that every person "holding property" in the state ought to contribute his part of the taxes.

2. The Legislature, in providing, as it has done in Acts 1902, p. 711, c. 486, that railroad and other bonds and railroad stock held in trust shall, for purposes of taxation, be treated as belonging to the cestui que trust, and not to the legal holder thereof, has not violated any of the provisions of the Bill of Rights or Constitution.

3. The law requiring a domestic corporation to pay the taxes on its stock for the stockholder, and Acts 1902, p. 711, c. 486, requiring that personal property held in trust shall be assessed to the equitable owner in the county in which he resides, should be construed together, and the residence of the equitable owner should be treated as the situs for taxation, and the taxes should be paid by the corporation.

Appeal from Baltimore City Court; Henry D. Harlan, Judge.

Application by the Safe Deposit & Trust Company of Baltimore to the appeal tax court of Baltimore to correct an assessment of personal property. From a judgment of the city court reversing the appeal tax court, and directing the correction of the assessment, the mayor and city council of Baltimore appeal. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Olin Bryan and Albert C. Ritchie, for appellants. W. Burns Trundle and Osborne L. Yellott, for appellee.

SCHMUCKER, J. This appeal raises the question of the validity of the Acts of 1902, p. 711, c. 486, which prescribes the method of assessment and taxation of personal property held in trust. The property involved in the present controversy consists of bonds of railroad and traction companies, and stock of a railroad company chartered in Maryland,

so that the precise issue now before us is that of the validity of the act in so far as it relates to personal property of that character.

The act under consideration adds a new section to article 81 of the Code of Public General Laws, tit. "Revenue and Taxes," to be designated as section 221, and to read as follows: "Sec. 221. All bonds, certificates of indebtedness, or evidence of debt, in whatsoever form, made or issued by any public or private corporation, incorporated by this state or any other state, territory, district or foreign country, or issued by any state, territory, district or foreign country, and all personal property of any kind whatsoever, not exempt from taxation by the laws of this state, in which any resident of any county of this state, has an equitable interest, with the legal title to the same in some other person or corporation who is a resident of some other county of this state or of the city of Baltimore, or (in the case of a corporation) which has its main office or principal place of business in some other county in this state or in the city of Baltimore, shall be valued and assessed for the purposes of state and county taxation to the equitable owner thereof in the county in which he or she resides, to the extent of his or her equitable interest as aforesaid, and the taxes due thereon shall be paid by the holder of said legal title to the collector of taxes for the county or city in which said property is so valued and assessed." Then follows a section repealing all inconsistent prior legislation.

It appears from the present record that the appellee, which is a corporation having its main office in Baltimore City, had in its possession \$28,890 worth of railroad and other bonds in trust for Noah Walker, a resident of Baltimore county, and \$22,930 worth of similar securities, including, however, 24 shares of stock of the Philadelphia, Wilmington & Baltimore Railroad Company, in trust for Emily R. Hoff, who is also a resident of Baltimore county. It is admitted that these securities were liable to assessment and taxation for the year 1903. The appellee, having been assessed on the taxbooks of Baltimore City for all of these securities, applied by petition to the appeal tax court of that city to correct its assessment, by striking therefrom the securities, upon the ground that under the Acts of 1902, p. 711, c. 486, it was required to pay the taxes on them for the year 1903 to the collector of taxes for Baltimore county, where the equitable owners resided. The appeal tax court rejected the application, and refused to correct the assessment. The trustee thereupon appealed, under the statute, to the Baltimore city court, which, relying upon the act of 1902, passed its order of April 1, 1903, from which the present appeal was taken, directing the appeal tax court to abate the assessed value of the securities from the trustees' assessment list.

It has long been settled that the power of taxation belongs exclusively to the legisla-

tive branch of the government, and that the Legislature, except as restricted by the Bill of Rights and Constitution, has the absolute power of taxation over all the property within the state. *Faust v. Building Ass'n*, 84 Md. 192, 35 Atl. 890; *State v. Mayhew*, 2 Gill, 487; *State v. Sterling*, 20 Md. 516, 517; *United States v. New Orleans*, 98 U. S. 392, 25 L. Ed. 225; *Meriweather v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *Savings Society v. Multnomah Co.*, 169 U. S. 421, 18 Sup. Ct. 392, 42 L. Ed. 803. This court has also repeatedly recognized and upheld the power of the Legislature to fix the situs of personal property for purposes of assessment and taxation. *M. & C. C. of Balto. v. Balto. City Pass. R. Co.*, 57 Md. 31; *Am. Coal Co. v. County Com'rs of Allegany Co.*, 59 Md. 185; *Baldwin v. Washington Co.*, 85 Md. 157, 36 Atl. 764; *Corry v. M. & C. C. of Balto.*, 96 Md. 320, 321, 53 Atl. 942.

As the act of 1902 specifically fixes the situs for purposes of taxation of personal property held in trust at the residence of the beneficial owner, the order appealed from was properly passed, unless the act is to be regarded as in conflict with some of the provisions of the Bill of Rights or the Constitution. The appellant contends that it does conflict with article 15 of the Bill of Rights, which declares that every person "holding property" in this state ought to contribute his proportion of taxes; and they rely upon the case of *Latrobe v. Baltimore*, 19 Md. 13, as deciding that the holder of property there referred to is the holder of its legal title, and not the owner of the beneficial interest in it. They also rely upon section 51 of article 3 of the Constitution, which provides that "personal property of residents in this state shall be subject to taxation where the resident bona fide resides for the greater part of the year," as requiring all personal property, except those classes of it which are excepted in the latter part of the section, to be taxed in the county where its legal owner resides. In the case of *Latrobe v. Baltimore*, 19 Md. 13, which was decided long prior to the passage of the Acts of 1902, p. 711, c. 486, our predecessors undoubtedly held that, under the law as it then stood, the situs for purposes of taxation of personal property held in trust was the residence of the trustee, and not that of the cestui que trust, and that the trustee in whom the legal title was vested was the holder of the property, under the fifteenth article of the Bill of Rights. In that case, however, they arrived at their conclusion upon the general principles regulating taxation, when not modified by statute, for they preface their opinion with the statement, "We are not aware that the acts of assembly regulating the imposition and collection of taxes have affected any modification of the rules of law which otherwise must govern the determination of this question." Applying those general rules to the case before them, they held that as the obligation

under the fifteenth article of the Bill of Rights to pay taxes according to actual worth was a legal one, and the estate in the hands of a trustee had the legal incidents and obligations of an absolute title, the obligation fell upon him, and he was the proper person to be assessed for the payment of the taxes, and that through him it reached and fastened upon the interest of the beneficial owner. Upon the same principles the court there held that the Acts of 1841 (chapter 23), 1847 (chapter 266), and 1852 (chapter 337), requiring all property owned by residents of this state, and not permanently located elsewhere within the state, to be valued to the owner at his place of residence, referred to the ownership of the legal estate, without regard to the ownership of the equitable title or use. That the decision in *Latrobe v. Baltimore* was intended to go no further than we have said is apparent from the fact that when it afterwards, for the first time, came before this court for consideration, in *Tyson v. State*, 28 Md. 587, it was construed to have determined only "that, in the absence of any law regulating the imposition and collection of taxes, the trustee holding the legal title was properly chargeable with the tax." When the case recently came before us again, in *Cherbonnier v. Bussey*, 92 Md. 422, 48 Atl. 923, we cited *Tyson's Case* along with it in our opinion, as showing that it was only "in the absence of any law regulating the imposition and collection of taxes" that the trustee was held chargeable with the tax. We therefore find nothing in the interpretation of the fifteenth article of the Bill of Rights adopted in *Latrobe v. Baltimore*, as that case has been construed by this court, to impair the validity of the act of 1902 in regulating the assessment and taxation of the class of personal property involved in the present case.

It is not necessary to refer to the cases of the *Mayor and C. C. of Baltimore v. Stirling*, 29 Md. 48, *Appeal Tax Court v. Gill*, 50 Md. 377, and the *Appeal Tax Court v. Patterson*, 50 Md. 354, relied on by the appellants, further than to call attention to the fact that they were all decided before the Legislature had made provision by statute, as it has specifically done by the act of 1902, for the assessment for taxation of personal property held in trust to the cestui que trust, and not to the trustee. It is obvious, therefore, that those cases cannot be regarded as controlling the determination of the issue arising upon the present record. When property is held in trust, there are two persons, each of whom is, in a certain sense, its owner. The trustee, who holds the title, is the owner in a legal and technical sense, but the cestui que trust is the beneficial and substantial owner. We do not think that the Legislature has exceeded its power over the subject of taxation, or violated any of the provisions of the Bill of Rights or Constitution, in providing that personal property of the kind in-

volved in this case shall, for purposes of assessment and taxation, be treated as belonging to its substantial owner, and not to its technical holder. When the personal property held in trust consists, as a small portion of that now before us does, of stock in corporations of this state, the act of 1902 being in *pari materia* with the existing laws requiring the corporation to pay the taxes on its stock for the stockholder, the two laws should be construed together, and the residence of the cestui que trust be treated as the situs for taxation, and the taxes be paid by the corporation in accordance with the uniform system in force in this state for the payment of such taxes.

We must not be understood by what we have said in this opinion to hold that the act of 1902 is valid or effectual in so far as it may conflict with the special provision made by section 51 of article 3 of the Constitution for the taxation of goods and chattels permanently located, or of mortgages and the debts thereby secured, or that the act was intended to apply to leaseholds or any other interest in lands.

From what we have said, it follows that the order appealed from must be affirmed. Order affirmed, with costs.

(97 Md. 550)

ROGERS v. SISTERS OF CHARITY OF ST. JOSEPH et al.

(Court of Appeals of Maryland. July 1, 1903.)
DEEDS—CONSTRUCTION—VESTING OF TITLE IN BENEFICIARY—RELIGIOUS SOCIETIES—RIGHT TO ACQUIRE LAND—LEGISLATIVE SANCTION.

1. A deed conveying land for a nominal consideration to a domestic corporation empowered to acquire, hold, and dispose of real estate, and formed for works of piety and charity, which recited that the grantor granted, bargained, sold, aliened, enfeoffed, and conveyed certain described real estate to the corporation, "to have and to hold, * * * in trust, for the sole use and benefit" of an orphan asylum, authorized to acquire and hold real estate, was a deed of feoffment, so that, on its execution, delivery, and recording, the title in fee at once vested in the orphan asylum.

2. The orphan asylum was authorized to dispose of such real estate.

3. Declaration of Rights, art. 38, declaring void every gift, sale, or devise of land to any religious sect, order, or denomination, without prior or subsequent legislative sanction, does not affect a conveyance to a "Sisters of Charity" corporation, to hold in trust for an orphan asylum, where the deed of conveyance passes the title to the beneficiary.

4. The charter creating a "Sisters of Charity" corporation, which empowered it to acquire real estate in fee simple, is a sufficient legislative sanction to its acquisition of real estate conveyed by deed, within Declaration of Rights, art. 38, so as to render the same valid.

Appeal from Circuit Court, Prince George's County, in Equity; George O. Merrick, Judge.

Suit between James C. Rogers and the Sisters of Charity of St. Joseph and another. From a decree for the latter, the former appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, and BOYD, JJ.

James C. Rogers, for appellant. F. Snowden Hill, for appellees.

McSHERRY, C. J. There can be no doubt as to the correctness of the decree against which the pending appeal was taken. The single question presented arises on a case stated under article 16, §§ 184, 185, Code of Public General Laws. The facts are briefly as follows: The Sisters of Charity of St. Joseph are a body corporate. The corporation was created by the General Assembly of Maryland at the session of 1816. By the terms of its charter the corporation was empowered, amongst other things, to take and hold in fee simple "lands and real estate, * * * and all such lands and real * * * estate to sell, lease, dispose of and convey in as full and ample manner as any person or body corporate holding any lands or property, real, personal or mixed, may sell, lease, dispose of and convey the same." The corporation was formed "for works of piety, charity and usefulness, and especially for the care of the sick, the succor of aged, infirm and necessitous persons, and the education of young females." By an act of Congress approved February 25, 1831 (6 Stat. 453, c. 35), St. Vincent's Orphan Asylum was incorporated. It was also authorized to acquire and hold real estate. In 1882, John Hoover and wife, in consideration of the sum of \$10, granted, bargained, sold, aliened, enfeoffed, released, and conveyed to the Sisters of Charity of St. Joseph certain real estate, lying partly in the District of Columbia and partly in Prince George's county, Md., "to have and to hold, * * * in trust, for the sole use and benefit of St. Vincent's Female Orphan Asylum." In February, 1889, the same John Hoover, in consideration of the sum of \$10, granted, bargained, sold, aliened, enfeoffed, released, and conveyed to the Sisters of Charity of St. Joseph certain other real estate lying in Prince George's county, "to have and to hold, * * * in trust, for the sole use and benefit of St. Vincent's Female Orphan Asylum." In February, 1903, the two corporations, the Sisters of Charity and the St. Vincent's Orphan Asylum, entered into a written contract with the appellant to sell to him the property conveyed by the deeds above referred to; but, the appellant apprehending that there were defects in the title, this proceeding was docketed, and a special case stated was filed, for the purpose of obtaining the court's opinion on the question as to whether the appellees, the two corporations, jointly or severally can convey to the appellant a valid fee-simple title to the lands, or to any part of the lands mentioned and described in the deeds from Hoover.

Several objections have been interposed to the right of the appellees to convey the property; but, as the view we take will render it unnecessary to discuss them, they need not

be alluded to or considered. If the deeds from Hoover be treated as deeds of feoffment, and not as deeds of bargain and sale, all of the difficulties suggested by the appellant will be cleared away. There are no active duties imposed upon the trustee by either deed. In fact, there are no duties of any kind prescribed. In the absence of such duties, if the deeds are deeds of feoffment, the statute of uses at once executed the legal estate in the cestui que trust, and that corporation, the St. Vincent's Orphan Asylum, was immediately vested with a fee-simple estate upon the delivery and recording of the deeds. The design, object, and purpose of the parties to the deeds are evident. The consideration is nominal. No beneficial interest was conveyed to the Sisters of Charity. The Orphan Asylum was clearly intended to be the real owner of the property. On the face of the deeds all of this is apparent. The law is thoroughly settled.

In *Handy et al. v. McKim et al.*, 64 Md. 568, 569, 4 Atl. 125, it was said by Alvey, C. J., speaking for the court: "In expounding deeds no principle is more familiar or better established than that the intention of the parties shall prevail, if not repugnant to some principle or maxim of the law, and that the intention is to be gathered by considering the whole deed, and each and every part thereof. As was declared by the Court of Appeals in *Budd v. Brooke*, 3 Gill, 234: 'In construing a grant it is the duty of the court, first, to ascertain what the parties intended should be affected by it; and, that intention being collected from an inspection of the grant itself, it is the duty of the court to give to it such an interpretation as will effectuate that intention, provided the terms and expressions used in the grant will admit of such a construction.' And in construing deeds of conveyance of a freehold estate, such as those under consideration in this case, the court will, if appropriate terms be employed, treat them either as deeds of feoffment or deeds of bargain and sale, as will best subserve the objects and purposes in the contemplation of the parties. *Matthews v. Ward*, 10 Gill & J. 448, 449; *Ware v. Richardson*, 3 Md. 546, 56 Am. Dec. 762. Acts 1766, c. 14, provided for recording deeds of feoffment, as well as deeds of bargain and sale, and the enrollment of such deeds is a substitute for the act of livery, and is equivalent to it. Here both deeds in question contain operative words to make them either deeds of feoffment or deeds of bargain and sale; and whether they are to be taken as being the one or the other species of conveyance must depend upon construction to subserve the manifest intention of the parties. If construed to be deeds of bargain and sale, the uses declared are not operated upon by the statute of uses, further than to vest the legal estate in fee in the bargainees, the trustees, and all the uses declared remain un-

executed by the statute, and are trusts, and mere equitable estates. Whereas, if construed to be deeds of feoffment, being common-law assurances, the question of the operation of the statute of uses—whether and when it will operate to execute the use or uses declared and convert them into legal estates—will depend upon the nature of the trust and the duties imposed upon the feoffees as trustees; for, if the duties create a special or active trust in the feoffees, the uses in respect of which such duties are required to be performed are not within the purview of the statute, and remain unexecuted, and are mere trusts, and constitute equitable estates in the cestui que trust, the legal estate remaining in the feoffees. But whenever such special trust or active duties shall cease, there being no longer any object to serve by keeping separate and distinct the legal and equitable estates, the statute of uses operates, and executes the legal estate in the cestui que trust. 1 Perry on Trusts, § 320, and cases there collected."

We hold these deeds to be deeds of feoffment, and, for the reasons just quoted from the case above cited from 64 Md. and 4 Atl., we further hold that upon the execution, delivery, and recording of the deeds the fee-simple title at once vested in the Orphan Asylum, and that it (the Orphan Asylum) has authority and the right to convey a valid title to the appellant.

There is nothing in article 38 of the Declaration of Rights that affects the conclusion just announced. That article declares "that every gift, sale or devise of land to any * * * religious sect, order or denomination * * * without the prior or subsequent sanction of the Legislature, shall be void. * * *" Under the deeds from Hoover, no title vested in the Sisters of Charity. That corporation was the mere conduit through which the title passed, by virtue of the statute of uses, from Hoover to the Orphan Asylum.

But, even if this were not the case, the prior sanction of the Legislature to the acquisition of land by the Sisters of Charity was distinctly given in that corporation's charter, as the extracts quoted from that charter in an earlier part of this judgment clearly show. Whilst the sanction of the Legislature contemplated and required by article 38 must be expressly given to each particular devise or bequest in order to render it valid, that is not necessary when the title has been conveyed by deed, because in such an instance a prior or subsequent general sanction, without particularizing the grants, is all that is needed to gratify the requirement of the Declaration of Rights. *Trustees, etc., v. Manning*, 72 Md. 131, 19 Atl. 599.

The decree appealed against will be affirmed. Decree affirmed, with costs above and below.

(205 Pa. 533)

RÖSSBACH et al. v. BEEBE et al.
(Supreme Court of Pennsylvania. May 4, 1903.)

APPEAL—REVIEW—REFEREE'S FINDING.

1. The appellate court will not reverse a referee's findings of fact, which had been approved by the court of appeals.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Jacob Rossbach and another against Marcus Beebe and Junius Beebe. From an order overruling the exceptions to the auditor's report, plaintiffs appeal. Affirmed.

From the record it appeared that the form of proceeding was a sheriff's interpleader to test title to certain skins and hides. The question at issue was whether the skins and hides had been sold by the plaintiffs to one Albert A. Guigues, on representations by the latter alleged to be false. The case was referred to Thomas B. Price, Esq., as referee, who found as a fact that the representations were not false, and awarded a verdict in favor of the defendant.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Henry O. Terry, for appellants. James Collins Jones and M. Hampton Todd, for appellees.

PER CURIAM. This is an effort to rescind a sale for fraudulent representations by the buyer, on the faith of which plaintiffs parted with their goods. But the referee found affirmatively that the representations were not fraudulent, but made in good faith, and his finding has been approved by the court. It was a question of fact, depending on the weight of evidence and the credibility of witnesses. It has not been shown that there was any clear error.

Judgment affirmed.

(205 Pa. 535)

COMMONWEALTH TITLE INS. & TRUST CO. v. COLEMAN.

(Supreme Court of Pennsylvania. May 4, 1903.)

ATTORNEY AND CLIENT—ACTION FOR FEES—EVIDENCE.

1. In an action to recover fees, defendant introduced a formal receipt for money sent to the client, who lived in France. Shortly afterwards the attorney wrote to his client a letter in French, acknowledging the receipt of the money. The evidence as to the meaning of a word used in the letter was not uniform; some witnesses testifying that it meant "pay," and others that it meant "settle." The court construed the word to mean "pay," and refused to permit the French teacher, who had corrected the letter and suggested to the attorney to use the word in question, to testify that it meant "payment on account." *Held* not error, by divided court.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Commonwealth Title Insurance & Trust Company, executor of F. Carroll Brewster, against Rosalie Parant Coleman. From a judgment for plaintiff for less than the amount claimed, he appeals. Affirmed, by divided court.

At the trial it appeared that in 1893 F. Carroll Brewster was retained by Rosalie Parant Coleman to represent her in a very important and extensive litigation in the estates of her husband and son. The principal involved was about \$1,750,000. A number of leading members of the bar testified that a fee of \$100,000 for all the services rendered was reasonable. During the progress of the litigation, and until April 26, 1898, Mr. Brewster received about \$9,000 in fees. On May 16, 1898, he received from his client, who lived in France, an order for \$20,000. For this he sent a formal receipt, simply stating that he had received the amount of the order. On May 20, 1898, he sent to his client the following letter:

No. 214 West Washington Square, Phila.
May 20, 1898.

MA CHÈRE MADAME:

Je vous dois mille remerciements pour la façon généreuse dont vous avez daigné régler mes honoraires.

J'ai l'honneur de vous annoncer que vous avez gagné une grande victoire (non seulement contre M. Bertram, en Avril mais aussi) contre Madame Ybanes samedi dernier.

Je compte fermement sur une autre victoire en Juin et la définitive en Février 1899.

Je vous félicite de tout mon cœur. Jamais il n'y eut dame plus persécutée que vous, mais en revanche jamais triomphe plus éclatant.

Veuillez Madame agréer l'assurance de mon respectueux dévouement.

F. CARROLL BREWSTER.

This letter was copied from a letter originally written by Mr. Brewster, but corrected by his French teacher, Prof. Lorenz. The corrected draft was as follows:

PHIL: May 19, 1898.

MA CHÈRE MADAME:

Je vous dois mille remerciements pour votre façon le façon
généreuse dont vous daigniez régler mes honoraires.
~~généreux paiement.~~

J'ai l'honneur de vous annoncer que vous avez gagné une grande victoire non seulement contre M. Bertram le pr en Avril mais aussi contre Madame Ybanes le samedi dernier.

Je compt fermement sur une autre

~~J'attends une seconde victoire en Juin et la définitive~~
~~dernière en Février 1899.~~

Je vous félicite de tout mon cœur. Jamais il n'y eut ~~mais en revanche jamais~~
~~une dame plus persécutée que vous et jamais un~~
~~trionphe plus éclatant.~~

~~resultat plus triomphant.~~

Veuillez Madame agréer l'assurance de mon respectueux dévouement.
~~Agrez mes salutations les plus sincères, et am-~~
~~pressées.~~

The obliterated words above were in the letter as originally written. The interlineations were the changes made at the dictation of Prof. Lorenz.

Indorsed by F. Carroll Brewster: "Coleman. My letter of thanks announcing victory of Sat. May 14/98. May 20/98."

The following question was asked of Theodore C. G. Lorenz:

"Q. I notice the rough draft that you hold in your hand has a number of changes, words being stricken out and other words interlined in place thereof. Will you tell us, please, when those changes were made?"

Objected to as being ungermane to this case.

Mr. Simpson: "I propose to show that the letter as subsequently changed—"

Mr. Duane requests that the offer be made at the side bar.

Mr. Simpson: "I have no objection to doing that. I don't propose to state anything in the paper."

Counsel now come to the side bar, and Mr. Simpson states that he proposes to follow the question asked the witness by proof by the witness upon the stand that when the letter was originally written it contained the expression "votre genereux paiement"; that Judge Brewster submitted it to the professor, who was his French teacher, and asked him whether that was a proper expression to use; that he was told that the words quoted were not elegant French; that the words interlined constituted elegant French, and denoted a payment on account, and not a payment in full, and the change was thereupon made, being written by Judge Brewster under the dictation of the witness upon the stand, and the letter was sent with that change appearing in it.

Objected to.

The court sustains the defendant's objection to the offer, because it is an offer to show, when the witness has translated the letter, "You have deigned to pay my fees," and now attempts to show by the same witness that he should have translated the letter, "You have deigned to pay my fees in part or on account."

Exception to plaintiff.

J. Coleman Drayton was asked this question as to a conversation he had with Mr. Brewster at the beginning of the litigation:

"Q. Will you give the conversation?"

Objected to as not evidence for any purpose. Objection overruled. Exception noted for plaintiff.

"A. The conversation was begun by myself. I said to Judge Brewster: 'This is going to be an expensive litigation, and I should like to have some idea—not a definite idea, still an idea as near as you could possibly give me—as to what the cost of this litigation to Mrs. Coleman would be, taking into consideration your services and the services of Messrs. Coudert Bros.' He said: 'How much would you think?' I said: 'Well, I suppose it will be some twenty-five or thirty thousand dollars,' and he said it would be more than that. I said: 'How much do

you put it at? How much do you think it would cost?' 'Well,' he said, 'it might be as much as fifty thousand dollars.'"

The court charged as follows:

"Under the law, the trial of a common-law issue, such as this is, in a court, involves the discharge of certain duties on the part of the judge and certain other and distinct duties on the part of the jury. To the judge is committed the duty of ruling upon questions of law arising during the progress of the case. To the jury is given exclusively the duty of deciding upon questions of fact. I have ruled upon numerous questions of law during the presentation of the evidence; and since the evidence was all in I have ruled upon a question of law which largely diminishes the duties cast upon you as triers of fact. I have ruled, as a matter of law, that the receipt or acknowledgment sent by Judge Brewster to his client in May, 1898, was in point of fact a receipt or acknowledgment of the payment of a sum of money satisfactory to him, for his services rendered for his client, up to April 11, 1898, and that his executor has therefore no right to recover from Mrs. Coleman anything for his services rendered back of that date. This leaves, then, for you, the simple question—I won't say the 'simple question' in the sense of its being trivial, but it leaves for you the sole question—what is the just and reasonable compensation to be awarded to Judge Brewster's estate for his services from that time down to the time of his death? I have no desire whatever to even hint to you what my views with regard to Judge Brewster's compensation are. It is for you to settle that question. You have, to guide you, the testimony, which has been most carefully taken throughout this case; and you have the arguments of counsel, that have been made in presenting the views of either side, as to what should be your verdict in this case. I feel convinced that if I attempted to go over in detail the basis of the compensation to be made by the jury, I would rather retard or hinder you than I would aid you. I shall therefore leave the question to you, saying to you that, under my ruling on the law, you are limited to awarding compensation to the executor of Judge Brewster's estate for his legal services on behalf of Mrs. Coleman, from April 11, 1898, down to the time of his death. Whatever sum you find to be just and reasonable compensation for those services you will award to the executor, in this suit the plaintiff, with interest from the time of suit brought, July 12, 1900.

"The plaintiff has asked me to charge you, gentlemen, as matters of law, that:

"(1) 'The verdict of the jury should be in favor of the plaintiffs for the value of the services rendered by Judge Brewster during the entire litigation, less the payments made on account of such services, and with legal interest on the balance.' Answer: I

decline that point; that is to say, I say to you that that is not, in my view of the case, the law on the subject.

"(2) 'Even if the jury believe that at some time in the summer of 1894, 1895, or 1896, Judge Brewster said to J. Coleman Drayton that the fees and costs of the litigation "might be as much as \$50,000," such statement will not deprive his estate of the right to recover for the actual value of the services rendered by him to the defendant, less the payments made on account of such services, and with legal interest on the balance.' Answer: I have already said to you, gentlemen, that his estate has not the right to recover for the actual value of the services rendered by him to the defendant (less the payment made on account of the actual value of the services rendered by him) after April 11, 1898; he having been settled with, by his client, upon a basis satisfactory to him for services up to the end of the will case. I think it just, however, to say (though the point does not require me to say it to you) that you are not compelled to be guided by the statement of Mr. Drayton as to what Judge Brewster told him, in 1894, 1895, or 1896, might be the expenses of the litigation. It did not rise to the dignity of a bargain. It was the expression of an opinion, and it may have been some guide to the client; but, if the client desired to pin her lawyer down to a fixed and definite sum, she should have contracted it. She not having done so, it becomes pertinent evidence simply as aiding you in determining what should be the quantum of the fee for Judge Brewster's services.

"(3) 'The letter of May 20, 1898, will not operate to deprive plaintiffs of the right to recover the actual value of the services rendered by Judge Brewster to the defendant, less the payments made on account of such services, and with legal interest on the balance.' Answer: That, of course, raises the point in this case upon which I have ruled against the plaintiff. I therefore decline that point."

Verdict and judgment for plaintiff for \$12,164.17. Plaintiff appealed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Alex. Simpson, Jr., and Francis E. Brewster, for appellant. Francis Rawle and Russell Duane, for appellee.

PER CURIAM. The six judges who heard this case being equally divided in opinion, the judgment must be affirmed.

(205 Pa. 651)

O'BRIEN v. COLLINS et al.

(Supreme Court of Pennsylvania. May 4, 1903.)

APPEAL—REVIEW.

1. Where the only issue below was as to whether a partnership existed between the par-

ties, and the court on sufficient evidence finds against such existence, in the absence of manifest error, the finding will not be reversed.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Robert A. O'Brien against Philip P. Collins, administrator, and others. From a decree dismissing bill, plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

A. S. Ashbridge, Jr., for appellant. Daniel J. Shern and Henry J. Scott, for appellees.

PER CURIAM. This was a bill against the executor of Joseph Collins and the guarantee company to declare a partnership between plaintiff and the decedent, and that the funds on deposit in the guarantee company were assets of the alleged partnership. The executor filed a cross-bill, denying the partnership, and asking that plaintiff be decreed to account and pay over the assets of the decedent wrongfully taken possession of by him. The only issue in the whole case was the alleged partnership. The court found against its existence. It was a single question of fact, which does not require further discussion.

Decree affirmed, at costs of the appellant.

(5 R. I. 177)

ELMGREN v. ELMGREN.

(Supreme Court of Rhode Island. May 6, 1903.)

DIVORCE—VACATING DECREE—AFFIDAVIT OF RESIDENCE—FRAUD.

1. A decree of divorce entered on a false affidavit of the husband concerning the residence of the wife, in which she is not implicated, will be set aside, on her application, as a fraud on the court.

Petition by Emma B. Elmgren against Andrew J. Elmgren to vacate a decree of divorce. Granted.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

William A. Morgan, for petitioner.

PER CURIAM. The respondent filed a petition for divorce in this court June 6, 1896, to which he appended his affidavit that he had no information or belief as to the residence of his wife, now the petitioner, or where she could be found; that when he last heard of her she was at Hartford, Conn., and that he had written letters and made inquiries to find her. Upon this affidavit notice was given by publication. A decree of divorce was entered April 6, 1897. It is now shown that the parties were married in Middletown, Conn.; that he left her in that place about nine years ago—about two years before he filed his petition—and that his wife and children remained in the same house for

¶ 1. See Divorce, vol. 17, Cent. Dig. § 536.

about six years thereafter. He also had a brother living in the same place. The court finds that the affidavit was false, and a fraud upon the court. As held in *State v. Watson*, 20 R. I. 354, 39 Atl. 193, whenever a judgment, in divorce or other proceeding, is obtained by the fraud of the party in whose favor it is rendered, and the other party is not implicated therein, the judgment will be vacated.

The petition is granted, and the decree of divorce entered April 6, 1897, upon the petition of said Andrew J. Elmgren, is set aside and declared void.

(35 R. I. 178)

STATE v. PEABODY.

(Supreme Court of Rhode Island. May 6, 1903.)

CRIMINAL LAW—PROCEEDINGS FOR NONSUPPORT—COMPLAINANT'S DEATH—ABATEMENT—SUCCEEDING PROSECUTOR.

1. Though a private individual instituting a criminal complaint against a person for nonsupport of the latter's children is required to give surety for the costs, this does not render the case any the less a state case than though it were brought by a prosecuting officer, and hence the proceeding is not abated by the death of the complainant before its final determination.

2. A proceeding against a person for the nonsupport of his children, instituted by a private individual, is a criminal proceeding, and can be prosecuted by the town authorities or the sureties on complainant's bond, should complainant die before the final determination of the case.

A complaint was instituted in the district court against Francis S. Peabody, charging him with nonsupport of his children. He was convicted, and appealed to the common pleas division, where he was again convicted on trial by jury. He thereupon filed a petition for a new trial. Pending this petition, complainant died, and now defendant moves in arrest of judgment. Motion denied.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

A. B. Crafts, for the State. Thomas H. Peabody and Nathan B. Lewis, for defendant.

TILLINGHAST, J. The defendant moves in arrest of judgment on the ground that the complainant is dead. The record shows that one John P. Burdick, of Westerly, instituted a criminal complaint against the defendant on the 9th day of August, 1901, under the provision of Gen. Laws R. I. 1896, c. 281, § 24, charging him with nonsupport of his children. The complainant, not being a public official authorized by section 25 of said chapter to make such complaint, gave surety for costs in the usual way. See *State v. Woodmansee*, 19 R. I. 651, 35 Atl. 961. The record further shows that the defendant was tried and convicted of said offense in the district court of the Third Judicial District; that he thereupon took an appeal to the common pleas division, where, upon trial by a

jury, he was again convicted of said offense. He then filed in this court a petition for new trial, and pending this petition the complainant has deceased, and the defendant now moves in arrest of judgment as aforesaid.

We think it is clear that this motion must be denied. A motion in arrest of judgment raises only those objections which are apparent upon the record, and such as would be fatal on demurrer. *State v. Paul*, 5 R. I. 189; *Bull v. Mathews*, 20 R. I. 100, 37 Atl. 536; *Dunn v. Sullivan*, 23 R. I. 605, 51 Atl. 203; 1 Black on Judg. (2d Ed.) § 98, and cases cited. There is no apparent or demurrable defect in the case now before us. The proceeding is entirely regular on its face. The defendant has been twice convicted of the offense which is charged against him (first in the district court, and, second, in the common pleas division upon trial by jury), and nothing remains to be done (unless the petition for new trial is prosecuted) except for the court, upon motion, to impose sentence upon the defendant.

The position taken by defendant's counsel that the death of the complainant operates as an abatement of the proceeding is untenable. The state is the real party in all criminal prosecutions. The individual complainant simply sets the criminal law in operation, as he may rightfully do, but the state is the real prosecutor. It is the peace and dignity of the state which has been violated in the commission of any crime or offense, and hence no one but the state can, in any true sense, prosecute the offender for such a wrong. It is true that private complainants are required to become responsible for the costs to which the state may be subjected in case the prosecution fail. This requirement is probably for the purpose of preventing the bringing of complaints which may be instigated by personal spite or malice, or of bringing those which are not well founded in fact. But the mere fact that a private individual is the complainant does not have the effect to render the case any the less a state case than though it were brought by a chief of police or any other prosecuting officer.

Defendant's counsel further argues that, because of the death of said Burdick, there remains neither complainant nor prosecutor in the case, and also that there is now no person qualified or authorized to further prosecute the complaint. We cannot agree to this. We see no reason why the surety in the complaint may not, for his own protection, as well as in the interest of public justice, appear, and move for sentence, or take such further proceedings as may be necessary to dispose of the case. We also see no reason why the town authorities of Westerly may not do likewise. It would certainly be a reproach to our criminal system if, merely by the death of a complainant, a defendant who has been finally found guilty of an offense should escape punishment therefor.

But we are of the opinion that no such condition in fact exists. Counsel for defendant has cited no authority, nor have we been able to find any, in support of the position taken by him.

The case of *State v. Sullivan*, 12 R. I. 212, while not a direct authority in support of the position which we have taken, yet would seem to give strength thereto. In that case, which was a bastardy complaint under the statute, the complainant died before the case came on for trial in the court of common pleas. The defendant then moved the court to dismiss the complaint on that account, and the court denied the motion. Upon a petition for new trial this court held that the death of the complainant abated the proceeding, on the ground that, "though it resembles in form a criminal prosecution, it is, in substance and effect, civil. It abated, therefore, on the death of the complainant." It is evident, we think, that the decision of the case was based solely upon the ground that the proceeding was to all intents and purposes a civil, rather than a criminal, one; and it is fair to infer that, had it been a criminal proceeding, the court would have held that it did not abate by the death of the complainant. It may be observed in this connection that since that decision a provision has been incorporated in the statute which prevents even a complaint of that sort from abating by reason of the death of the complainant. Gen. Laws R. I. 1896, c. 81, § 18.

The motion in arrest of judgment is denied.

(35 R. I. 176)

STARKWEATHER et al. v. BROWN et al.

(Supreme Court of Rhode Island. May 6, 1903.)

CORPORATIONS—STOCKHOLDERS' LIABILITY—STATUTES—CONSTRUCTION.

1. Gen. Laws 1896, c. 180, § 17, relating to the individual liability of stockholders for debts of the corporation, and prescribing how a manufacturing corporation theretofore established may adopt the provisions thereof, does not create any exemption of corporations already subject to the act, but provides a method whereby certain corporations which had not availed themselves of a similar provision of Pub. St. 1882, c. 155, might acquire the privileges granted, though that chapter had been repealed, and chapter 180 substituted for it.

Petition for reargument. Petition denied.

For former opinion, see 55 Atl. 201, 25 R. I. 142.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

DOUGLAS, J. Upon the filing of the opinion of the court April 24th, the defendant Wilson D. Wing prays for a reargument on the ground that the Oakland Beach Association is not subject to the provisions of sections 11 and 12 of chapter 180 of the General Laws of 1896, because section 17 of that

chapter exempts from its provisions all manufacturing corporations theretofore established, unless they adopt those provisions in a certain manner. The assumption is not sustained by the text. Section 17 does not create any exemption of corporations already subject to chapter 180, but provides a method whereby certain corporations which had not availed themselves of a similar provision in chapter 155 of the Public Statutes of 1882 might still acquire the privileges granted, although that chapter had been repealed, and chapter 180 substituted for it. It cannot be held to exclude from the operation of chapter 180 a corporation which, by the terms of its charter, is made subject to the provisions of chapter 155 and any amendments thereto.

Petition for reargument denied.

(35 R. I. 181)

HAWKINS et al. v. BOYDEN.

(Supreme Court of Rhode Island. May 7, 1903.)

MECHANICS' LIENS—FORECLOSURE—NOTICES—DEFECTS—AMENDMENT—CITATION—SERVICE—TRUSTEE IN BANKRUPTCY—STATUTES—CONSTRUCTION—ATTACHMENT OF LIEN—CLAIMS—DEFECTS—AMENDMENT.

1. Where an officer was permitted to amend his return of service on a citation for a mechanic's lien which was made by mistake, and the return, as amended, showed 20 days' notice, as required, a motion to dismiss on the ground that the citation was not served 20 days before the return day will be denied.

2. Where a landowner's attorney, 20 days before the return day of the citation to enforce a mechanic's lien, agreed with petitioner's attorney to acknowledge service thereof, which he subsequently indorsed on the citation, such acknowledgment constituted a submission to the jurisdiction of the court; and it was not material that the written evidence thereof, indorsed on the citation, was not made 20 days before the return day.

3. Under Gen. Laws 1896, c. 206, providing that a mechanic's lien originates when the work begins, and becomes operative when the first notice is given, and will be lost, unless followed by legal process, an omission in the notice is jurisdictional, and cannot be supplied by amendment.

4. A defect in the petition to foreclose the lien may be cured by amendment.

5. Under Gen. Laws 1896, c. 206, § 10, providing that a citation in proceedings to enforce a mechanic's lien shall issue to the owner of the property, and to each and every person having a mortgage, attachment, or any other conveyance thereof, or of any part thereof, on record, a trustee in bankruptcy of the original owner, appointed after the lien had attached, should be treated as the owner; and service on him was sufficient, without service on the bankrupt.

6. Gen. Laws 1896, c. 240, § 1, providing that petitions to enforce mechanics' liens shall follow the course of equity, enlarges the power of the court, and authorizes the service of subpoenas in equity on various parties necessary to a final determination of the cause.

7. Where citation was issued and served on a bankrupt's trustee in proceedings to enforce a mechanic's lien against the bankrupt's land, an acknowledgment of service by the bankrupt only affected his possible reversion in case of

¶ 3. See *Mechanics' Liens*, vol. 34, Cent. Dig. § 225.

a surplus after payment of his debts from the proceeds of his property.

8. Where a claim for a mechanic's lien was based on the fact that defendant was a lessee of the property, and cited the lease, claiming a lien generally under Gen. Laws 1896, c. 240, the claim was not invalid for failure to specify the section of the chapter under which the lien was claimed.

9. Failure of a mechanic's lien claim to specify the section of Gen. Laws 1896, c. 206, under which the lien was claimed, was amendable, and not ground for dismissal.

10. There is nothing in the statute on mechanics' liens to warrant the construction that a lien of any kind does not attach until the notice of the commencement of proceedings.

Petitions by Benoni Hawkins and others against George B. Boyden for the enforcement of a mechanic's lien. Heard on motions to dismiss, and motions denied.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

A. A. Baker and J. C. Collins, Jr., for Hawkins. Richard E. Lyman, for Grant. N. W. Littlefield, for Willmarth & MacKillop. Raymond G. Mowry, for Rust. Comstock & Gardner, for trustee in bankruptcy. Van Slyck & Mumford, for respondent Boyden.

STINESS, C. J. These petitions to enforce liens were filed, respectively, November 3, 1902, November 19, 1902, November 20, 1902, and December 1, 1902. A trustee in bankruptcy of Boyden, appointed December 2, 1902, has appeared specially to move to dismiss the petitions. Boyden was adjudged a bankrupt November 21, 1902, and the title of the trustee to the property vested in him as of that date.

In the Hawkins case the motion to dismiss set out that the citation had not been served 20 days before the return day. A mistake having been made by the officer in the date of service, he was allowed to amend his return, thus showing 20 days' notice, which disposes of that motion.

In the Grant case the citation was duly served upon the trustee 20 days before the return day. It was not served upon Boyden, because his attorney agreed with petitioner's attorney, 20 days before the return day, to acknowledge service thereof, which he subsequently indorsed on the citation. The agreement was a waiver or an acknowledgment of service. The actual signing of the acknowledgment was simply evidence of it. It is therefore immaterial when this evidence was supplied—whether before or after the prescribed date—our rules requiring evidence in writing in such cases. Acknowledgment of service is submission to the jurisdiction of the court, and as effective as the service of process by an officer, unless otherwise prescribed by statute. In most states there is statutory provision. In this state we have no statute upon the subject, except as to nonresidents. Gen. Laws 1896, c. 240, § 20. It has, however, been the uniform practice of the court to recognize due service and

jurisdiction by an acknowledgment thereof, or even by an appearance without objection. *Gorman v. Stillman*, 25 R. I. 55, 54 Atl. 934; *Vickerle v. Spencer*, 9 R. I. 585. We are therefore of opinion that sufficient evidence of service of the citation appears.

The trustee argues that Boyden could not, by an acknowledgment of service after adjudication in bankruptcy, give a lien to the petitioners to the prejudice of the estate for general creditors. Without doubt, this is true, but the argument overlooks the distinction between the lien and the proceedings to enforce the lien. In Gen. Laws 1896, c. 206, the line is clearly drawn. The lien originates when the work begins, and it becomes operative when the first notice is given, and it will be lost unless it is followed up by legal process. The commencement of legal process consists in lodging the account in the town clerk's office, with notice to what land and buildings, and to what and whose estate, the demand refers. This notice is to inform the owner and the public of the nature and extent of the account for which the lien is sought. Hence an omission in that notice is substantial. Being a notice of claim of lien, whatever is omitted in it cannot be supplied by amendment. It would not operate as a notice if it could be extended by amendment. *Harris v. Page*, 23 R. I. 440, 50 Atl. 859; *Murphy v. Guisti*, 22 R. I. 588, 48 Atl. 944. These notices are jurisdictional. The petition filed in this court is not of that character. It is more like a declaration in a civil case, while the notices are like an attachment. A declaration is amendable, but a substantial defect in an attachment cannot be cured by amendment. *Greene v. Tripp*, 11 R. I. 424. Accordingly we held, in *Murphy v. Guisti*, *supra*, and *Spencer v. Doherty*, 17 R. I. 89, 20 Atl. 232, that the petition could be amended, and in *Bouchard v. Guisti*, 22 R. I. 591, 48 Atl. 934, that the notice essential to the lien was not amendable. After the commencement of process by the recorded notice, a petition is filed, and notice of this petition is to be given to the owner by citation, and to others by publication.

The particular point made in this case is that, as the trustee does not hold title by conveyance (Gen. Laws 1896, c. 206, § 10), service on him is of no effect, in the absence of proper service on Boyden. Section 10 provides that a citation shall issue "to the owner of said property and to each and every person having a mortgage, attachment, or any other conveyance thereof, or of any part thereof, on record." This clearly shows two classes of persons—the "owner" and those having a qualified interest—for, if one had a "conveyance" of the whole interest, he would be the owner, and the provision would be tautological. One may become owner by inheritance or by operation of law. The conveyance therefore relates to a conveyance of a less interest. The lien has priority of any other lien which originates after the

commencement of the erection or reparation on the land. The new work is supposed to be notice enough to put one on his inquiry. *Bassett v. Swarts*, 17 R. I. 215, 21 Atl. 352. The trustee in bankruptcy is vested with title by operation of law, and therefore is the owner. Notice to him was both proper and necessary. At the time of the citation, Boyden had no power to give a lien, for his rights had been transferred to the trustee. His act did not create a lien, for that was fixed by the petitioner's acts before the citation. Subsequent parties are brought in for the purpose of marshaling the estate. They are not required to be made parties or to have notice before the citation issues. So, in *Chace v. Pidge*, 21 R. I. 70, 41 Atl. 1015, it was held that the recorded notice should be in the name of the owner at the time the lien attached. It is his interest to which the lien applies. Subsequent purchasers or incumbrancers take title subject to the possible lien, as in *Bassett v. Swarts*, and are brought in on the citation. Thus in *Vickerie v. Spencer*, 9 R. I. 585, the recorded claim of lien was against the interest of Spencer. Subsequently, and before citation, Spencer sold to Brown, on whom the citation was served, but no service was made on Spencer. The court held that the citation was properly served on Brown, as owner, and that the petition might be amended to state the fact of transfer of title, so as to show that he was the owner, and, if it was necessary that Spencer should be a party, the statute did not prevent his being summoned.

Reference is made to Gen. Laws 1896, c. 240, § 1, where it is provided that petitions to enforce mechanics' liens shall follow the course of equity. This does not abridge, but enlarges, the power of the court, for since 1857 (4 R. I. 547) successive subpoenas in equity have been allowed until service.

It follows that service on Sweet, as owner, was a proper and sufficient service of the citation in this case, and Boyden's acknowledgment of service did not affect the petition. Boyden was a proper party, because in case of a composition the title would revert in him; and also, in case the property, when sold, should bring more than enough to pay his debts, he would have an interest in the surplus. His acknowledgment of service could only affect his possible reversion.

In the *Willmarth & MacKillop* case the motion to dismiss is based upon the claim that, Boyden being declared in the petition to be a lessee, the lien is given by section 2 of the act, and the petition claims a lien generally under chapter 206, without specifying the section. There is no substantial defect in this regard. The petition cites the lease, and from that fact the lien to be decreed must be under the section which gives the lien, but the lien is not lost because the section is not referred to. A lien is only lost, by the terms of the statute, when the

prescribed steps are not taken, and no one of those steps requires a reference to sections of the act. Moreover, if this were a defect in the petition, under the decisions already cited, it would be amendable, and not a ground for dismissal.

The second motion is for an interlocutory decree declaring that the lien must be claimed under section 2, and that said section does not provide that the interest of a lessee shall stand pledged before other liens which shall arise subsequent to the commencement of erection, and hence that the lien did not accrue until the filing of notice in the town clerk's office for commencing legal process. There is nothing in the statute to warrant the construction that a lien of any kind does not attach until the notice of the commencement of proceedings. In point of order, that is a second notice; and although, as we have held, the two notices may be combined (*Goff v. Hosmer*, 20 R. I. 91, 37 Atl. 533), no reason appears why a lien should attach on the second notice, instead of the first, if either notice was the proper time. We fail to see the importance of this question, however, as the motion to dismiss states no way in which the trustee's interests are in any way affected by the date when the lien attached; the allegation in the petition being that the commencement of legal process was prior to the adjudication in bankruptcy.

We therefore see no ground of dismissal in this case.

In the *Rust* case the motion to dismiss is based upon an acknowledgment of service, which, as we have already said, was sufficient, by long-established practice.

The several motions to dismiss are denied.

(25 R. I. 187)

DONOHUE v. LONSDALE CO.

(Supreme Court of Rhode Island. May 13, 1903.)

MASTER AND SERVANT—INJURIES TO SERVANT—SAFE APPLIANCES—SEATS FOR FEMALE EMPLOYEES—DUTY OF MASTER—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF DECLARATION—DEMURRER.

1. Gen. Laws R. I. c. 68, § 8, provides that in every establishment in which women are employed there shall be provided conveniently located seats for them, and they shall be permitted to use them when their duties do not require their standing. Plaintiff alleged that the seat furnished her by defendant was unsafe, and was liable to fall or turn at a very slight contact with the skirts of the employees; that the feet of the seat were so pointed, when turned upwards, as to injure a person falling on them; that while in the exercise of due care she sat down on the stool, when her duties did not require her to be standing, and while thus seated it became necessary that she should stand momentarily; that when she went to sit down again the stool had turned over, and that she fell on a point and was injured. *Held*, that plaintiff was guilty of contributory negligence in sitting down without first ascertaining whether or not the stool was standing.

¶ 1. See *Master and Servant*, vol. 24, Cent. Dig. § 710.

2. The mere fact that an appliance may become dangerous if carelessly used is not a test of the master's liability.

3. Defendant was not bound to furnish seats which would not tip over when caught in the skirts of its employes, or to warn them of the danger of sitting down where a stool had been placed without first ascertaining whether it was standing or had been overturned.

4. As the declaration, taken as a whole, showed that plaintiff could not have been in exercise of due care at the time of the injury, the mere fact that she alleged that she did not save it from being demurrable.

Trespass on the case for negligence by Catherine Donohue, pro am, against the Lonsdale Company. Heard on demurrer to declaration, and demurrer sustained.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Hugh J. Carroll, for plaintiff. Miller & Carroll, for defendant.

TILLINGHAST, J. The negligence alleged in this case was the failure of the defendant corporation to provide a reasonably safe seat for the use of the plaintiff when the duties of her work did not require her to be standing. Gen. Laws R. I. c. 68, § 8, provides as follows: "In every manufacturing, mechanical or mercantile establishment in which women and girls are employed, there shall be provided conveniently located seats for such women and girls, and they shall be permitted to use them when their duties do not require their standing." The plaintiff alleges that the seat which was furnished her was unsafe in this: That it was made with a round seat screwed upon a piece of piping, which piping was screwed into a standard having three feet, flattened and triangular in shape, after the style of the points of an anchor; that the seat or stool was heavier at the top than at the bottom, and was, therefore, liable to fall or turn over upon the floor at a very slight contact with any substance—e. g., the skirts or clothing of any of the women and children working in the room—and that the feet of the stool or seat were so pointed and sharp, when turned upwards, as to injure any person who might fall upon them. The plaintiff further alleges that while in the exercise of due care she sat down upon the stool furnished her, at a time when her duties did not require her to be standing, and while thus seated it became necessary that she should stand momentarily upon her feet in the discharge of her duties, which she did, and that when she went to sit back again upon said stool it had fallen or turned over upon the floor, leaving the points or feet thereof projecting upwards, and that she fell upon one of said points, and was seriously and permanently injured.

The defendant has demurred to the declaration on various grounds, the substance of which is that it appears from the plaintiff's own showing that she was guilty of contrib-

utory negligence in proceeding to sit back upon the stool without first ascertaining whether it was standing or not. The demurrer also is based upon the ground that no duty is owing from an employer under said statute to provide a seat or stool which would not tip over from the contact therewith of the skirts or clothing of women, or to provide one made with four feet, or stationary upon the floor.

We think the demurrer must be sustained. The case shows that the plaintiff, after momentarily leaving the seat provided for her, attempted to "sit back" upon it without looking to see whether it was there or not. In other words, it shows that the plaintiff must not only have stepped backwards without looking to see what was behind her, but that she must also then have attempted to sit down without knowing whether the seat was there or not. We can hardly conceive of a plainer case of contributory negligence than is thus shown. The fact that the stool was heavier at the top than at the bottom, and hence liable to tip over upon slight contact with other bodies, is not controlling in the plaintiff's favor; for the mere fact that a machine or appliance may become dangerous if carelessly used is not a test of the master's liability. If the appliance is reasonably safe, and of such a character as can, with the exercise of due care, be used without danger to the servant, it is all that the law requires of the master. A master is not an insurer against accident to his servants, and is not called upon so to construct every appliance upon his premises as to prevent the possibility of accident therefrom. And if, in a given case, the exercise of ordinary care by the servant would have prevented him from taking the risk which resulted in the injury of which he complains, the law can afford him no redress. *McCann v. Atlantic Mills*, 20 R. I. 566, 40 Atl. 500. That the stool or seat in question was not inherently dangerous, and was not an unsafe article if carefully used, would seem to be evident. And that the defendant was not bound to furnish seats which would not tip over when caught in the skirts of its employes, or to warn them of the danger of sitting down where a chair or stool had been placed without first ascertaining whether it was standing on its legs or was overturned, would seem to be a proposition so reasonable as not to require argument in its support. It is true the declaration alleges that the plaintiff was in the exercise of due care at the time of receiving the injury in question. But as the declaration, taken as a whole, clearly shows that she could not have been in the exercise of such care, the mere fact that she alleges that she does not save it from being demurrable. *Baumler v. Narragansett Brewing Co.*, 23 R. I. 430, 50 Atl. 841. See, also, *Thompson's Com. on Neg.* vol. 1, § 385.

The demurrer must be sustained.

(35 R. I. 173)

CROSBY v. MILLER, VAUGHN & CO.

(Supreme Court of Rhode Island. April 29, 1903.)

BANKRUPTCY—LIABILITIES DISCHARGED—ACTIONS FOR FRAUD—FIDUCIARY CAPACITY—BROKERS.

1. Under Bankr. Act 1898, § 17, cl. 4 (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3428]), providing that a discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as were created by his fraud, embezzlement, or defalcation while acting as an officer or in a fiduciary capacity, a discharge in bankruptcy cancels a judgment obtained on a debt incurred by a broker by failure to return to his customer securities deposited with him as collateral against loss, as the act was not a fraud committed in a fiduciary capacity.

2. Under Bankr. Act 1898, § 17, cl. 2, providing that a discharge in bankruptcy shall release a bankrupt from all his provable debts except judgments in actions for fraud, a discharge in bankruptcy releases a judgment in an action of trover and conversion, as it is not an action for fraud.

Petition by Charles L. Vaughn for perpetual stay of an execution on a judgment in favor of Sarah G. Crosby against petitioner as surviving partner of Miller, Vaughn & Co. Granted.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Comstock & Gardner, for petitioner C. L. Vaughn. J. E. Bolan, for respondent Crosby.

DOUGLAS, J. This is a petition by Charles L. Vaughn for perpetual stay of execution in an action of trover and conversion brought May 6, 1897, against himself and his partner, W. B. M. Miller, now deceased, in which Sarah G. Crosby, May 4, 1901, recovered judgment for \$2,208.35 and costs, against Vaughn as surviving partner, whereon execution against the body of said Vaughn is liable to issue.

On the 24th day of February, A. D. 1902, said Vaughn was discharged from all debts and claims which are provable by the act of Congress relating to bankruptcy, excepting such debts as are by law excepted from the operation of such discharge. He prays the court to adjudge that his discharge has canceled the judgment in this case, and to grant him a perpetual stay of execution thereon. The plaintiff had been a customer of the defendant's firm, who bought and sold stocks, etc., for her account. On August 2, 1895, the plaintiff deposited certain stocks and bonds with the defendant's firm to secure them against any loss which might accrue from their dealings on behalf of the plaintiff. On November 2, 1896, the defendants made a general assignment for the benefit of creditors, and the plaintiff later demanded her securities, which were not returned, though the defendants were owing her a balance on account of their mutual trading, and were legally bound to return the securities. Upon

these facts the plaintiff claims that the debt in question is within the exception set forth in section 17, cl. 4, of the national bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3428]), which provides that "a discharge in bankruptcy shall release a bankrupt from all his provable debts except such as . . . (4) were created by his fraud, embezzlement, misappropriation, or defalcation, while acting as an officer or in any fiduciary capacity." It is well settled by authority of the United States courts that the words "fiduciary capacity," as used in this and the preceding bankrupt acts, do not describe the relation which a broker holds to his customer for whom he is buying and selling, and who has deposited with him collateral securities against loss in such transactions. *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236, under the act of 1841, dealt with the case of a factor who had retained the money of his principal. Under the act of 1867, in the case of *Hennequin v. Clews*, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 563, the court applied the construction adopted in *Chapman v. Forsyth* to the words of the later act, and held that the relation of broker to his customer was analogous to that of factor to principal, and equally outside of the words "fiduciary capacity" in the meaning of the law. Mr. Justice Bradley, delivering the opinion of the court, says: "There is no more—there is not so much—of the character of trustee in one who holds collateral security for a debt as in one who receives money from the sale of his principal's property; money which belongs to his principal alone, and not to him, and which it is his duty to turn over to his principal without delay. The creditor who holds a collateral holds it for his own benefit under contract. He is in no sense a trustee. His contract binds him to return it when its purpose as security is fulfilled, and if he fails to do so it is only a breach of contract, and not a breach of trust." The case is exactly in point, and decisive of the motion now before us; for the act of 1898 evidently uses those words in the same sense which judicial construction has fixed upon them under the acts of 1841 and 1867.

The leading cases on this subject, and the reasoning which has governed them, are collected and summarized in the case of *Bracken v. Milner* (C. C.) 104 Fed. 522, and the decisions are held applicable to the act of 1898. So, also, in the *Case of Basch* (D. C.) 97 Fed. 761, it is said: "Under the prior bankruptcy acts of 1841 and 1867, after conflicting adjudications in the courts below, it became definitely settled by the decisions of the Supreme Court that debts excepted from the effect of a discharge in bankruptcy did not embrace debts arising in commercial dealings between principal and agent or factor for the sale of goods on commission;" citing numerous cases, and proceeding: "The provisions of sec-

¶ 1. See *Bankruptcy*, vol. 6, Cent. Dig. §§ 799, 804.

tion 17 (4) of the present bankrupt act as to the debts excepted from the operation of the discharge are so nearly identical with the language of the preceding acts that these provisions must be deemed to be used in the sense adjudicated by the above decisions, so as not to except a debt or claim for a technical conversion or sale on commission like the claim of the present creditor." Collier on Bankruptcy, 181, referring to *Hennequin v. Clews*, says: "That decision was, of course, final and authoritative on all courts under the act of 1867, and must be considered as decisive under the present act of what constitutes 'fiduciary capacity' and of what is 'fraud.'" The case of *John H. Benedict, Trustee*, 8 Am. Bankr. R. 463, 75 N. Y. Supp. 165, was one where trover and conversion was clearly proved; but the court held that the act was not fraud committed in a fiduciary capacity, as the construction of these words in former statutes which the court had adopted was equally applicable to the act of 1898. Of the cases cited by the plaintiff—*Commercial Bank v. Buckner*, 2 La. Ann. 1023; *Hayman v. Pond*, 7 Metc. (Mass.) 328; *Austill v. Crawford*, 7 Ala. 335—all decide that a factor does not hold a fiduciary relation to his principal in the meaning of the act of 1841; and the other cases cited by him, which hold the contrary with respect to the act of 1867, viz., *Lemcke v. Booth*, 47 Mo. 385, 4 Am. Rep. 326; *In re Kimball*, 6 Blatchf. 292, Fed. Cas. No. 7,769; *In re Seymour*, 1 Ben. 348, Fed. Cas. No. 12,684; *Whitaker v. Chapman*, 3 Lans. 155; *Treadwell v. Holloway*, 46 Cal. 547—are expressly overruled by the Supreme Court of the United States in *Hennequin v. Clews*, 111 U. S. 680, 4 Sup. Ct. 576, 28 L. Ed. 565.

The plaintiff does not argue that the case comes within paragraph 2 of section 17, which exempts "judgments in actions for fraud or obtaining property by false pretenses or false representations or for wilful or malicious injury to the person or property of another," but the question is considered in the defendant's brief, and the cases cited on his behalf are conclusive in his favor. An action of trover and conversion is not an action for fraud. *Watertown Carriage Co. v. Hall*, 7 Am. Bankr. R. 716, 72 N. Y. Supp. 466; *Collier on Bankruptcy*, 178; *Burnham v. Pidcock*, 5 Am. Bankr. R. 42, 66 N. Y. Supp. 806, affirmed on appeal, 5 Am. Bankr. R. 590, 68 N. Y. Supp. 1007. See, also, *In re Bullis*, 7 Am. Bankr. R. 238, 73 N. Y. Supp. 1047. The word "fraud," in the meaning of the bankruptcy act of 1867, means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586. In *Hennequin v. Clews* the court held that a broker who failed to return stocks pledged to him as collateral security did not commit fraud in the meaning of the law. The word has the

same meaning in the act of 1898. *In re Blumberg* (D. C.) 94 Fed. 476; *In re Rhutassel* (D. C.) 96 Fed. 597; *Western Union Cold Storage Co. v. Hurd* (C. C.) 116 Fed. 442. The discharge in bankruptcy therefore operates to cancel this judgment, and the execution must be perpetually stayed.

Petition granted.

(25 R. I. 183)

SPENCER v. CLARKE.

(Supreme Court of Rhode Island. April 29, 1903.)

ASSUMPSIT — ACTION AGAINST TRUSTEES — MONEY HAD AND RECEIVED — WHEN MAINTAINABLE — SETTLEMENT — REVOCATION OF TRUST — DEMAND.

1. An action at law for money had and received will not lie against a trustee while the trust is still open, but, if a final account is settled, and a balance struck, the action may be maintained.

2. Plaintiff, a servant in the employ of defendant's testator, trusted her wages during a period of several years to the latter, at his suggestion, for investment. When asked for a settlement, he did not dispute the amount claimed by her, except as to the item of interest, but wanted her to take a mortgage in part payment. She refused this proposition, and demanded payment in full in money. Held, that such demand amounted to a revocation of the trust, and, on payment being denied, plaintiff was entitled to maintain an action at law for the amount agreed on.

Assumpsit by Isadora A. Spencer against Thomas W. D. Clarke, executor. Heard on defendant's petition for new trial. Petition denied.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Charles E. Salisbury and James O. Collins, Jr., for plaintiff. Job S. Carpenter and Edwards & Angell, for defendant.

TILLINGHAST, J. This is an action of assumpsit, and is brought to recover the sum of \$980, with interest from January 1, 1893, for services rendered by the plaintiff to the defendant's testator, Henry W. Tiffany, in the capacity of housekeeper. The facts in the case are substantially as follows: The plaintiff went to live with Mr. Tiffany in August, 1887, as his housekeeper, and remained in his service until about the 20th of August, 1896. She was to receive as compensation for her services the sum of \$4 per week. This amount was regularly paid to her until December 27, 1887, at which time an agreement was entered into between her and Mr. Tiffany whereby he was to retain the wages which should become due to her, except so much thereof as she actually needed, and invest them for her so that she should receive 6 per cent. interest thereon. Under this agreement Tiffany retained plaintiff's wages until January 1, 1893, when, at the plaintiff's instance, she again received her pay regularly as at the first. The plaintiff's claim that she rendered the services for which she now claims compensation, and that

she has not been paid therefor, is not disputed. In addition to the plea of the general issue, the defendant pleaded (1) the general statute of limitations, and (2) the statute of limitations as to actions against executors. To these special pleas the plaintiff replied, and joined issue. The only defense interposed was based upon said statutes of limitation. The jury returned a verdict in favor of the plaintiff for the sum of \$1,516, and also found specially "that on the 2d day of July, 1901, the defendant executor did not deny the validity of the plaintiff's claim"; and the case is now before us on the defendant's petition for a new trial on the grounds (1) that the verdict is against the law and the evidence, and (2) that the presiding justice erred in refusing to charge the jury as requested by defendant.

The testimony shows that Mr. Tiffany agreed to keep the money which the plaintiff earned, and invest it for her, and that this arrangement was made at his suggestion. The plaintiff says: "Mr. Tiffany asked me what I did with my money. He talked to me as he would to a child of his own, and I told him I spent my money as fast as I got it. * * * I said I did not know of any other way of saving it except the bank, and that only brought four per cent, and I did not put it there, and did not think I would. He encouraged me to save it, as he had authority to talk that. He was always talking about saving money. I asked him how to save my money to get benefit from it, and he said to put it in mortgages and let it out. I asked him if he would not do it for me, and he said after awhile—he did not say he would at first—but after we talked it some he said he would do so if I wished. I said I was not any business woman, and he understood it better than I did, and if he would do so I would be glad to have him. I took him to be a friend of my father. He said he was interested in me because he thought a great deal of father, and under those circumstances he would do it. He kept my wages from that time on, with the exception of three or four payments, money that he let me have when I wanted more than what I had." This condition of affairs continued until the 1st of January, 1893, after which, upon plaintiff's request, her regular wages were again paid to her by said Tiffany. She continued in his employ at the same weekly compensation until about the 20th of August, 1896, making a total of a little over nine years' service. No demand was ever made upon Mr. Tiffany for any settlement regarding the money which he had retained out of her wages for investment as aforesaid until some time in August, 1896. She then had a brief interview with him, on the street, relating to the settling of that account. She asked him when she could see him to settle this account, and he replied, "I will try to come up, or will you come down?" meaning, by the latter part of the answer, when would

she come down to his house at Crompton village. A short time afterwards she met him in Crompton village, and had some conversation with him about the matter, and he wanted her to go to the house, and see if they could not have a settlement; but she told him she would rather not go to the house, but when he was in the city to let her know, or to come to the house (her house), "and we would settle." Two or three months after that Mr. Tiffany went to the plaintiff's house on Burrington street, in the city of Providence, and had a conversation relating to a settlement of said account. With regard to this interview the plaintiff testifies: "He wanted to know if I would take a mortgage in part payment for the settlement of the bill, and I told him that I did not think I could; that I did not understand the business—I knew nothing about it—and the mortgage that he wished me to take he had a great deal of trouble with himself, and it was something that I did not wish to take on my hands. I wished a cash settlement with him. He demurred, and did not want to pay me in cash, but wanted me to take a mortgage in part payment. It was a small mortgage—I don't know what the amount was—on a cottage in Natick village." At this interview a bill was presented to Mr. Tiffany for the amount which the plaintiff claimed to be due to her, with interest thereon, to which bill he made no objection, saying that the dates were correct, and the amount was also correct, but that the interest was more than it should be. No settlement was effected, however, but he said he would come in again. In the latter part of 1897, or the first part of 1898, Mr. Tiffany again went where the plaintiff was living, and had an interview with her regarding the settlement. It was quite similar to the one last referred to. He did not want to pay the full amount in cash, but wanted her to take a mortgage in part payment. He found no fault with any part of the plaintiff's claim except as to the item of interest, and expressly admitted that all the amounts, dates, and wages were correct as stated. His only objection was to the amount of interest and to paying the claim in full in cash. "He said he would see me again, and make it all right, and we would come to a settlement the next day he saw me." This was the last time that the plaintiff saw Mr. Tiffany before his death.

During the time that Mr. Tiffany was withholding the plaintiff's wages under the arrangement above referred to, she had several familiar talks with him about the matter, in which she says: "He would talk about it, and tell me how much better it was for me to have my money at interest. But he never told me how he had invested it. He said, from time to time, how I was saving my money, and how much better it would be for me. That I would have something in my old age to take care of me." After 1893,

when the plaintiff had commenced to receive her wages again, she also had conversations with him, and he said he was sorry that she was not still continuing to let him have her wages, and save up more; to which plaintiff replied that she had use for her money at that time. Her mother had died, and she had a good many expenses, and needed the money which she drew and used up. The total amount of wages earned during the period covering the time that Mr. Tiffany retained them from the plaintiff was about \$980, after deducting the payments made to her during said time. The plaintiff testifies that she never had any talk with Mr. Tiffany as to what he was doing with the money—that is, as to the way he invested it—but that he told her he had invested it, and it was drawing good interest. In reply to the question by defendant's attorney, in cross-examination, "And you never asked him for any of the income from your money?" she answered: "I never did. He would say it would be all right, 'it is doing nicely,' whenever we talked about it. I knew he had several mortgages, and I supposed he had invested my money in that way, although I did not know it. Q. He always assured you it was invested in good securities? A. Yes, sir; he told me time and time again it would be all right, and it was all right with me."

At the first hearing in this division, on the defendant's petition for a new trial, the arguments of counsel upon both sides were confined to the questions raised by the pleas of the statutes of limitation, the contention of the defendant being that the claim in suit was barred by the general statute of limitations applicable to actions of assumpsit, and also that the action was not commenced against the executor within the special period allowed by law for the commencement of actions against executors; while the contention of the plaintiff, on the contrary, was that the claim had been taken out of the general statute of limitations by a new promise on the part of defendant's testator, and that the action against the executor was commenced within the special time limited therefor by the statute. Upon considering the testimony, a summary of which is above set forth, the court suggested to counsel that it seemed to show that Henry W. Tiffany, the defendant's testator, was a trustee for the plaintiff in the care, management, and investment of her wages; and that, if this were so, the statute of limitations as to him did not commence to run until a breach of the trust on the part of said Tiffany occurred, namely, until demand was made upon him by the plaintiff for a settlement of the account in 1896, and a refusal on his part to comply therewith. In pursuance of said notice, and upon the suggestion of the court, the case has since been reargued by counsel upon the point thus raised.

Counsel for defendant argues that the testimony discloses either (a) a trust relation, or

(b) an agreement by Tiffany to invest the plaintiff's money; and, as to the first point, "if the relation between the plaintiff and Tiffany was that of trustee and cestui que trust, the present action cannot be maintained, since there was no repudiation of the trusteeship by Tiffany which would enable the plaintiff to sue her trustee at law." In support of this contention he cites from Perry on Trusts (8th Ed.) § 843, as follows: "Unless some legal debt has been created between the parties, or some engagement, the nonperformance of which may be the subject of damages at law, a court of equity is the only tribunal to which he can have recourse for redress. An action at law for money had and received will not lie against a trustee while the trust is still open." This is doubtless good law, but so also is the remainder of the text of the last proposition, which immediately follows and forms a part thereof, namely, "But, if a final account is settled, and a balance struck, an action may be maintained." That is just the case here. A balance had been struck and agreed upon between the plaintiff and Tiffany, except as to the item of interest, and he had promised to settle with her on that basis, provided only that she would accept of a certain mortgage or of certain mortgages held by him in part payment of the amount agreed to be due her. This proposition she refused, not knowing about the value of the mortgages, and wishing to be paid in money. She therefore demanded payment in full in money. We think the relationship of trustee and cestui que trust between the parties was terminated as to the subject-matter of this action by their own arrangement thus made for a settlement, and that nothing remained to be done except for Tiffany to pay over the money which he acknowledged to be due and owing to her. She had made her demand, and Tiffany had acquiesced in the practical correctness thereof, and the trust relations between them were thus ended. That such was the result of said arrangement seems to be well sustained by the following language used by Wightman, J., in delivering the opinion of the court in *Topham v. Morecraft*, 8 Ell. & Bl. p. 983: "It seems to me impossible to maintain that, if a trustee in possession of trust money enter into an account with his cestui que trust, and thereupon expressly state an account, and acknowledge that he has a fund in hand applicable to the claim made on him, he does not thereupon put an end to his character of being a trustee merely, and become liable as a debtor to an action at law brought against him in his personal capacity." Roper v. Holland, 3 Ad. & El. 99, *Allen v. Impett*, 8 Taunt. 263, and *Bartlett v. Diamond*, 14 M. & W. 49, are to the same general effect. See, also, *Coster v. Murray*, 5 Johns. Ch. 522; *Judah v. Dyatt*, 3 Black. 824, 25 Am. Dec. 112. In *Buttrick v. King*, 7 Metc. 20, Shaw, C. J., in referring to an action at law to recover certain trust estates or trust property,

says: "But when it remained wholly in money, in the hands of the defendant as administrator of the widow, an action for money had and received—which is in the nature of a bill in equity—when nothing remains to be done but the payment of money, may be maintained." In the case at bar we must infer from the testimony that the trust property remained wholly in money; that this money had never been invested by Tiffany, either in the name of the plaintiff or in his own name as trustee for her, but that it had been mingled with his own funds, and invested, if invested at all, as his own money. When the plaintiff made demand upon him for her money, therefore, such demand amounted to a revocation of the trust, and entitled her to immediate payment; which, being denied, entitled her to maintain an action at law for the recovery of the amount agreed upon, as aforesaid. If Tiffany had in fact invested her money in a mortgage or in other securities, either in her name or in his own name as trustee for her, as he should have done, and had offered to turn over to her such securities instead of paying her the money when she demanded the same, of course she would have been obliged to accept the same, as this would have amounted to a fulfillment of the trust on his part. But he did not and evidently could not do so, for the reason already given, and hence was clearly in default in his trust relations with the plaintiff. We can see no reason, therefore, why the action was not properly brought.

In *Johnson v. Johnson*, 120 Mass. 465, while it was held to be well settled that a cestui que trust cannot bring an action at law against a trustee to recover for money had and received while the trust is still open, yet the court said that, "when the trust has been closed and settled, the amount due the cestui que trust established and made certain, and nothing remains to be done but to pay over money, such an action may be maintained."

The case of *Campbell v. Whoriskey*, 170 Mass. 63, 48 N. E. 1070, is very similar to the case at bar. There the plaintiff went into defendant's service in 1869, and saved money from her wages. Having confidence in the defendant, and knowing him to be a man of considerable property, she placed various sums of money in his hands from time to time, of which he kept an account in a book. When she first gave him money he asked her to let him have it "sooner than to bank it." He promised to give her bank interest, and to keep the money safe for her until she wanted it. In 1890 she demanded the money from him, but this demand was refused, whereupon, in February, 1895, she brought suit to recover the same, and the question raised was whether her claim was barred by the statute of limitations. The court held that the defendant was not liable to a suit for the money earned and turned over to

the defendant until the arrangement under which he was retaining and using it was terminated by the plaintiff. "His promise," said the court, "was not like that of the maker of a promissory note payable on demand, but was an undertaking to pay within a reasonable time after a demand. Her cause of action in the sense of a present right to maintain a suit did not accrue until she had demanded the money." The court further said: "The plaintiff's deposit of her money was not an ordinary loan. While it was undoubtedly contemplated that the defendant might use the money as his own, and that the relation of debtor and creditor should grow out of the transaction, an element of trust entered in, indicating an intention that the defendant should hold it for an indefinite time in the future, as much for the safety and convenience of the plaintiff as for the pecuniary benefit of either of them. Their conversation shows that in some respects he was to stand in the place of a savings bank in receiving and keeping the money. A depositor in a savings bank need not call for his money within six years." The court held that the plaintiff was entitled to recover. The trust relationship in the case at bar is stronger than the one which appeared in that case, because here the defendant's testator was not simply to keep the money, or "bank it and pay interest on it," as was the agreement in that case, but he agreed to safely invest it for the plaintiff, which he failed to do. In addition to the cases above cited, see *Davis v. Coburn*, 128 Mass. 377; *Goodell v. Bank*, 63 Vt. 303, 21 Atl. 956, 25 Am. St. Rep. 766; *White v. Sheldon*, 4 Nev. 280; *Baker v. Joseph*, 16 Cal. 178; *Trust Co. v. Manchester*, 16 R. I. 308, 15 Atl. 76; *Blackmar v. McLaughlin*, 21 R. I. 497, 44 Atl. 804; *Watt's Act. and Def. vol. 7, p. 238, § 11.*

As what we have above said practically covers both points (a) and (b) of the defendant's argument, there is no occasion for a particular discussion of the latter point.

As to the point made by defendant that the action was not commenced against the executor within the time limited for the bringing of such action, it is sufficient to reply that the special finding of the jury upon that point in favor of the plaintiff is sustained by the evidence.

The petition for new trial is denied, and the case remanded for judgment on the verdict.

(4 Pen. 260)

WILMAN v. PEOPLE'S RY. CO.

(Superior Court of Delaware. New Castle.
Feb. 17, 1903.)

STREET RAILROADS—COLLISION WITH VEHICLES—INJURIES—CARE REQUIRED—CONTRIBUTORY NEGLIGENCE—DAMAGES.

1. The rights of a street railway and the public to use the streets of a city must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the rights of the other.

2. A street car company, in operating its cars in a street, must move them at a reasonable rate of speed, and reduce the speed or stop, if need be, when danger is imminent.

3. Persons using the streets of a city on which street cars are operated are required to use reasonable care to avoid collision by stopping, and, if need be, turning out and keeping off the tracks in the presence of danger.

4. A person attempting to cross a street railway track is bound to look for approaching cars in time, if possible, to avoid collision, and, if he does not look and does not see an approaching car until it is too late to avoid a collision, he is guilty of negligence.

5. Though the right of a street railway within its lines to use the street is superior to that of other users of the street, the public, in the exercise of due care, are entitled to cross the tracks as well within the blocks as at street crossings, in which case both the traveler and the railway company are required to use care, commensurate with the danger, to prevent a collision.

6. A person injured by reason of a collision with a street railway car is entitled to recover for pain and suffering, loss of power to labor, in the past and in the future, resulting from the injuries, loss of time and necessary expense in procuring labor which but for his injuries he would have performed himself, and expenses for medicine and medical attendance.

Action by Jacob Wilman against the People's Railway Company for damages for personal injuries, also for injuries to horse and wagon and loss of milk, occasioned by a collision of a car of the defendant company with the milk wagon of the plaintiff on East Second street, in the city of Wilmington. Verdict for defendant.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Levin I. Handy, for plaintiff. William S. Hillis, for defendant.

BOYCE, J. (charging jury). This action is brought for the recovery of damages for injuries to the person and property of the plaintiff, alleged to have been sustained by him by reason of the negligence of the defendant company. The issue presented is essentially one of fact, to be determined by you from the evidence as disclosed by the witnesses.

In a case like this, the right of action by the plaintiff rests upon the negligence, if any, of the defendant. It is, therefore, incumbent upon the plaintiff to establish, by a preponderance of the evidence, that the injuries complained of resulted from the negligence of the defendant company. Negligence is never presumed; it must be proved.

This case is similar in many respects to the case of Snyder against the defendant company, which was recently tried in this court (53 Atl. 433). Adopting the language of the court in that case, so far as it is applicable to the facts in this, we say to you that Second street, in this city, is a public highway. The defendant company uses and has the right to use that street for the purposes of its railway thereon, and the public have the right to use that and the intersecting streets for

the ordinary purposes of a public street. The railway company and the public are required by law to use due and proper care in the exercise of their respective rights. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the rights of the other. *Price v. Charles Warner Co.*, 1 Pennewill, 462, 42 Atl. 699. And it is the duty of the company to provide competent and careful motormen and servants, to see that they use reasonable care in operating the cars, that the cars move at a reasonable rate of speed, and that they slow up or stop, if need be, where danger is imminent. There is a like duty of exercising reasonable care, on the part of people who may otherwise use such highway, to stop, and, if need be, to turn out and keep out of the tracks of the cars in the presence of danger. *Brown v. Railway Co.*, 1 Pennewill, 332, 40 Atl. 936.

We will not attempt to specify the precise acts of precaution which are necessary to be done or omitted by one in the management of an electric car, or by one in the management of a wagon approaching the railway track or attempting to cross the same. Such acts must depend upon the circumstances of each case, and the degree of care required differs in different cases. The general rule is that the person in the management of the car, and the person in the management of the wagon, are bound to the reasonable use of their sight and hearing for the prevention of accident, and to the exercise of such reasonable caution as an ordinarily careful and prudent person would use under like circumstances. What is due and proper care depends upon the facts in each case. A person approaching a railway track or attempting to cross it, whether at a street crossing or at any other point along the street upon which it is laid, is bound to avail himself of his knowledge of the fact that the track is laid in the street, and act accordingly. If he approaches the track, or attempts to cross it, he is bound to look for approaching cars in time, if possible, to avoid collision with them; and if he does not look, and for this reason does not see an approaching car until it is too late to avoid a collision, he is guilty of negligence. *Price v. Chas. Warner Co.*, supra.

It has been held by this court that the right of a street railway company, within its lines, is superior to that of other users of the street, and must not be unnecessarily interfered with or obstructed. *Maxwell v. Railway Co.*, 1 Marv. 199, 40 Atl. 945, and *Brown v. Railway Co.*, 1 Pennewill, 335, 40 Atl. 938. But, as was said in *Price v. Warner*, supra, "the broad assertion of the superior right of a railway company may be subject to abuse, and should not be understood as exempting it in any case from the exercise of

¹ See *Damages*, vol. 15, Cent. Dig. §§ 222, 237, 244, 245, 255.

due and proper care." The public, using due care, have the right, in vehicles or on foot, to cross railway tracks, as well within the blocks as at street crossings. The company and the traveler are required to use such reasonable care as the circumstances of the case demand, an increase of care on the part of both being required where there is an increase of danger.

Even though the defendant company may have been negligent upon its part, yet if the negligence of the plaintiff contributed or entered into the accident, at the time of the injuries complained of, your verdict should be for the defendant, as the plaintiff in that case would be guilty of contributory negligence. Where there is contributory negligence, the law will not attempt to measure the proportion of blame or negligence to be attributed to each party. If the injuries to the person and property of the plaintiff were occasioned by the negligence of the defendant company, or of its servants or agents, or any of them, and without the fault and negligence of the plaintiff, then your verdict should be for the plaintiff. If your verdict should be for the plaintiff, it should be for such sum as will reasonably compensate him for the injuries to his property and his person. For this purpose, you should take into consideration the plaintiff's pain and suffering, and his loss of power to perform labor, in the past and in the future, which may be found by you to be the result of the injuries sustained by him; also his loss of time and necessary expenses in procuring labor which but for such injuries he would himself have performed; also his expenses for medicine and medical attendance received by reason of such injuries, and, if such injuries are of a permanent character, you should consider that fact in determining the amount of damages.

Verdict for defendant.

(4 Pen. 396)

BARKER v. DAVID.

(Superior Court of Delaware. New Castle.
June 23, 1903.)

JUSTICES OF THE PEACE—APPEALS—TRANSCRIPT—CERTIFICATE.

1. Under Rev. Code, p. 737, § 34, requiring a justice on an appeal to send up a true transcript of all the docket entries in the case before him, a certificate that the transcript was a true copy of a judgment against B. and in favor of D. as it stands on the justice's docket was insufficient.

Appeal from Orphans' Court, New Castle County.

Action between George G. Barker, as treasurer of the National Dredging Company, and James L. David, as administrator of the estate of Benjamin David, deceased. From a justice's judgment in favor of the latter, the former appeals. Dismissed.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Anthony Higgins, for appellant. Walter L. Willis, for respondent.

The certificate of the justice was as follows: "I hereby certify that the foregoing is a true copy of a judgment against George G. Barker, treasurer for National Dredging Co., and in favor of James L. David, administrator of Benjamin David, deceased, as it stands on my docket."

Mr. Willis, for respondent, moved to dismiss the appeal on the ground that the above certificate was defective, in that it did not comply with the requirements of the statute (section 34, Rev. Code, p. 737) requiring the justice to send up a true transcript of all the docket entries in any case before him. *Trimble, Sides & Co. v. Dugan*, 2 Pennewill, 524, 47 Atl. 1008.

Mr. Higgins, for appellant, contended that the decision in the case of *Trimble, Sides & Co. v. Dugan* did not apply to the present case, and that when the justice certifies that the transcript contains a true copy of a judgment "as it stands on my docket" it is the equivalent of saying "all the docket entries," as required by the statute.

LORE, C. J. The statute, in order to bring the case before us as an appellate court, requires that the justice shall file a duly certified copy of all the docket entries, and that must affirmatively appear in order for this court to assume jurisdiction.

Let the appeal be dismissed.

(4 Pen. 396)

GRAVES v. SPRY.

(Superior Court of Delaware. New Castle.
June 23, 1903.)

JUSTICES OF THE PEACE—JUDGMENTS—EXECUTIONS—RETURN NULLA BONA—TIME.

1. Under Rev. Code, p. 747, § 14, providing that an execution issued by a justice shall bear date of the day it is issued, and shall be made returnable on a day certain not more than six nor less than three months thereafter, and that a return of "No goods" may be made after two days from date, an execution issued on the 21st of a certain month and returned "No goods" on the 23d of the same month was invalid.

Action by William E. Graves against Anna M. Spry. On rule to show cause why a judgment should not be stricken from the record. Rule made absolute.

A judgment was obtained by the plaintiff against the defendant before William R. Reynolds, a justice of the peace in and for New Castle county, and scire facias was issued on said judgment.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

James W. Lattomus, for plaintiff. Benjamin Nielsa, for defendant.

Mr. Nielsa, for defendant: The statute (section 14, p. 747, Rev. Code) provides that a return of no goods may be made after two days from the date of the execution. The

execution in this case was issued on the 21st, and a return of no goods was made on the 23d of the same month, as shown by the record.

LORE, C. J. The record discloses that two days had not elapsed after the date of the execution before the return was made, as required by the statute. On that ground we order the rule made absolute.

(4 Pen. 211)

MORRISON v. TAYLOR.

(Superior Court of Delaware. New Castle.
Feb. 14, 1903.)

**EXECUTION—LEVARI FACIAS—LOSS OF WRIT—
SUBSTITUTION—RETURN.**

1. Where the purchaser of land under a sale on a writ of levavi facias shows that the writ has been lost, and that deed has been delivered to him on payment for the land, a substituted writ may be issued and returned by the sheriff, showing the sale.

Petition by William S. Hilles for the substitution of a duplicate writ of levavi facias issued on a judgment foreclosing a mortgage in lieu of a lost one, and to require a return showing sale of the land to him. Granted.

Argued before LORE, C. J., and BOYCE, J.

William S. Hilles, for petitioner.

LORE, C. J. The petition of William S. Hilles respectfully represents: "That the above-stated judgment was duly recovered in this honorable court, being No. 151, September term, A. D. 1901. That thereafter a writ of levavi facias, being No. 12 to the November term, 1901, of said court, was issued, directed to Samuel A. McDaniel, then sheriff of New Castle county. That in obedience to the command of the said writ of levavi facias contained, the said sheriff did give due and public notice, and expose the lands and premises in the said writ mentioned at public sale, and sold the same on the 23d day of October, A. D. 1901, to your petitioner, for the sum of two hundred dollars. That your petitioner duly paid to the said Samuel A. McDaniel, then sheriff, the said sum of two hundred dollars. That thereafter the said Samuel A. McDaniel, sheriff, as aforesaid, by deed poll bearing date the 15th day of May, A. D. 1902, conveyed the said lands and premises to your petitioner in fee simple, as by the said deed poll recorded in the office for the recording of deeds, etc., in and for New Castle county, in Deed Record A, volume 19, page 506, etc., appears. That the said writ of levavi facias, being No. 12 to the November term, 1901, has been in some way lost, and that the same has never been returned by the said Samuel A. McDaniel to this honorable court. Your petitioner therefore prays that the prothonotary of this court may be directed to prepare a duplicate or substitute writ to take the place of the said writ so lost as

aforesaid, and that the said Samuel A. McDaniel, late sheriff, may be authorized to make return thereon of the said sale to your petitioner as aforesaid; said return to be made as to the November term, 1901, of this honorable court; and that your petitioner may have such other or further relief as the nature of the case may require. Wm. S. Hilles."

In support of the above petition Mr. Hilles cited *White v. Lovejoy*, 8 Johns. 448; *Herman* on the Law of Executions, § 87. And now, to wit, this 14th day of February, A. D. 1903, the foregoing petition having been read, and it appearing to the court that the said writ of levavi facias in the said petition mentioned, being No. 12 to the November term, 1901, was duly issued and delivered to Samuel A. McDaniel, then sheriff; and it further appearing that the said Samuel A. McDaniel, in pursuance of the directions of the said writ, sold the lands and premises therein mentioned unto William S. Hilles, and that the said William S. Hilles has paid therefor; and it further appearing that the said Samuel A. McDaniel, then sheriff, has executed and delivered unto the said William S. Hilles a deed of said lands and premises; and it further appearing that the said writ of levavi facias has been lost:

It is thereupon ordered by the court that the prothonotary of this court do issue a substitute writ in lieu of and to take the place of the one so lost as aforesaid; and it is further ordered that the said Samuel A. McDaniel, late sheriff, be permitted to make return thereon of the said sale as to the November term, 1901, of this court.

(4 Pen. 279)

MANN v. PERR.

(Superior Court of Delaware. New Castle.
March 4, 1903.)

**FOREIGN ATTACHMENT—CORPORATE STOCK—
CERTIFICATE OF CORPORATE OFFICER—ANSWER
OF CORPORATION AS GARNISHEE.**

1. Where, in foreign attachment, the sheriff returned that he laid the writ in the hands of R., president of a corporation, and summoned the latter as garnishee, and left with such president a certified copy of the process, and attached 400 shares of the corporation's stock held and owned by defendant, and received from the president a certificate attached to the return, which recited that defendant, as appeared from the books of the corporation, on the day of the levy held and owned 400 shares of the capital stock of the company, represented by certificate No. 56, such return and certificate constituted a sufficient attachment of the stock without the answer of the corporation as garnishee.

Action by Frank Mann against John A. Peer. A foreign attachment was issued, to which nulla bona was pleaded.

The sheriff's return upon the writ of foreign attachment was as follows: "On the twentieth day of November, A. D. 1902, laid the within writ in the hands of Burke L. Rossberg, President of the American Artificial Leg Company, and summoned it as gar-

[1. See *Execution*, vol. 21, Cent. Dig. § 106.

nishee, and garnishee fee paid; and at the same time left with the said Burke L. Rossberg, as president of the said the American Artificial Leg Company, a certified copy of the said process, and attached 400 shares of the capital stock of the said the American Artificial Leg Company, held and owned by the said defendant, and then received from the said Burke L. Rossberg, president as aforesaid, a certificate of the number of shares held and owned by the said debtor, in the said company attached, which certificate is herewith returned. So answers Samuel A. McDaniel, Sheriff." The certificate attached to the writ set forth "that John A. Peer, the above-named defendant, as appears by the books of the American Artificial Leg Company, on November the twentieth, A. D. one thousand nine hundred and two, held and owned four hundred (400) shares of the capital stock of the said company. The certificate representing the said four hundred (400) shares being certificate No. 56."

Query: Must the corporation in whose hands the attachment was laid answer as garnishee, or is the signing of a certificate and the return of the same by the sheriff a full compliance with the statute, and is it an effectual attachment?

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Victor B. Woolley, for plaintiff. J. Harvey Whiteman, for garnishee.

PER CURIAM. The statute contemplates the attachment of shares of stock, and it is complied with when a certificate is obtained from the proper officer of the corporation. The garnishee has answered when it gives the certificate provided for by the law, and this, we understand, is all the plaintiff wants.

Mr. Whiteman: We ask leave to withdraw the plea of nulla bona.

LORE, C. J. You have leave to withdraw it.

(4 Feb. 1903)

STATE v. IANNUCCI.

(Court of General Sessions of Delaware. New Castle. Feb. 5, 1903.)

CARRYING CONCEALED WEAPONS—WEAPONS PROHIBITED—PURPOSE—BURDEN OF PROOF.

1. A razor is a deadly weapon within Laws 1881, vol. 16, p. 716, c. 548, providing for the punishment of persons carrying concealed deadly weapons.

2. On an indictment for unlawfully carrying concealed a deadly weapon, under Laws 1881, vol. 16, p. 716, c. 548, providing for the punishment of persons carrying concealed deadly weapons, the burden is on the prisoner to show that his purpose in carrying the weapon was lawful, and the state need not prove that the purpose was unlawful.

Nicholas Iannucci was indicted for carrying concealed a deadly weapon. Verdict, "Guilty."

The defendant was indicted at this term for carrying concealed a deadly weapon. At

the trial the state proved that on the 1st day of January, 1903, the defendant was found by a police officer with a deadly weapon, to wit, a razor, concealed upon his person. The defendant testified that, although he had the razor concealed upon his person, he was not carrying it for an unlawful purpose; that he was sharpening it, and getting ready to shave himself with the razor, when notified that his brother was in a fight three or four squares away from defendant's home; that he ran down to the scene of the supposed fight with the razor in his hand, but just before getting there put it up his sleeve, where it was found by the police officer who arrested him.

Argued before PENNEWILL and BOYCE, JJ.

Herbert H. Ward, Atty. Gen., for the State. John F. Lynn, for defendant.

PENNEWILL, J. (charging the jury). Nicholas Iannucci, the prisoner at the bar, is charged in this indictment with, on the 1st day of January, 1903, having unlawfully carried a concealed deadly weapon upon and about his person, other than an ordinary pocketknife, viz., a razor. The indictment is based upon the following statute of this state, being chapter 548, p. 716, vol. 16, Laws Del., entitled "An act providing for the punishment of persons carrying concealed deadly weapons," which provides "that if any person shall carry concealed a deadly weapon upon or about his person other than an ordinary pocket knife, or shall knowingly sell a deadly weapon to a minor other than an ordinary pocket knife," he shall, upon conviction, be punished as the statute prescribes; "provided, that the provisions of this section shall not apply to the carrying of the usual weapons by policemen and other peace officers." There is no contention, as we understand, that this defendant was a policeman or other peace officer, and therefore the case does not fall within the exception or proviso of the statute. It has been repeatedly decided in this court that a razor is a deadly weapon within the meaning and contemplation of this act. Quoting the language employed by this court in the case of State v. Costen, 1 Pennewill, 19, 39 Atl. 456—a case similar to this in many respects: "This court has held that, where a jury is satisfied, beyond a reasonable doubt, from the facts before them, that the accused has upon or about his person a deadly weapon other than an ordinary pocketknife, put there by him out of view, he is prima facie guilty under the law of carrying concealed a deadly weapon upon or about his person. But we have also held and instructed juries that, although the accused is to be presumed guilty from the mere fact of having upon his person a deadly weapon out of sight, yet that he may nevertheless show to the jury that he had put that weapon there and carried it there for a lawful purpose. So that, although you

may find that he had a deadly weapon upon his person out of sight, you should not find him guilty if he has satisfied you by the evidence that he had it there for a lawful purpose. If you are satisfied, however, that he had it there out of sight upon his person, and the accused has not shown to your satisfaction that it was so carried for a lawful purpose, your verdict should be 'Guilty,' because, as already said, in the absence of such proof he is presumed in law to be guilty, no matter what may have been his real intent."

We think it is proper for us to say to you that by the use of the words "lawful purpose" in the case above referred to the court meant a lawful purpose that was specific, and, in a sense, temporary. For example, if a person should buy a deadly weapon at a store, and put it in his pocket for the purpose of taking it home; or if a person should find a deadly weapon, and place it in his pocket for the purpose of keeping it only till he could restore it to the owner, or make some other proper disposition of it—such person would not be carrying a deadly weapon concealed within the meaning of said act. And, to further illustrate, if a person takes such weapon from a drunken man, or a man laboring under great excitement, and in a dangerous condition, and places it in his pocket for the purpose of keeping it till the person from whom it is taken is in a fit condition to receive it; or if such weapon is placed in the pocket of another accidentally, without his knowledge, and he is unconscious of carrying it concealed upon his person—in none of these cases would he be guilty under said act. Many other illustrations might be used, but those we have given are sufficient to indicate to your minds what is meant by the words "lawful purpose." If you are satisfied from the evidence, beyond a reasonable doubt, that the accused was, at the time of his arrest, carrying concealed a deadly weapon upon or about his person, other than an ordinary pocketknife, and he has not shown to your satisfaction, by the evidence, that his purpose was a lawful one, your verdict should be "Guilty." It matters not what may have been his intent or purpose, unless he has satisfied you that it was lawful in the sense we have indicated; and in order to convict it is not necessary for the state to prove that the purpose was unlawful. The burden is upon the prisoner to prove that it was lawful.

Verdict, "Guilty."

(4 Pan. 106)

DONAHOE v. STAR PUB. CO.

(Superior Court of Delaware. New Castle.
Feb. 20, 1903.)

LIBEL—GENERAL ISSUE—EVIDENCE—ADMISSIBILITY—DISPROVING EXPRESS MALICE—PRIVILEGED COMMUNICATIONS—DAMAGES—NOMINAL—ACTUAL—EXEMPLARY.

1. Where, in an action for libel, plaintiff claims exemplary damages, defendant may, un-

der the general issue, for the purpose of rebutting express malice, and in mitigation of damages, offer evidence tending to prove the truth of the charge.

2. The law presumes malice from publishing a libel charging one with a crime, and implies that the latter has been damaged thereby.

3. On a plea of not guilty, in an action for libel charging plaintiff with a crime, plaintiff is entitled to a verdict for nominal damages, and such additional actual damages as the evidence shows he is entitled to.

4. In an action for libel, express malice must be proved; it never being implied.

5. In an action for libel, express malice may be proved either directly or indirectly.

6. In determining, in an action for libel, whether there was express malice on defendant's part, the jury must consider all the evidence rebutting express malice; and if they find that the facts were such as would reasonably impress a fair-minded man that plaintiff was guilty of the charge made in the alleged libel, and that defendant was so impressed when he published the charge, then express malice was disproved.

7. Ordinarily, under the general issue, defendant, in an action for libel, may prove that the publication was privileged.

8. Charging a candidate for office with a criminal offense is not privileged, and, if false, good faith and probable cause constitute no defense.

9. Exemplary damages, in an action for libel, can only be awarded where the proof of express malice is clear.

Action by John P. Donahoe against the Star Publishing Company. Verdict for plaintiff.

See 53 Atl. 1028.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

William S. Hilles, for plaintiff. J. Harvey Whiteman and Victor B. Woolley, for defendant.

On February 20, 1903, the case came on for trial. While the defendant was upon the stand, after detailing certain conversations that he had had with the plaintiff, he was asked by his counsel to detail to the court and the jury what took place at Dover the last day of the legislative session of 1899, so far as it related to the matter before the court.

Mr. Hilles objected to the above question, on the ground that, under the plea of not guilty, the defendant could not put in any evidence of facts or circumstances going to prove the truth of any allegation contained in the libel, or which would tend to prove the same.

After an extended argument by counsel on both sides and the citation of numerous authorities, LORE, C. J., rendered the following opinion, overruling the objections and admitting the evidence:

The defendant, under the general issue, in mitigation of damages, and for the purpose of rebutting express malice, offers to prove facts and circumstances connecting the plaintiff with the charges made in the alleged libel, at and about the time of its publication, of such

¶ 7. See Libel and Slander, vol. 22, Cent. Dig. § 365.

a character as reasonably to induce in his mind a belief of those facts. It is distinctly stated that the evidence is not offered in justification, or in proof of the truth of the alleged libel, but only in mitigation of damages. In this action punitive or exemplary damages are claimed, which involves the issue that the alleged libel was wantonly malicious, and therefore that the defendant should pay to the plaintiff, not only the actual damage he has sustained, but a further sum, in the discretion of the jury, by way of punishment.

The plaintiff contends that under the general issue particular facts and circumstances cannot be given in evidence, but only general reputation, or, at most, common rumor as to the particular charge, and that nothing can be so given in evidence that proves or tends to prove the truth of the charge. The argument of counsel has been very able, and discloses that there is not only much conflict, but much confusion, in the authorities upon this subject. This court has heretofore decided, in this very case, that under our law and practice whatever is properly admissible in mitigation of damages may be proved under the general issue, and cannot be specially pleaded. As this evidence is offered, not in proof of, or as tending to prove, the truth of the charges, but only to disprove malice, we think the weight of authority, as well as sound reason, dictate that the defendant should be permitted to show such facts and circumstances surrounding the case as tend to rebut malice and show reasonable cause. We think this conclusion is not in conflict with the authorities in our own state, when carefully examined as to their scope and purpose.

It may be urged that this would compel the plaintiff to meet a multitude of facts and circumstances of which he had no notice in the pleadings. This may show the propriety of ordinarily putting upon the record in some form or other the facts so relied on, but works no hardship in this case, inasmuch as the defendant states specifically that the plaintiff has had notice of the facts and circumstances sought to be proved, and which have been set out in pleas heretofore ruled upon.

We are therefore of opinion that all pertinent facts and circumstances that are offered for, and clearly go in, mitigation of damages, may be proved under the general issue, subject to the charge of the court that such evidence can in no wise justify the libel or go in bar of the action.

LORE, C. J. (charging jury). The plaintiff in his declaration alleges that the defendant company maliciously composed and published, in a public newspaper called the "Star," issued by the defendant on the 2d day of September, 1900, a libel containing, among other things, certain defamatory charges as to the conduct of the plaintiff,

while a member of the General Assembly of the state of Delaware in the session of 1899. The plaintiff avers that he has been injured by such publication, and claims both compensatory and punitive damages therefor. To this declaration the defendant has pleaded not guilty.

It is not disputed that the alleged libel was actually published in the "Star," a newspaper owned and issued by the defendant, on the day named. The first question that meets you, therefore, is, was it maliciously published? The words of the alleged libel impute to the plaintiff a crime punishable by the laws of this state, and are actionable in themselves. In such case the law presumes malice, and implies that the plaintiff has received some damage. Upon the plea of not guilty, the plaintiff, therefore, is entitled to your verdict for nominal damages. He would also be entitled to such actual or compensatory damages as he may have shown you by the proof in this case that he has sustained, if any such proof there be.

The plaintiff insists that he has proved, not only the malice implied by law from the character of the libelous publication, but that express malice has also been proved, viz., that the libel was composed and published in a vindictive and malevolent spirit, with a malicious intent to injure the plaintiff, and that, therefore, he is entitled to punitive or exemplary damages.

Express malice must be proved. It is never implied or presumed. It may be proved, however, either directly or indirectly. To rebut express malice, and in mitigation of damages, the defendant has been permitted, under the ruling of the court, to put in evidence by a number of witnesses the acts, expressions, and conduct of the plaintiff, and the conditions surrounding him, on the last day of the session of the Legislature of 1899, being the time set forth in the alleged libel, and also to prove the general reputation and rumors relating thereto which came to the defendant before the publication of the libel. Such testimony was admitted by the court solely for the purpose of rebutting express malice and in mitigation of damages, and in no manner may be considered by you as a justification or in bar of this action.

In determining, therefore, whether there was express malice or not, it is your duty to consider all such acts, expressions, and conduct of the plaintiff, the circumstances surrounding him, coupled with such general rumors and reputation as may have been proved. If, upon careful examination, you are satisfied that they were such as would reasonably impress a fair-minded man that the plaintiff was then acting corruptly, as alleged in the libel, and that the defendant was so impressed when the libel was composed and published, you should give such proof all due weight in rebutting express malice, and in mitigating the damages claimed by the plaintiff; for in that case such

reasonable cause for belief, and evidence that the defendant acted thereon alone, would rebut and disprove express malice.

Ordinarily, under the general issue, the defendant may prove that the publication was a privileged one. The defendant insists that, under the facts and circumstances proved in this case, this libel was privileged. The defendant claims that the plaintiff, at the time of the publication, was a candidate for public office, and as such submitted himself to all proper criticism as to character and fitness therefor; that the matter contained in the said libel was only such proper criticism.

The right of free discussion in the public press of the conduct of public officers, and of candidates for public office, is safeguarded by the Constitution of the United States and of the several states. The Constitution of this state, adopted in 1792, contains the following provision, which has ever since remained unchanged: "The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity; and any citizen may print on any subject, being responsible for the abuse of that liberty." Article 1, § 5.

What is the extent of that liberty, and what is the abuse of it? The greatest freedom is allowed in the discussion and criticism of the acknowledged or proved acts of a public man (*Davis v. Shepstone*, 11 App. Cas. L. R. 187); but publications of falsehoods, even about public officers or candidates for office, are never privileged (*Belknap v. Ball*, 83 Mich. 583, 47 N. W. 674, 11 L. R. A. 72, 21 Am. St. Rep. 622).

In an action for damages for writing or publishing an alleged libel, the defendant, under a statute of this state (chapter 449, p. 511, 11 Del. Laws), may plead and prove the truth of the charge, and that it was written or published properly for public information, and with no malicious or mischievous motives. If such a plea is made and sustained by proof, it is a complete defense to the action. But if, on the other hand, in an action such as this, the defendant files no such plea of justification in bar of the action, but files only, as in this case, the general plea of not guilty, the utmost effect of evidence that the defendant had probable cause to believe that his charge against the plaintiff was true, and that the publication was made for the public good, would be to negative express malice, and thus defeat the claim for exemplary damages.

The law as to privilege is well stated by Lord Herschell in *Davis v. Shepstone*, 11 App. Cas. L. R. 187, where he used these words: "There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment and criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly drawn in mind between comment or criticism and allegations of fact, such as that disgrace-

ful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct."

This seems to be a leading case, and has been quoted and approved as such in the case of *Burt v. Advertiser Newspaper Company*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97, where Judge Holmes adds: "If one privileged citizen wrote to another that a high official had taken a bribe, no one would think good faith a sufficient answer to an action. He stands no better, certainly, when he publishes his writing to the world through a newspaper, and the newspaper itself stands no better than the writer. *Sheckell v. Jackson*, 10 Cush. 25."

Again, in *Post Pub. Co. v. Hallam*, 59 Fed. 530, 8 C. C. A. 201, Judge Taft approves this case, and adds: "The public acts of public men could be lawfully made the subject of comment and criticism, not only by the press, but also by all members of the public, for the press had no higher rights than the individual; but while criticism and comment, however severe, if in good faith, were privileged, false allegations of fact, as, for instance, that he committed disgraceful acts, were not privileged, and if the charges were false, good faith and probable cause were no defense, though they might mitigate damages."

The law, therefore, seems to be clear that false allegations of fact, charging a candidate for office with a criminal offense, are not privileged, and, if the charges are false, good faith and probable cause are no defense. In such case the publisher of the libel takes his own risk, and can justify only by proving the truth of the charge. In our judgment the doctrine of privileged publication is not applicable to this case, and you may not consider it in reaching your verdict.

With this instruction upon the law, we now say to you that in any event you should find a verdict for the plaintiff for nominal damages. In the absence of express malice, your verdict should be confined to nominal damages, unless the plaintiff has proved that he has suffered some actual damage. If he has made such proof, whatever actual damage has been so proven should be added to nominal damages. If you should be satisfied, however, that express malice has been proved, and that the publication was maliciously and vindictively made, with intent to injure the plaintiff, you may give exemplary damages, such as the circumstances of the case may warrant, to punish the defendant and to deter others from like offenses, without regard to proof of actual damages. Punitive damages, however, can only be given where there is clear proof of express malice.

Verdict for plaintiff for \$700.

(4 Pen. 21)

JOLLS v. KEEGAN et al.(Superior Court of Delaware. New Castle.
Dec. 23, 1901.)**ATTACHMENT — CROPS — WITNESSES—ATTORNEYS—COMMUNICATIONS BY ADVERSE PARTY—ADMISSIONS AGAINST INTEREST.**

1. In an action against a garnishee, plaintiff's attorney was competent to testify to a conversation had with such garnishee, in which the latter made an admission against his interest.

2. Where, at the time of an attachment, defendant was entitled to a one-sixth interest as heir in certain real estate, in possession of the person in whose hands the attachment was laid as garnishee, who was a tenant of the land on shares, defendant's interest in crops raised by the garnishee was subject to the attachment.

Action by John W. Jolls against Michael Keegan, as garnishee, and another. Verdict for plaintiff.

John W. Jolls, on May 26, 1889, obtained a judgment against Julian Cochran for \$66.92, upon which an attachment *fi. fa.* issued. The sheriff returned attachment laid in the hands of Michael Keegan, Jr., March 23, 1901. A plea of *nulla bona* was entered. Michael Keegan, Jr., in whose hands the attachment was laid, was a tenant on shares on the farm of which Julian Cochran owned one-sixth interest. The plaintiff contended that such attachment thus laid covered the interest of Julian Cochran in the wheat crop which was gathered in 1901 from said farm.

Argued before LORE, C. J., and SPRUANCE, J.

John H. Rodney, for plaintiff. Benjamin Nields, for defendant.

J. Frank Biggs, Esq., who had been counsel in the case, was called to the stand on behalf of the plaintiff, and asked to detail a conversation that he had with Michael Keegan, Jr., in the town of Middletown, about April, 1901, in reference to the share of Julian Cochran in the wheat crop upon the farm on which Michael Keegan, Jr., lived as tenant.

Objected to by counsel for defendant, on the ground that Mr. Biggs, having been counsel in the case, was disqualified as a witness, under the ruling of the court in *De Ford v. Green*, 1 Marv. 816, 40 Atl. 1120.

LORE, C. J. We never have decided that an admission made by the opposite party to an attorney of the other side could not be put in evidence. The only thing decided in the case cited was that the witness, when called, became a general witness, and was subject to a general examination.

Mr. Nields: You would not allow the person who was in a lawyer's office to testify in the case.

LORE, C. J. That was based upon the ruling of privileged communications between lawyer and client. That we would not allow, but we have never held that, if the adverse party goes either to the other party or counsel of the other party and makes an admission, he cannot be contradicted as to that either by the party himself or by his attorney. We think that this testimony ought to be admitted, and this witness allowed to testify, upon the ground that it is an admission by a party against his own interest to the counsel of the adverse party, and who is not even counsel now.

LORE, C. J. (charging jury). It is claimed on the part of the plaintiff that John W. Jolls, having recovered a judgment against Julian Cochran, issued an execution and attachment *fi. fa.* upon that judgment, and on the 23d day of March, 1901, laid that attachment in the hands of Michael Keegan, Jr., a tenant upon the farm. To that attachment Michael Keegan, Jr., pleaded *nulla bona*; that is, that he had nothing in his hands belonging to Julian Cochran. So that the question for you to decide is whether or not, on the 23d day of December, 1901, at the time that the attachment was laid in the hands of Michael Keegan, he actually had in his possession or control any property, money, or other thing belonging to Julian Cochran. The claim of the plaintiff in this case is that at that time Keegan did have in his hands Cochran's one-sixth interest in the wheat crop, amounting to 258 bushels, at 70 cents a bushel, which amounted to \$180.60, sufficient to pay the judgment against Julian Cochran, debt and interest, \$103.28, with the costs of the suit thereon.

The point for you to decide is whether, on the 23d of March, 1901, Michael Keegan, Jr., had anything in his hands belonging to Julian Cochran. Should you believe at that time Julian Cochran was entitled as the heir at law of his mother to the one-sixth interest in the land, and that Dr. Gilpin was acting as the agent for the heirs at law, including Julian Cochran, then we say to you that Julian Cochran would be entitled to one-sixth interest in the crop of wheat, and the plaintiff would be entitled to recover from this defendant the money value of the one-sixth interest in the wheat crop, when sold, to the extent of his judgment, \$103.28.

Verdict for plaintiff for \$103.28.

(4 Pan. 238)

DOE ex dem. DOCKSTADER v. ROE et al.

(Superior Court of Delaware. New Castle.
July 1, 1903.)ALIENS — DISQUALIFICATION — ELIMINATION
— ALIEN NEXT OF KIN — TREATY — CON-
STRUCTION — CONSTITUTIONAL LAW.

1. Article 1 of the treaty with Great Britain ratified July 28, 1900 (31 Stat. 1939), which provides that when, on the death of any person holding real property within the territories of one of the contracting parties, such real property would pass to a citizen or subject of the other were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed three years in which to sell the same, etc., while loose in expression, contemplates the elimination of the disqualification of alienage in the next of kin, and puts them on the same footing as if they were all residents of the state at the death of the intestate.

2. Rev. Code 1852, amended 1893, c. 81, § 1, which declares that it shall be no objection to the kindred, husband, or widow of any alien, or of any citizen deceased, taking lands by virtue of the intestate law of the state, that they are aliens, if at the time of the death of the intestate they reside within the United States, and any such kindred, being aliens, and not residing within the limits of the United States at the time of the intestate's death, shall be passed by as if they were dead, is in violation of the treaty with Great Britain of July 28, 1900 (31 Stat. 1939), and the treaty is paramount to the statute.

Action by John Doe, on the demise of William A. Dockstader, against Richard Roe, casual ejector, and Robert R. Kershaw, tenant in possession. Judgment for plaintiff.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Horace G. Knowles and William S. Hillea, for plaintiff. Herbert H. Ward and Walter H. Hayes, for defendant.

LORE, O. J. From the case stated it appears that Robert Roberts, a resident and citizen of the state of Delaware, died in December, 1901, intestate, seised in fee of certain real estate situated in the city of Wilmington, in the state of Delaware; that he left no wife or children; that his next of kin were the four children of a then deceased sister, Maria Kershaw, viz., Tom Kershaw, Joseph Kershaw, and Nanny Kershaw, all at the time of the death of the intestate being residents of England, and subjects of Great Britain and Ireland, and Robert R. Kershaw, the defendant, at that time an alien Englishman, but resident of the state of Pennsylvania, in the United States; that by deed dated October 14, 1902, the said Tom Kershaw and wife and said Joseph Kershaw and wife conveyed all their one-half interest in said real estate to William L. Dockstader, the plaintiff. The plaintiff claims title to the one-half of said real estate under the terms of a treaty between the United States and the Kingdom of Great Britain and Ireland, which was ratified July 28, 1900, to go into effect 10 days thereafter, and to remain in force 10 years. 31 Stat. 1839. So much of

said treaty as relates to this case is as follows:

"Article 1. Where, on the death of any person holding real property (or property not personal) within the territories of one of the contracting parties, such real property would, by the laws of the land, pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and to withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the citizens or subjects of the country from which such proceeds may be drawn."

"Art. 5. In all that concerns the right of disposing of every kind of property, real or personal, citizens or subjects of each of the high contracting parties shall in the dominions of the other enjoy the rights which are or may be accorded to the citizens or subjects of the most favored nation."

31 Stat. 1940.

The defendant, on the other hand, claims the whole of the said land under the provisions of section 1, c. 81, of the Revised Code of 1852, of this state, amended in 1893, which, so far as it relates to this case, is as follows: "And it shall be no objection to the kindred, husband, or widow of any such alien, or of any citizen deceased, taking lands, tenements or hereditaments by virtue of the intestate law of this state, that they are aliens, if they, at the time of the death of the intestate, reside within the limits of the United States; and any such kindred, being aliens and not residing within the limits of the United States at the time of the intestate's death, shall be passed by, and the effect shall be the same as if they were dead."

It is conceded by the defendant's counsel that the devolution of title to real estate in Delaware, to the extent of the plaintiff's claim in the real estate in this case, is within the scope of article 6 of the Constitution of the United States, which provides as follows: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." This admission eliminates one of the questions that met us at the threshold of the discussion. It seems, however, to be clearly supported by the cases cited by the plaintiff, viz.: *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628; *Chirac v. Chirac*, 2 Wheat. 260, 4 L. Ed. 234; *Jackson v. Wright*, 4 Johns. 75; *Yeaker's Heirs v. Yeaker*, 4

Metc. (Ky.) 33, 81 Am. Dec. 530; Opel v. Shoup, 100 Iowa, 407, 69 N. W. 560, 37 L. R. A. 583. In the latter case the whole subject is very fully discussed. See, also, many other cases in American and English Ency. of Law, vol. 2, p. 97, etc.

The defendant further contends, however, that the language of said section 1 of the treaty is so obscure, ambiguous and contradictory as to be incapable of any sensible interpretation, and especially of that claimed by the plaintiff. It is almost inconceivable that the language of a paper of such grave importance as this treaty between two great nations should be clothed in language at once so loose and careless. It reflects but little credit upon the persons charged with the duty of framing this treaty, and suggests that some degree of competency should hereafter be required in such cases. Still, however, in applying the ordinary rules of interpretation to the plain purpose and scope of the treaty, it seems to us that section 1 of the treaty contemplates the elimination of the disqualification of alienage in the next of kin, so far as it relates to the subject-matter of this suit, and puts the next of kin on the same footing as if they were all residents of this state at the time of the death of the intestate.

Again, we cannot agree with the contention of defendant's counsel that our statute which passes by any nonresident alien next of kin as if they were dead, even when taken most broadly in connection with the rest of the statute and context, can justly be construed as an enabling statute. Manifestly, it is a disqualifying statute on the express ground of alienage.

In our judgment, the treaty controls this case, and is paramount to our statute. We therefore hold that William L. Dockstader, the plaintiff, was and is entitled to a one-half interest in the lands and premises in the declaration in this case mentioned.

(4 Penn. 408)

CARSWELL v. PATZOWSKI.

(Superior Court of Delaware. New Castle. July 1, 1903.)

MECHANIC'S LIEN—ENFORCEMENT—NECESSARY PARTIES—SUBSEQUENT PURCHASER.

1. Under the statute relative to mechanics' liens, and providing that a lien may be obtained in pursuance of a contract with the owner or reputed owner or contractor, and prescribing that the statement or claim which is the commencement of a suit must set out the name of the owner or reputed owner and of the contractor, etc., one who purchases the property after the contract is made is not a necessary party to a proceeding to enforce a mechanic's lien.

Action by Frank R. Carswell against Richard Patzowski. On demurrer to plea. Demurrer sustained.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Herbert H. Ward, for plaintiff. Robert H. Richards and William S. Hilles, for defendant.

LORE, C. J. On June 24, 1902, Frank R. Carswell, the plaintiff, filed his statement under the mechanic's lien law for a lien against four houses and lots in the city of Wilmington, in this county, and against Richard Patzowski, the defendant, as the owner or reputed owner thereof. The claim was for work as an architect, which was commenced February 21, 1901, and finished March 10, 1902, under a contract made with the said Patzowski as the then owner or reputed owner. February 14, 1902, while the work was in progress, Patzowski conveyed the lands and buildings in question to the New Castle Lumber Company, a corporation of this state, by deed, which was duly recorded the same day. In the statement of lien filed by the plaintiff and in the scire facias issued thereon the said New Castle Lumber Company, the owner of the lands and buildings at the time the statement was filed, was not made a party defendant; the only defendant named therein being Patzowski, the owner, with whom the contract was made. The defendant pleads such failure to make the said New Castle Lumber Company a party defendant in abatement of the suit. The plaintiff demurs generally to this plea. The question raised, therefore, is whether the New Castle Lumber Company is a necessary party defendant.

There is much apparent conflict of authority as to who should be made parties defendant in mechanic's lien cases, where there has been a change of ownership after the contract is made and work begun. The conflict has grown out of the varying language and provisions of the statutes of the different states, and from the method of enforcing the lien, whether by proceedings at law or in equity. The language of some of the statutes is either mandatory, or clearly imports that the owner of the land and buildings at the time the suit was commenced should be made defendant. This applies to the decisions with much force in Massachusetts, New Jersey, and Maryland. Where the lien has been enforced as if in equity, the equitable rule that all parties interested should be made defendants has prevailed. The cases in Connecticut and Indiana are within this class. The Pennsylvania statute, in its language and main features, is very like our own. Under that statute it has been uniformly held that the only essential party defendant is the original owner of the buildings or lands, who contracted for the labor or material. Jones v. Shawhan, 4 Watts & S. 257; Fourth Ave. Baptist Church v. Schreiner, 88 Pa. 124. Like rulings have been had in Wisconsin and in Maine. McCoy v. Quick, 30

¶ 1. See Mechanics' Liens, vol. 24, Cent. Dig. §§ 232, 474.

Wis. 521; Colley v. Doughty, 62 Me. 501. While these decisions do not control us in construing our statute, they throw much light on the subject. We are to be controlled, however, by the terms of our own statute.

The statute provides that a lien may be obtained in pursuance of a contract with the owner or reputed owner or contractor. It further prescribes that the statement of claim, which is the commencement of the suit, must set out the name of the owner or reputed owner and of the contractor, and whether the contract was made with such owner or reputed owner or contractor. The scire facias and all subsequent proceedings are based upon this claim, and point only to the contract owner or reputed owner as the defendant. The contract, when made, is the pivotal point, and fixes the parties who are the necessary defendants in any suit thereunder. Other holders are only recognized in the statute as entitled to notice by service of the sc. fa. upon the tenant when the premises are occupied, or by notice posted upon the premises, etc. Careful examination of our statute clearly indicates that whenever the word "owner" or "reputed owner" is used, it means the owner or reputed owner with whom the contract was made, and he is, therefore, the only necessary defendant, as such owner or reputed owner. While, therefore, a subsequent owner may properly be made a party defendant, it is not indispensable that he should be joined; inasmuch as he takes title at his peril, and subject to the lien created by the contract owner whenever such lien is properly enforced. We therefore sustain the demurrer.

Let judgment of respondent ouster be entered upon election of defendant.

(4 Pen. 196)

STATE v. HOLMES.

(Court of General Sessions of Delaware. New Castle. Feb. 6, 1903.)

MAIMING—LYING IN WAIT—INDICTMENT.

1. Rev. Code 1852, amended in 1893, p. 924, c. 127, § 8, provides that, if any person shall maliciously and by lying in wait deprive any person of one of his genital members, or put out an eye, etc., he shall be deemed guilty of a felony; and section 9 provides that if any person shall maliciously, without lying in wait, maim another, he shall be guilty of a misdemeanor, and shall be fined. *Held*, that an indictment under section 9, charging defendant with maiming prosecutrix by throwing acid into her eyes and injuring one of them, was not objectionable for failure to charge that the offense was committed either with or without lying in wait.

2. An allegation that defendant maliciously threw a certain acid into the eyes of prosecutrix, by reason of which one of her eyes was destroyed, sufficiently described the offense of maiming, prohibited by Rev. Code 1852, amended in 1893, p. 924, c. 127, § 9, declaring that if any person shall maliciously maim another he shall be guilty of a misdemeanor.

Clara Holmes was indicted for maiming. On motion to quash the indictment. Denied.

Argued before PENNEWILL and BOYCE, JJ.

Robert H. Richards, Dep. Atty. Gen., for the State. Daniel O. Hastings, for defendant.

The indictment, consisting of two counts, was framed under section 9, c. 127, p. 924, Rev. Code 1852, amended in 1893, and the first count of same, omitting the formal opening, was as follows: "That Clara Holmes late of Wilmington Hundred in the County aforesaid, on the Tenth day of January, in the year of our Lord, One thousand nine hundred and three, with force and arms, at Wilmington Hundred in the County aforesaid, did, then and there, unlawfully and maliciously, in and upon one Bella Johnson, make an assault, and then and there, unlawfully and maliciously, a certain acid, the kind and character of which are to the Grand Jurors, aforesaid, unknown, with the right hand of her, the said Clara Holmes, upon and into both the eyes of her, the said Bella Johnson, did throw, and by such throwing, as aforesaid, she, the said Clara Holmes, did, then and there, the left eye of her, the said Bella Johnson, put out and destroy, and then and there, and thereby, she, the said Clara Holmes, her, the said Bella Johnson, did maliciously maim, against the form of an Act," etc. The second count of the indictment was similar to the above, except that it alleged that the left eye of the said Bella Johnson was permanently injured by the said defendant.

Mr. Hastings, for defendant, moved to quash the indictment; contending that the statute under which the indictment was framed provides, first, that, if any person shall maliciously and by lying in wait maim another, etc.; and, second, that if any person shall maliciously without lying in wait commit the same crime, he shall be deemed guilty of the offense of maiming. The indictment did not state whether the offense charged was committed by lying in wait or without lying in wait.

Mr. Richards, Deputy Attorney General: It is clear from the indictment itself that it is drawn under section 9 of chapter 127, Rev. Code 1852, amended in 1893. Section 8 specifically makes the offenses enumerated felonies, and says they may be committed by lying in wait. If drawn under section 8, the indictment would allege that it was done feloniously. It does not charge a felony, and therefore could not be drawn under section 8.

As to the contention that the indictment must contain the averment that the act was done without lying in wait, I submit that the words "lying in wait," in section 9, are simply used therein for the purpose of distinguishing it, in the manner in which the offense is committed, from section 8.

PENNEWILL, J. The court refuse the motion to quash the indictment or either of the counts thereof.

The defendant thereupon entered a plea of guilty.

(4 Pen. 286)

PETIT v. COLMARY.

(Superior Court of Delaware. New Castle.
Feb. 18, 1903.)

FALSE IMPRISONMENT—INSTRUCTIONS—ARREST—JUSTIFICATION—RESIDENCE—SEARCH WARRANT—EXECUTION—"NIGHTTIME"—DEFINED—DAMAGES.

1. The actual detention of the person, and the unlawfulness thereof, constitute the actionable trespass, in false imprisonment.

2. It is the duty of a constable to execute a warrant of arrest in a lawful manner, and, when acting as a peace officer, he must not commit a trespass by exceeding his authority.

3. Any cruel or unnecessary exposure of a prisoner to cold, or deprivation of suitable clothing or covering, while in the custody of the officer arresting him, is unlawful, rendering the officer liable.

4. An officer in the discharge of a public duty may, if attacked by another, avail himself of the law of self-defense in the same manner as any other person, using such force as may be necessary to protect himself.

5. If an officer endeavoring to make an arrest is interfered with by others, he may use all reasonable force necessary to effect the arrest.

6. In an action for false imprisonment, where plaintiff was arrested under a search warrant, the burden was on plaintiff to show that the arrest was unlawful.

7. Under Rev. Code 1893, p. 737, c. 97, § 29, providing that search warrants shall not authorize the searching of any dwelling house in the nighttime, etc., an arrest under a search warrant is not unlawful, because made in the nighttime, if made without entering the house of the party arrested.

8. To constitute a legal arrest, the officer must lay his hand on the defendant, or otherwise take possession of his person, making him his prisoner in an unequivocal form.

9. Under Rev. Code 1893, p. 737, c. 97, § 29, providing that search warrants shall not authorize the searching of any dwelling house in the nighttime, the term "nighttime" means that space of time during which the sun is below the horizon, except that space which precedes its rising and follows its setting, during which, by its light, the countenance of a man may be discerned.

10. Where an officer is resisted in making an arrest, and in retaliation uses more force than is reasonably necessary to effect the arrest, it is unlawful.

11. In an action for false imprisonment, plaintiff's damages are such expenses as were incurred in procuring his discharge, loss of time, physical and mental suffering, and the humiliation the arrest may have occasioned.

12. In an action against an officer for false imprisonment, where exemplary damages are claimed, defendant may, in mitigation, show that he was resisted by the plaintiff, and any relevant circumstances showing a reasonable provocation for the resort to force.

13. Where an injury is inflicted maliciously and wantonly, the jury are not restricted to actual damages, but may give such damages in addition as the circumstances seem to warrant, to deter others from like offenses.

¶ 11. See False Imprisonment, vol. 23, Cent. Dig. § 111.

Action by Joseph Petit against William T. Colmary. Verdict for plaintiff.

Argued before SPRUANCE and BOYCE, JJ.

John H. Rodney, for plaintiff. J. Harvey Whiteman, for defendant.

BOYCE, J. (charging jury). This is an action of trespass, brought to recover damages for an alleged false imprisonment of the plaintiff by the defendant. False imprisonment is an unlawful arrest and detention of the person of another, either with or without a warrant of arrest. It consists in an unlawful restraint upon a man's person, or control over the freedom of his movements, by force or threats; and every such restraint or confinement is unlawful, where it is not authorized by law. The actual detention of the person, and the unlawfulness thereof, constitute the trespass, the gravamen being the unlawfulness of the imprisonment; and for every such imprisonment the officer making the arrest is liable in damages.

It is conceded that the plaintiff was arrested by the defendant, and that the latter was, at the time of making the arrest, a constable of this county. A constable has the right, and it is his duty, to execute a warrant of arrest in a lawful manner; and, in so far as he acts as a peace officer, he must be concerned not to commit a trespass upon the person of another by exceeding his authority, and he must obey the mandate of his warrant. The court, in the case of *State v. Townsend*, 5 Har. 487, said "that, with regard to a known peace officer of the county, it is not necessary for him to either produce his warrant, or state his character and authority, before making an arrest. The arrest itself is the laying of hands on the defendant, and it might be defeated by the ceremony of making an explanation or producing a paper before the arrest is made. It is quite time to produce the authority on the demand of the person arrested, or after the arrest. Every one is bound to know the character of an officer who is acting within his jurisdiction, and every citizen is bound to submit peaceably to such officer until he can demand or investigate the cause of his arrest. If the officer have no warrant for the arrest, he is liable to the defendant, who can suffer no wrong by submitting to the law; but if he resist before such investigation, and the officer have authority, he is indictable for obstructing such officer in the discharge of his duty." And in case of *State v. List*, Houst. Cr. Cas. 133, 143, the court said, "As to the manner in which such an officer should proceed to make an arrest, it is not easy to prescribe any precise and definite rule under the varying circumstances and degrees of force and resistance which he may be destined to encounter in the legitimate discharge of his hazardous and responsible duty." A constable may take with

him such assistance as he may deem necessary to aid him in the execution of a warrant of arrest. But with or without such assistance, he may not use more force than is reasonably necessary to make the arrest or to prevent the escape of the accused; and if there be no resistance on the part of the person to be apprehended, or interference on the part of others, the officer may not resort to any violence in making the arrest. If, however, he be resisted, he may use such force as the circumstances reasonably require, in order to make the arrest, to prevent an escape, or for the purpose of protecting himself from bodily harm. This court said in the case of *State v. Mahon*, 3 Har. 568: "A person having authority to arrest another must do so peaceably and with as little violence as the case will admit of. He must touch the person, and ought to do it without violence, unless the case require roughness. If resisted, he may use force sufficient to effect his purpose. But if no resistance be offered, or attempt at escape, he has no right, rudely and with violence, to seize and collar his prisoner."

Any cruel or unnecessary exposure of the plaintiff to cold, or deprivation of suitable clothing or covering, while he is in the carriage with, and in custody of, the officer, would be unlawful.

We may say to you, as was said by the court in the case of *State v. Dennis*, 2 Marv. 433, 43 Atl. 261: "Public peace officers are charged not only with the maintenance of the public peace and order, but with the preservation of the safety of person and property, within their jurisdiction. Their duties, therefore, are very responsible ones, and at times very perilous ones; and, unless they are protected by the law, neither the public peace, nor the preservation and protection of life, person, and property, can be secured."

An officer in the discharge of a public duty, if attacked by another, may, no less than any other person, avail himself of the law of self-defense. He may, in defending himself, use such force as may be sufficient to repel the attack upon him; but for this purpose the force and resistance resorted to by him must be no more than are necessary to protect himself from bodily harm. In addition to this force, if he be attacked by one whom he is endeavoring to arrest, or if interfered with by others in making the arrest, he may use all reasonable force necessary to effect the arrest.

If you find that the plaintiff was arrested under what is commonly known as a "search warrant," then we say to you that it is incumbent upon the plaintiff to satisfy you by a preponderance of the evidence that the arrest so made was unlawful. The statute in this state in relation to a search warrant contains this provision: "A search warrant shall not authorize the person executing it to search any dwelling house in the nighttime, unless the magistrate, or justice, shall

be satisfied that it is necessary in order to prevent an escape, or removal of the person, or things, to be searched for; and then the authority shall be expressly given in the warrant." Rev. Code 1898, p. 787, c. 97, § 29. If you find from the search warrant in evidence before you that it authorized the defendant to enter the house of the plaintiff in the daytime only, and not in the nighttime, as it is alleged by the plaintiff, then it will be your duty to determine from the evidence whether the arrest of the plaintiff was made before or after entering his house, if made in the nighttime. For if the arrest was effected before entering the plaintiff's house, and it was not otherwise made unlawfully, it matters not that it may have been made in the nighttime. And to aid you in determining as to the place of arrest (that is, whether it was made in or out of the plaintiff's house), it may be well again to inform you as to what constitutes an arrest. This court has said that, "to constitute a legal arrest, the officer must lay his hand on the defendant, or otherwise take possession of his person. He must make him his prisoner in an unequivocal form." *Lawson v. Buznes*, 3 Har. 416.

If you find that the arrest was made in the plaintiff's house, then it will remain for you to determine whether the arrest was made in the nighttime. By "nighttime," under the statute authorizing the execution of a search warrant, is meant that space of time during which the sun is below the horizon of the earth, except that space which precedes its rising and follows its setting, during which, by its light, the countenance of a man may be discerned. *Bouv. Law Dict.* If you find the arrest was made in the house of the plaintiff, and during that space of time which follows the setting of the sun, during which, by its light, out of the house, the countenance of a man might be discerned, and that no unnecessary force was used in executing the warrant, then such an arrest would not be unlawful; and if you find that the arrest was made in the house, in the nighttime, and that the officer had gone into the house at the instance of the plaintiff, and the arrest was not made with unnecessary violence, then such an arrest was not unlawful.

If you find that the defendant was not authorized to make the arrest of the plaintiff when and where it was made, or that the arrest was unlawful, in that the constable used unnecessary force in making the arrest, then your verdict should be for the plaintiff. For if the officer was resisted, and he, in retaliation, used more force or greater violence than was reasonably necessary to effect the arrest, then he would be without justification, and the arrest so made would be unlawful.

The plaintiff claims in this case both compensatory and exemplary or punitive dam-

ages; and, if you find that the defendant made an unlawful arrest of the plaintiff, you should find a verdict in his favor for such expenses, if any, as were reasonably incurred in procuring his discharge, for his loss of time, for his physical and mental suffering, and for the humiliation which the arrest and incarceration may have occasioned him.

In actions for false imprisonment, when exemplary damages are claimed, the defendant may, in mitigation of these, show to the jury that he was resisted by the plaintiff in his effort to effect the arrest of the latter, and any relevant circumstances showing a reasonable provocation for a resort to force on the part of the officer in making the arrest. The general rule as to exemplary damages is that, when an injury has been inflicted maliciously and wantonly, the jury are not restricted to actual or compensatory damages, but may give such damages in addition thereto as the circumstances of the case seem to warrant, to deter others from like offenses.

You will now take this case, gentlemen, and render your verdict for that party in whose favor the evidence preponderates.

Verdict for plaintiff for \$275.

(4 Pen. 59)

STATE v. SIENKIEWIEZ et al.

(Court of General Sessions of Delaware. New Castle. May 26, 1902.)

EMBEZZLEMENT—BAILMENT—CONTRACT MADE ON SUNDAY—EVIDENCE—ADMISSIBILITY.

1. In a prosecution for embezzlement as bailee of certain costumes, from which it had been shown that the costumes were obtained by two of the defendants, evidence to show that the other defendant inquired of witness the address of prosecuting witness for the purpose of procuring the costumes from her was inadmissible.

2. In a trial of three persons for embezzlement, as bailees of certain costumes, it appeared that two of the defendants obtained the costumes at a time when the other was not present. *Held*, that evidence that, when the three defendants came to the house where they boarded, the defendant who was not present when the costumes were obtained tried them on, was admissible.

3. Evidence that the defendant not present when the goods were obtained employed the other two was admissible.

4. A bailment consists in the delivery of some personal property which may be the subject of larceny by one person to another, to be held according to the purpose or object of the delivery, and to be returned or delivered over when that purpose is accomplished.

5. In a prosecution for embezzlement or larceny by a bailee, any exercise of dominion or control over the property inconsistent with the rights of the owner, or with the nature and purpose of the bailment, is evidence of a conversion; but, in order to amount to a fraudulent conversion, it must be effected with intent to defraud.

6. In a prosecution for embezzlement by a bailee, it is not necessary for the state to prove the fraudulent conversion of all the property de-

scribed in the indictment; conversion of any of the articles so described being sufficient.

7. Where a contract of bailment was void because attempted to be made on Sunday there was nevertheless a bailment sufficient to render the bailee liable for embezzlement as bailee, under Rev. Code 1852, p. 943, c. 782, § 1, providing that if any person, being bailee, shall embezzle or fraudulently convert the property to his own use, he shall be guilty of a misdemeanor, etc.

John Sienkiewicz and others were indicted for embezzlement.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Herbert H. Ward, Atty. Gen., for the State. Levin I. Handy, for defendants.

The testimony of Isabella Behringer, the prosecuting witness, as to the alleged embezzlement, was as follows: That she was a costumer, doing business at No. 303 Taylor street, in the city of Wilmington, and hired costumes to persons who desired to use them for balls, parties, and theatrical purposes, and was engaged in said business on Sunday, February 9, 1902. That upon the date mentioned two of the defendants, Kosin and Sienkiewicz, came to her house and asked to see some costumes; saying that they belonged to the Polish Turners of Wilmington, and lived on Maryland Avenue. That they said they wanted the costumes to use in a play that they were going to give for the benefit of a new Polish church which was about to be built; that the play would probably be given on Sunday night, if the police authorities would allow it, and, if not, then on Monday night, the 10th of February. Witness told them if they played on Sunday night to return the things on Monday morning, and, if they played on Monday night, to return them on Tuesday morning, to which the defendants assented. They were then allowed to select such articles as they wanted, consisting of one dressing gown, one lady's wig, three gent's wigs, one set black mustaches, and one pair of top boots; the whole being valued at \$20. That the rent of said articles, amounting to \$1.90, was charged to the Polish Turners' Society, because the defendants informed the witness that the priest would get one-half of the profits, and he would pay them, and requested her to so make out her bill and hand it to the priest, and when they returned the articles the priest would give them the money to pay her charges. With this understanding, they were allowed to take the goods away. That the goods were not returned at the time agreed upon.

The Attorney General then sought to prove by the witness Annie Derrick that the defendant Paklewski came to her house on the day the goods were obtained, and inquired the address of Mrs. Behringer, the costumer, for the purpose of procuring the costumes from her. This line of testimony was objected to by counsel for the defendants as

¶ 5. See *Embezzlement*, vol. 18, Cent. Dig. § 6.

immaterial, because, upon the testimony of Mrs. Behringer, the defendant Paklewski never sustained the relation of bailee. Commonwealth v. Hays, 80 Mass. 62, 74 Am. Dec. 662.

GRUBB, J. The court are unanimously of the opinion that the evidence is not admissible at the present stage of the case.

The witness Martha Shilling, called in behalf of the state, testified that the three defendants came to her house, No. 222 Maryland avenue, on February 5, 1902, stating that they were Polish Turners, and engaged board with her until Monday, the 10th of February; that on Sunday, after they had had their dinner, they went out, and in about an hour's time they all came back, and brought the costumes testified to by Mrs. Behringer; that their leader, Paklewski, put the dressing-gown on, and then put one of the wigs on.

Mr. Handy objected to this line of testimony as immaterial, because there was no evidence to show that Paklewski was present at the time of making the contract of bailment.

GRUBB, J. What is the object of the state in offering to put this testimony in?

Mr. Ward: The object is to show that two of the defendants acted for the three, and that the three used the goods in accordance with the contract of bailment; in other words, that there was the conversion by the three.

GRUBB, J. The connection with Paklewski is not close enough at this stage of the case.

Q. Confining your testimony to Sienkiewiez and Kosin, I would ask you what they did with these costumes?

A. They did not do anything. They just took a seat when they walked in the room, but the leader—the one with glasses—tried on the things that I named.

(Objected to by counsel for defendants as immaterial. Motion to strike out the answer.)

GRUBB, J. We hold, when these three men were together, that whatever the other two did in regard to these goods, although Paklewski might not have been the bailee, it is proper to show those circumstances which connect the other two with the goods, as circumstances from which their guilt or innocence may or not be inferred by the jury. On that ground it is admissible. The question of good faith is involved, and all the acts showing whether they got the goods in good faith or bad faith are relevant in this case. Their intent and good faith are at the bottom of this transaction.

Q. Why do you call him [Paklewski] the leader?

(Objected to by counsel for the defendants as irrelevant.)

GRUBB, J. Suppose the state undertakes to show that this man was the employer, and employed them to obtain the goods and fraudulently convert them; cannot that be proven, if it is true? And cannot it be proven by his acts as well as his words? If that is not shown, and Paklewski is not connected in some way, it would be inadmissible, and we would rule it out.

A. Because he [Paklewski] told us he was the boss of the two, that he was the head one, and these two worked for him.

The state offered further evidence tending to show that the defendants all left the city on February 11, 1902, and on the 18th of the same month the defendants and the costumes in question were found by State Detective Francis locked up in the police station in Baltimore, and were all brought back to Wilmington and identified by Mrs. Behringer; that on the way back the defendant Paklewski stated to the detective that he had to be back in Baltimore that evening at 7 o'clock, because he was the manager of the show, and was going to give a performance in that city that night.

The state rested, and Mr. Handy moved that the court give binding instructions to the jury to bring in a verdict of not guilty as to Stanley K. Paklewski, because there was no proof that he was the bailee of the goods as alleged in the indictment, and no evidence of any conversion of the goods to his own use, as alleged in the indictment.

Mr. Handy further moved the court to give binding instructions to the jury to bring in a verdict of not guilty as to John Sienkiewiez and Ludwig Kosin, for the following reasons:

(1) That the evidence was that the bailment of the goods to them was attempted on Sunday, and the contract was therefore void and of no effect. Mrs. Behringer could not on Sunday assent to their becoming her bailees for the goods mentioned in the indictment, and their promise to return the said goods to her at the time named was not binding, because made on Sunday. Hence there was no such bailment as is required by law to support an indictment for embezzlement as bailees.

(2) That there was no evidence that they, or either of them, converted to their own use the goods, as alleged in the indictment, and no evidence that they, or either of them, used the goods in any other way, at any other time, or in any other place than in the way, at the time, and in the place authorized by Mrs. Behringer, the owner of the goods. The testimony of Theodore Francis does not connect them, or either of them, with the goods, when he secured the same in Baltimore, Md.

(3) That there was no evidence that they, or either of them, converted to their own use the goods in New Castle county, as alleged in the indictment. The bailment, if there was

a bailment, is proved to have occurred in this county, but the bailment was not a crime. If there was any crime, it was the act of conversion. There is not a word of evidence to show where such act of conversion occurred, if it occurred at all.

After an extended argument, court rendered the following decision:

GRUBB, J. Defendants' counsel has presented two motions to the court: First, that the court instruct the jury peremptorily to bring in a verdict at once of not guilty as to Stanley K. Paklewski. We refuse to give that instruction to the jury at this stage of the trial.

Mr. Handy: I desire to note an exception.

GRUBB, J. We will let you note an exception, subject to the law as to whether it is a valid exception or not. We did it in the Foster Case, but there has been some question as to whether you have the right to have an exception noted to this ruling upon the motion you make. Let an exception be noted for what it is worth in law.

Your second motion is that we give binding instructions to the jury to bring in a verdict of not guilty as to John Sienkiewicz and Ludwig Kosin. We decline to give such instructions to the jury as to these two defendants.

Mr. Handy: I desire to note an exception.

GRUBB, J. Let the exception be noted, subject to the validity of it.

Mr. Handy: I wish to make the motion that the jury be instructed to bring in a verdict of not guilty as to all three of the defendants.

GRUBB, J. We refuse to give such instructions.

Mr. Handy: I desire to note an exception.

GRUBB, J. You may note the exception, subject to its validity.

The defendants admitted the facts testified to by the state's witnesses as to the manner in which they obtained the goods in question, and stated that the goods were taken to Baltimore through mistake, and with no criminal intent to convert them to their own use, and before they could return them to the owner, in Wilmington, they were arrested, and were then unable to do so.

PENNEWILL, J. (charging jury). John Sienkiewicz, Stanley K. Paklewski, and Ludwig Kosin, the defendants, are charged in this indictment with having, as bailees of certain personal property of Isabel Behringer, fraudulently converted the same to their own use in this county. The indictment is based on the following provision of a statute of this state passed May 3, 1898 (Rev. Code 1852, p. 943, c. 782, § 1), viz.: "That if any person, being a bailee of money or other property the subject of larceny, shall embez-

zle or fraudulently convert the same to his own use, he shall be deemed guilty of a misdemeanor," etc.

Before you can render a verdict of guilty against the defendants, or any of them, you must be satisfied from the testimony, beyond a reasonable doubt, first, that such defendants or defendant were the bailees of property belonging to Isabel Behringer, which was the subject of larceny; and, second, that as such bailees they fraudulently converted the same to their own use.

A bailment consists in the delivery of some personal property, the subject of larceny, by one person to another, to be held according to the purpose or object of the delivery, and to be returned or delivered over when that purpose is accomplished. A bailer is one to whom such property is so delivered. It is not denied that the property alleged in this case to have been fraudulently converted by the defendants to their own use is of such character as would, under the law of this state, be the subject of larceny; and we say to you, therefore, that you may assume as an undisputed fact that the property described in this indictment is such as would be the subject of larceny. As you have, no doubt, already noted, the material part of the charge against these defendants, and we may say the gist of this action, is the fraudulent conversion by the defendants to their own use of the property described in the indictment. It is incumbent on the state to satisfy you not only that the property came into the possession of the defendants as bailees by delivery from the owner thereof, and while so in their possession was converted by them to their own use, but also that it was fraudulently converted by them to their own use.

Any exercise of dominion or control over property by one in possession thereof, inconsistent with the rights of the owner or with the nature and purpose of the bailment, is evidence of a conversion; but in order that it shall amount to a fraudulent conversion, to the bailee's own use, it must be effected with the intent to defraud the owner. The intent to defraud—that is, the bad faith of the bailees—is necessary to be shown before the defendants can be found guilty. Such fraudulent intent may be proved by direct evidence, such as the declarations and admissions of the defendants, or by any circumstances from which the fraudulent intent may be inferred. It is not necessary for the state to prove the fraudulent conversion by the accused of all the property described in the indictment. The proof of the fraudulent conversion of any of the articles so described will be sufficient, if so proven to your satisfaction beyond a reasonable doubt.

It is strongly urged by the counsel for the prisoners that there was no such bailment in this case as is required by law to support an indictment for the fraudulent conversion of the property by the defendants as

ballees, because the contract of bailment proved by the state was a void contract, being made on Sunday. It is admitted by the state that the contract proved was made on Sunday and is void. But the state insists that even though such contract is void, and even though there be no contract at all, nevertheless there is a good and sufficient bailment proved in this case, and one capable of sustaining the indictment. This claim is based on the doctrine that a delivery of the property by Mrs. Behringer to the defendants upon a condition or trust that it should be returned, and an acceptance by the defendants of said property, constituted a valid bailment of the property; and made the defendants the ballees thereof; that, even though the contract attempted to be made between Mrs. Behringer and these defendants was invalid and of no effect, yet the property was in fact delivered by her under such circumstances as to create in the persons to whom she delivered it the relation of ballees to the property. We think the law upon this subject is very clearly and correctly stated in the case of *The Queen v. McDonald*, L. R. 15 Queen's Bench Division, 323, upon which the state relies. In that case Lord Coleridge, C. J., said: "It is said that the prisoner cannot be convicted of larceny as a bailee, because, being an infant, he was not competent to enter into a contract of bailment; that, the offense charged against him depending upon his having acted in a manner inconsistent with the terms of a contract, he, being unable to enter into such a contract, cannot be guilty of the offense. It seems to me that this contention is based upon an assumption which is not correct in law. It is not correct, as it appears to me, to use the expression 'contract of bailment' in a sense which implies that every bailment must necessarily in itself be a contract. I do not so understand the definitions of the term 'bailment.' It is perfectly true that in almost all cases a contract, either express or implied by law, accompanies a bailment, but it seems to me that there may be a complete bailment without the contract. * * * He is guilty of the offense, not because he has broken a contract which he was incapable of making, but because, being capable of becoming a bailee of these goods, and having become one, he dealt with the goods in such a manner as by the terms of the act to render him guilty of the crime of larceny." In the same case, Cave, J., said: "Surely there was a bailment, in the sense that there was a delivery upon condition. The infant was in lawful possession of the goods only by reason of the owner's having delivered them to him upon certain conditions." In *Hale on Bailments & Carriers*, at page 14, it is said: "It may be

safely said that wherever possession of a thing is knowingly acquired, unaccompanied by the right of ownership, a bailment relation is established, and the person in possession holds the thing acquired simply as a bailee. The delivery is the keynote of the whole transaction." It is a general and well-established rule that no action can be maintained on a contract made in violation of law. When a contract is made on Sunday, and the making of it on that day is forbidden by statute, the contract is void, though the thing contracted to be done may be lawful. And yet, although the owner may place his property in the hands of another under a contract which is void, he does not forfeit his property in the thing which he has thus delivered. While the party to an unlawful contract shall not receive the aid of the law to enforce that contract, or to compensate him for the breach of it, and while the contract may be void, the general property in the thing bailed remains with the former owner. The consequences of a void contract do not extend to a forfeiture of the owner's general right of property, and for a wrongful invasion of that right he may maintain trover against the bailee. *Woodman v. Hubbard*, 25 N. H. 87, 57 Am. Dec. 310, and cases therein cited; *Hale on Bailments & Carriers*, 181; 2 *Parsons on Contracts* (5th Ed.) 763. We say to you, gentlemen of the jury, that there may be a bailment without a contract, and, even though the contract sought to be made be void in law, yet, if the property be delivered by the owner, the law imposes upon the person to whom it is delivered the duty or obligation to return it to the owner.

It is for you to say, upon all the evidence in the case, after applying thereto the law as we have declared it to you, whether the defendants, or any of them, are guilty of the charge laid in this indictment. If you are satisfied from the evidence, beyond a reasonable doubt, that the property described in the indictment, or any part of it, was delivered by Mrs. Behringer to the defendants upon a condition or trust to be returned to her, and so accepted by them, and you shall further believe that they did not return said property, but fraudulently converted the same to their own use, as alleged in the indictment, your verdict should be "Guilty," as to all or such of the defendants as you believe to be guilty under the evidence and the law as we have stated it. If, after carefully considering all the testimony, you should entertain a reasonable doubt as to the guilt of the defendants or any of them, your verdict should be "Not Guilty," as to any one or more of said defendants regarding whose guilt you entertain such reasonable doubt.

The jury disagreed.

(4 Pen. 336)

STATE v. DI GUGLIELMO.

(Court of General Sessions of Delaware. New Castle. May 21, 1903.)

HOMICIDE—ASSAULT WITH INTENT TO KILL—INTENT—MALICE—CAPACITY—PRESUMPTION—DRUNKENNESS—REASONABLE DOUBT.

1. Under an indictment charging an assault with intent to commit murder, defendant may be convicted of simple assault only.

2. In order to warrant a conviction for assault with intent to commit murder, it must be proved that defendant intended to murder his victim.

3. An assault is an unlawful attempt by violence to do injury to the person of another, the person making the attempt having the present ability to commit such injury.

4. To constitute the statutory offense of assault with intent to commit murder, the attending circumstances must be such as to show that it would have been murder of the first or second degree if the assailant had accomplished his purpose.

5. The express malice which constitutes murder of the first degree is proved by circumstances satisfactorily evidencing a sedate, deliberate purpose, and formed design, to kill another.

6. The implied malice which constitutes murder of the second degree is proved where it is shown that the killing was done suddenly, without justification or excuse, and without provocation, or without provocation sufficient to reduce the homicide to manslaughter.

7. Malice is implied by law from every deliberate, cruel act committed by one person against another, no matter how sudden such act may be.

8. An intent to commit murder may be shown by direct evidence, or by the acts and conduct of the accused, and by other circumstances.

9. When a person charged with an offense is more than 14 years of age, he has the burden of proving that he was mentally incapable of committing the crime alleged.

10. Though mere drunkenness does not excuse a crime committed while in that condition, a person so intoxicated as to be incapable of forming that particular and specific intent necessary to constitute an assault to commit murder cannot commit that crime.

11. The reasonable doubt required for a conviction of a crime is not a mere imaginary, whimsical, or even possible doubt of the guilt of the accused, but is such real and substantial doubt as intelligent men may reasonably entertain on a careful consideration of all the facts proven in the case.

Savino Di Guglielmo was indicted for an assault with intent to commit murder. Guilty.

The prisoner was indicted for an assault with intent to murder his wife. At the trial the evidence showed that the defendant on the day in question had been drinking heavily from about 10 o'clock in the morning, and, while in a more or less intoxicated condition, came into his wife's bedroom at his home, No. 103 Shipley street, in the city of Wilmington, and, after a few moments' conversation with her, went into the kitchen adjoining, secured a butcher knife, returned with the same to the bedroom, and made an attack upon his wife with the said knife while she was lying in bed, inflicting nine wounds upon her head, arms, and leg; that their son Michael, who was asleep in an ad-

joining room, was aroused by the screams of his mother, ran into the room, and succeeded in getting the knife away from his father; that the mother then escaped from the room, the police were summoned, and the prisoner placed under arrest.

Defendant's counsel asked the court to instruct the jury, *inter alia*, as follows: First, that it is as incumbent upon the state to prove beyond a reasonable doubt the intent to commit murder, as it is that it prove the assault; second, that the court instruct the jury as to what constitutes a reasonable doubt, and that such doubt should inure to the benefit of the prisoner; third, that the jury could only consider the act and intent, and are not to be influenced by the extent of the injuries; fourth, that drunkenness was no excuse for an assault, but, if the defendant is charged with an intent accompanying an assault, the intent could not exist if he was too drunk to entertain it, and the wrongful act does not supply or aid the proof of the intent to kill.

Argued before LORE, C. J., and GRUBB, J.

Herbert H. Ward, Atty. Gen., for the State.
Sylvester D. Townsend, Jr., for defendant.

GRUBB, J. (charging jury). This indictment charges Savino Di Guglielmo with an assault with intent to murder Marie G. Di Guglielmo, his wife, the prosecuting witness. Under this indictment, you may find the prisoner guilty either of the assault with intent to murder, or of the simple assault, merely, or not guilty of either, according as the law and the evidence may warrant your verdict. In order to warrant you in finding that he is guilty in manner and form as he is indicted (that is, not only of the assault, but of the assault with intent to murder, as charged in this indictment), it is incumbent upon the state to satisfy you from all the evidence in the case, beyond a reasonable doubt, that, although the assault may have been committed (if you find so upon the evidence), still it was also done by the prisoner with the specific felonious intent to murder his said wife. Such intent to murder is absolutely material, and essential to be proven in this case before you can find him guilty of the said assault with intent to murder.

An assault is an unlawful attempt, by violence, to do injury to the person of another; the person making the attempt having the present ability to commit such injury.

As, in addition to the assault, the intent to murder is also charged in this indictment, it therefore is necessary for us to define to you what murder, within the meaning of the law, is. For you must be satisfied from the evidence, beyond a reasonable doubt, that the prisoner's alleged act, if his wife's death had actually been caused thereby, would be murder of the first or second degree, and nothing less, before you can render a verdict of guilty of the intent to murder. To constitute

¶ 2. See Homicide, vol. 26, Cent. Dig. § 112.

the statutory offense of assault with intent to commit murder, the circumstances must be such as to show that it would have been murder if the assailant had accomplished such intent. Murder is where a person of sound memory and discretion unlawfully kills any reasonable creature in being, under the peace of the state, with malice aforethought, either express or implied. The chief characteristic of this crime, distinguishing it from every other kind of homicide, and therefore indispensably necessary to be proved, is malice prepense or aforethought. Under the statute law of this state, there are two degrees of murder, namely, murder of the first and murder of the second degree. The first is where the crime of murder is committed with express malice aforethought, or in perpetrating or attempting to perpetrate any crime punishable with death; and the second degree is where the crime of murder is committed otherwise, and with malice aforethought implied by law. The express malice which constitutes murder of the first degree is proved by circumstances satisfactorily evidencing a sedate, deliberate purpose and formed design to kill another, such as the deliberate selection and use of a deadly weapon, the preparation and use of poison, and the like. Implied or constructive malice is an inference or conclusion of law from the facts found by the jury. Therefore murder of the second degree may be proved where it is not satisfactorily shown by the evidence submitted to the jury that the killing was done with a sedate, deliberate purpose and formed design to take life, or in perpetrating or attempting to perpetrate any crime punishable with death, but is so shown that it was done suddenly, without justification or excuse, and without any provocation, or without provocation sufficient to reduce the homicide to the grade of manslaughter.

Malice is implied by law from every deliberate, cruel act committed by one person against another, no matter how sudden such act may be. For the law considers that he who does a cruel act voluntarily does it maliciously. And whenever the act from which death ensues is proven by the prosecution, unaccompanied by circumstances of justification, excuse, or mitigation, the law presumes that the homicide was committed with malice; and it is therefore incumbent upon the prisoner to show by evidence that the killing was not malicious, and therefore does not amount to murder.

Having explained to you what an assault is, and having also stated to you that, in addition to the proof of the assault, if they have proven it to you, the prosecution must show the specific intent to murder the person named in the indictment—that is, to kill her with either express or implied malice aforethought—it becomes necessary for us further to state to you how such intent to murder may be shown to your satisfaction. The intent to commit murder may be shown

by direct evidence of the intent—that is, by the express confession or declaration of the accused that he committed the alleged assault with intent to murder; or, if there be no such direct evidence, the intent to commit murder may be proved by the acts or the conduct of the accused, and other circumstances, from which the jury may naturally and reasonably infer the intent charged. For instance, it is a principle of law that every man must be presumed to intend the natural and probable consequences of his own voluntary or willful act. So that, from the use of a deadly weapon against another, the jury may infer the intent to commit murder, unless the circumstances in the case satisfy you to the contrary. As to the question of intent to murder, as charged in this indictment, it is for you to say from the evidence before you whether there is such evidence, taken in connection with all the facts in the case, as will warrant you in inferring that the accused assaulted his wife, Marie G. Di Guglielmo, the prosecuting witness, with intent to murder her; such intent, as we have said, being provable by and inferable from the voluntary, unlawful use, in a manner or under circumstances perilous to human life, or directly tending to great bodily harm, of a loaded pistol, sword, ax, heavy bar of iron, butcher knife, or other weapon which the law considers a deadly weapon, or of any other instrument or missile reasonably likely to take human life when so used.

It is a maxim of law in favor of every accused person that he is presumed to be innocent until the prosecution has shown him to be guilty beyond a reasonable doubt. It is also an established rule of law that every person of the age of 14 years and upwards is presumed to be mentally capable of committing crime until the contrary is proven; and the burden is upon the accused, after he has reached the age of 14 years, to prove that he is not mentally capable of committing the crime charged. In this case the prisoner has sought to show that he was incapable of committing the crime charged, because he was, as he contends, so intoxicated at the time of its alleged commission that he was by reason thereof mentally incapable of forming or entertaining the specific felonious intent to murder, as alleged in this indictment. The law regarding this ground of defense was declared by this court at the November term, 1902, in *State v. Michael Kavanaugh* (not yet officially reported) 53 Atl. 835. Larceny was the offense charged in that case, but we consider that the law therein announced is also applicable to the crime of assault with intent to murder, as charged in the present indictment. *Roberts v. People*, 19 Mich. 401, 416. The doctrine as stated by this court in *State v. Kavanaugh* is as follows: "The law is well settled, as a general rule, that one who voluntarily intoxicates himself and beclouds his reason cannot set up such condition in

excuse or mitigation of a crime committed while in that condition. The effects of drunkenness upon the mind and upon men's actions when under the full influence of liquor are facts known to every one, and it is as much the duty of men to abstain from placing themselves in a condition from which such danger to others is to be apprehended as it is to abstain from firing into a crowd, or doing any other act likely to be attended with dangerous or fatal consequences. There would rarely be a conviction for homicide, for instance, if drunkenness avoided responsibility. Few violent crimes would probably be attempted without resorting to liquor both as a stimulant and as a shield, and the very fact, therefore, which shows peculiar malignant deliberation, would be interposed as an excuse. But although voluntary intoxication constitutes neither excuse for nor palliation of crime, yet in cases in which a specific or particular intent or purpose is an essential or constituent element of the offense, as in the case of larceny, intoxication, even though voluntary, becomes a matter for consideration, and is competent evidence on the question whether by reason thereof the defendant was incapable of forming or entertaining such an intent or purpose at the time the act was perpetrated. When the nature and commission of the crime are made by law to depend upon the peculiar state and condition of the mind at the time, and with reference to the act done, drunkenness, as a matter of fact, affecting such state or condition of the mind, is a proper subject for the consideration of the jury. If the mental status required by law to constitute crime be one of deliberation or premeditation, and drunkenness excludes the existence of such mental state, then the particular crime charged is not excused by drunkenness, but has not, in fact, been committed. To regard the fact of voluntary intoxication as meriting consideration in such a case is not to hold that drunkenness will excuse crime, but to inquire whether the very crime which the law defines has been, in point of fact, committed. It is manifest that great caution is necessary in the application of this doctrine, and those whose province it is to decide in such cases should be satisfied from all the facts and circumstances before them that the unlawful act was committed by the accused when, by reason of intoxication, his mental condition was such that he did not know that he was committing the crime, and also that no design to do the wrong existed on his part before he became thus incapable of knowing what he was doing. There is great danger that undue weight will be attached to the fact of drunkenness. Where it is shown in

a criminal case, courts and juries should see that it is used only for the purposes stated, and not as a cloak or justification for crime, and that it is not feigned or pretended, nor actually incurred for the purpose of the commission of the particular offense. Whether the accused was so drunk at the time of committing the act as to be incapable of forming or entertaining the design or intent in question is always a conclusion to be drawn by the jury from all the evidence before it. And the mere fact of intoxication, no matter how complete or overpowering, is not conclusive evidence of the absence of capacity to form an intent to commit crime. Evidence of intoxication should always be received with great caution, and carefully examined in connection with the other proven circumstances. A person who is intoxicated may nevertheless be capable of deliberation and premeditation, and a drunken man who commits a wrongful act willfully and premeditatedly is as guilty, in the eyes of the law, as if he had been sober. If a person resolves to commit a crime, and then drinks to intoxication and commits the act, the fact of intoxication cannot lessen the degree of the offense, because he specifically intended to commit it. When the specific intent, as in this case before you, is a necessary ingredient of the crime, so long as the defendant is capable of conceiving and entertaining the design, he must be presumed, in the absence of proof to the contrary, to have intended the natural and probable consequences of his act."

So far as we remember the prayers, it only remains for us to say to you, gentlemen, that the state must prove to your satisfaction, beyond a reasonable doubt, the offense charged in this indictment—either the assault with intent to murder, or the simple assault—before you can find a verdict of guilty of either. A reasonable doubt is not a mere imaginary, whimsical, or even possible doubt of the guilt of the accused, but is such a real and substantial doubt as intelligent and impartial men may reasonably entertain upon a careful consideration of all the facts proven in the case.

We repeat, if you should be unable to find that the prisoner is guilty of the entire crime charged (that is, of the assault with intent to murder), under the law as we have stated it to you, then you may find him guilty of the assault, merely.

With these remarks, we leave the matter in your hands, to render such verdict as you deem proper under the law and the evidence in the case.

Verdict, "Guilty."

(65 N. J. E. 325)

GODFREY v. ROBERTS et al.

(Court of Chancery of New Jersey. June 29, 1903.)

WILLS—DEVISES IN TRUST—TERMINATION OF TRUST—RIGHT OF DEVISEE.

1. Where a testator devises his estate in trust, directing the payment of the interest to his daughter for life, and on her death the division of the fund equally among the daughter's children who shall then be living, the assignee of the daughter and her children cannot require the distribution of the fund during the daughter's life on the ground that any new beneficiaries may hold the parties who have received the fund and compel restitution.

Bill by Burrows Godfrey against George M. Roberts and others. Heard on demurrer to the bill. Demurrer sustained.

J. J. Crandall, for complainant. L. Newcomb, for demurrants.

STEVENSON, V. C. The complainant, in defending his bill against the criticism of the demurrants, reads from it the following case: George Roberts, by his last will, gives his entire estate, real and personal—\$10,000 of realty and \$4,000 of personalty—to his widow for life, and at her death \$4,000 of it to his son, the defendant George M. Roberts, who also is appointed executor, in trust to invest the same in safe securities, and pay the interest to the testator's daughter, Esther E. Gill, semiannually, during her life, and on her death to divide the fund equally among her (Esther's) children who shall then be living. All the residue of the estate goes to the son, George M. Roberts, absolutely. The widow died about 10 years ago. The daughter, Esther, and her three children, about a year before the filing of the bill, applied to the trustee of the fund, claiming the right to elect to take the fund and discharge the trustee. At first the trustee agreed to grant this request, but later refused, alleging that he was advised by counsel that it would not be legal for him to pay over the fund, and that, therefore, he would retain it, and execute the trust. Subsequently the daughter, Esther, and her three children assigned their interest in the fund to the complainant. There is no allegation that the fund is not invested according to the will, or any charge that the defendant, the trustee, has refused to give the beneficiaries all information to which they are entitled. The bill prays that the fund may be paid over to the complainant as assignee of Esther M. Gill and her three children, and that the complainant may have other relief connected with such payment.

The sole ground on which the bill is sought to be sustained is that the complainant, as assignee of Esther E. Gill and her three children, is entitled to take the fund. No other relief disconnected from that demand and claim has been pointed out in the argument as based upon any of the allegations of the bill. The defendants' demurrers specify,

among other grounds, that the bill shows that it is uncertain who the final takers of the fund may be; that the testator's daughter, Esther E. Gill, may outlive all her children, or other children may be born to her, who will be entitled to shares, or even to the whole of the fund; that, therefore, the trustee must hold the fund until at the death of Esther the final beneficiaries shall be ascertained. The complainant endeavors to meet this objection to the bill by urging that any new beneficiaries may hold the parties who have received the fund as trustee, and compel restitution; that, in the language of complainant's brief, "equity will not continue the trust to exhaust every conceivable expectancy." This view is manifestly unsound. The testator established the trust in order to insure the final distribution of the fund in accordance with his directions. The complainant, as assignee of Esther and her three children, now living, has no right at present to the fund, and may never have any right to any part of it. The trustee was properly advised that it is his duty to hold the fund in trust until the death of the daughter, Esther.

The demurrers will be sustained.

(4 Pen. 156)

CRAIG v. BURRIS.

(Superior Court of Delaware. New Castle. Dec. 10, 1902.)

SLANDER—PRIVILEGE—STATEMENT BY ATTORNEY—EVIDENCE.

1. In an action for slander in stating that plaintiff had committed a certain offense and would have to settle or "go up the road," it was proper to exclude a question as to what people in and about the vicinity understood by the phrase "go up the road."

2. Pleadings in a case are not admissible as evidence therein.

3. In an action for slander it appeared that defendant was a practicing attorney; that the words were spoken after plaintiff was arrested and brought before a justice on complaint of a third person charging him with obtaining money by false pretenses, but outside of the office of the justice, near the front thereof, and before plaintiff had been taken before the justice to answer the charge, defendant, plaintiff, and others being present, and defendant representing the prosecuting witness. The words spoken were that "you collected money by false pretenses from H., and it has got to be settled here and now, or you go up the road," etc. *Held*, that defendant had not exceeded his privilege.

Action for slander by William Craig against Martin B. Burris. Verdict directed for defendant.

The defendant was a practicing attorney, being a member of the New Castle county bar. At the trial it was proved that the alleged slanderous words were uttered after the plaintiff was arrested and brought to the office of a justice of the peace upon a warrant issued by said justice, upon complaint of one Benjamin F. Ginn, charging the plaintiff

¶ 2 See Evidence, vol. 20, Cent. Dig. § 712.

with obtaining money by false pretense; but outside of the office of the justice, near the front thereof, and before he had been taken before said justice to answer said charge, the defendant (Burris) and the plaintiff (Craig) and others being present. It was also proved that the defendant was present upon the occasion in question, representing one Benjamin F. Ginn, the prosecuting witness in the prosecution based upon the said warrant. Ginn claimed that Craig owed him a certain sum of money. The plaintiff, who was there without counsel, admitted that he owed Ginn, but denied that he obtained the money by false pretense from Geo. M. D. Hart, as stated in the warrant, claiming that the only money he obtained from Hart was for his one-third share of the grain, as tenant of Ginn's farm. The plaintiff's evidence on the last-named point was corroborated by the testimony of James A. Hart.

The statements made by the defendant to the plaintiff upon that occasion, as detailed by the different witnesses in the slander case, were as follows: "You collected this money" or "got this money, by false pretense." "You collected money by false pretense from Mr. George M. D. Hart." "You collected money by false pretense from Mr. George M. D. Hart, and it has to be settled here and now, or you go up the road." "Mr. Craig asked for a few days longer, that he might have his accounts straightened up, so he could settle. Mr. Burris said, 'No, sir; here and now this must be settled. You have committed a very grave offense against the state law. I could give you a great deal of trouble, but I don't want to hurt you.'"

Argued before LORE, C. J., and SPRUANCE, J.

Franklin Brockson, for plaintiff. Robert H. Richards and William S. Hilles, for defendant.

The plaintiff was asked by his counsel what the people in and about Townsend understood the phrase "go up the road" to mean when used in connection with a person brought before a justice of the peace. (Objected to by counsel for defendant, on the ground that it is not sufficient to prove a local meaning attached to words, but it must be a meaning generally accepted.)

LORE, C. J. We think this question inadmissible.

Plaintiff's counsel offered in evidence copy of all the defendant's pleas in the case, alleging the truth of the matter charged to have been spoken, as an admission that they were spoken. (Objected to by counsel for defendant, on the ground that it had been decided by the court, frequently, that pleadings in a case are not evidence therein, and are not proper to go before the jury.)

LORE, C. J. The pleadings are not evidence.

The defendant asked the court to grant a nonsuit on the ground that upon the evidence in the case the alleged slanderous words were proved to have been spoken under such circumstances as to make them privileged, and therefore they could not be the basis for an action for slander.

LORE, C. J. The motion for a nonsuit has been argued very fully, and, after giving the matter such careful and thoughtful consideration as the court have been able to do in the time at our command, we have reached a conclusion.

From the undisputed evidence on the part of the plaintiff, it appears that there was some legal proceeding. It is shown that there was a criminal action then in progress, and that the alleged libelous utterance took place at or near the office of the justice of the peace. It is also apparent from the evidence that the subject of conversation was in relation to this same matter; that it was pertinent to the charge then before the court, or pending in the case. It further appears that Mr. Burris was there rightfully as an attorney in that proceeding. Taking the utterances which are claimed to be libelous, and giving to them their most extended meaning connected with the circumstances, they do not appear to us as being outside of his privilege as an attorney. The evidence distinctly negatives express malice.

Considering all the evidence for the plaintiff, we feel that if this case were submitted to the jury by the court, and the jury should thereupon render a verdict for the plaintiff, we would be constrained to set such verdict aside. That being the case, it becomes a duty upon the part of the court to stop the case at this stage. We therefore order a judgment of nonsuit to be entered.

Mr. Brockson: If the court please, we decline to take a nonsuit.

LORE, C. J. Gentlemen of the Jury: For the reasons that the court have already stated upon the motion for a nonsuit, we direct you to return a verdict for the defendant.

Exception noted for plaintiff.

Verdict for defendant.

(73 N. H. 180)

LAHEY v. BRODERICK et al.

(Supreme Court of New Hampshire. Hillsborough. June 2, 1903.)

GIFTS—HUSBAND TO WIFE—PRESUMPTION—TAKING TITLE IN WIFE'S NAME—RIGHTS OF PARTIES.

1. Though there is a presumption, where the purchase price of property is paid by a husband and the deed is taken in the name of the wife, that the transaction was intended as a gift, the presumption is not conclusive, and, if rebutted, the law will imply a trust or use in the husband's favor.

2. A husband purchased property, taking title in his wife's name, but without any intention of making a gift of the property to her. After her death and the death of one of their two sons, the son's administrator conveyed a half interest in the property to a third person. *Held* that, the wife having no title as against her husband, the administrator and the third person, both claiming under her, acquired no greater title than she had.

Exceptions from Superior Court.

Bill in equity by Jeremiah Lahey against James A. Broderick, administrator, and others, praying for a decree confirming plaintiff's title to a tract of land on Ferry street in Manchester. Decree for plaintiff, and defendants excepted. Exceptions overruled.

Jeremiah and Mary Lahey were married in 1868. Mary died in 1892, leaving two children surviving her—Joseph and John. Joseph died in 1899, and John in 1901. The plaintiff is Jeremiah, and the defendant Broderick is the administrator of John's estate. At the date of their marriage neither Jeremiah nor Mary had any substantial amount of money. After their marriage Mary worked a few months, and then began housekeeping. Jeremiah worked steadily until his wife's death, and as he received his wages he turned them over to her to keep, and to use for the benefit of the family. Four children were born to them, two of whom died before the mother. About 1884 the children began to earn money, and their wages were turned over to Mary in the same way as Jeremiah's. In 1884 the family savings amounted to \$600, and Jeremiah then made a trade for the land in question with one Eastman, by the terms of which Eastman was to build a house on the land, and upon its completion convey the premises to Jeremiah. Jeremiah paid \$600 when the trade was made and agreed to secure the balance of the purchase price (\$850) by mortgage. After the trade was made, and before the house was completed, Jeremiah went away to work; and when the house was finished he sent his wife to complete the business with Eastman. The conveyance was made to her, and she gave the mortgage to secure the balance of the purchase price. Mary and Jeremiah were unlearned persons, and neither understood the legal effect of the conveyance. Jeremiah did not think he was giving, and did not intend to give, the property to his wife, when he sent her to complete the trade, nor did Mary understand that the house was a gift from her husband, although both knew that the title stood in her name. At the date of Mary's death the mortgage had been paid, and there was a deposit of \$600 in a savings bank in her name. The money on deposit and that used to pay the mortgage was derived from the earnings of Jeremiah and the children, the latter being minors at the time their mother died. John lived at home with his father about a year after his mother's death, and then boarded with Mrs. Gleason, whom he paid regularly

until some time in 1896, when he fell ill. He continued to board with her until a few weeks before he died, and was indebted to her at the time of his death. Broderick, as administrator of John's estate, sold one-half of the premises in question to the defendant McDermott. At the time of the sale, the plaintiff's attorney notified the defendants that John's interest in the estate could not exceed one-third, and that Jeremiah did not waive any rights he might have; but nothing was said as to what his rights were. Some time subsequent to 1896 Mrs. Gleason learned that the title to the premises stood in Mary's name. She thought that her claim against John could be enforced against the property. She knew that Jeremiah received the whole of the income from the property, and never asked him what interest, if any, John had in it; and Jeremiah did not know, and is not in fault for not knowing, that she looked to the property for the payment of her claim against John.

John O'Neill, for plaintiff. James A. Broderick, for defendant administrator.

REMICK, J. Where, upon the purchase of land, the deed is taken in the name of one person while the consideration money is paid by another, such fact may be proved by parol evidence, and, being established, the law implies a trust or use in favor of him who advances the money. *Scoby v. Blanchard*, 3 N. H. 170; *Pritchard v. Brown*, 4 N. H. 397, 17 Am. Dec. 431; *Page v. Page*, 8 N. H. 187; *Gove v. Lawrence*, 26 N. H. 484, 492; *Farrington v. Barr*, 36 N. H. 86; *Moore v. Moore*, 38 N. H. 382, 387, 388; *Hutchins v. Heywood*, 50 N. H. 491; *Ferrin v. Errol*, 59 N. H. 234; *Osgood v. Eaton*, 62 N. H. 512; *Fellows v. Ripley*, 69 N. H. 410, 45 Atl. 138. There was evidence to warrant the superior court in finding that, while the deed in the present case was taken in the name of the wife, the consideration was paid by the husband. But it is contended by the defendant that when the purchase price is paid by a husband, and the deed is taken in the name of his wife, as in the present case, there is a presumption that the transaction was intended as a gift, and that under such circumstances the law will not imply a trust or use. In support of this contention, *Dickinson v. Davis*, 43 N. H. 647, 80 Am. Dec. 202, is cited. That case decides merely that there is a presumption, under such circumstances, that the transaction was intended as a gift. But, as there said, the presumption is only *prima facie*. It may be rebutted by parol evidence showing that it was not the intention to make a gift, and thereupon a trust or use arises as effectually as though the transaction had been between strangers. *Fellows v. Ripley*, 69 N. H. 410, 45 Atl. 138; *Price v. Kane*, 112 Mo. 412, 418, 20 S. W. 609; *McClintock v. Loisseau*, 31 W. Va. 865, 869, 8 S. E. 612, 2 L. R. A. 816; *Blsp. Eq.* (6th Ed.)

135; Beach, Tr. § 160. It is found as a fact in this case that it was not the intention to make a gift; that neither the husband nor the wife so understood. If exceptionable—which does not appear—no exception was taken to the evidence upon which this finding was based; and as the record stands there is no warrant for saying that the evidence did not justify the finding. The facts found warrant the conclusion that the wife took the deed to the use of the plaintiff. The statute of uses executes the use, and vests the legal estate in the plaintiff. *Hutchins v. Heywood*, 50 N. H. 491; *Fellows v. Ripley*, 69 N. H. 410, 45 Atl. 138.

The question of laches, so far as it is one of fact, would seem to be disposed of by the decree, which presupposes a finding against that contention. *Page v. Whidden*, 59 N. H. 507, 511; 12 Enc. Pl. & Pr. 839, 840. Moreover, the defendants are here claiming through the wife. As against the plaintiff she had no title, and the defendants stand no better than she did. *Ferrin v. Errol*, 59 N. H. 234.

Exception overruled. All concurred.

(72 N. H. 186)

BROWN v. ELLSWORTH.

EATON v. SAME.

(Supreme Court of New Hampshire. Grafton. June 2, 1903.)

FOREIGN ATTACHMENTS—PRIORITY—AMENDMENT—NOTICE—LIABILITY OF TRUSTEE.

1. The writ in the first of two actions of foreign attachment against the same defendant was dated December 5, 1901, was served on the trustee December 9th, and was returnable to the May term at F., but was entered at the February term at H., where it was properly returnable, and was then amended by changing the description of residences of the defendant and trustee, and substituting the February for the May term of court as the return term, without notice to the defendant, the trustee, or the plaintiff in the second action. The action was then continued to the May term, with order that notice of its pendency be served on defendant. The writ in the second action was dated December 2, 1901, was served on the trustee December 21st, and was returnable to the February term, at which it was entered, but was then continued to the May term. *Held*, that the amendment in the first action was allowable under Pub. St. 1901, c. 222, §§ 7, 8, authorizing amendments in form when the person or case may be rightly understood and in matters of substance when necessary to prevent gross injustice, and saving the rights of third persons.

2. The amendment did not render the first attachment void as against the plaintiff in the second action, it not appearing that he had changed his position in any manner on account of the error in the first plaintiff's action.

3. The defendant, having notice of the action as amended, could not object to the course taken.

4. The trustee was not prejudiced by the amendment, he not having changed his position before receiving notice.

5. The plaintiff in the second action was not entitled to notice, as he could not appear in the first action without leave of court, which would not ordinarily be granted for matter of form.

Transferred from Superior Court.

Action by James B. Brown against Cyrus Ellsworth, and an action by Franklin Eaton against the same defendant. Facts agreed and case transferred. Case discharged.

The writ in the first action, dated December 5, 1901, was served on the trustee December 9th, and was returnable at the following May term of the superior court, to be holden at Plymouth. It was entered at the February term, 1902, holden at Haverhill. It was then amended by changing the description of the place of residence of the defendant from Boston, Mass., to Providence, R. I., and that of the trustee from Rumney to Wentworth, and by substituting the February for the May term of court as the return term. No notice of the proposed amendments was given to the defendant, the trustee, or the plaintiff in the second action. The action was continued to the May term, with an order of notice of its pendency to the defendant, which was complied with, but the defendant did not appear. An attested copy of the writ as amended was given to the trustee, March 22d. The writ in the second action, dated December 2, 1901, was served on the trustee December 21st, and was returnable at the following February term. It was entered at that term, and continued to the May term, with an order of notice to the defendant. The order was not complied with, but at the May term a paper signed by the defendant was filed, by which he acknowledged "service and notice." The trustee disclosed in each action that he had funds of the defendant in his possession. The question of the chargeability of the trustee was transferred from the superior court.

Eastman & Hollis and Harry J. Brown, for plaintiff Brown. William A. Flanders, for plaintiff Eaton.

CHASE, J. Formerly, Grafton county was divided into three judicial districts, each of which was provided with terms of court, and was treated as a separate county, so far as the prosecution of civil actions was concerned. Pub. St. 1901, c. 21, §§ 12, 13, 18; Laws 1893, p. 10, c. 8, §§ 1, 2. This division was abolished in February, 1901, and four terms of court for the county were established, one to be held at Plymouth on the first Tuesday of May, one at Haverhill on the second Tuesday of September, one at Lebanon on the third Tuesday of November in each year, and one at Haverhill on the third Tuesday of February, 1902, one at Plymouth on the third Tuesday of February, 1903, and one at Lebanon on the third Tuesday of February, 1904, and one at those places in rotation on the third Tuesday of February in each year thereafter. All civil actions prosecutable in the county are to be returnable at the next term after their commencement for which service can be

made, and continuances of actions are to be to the next term in the county, wherever held. Laws 1901, pp. 515, 516, c. 24, §§ 1-3, 6; *Id.*, p. 565, c. 78, § 15. The actions now before the court were begun in the December following the passage of these acts. Brown's writ, although returnable to the term mentioned in the old statute, was entered at the term at which it should have been made returnable under the existing law, and was then amended so as to conform to such entry, and in other less important particulars.

Courts are authorized to order amendments of writs and other process in matters of form when the person or case may be rightly understood, and in matters of substance when it appears that amendments are necessary for the prevention of gross injustice, saving the rights of third persons. Pub. St. 1901, c. 222, §§ 7, 8. In a case decided nearly 50 years ago, *Bell, J.*, said: "The general rule seems to be that, when the return day of process is mistakenly or defectively stated, it does not render the process void, but only voidable, liable to be set aside; but the defect may be remedied by amendment." *Kelly v. Gilman*, 29 N. H. 385, 388, 61 Am. Dec. 648. The earlier case of *Wood v. Hill*, 5 N. H. 229, to the contrary, was treated as one in which the writ was a *capias*, and for that reason as an exception to the general rule, to avoid the danger of a long imprisonment of the defendant. The case at bar does not fall within the exception, if one now exists. The power and inclination of courts to allow amendments have not become less since 1854, when *Kelly v. Gilman* was decided. Among the more recent decisions on the point, it has been held that actions which are local in their nature, and are made returnable to and are entered at a term of court in a wrong county, may be transferred from that term to the term held in the county in which they should have been brought, and that if the error is jurisdictional there is jurisdictional power to cure it. *Bartlett v. Lee*, 60 N. H. 168; *Lord v. Walker*, 61 N. H. 261; *Wheeler & Wilson Mfg. Co. v. Whitcomb*, 62 N. H. 411; *Hayes v. Rochester*, 64 N. H. 41, 6 Atl. 274; *Tucker v. Lake*, 67 N. H. 193, 29 Atl. 406. Power, jurisdictional and other, that is sufficient for entertaining an action in a wrong county and transferring it to the right county, must be adequate for doing what was done in Brown's action. Whether justice required it to be done, was a question of fact that cannot be reviewed in this court.

Did the amendments render Brown's attachment of the defendant's money, etc., in the hands of the trustee, void as against Eaton? The statute provides that the rights of third persons shall not be affected by amendments. Pub. St. 1901, c. 222, § 8. It therefore becomes material to inquire what Eaton's rights were. He had a lien upon the defendant's property rights in the pos-

session of the trustee, subject to the prior lien created by Brown's attachment. As against Eaton, the extent of Brown's lien was limited by the amount he was entitled to recover upon the demand for the recovery of which his action was brought. If the declaration in his writ was not sufficient in form or substance to include such demand, or if the writ itself was defective in some amendable particular, he might amend without prejudicing his rights. Eaton's lien was subject to the right of Brown to have all amendments of such nature made that justice required. But Brown could not enlarge his action by an amendment including other demands, and take judgment upon them, without sacrificing the superiority of his right under his prior attachment. The law would regard such an amendment as a fraud upon the subsequent attaching creditor, and consequently, if made, would treat the attachment in the prior action as void as against such creditor. If an amendment of this nature were made through accident or mistake, but the judgment was taken only upon the demand originally sued, the prior attachment would not be affected by the amendment. *Laighton v. Lord*, 29 N. H. 237; *Clough v. Monroe*, 34 N. H. 381; *Page v. Jewett*, 46 N. H. 441. Accordingly it was held, in *Garvin v. Legery*, 61 N. H. 153, that the rights of subsequent attaching creditors would not be infringed by an indorsement of the first writ by leave of the court after entry of the action and a motion by such creditors to dismiss the action or quash the writ for want of an indorser. The court say: "In this case the amendment, if granted, will not prevent the defendant or subsequent attaching creditors from making the same defense upon the merits which they could have made if the writ had been indorsed before service, nor will the plaintiffs be relieved from proving the same facts which they would have been required to prove if their writ had been seasonably indorsed." These remarks, when changed to conform to the facts of the case at bar, are equally true of the amendments therein made. The demand for the recovery of which the action was begun was not enlarged or in any way changed by the amendments. The amendments had no greater or different effect upon the results of Eaton's action than would have been the case if Brown's action had been returnable to the February term and the amendments had cured defects in the declaration, which, but for the amendments, would have prevented a recovery upon the cause of action in contemplation when the writ was brought. The question much resembles that relating to the effect of an amendment upon the liability of a receptor. *Laighton v. Lord*, *supra*; *Page v. Jewett*, *supra*. It has been held that a receptor is not discharged by the neglect to enter the action in which the receipt was given on the return day, and by

its subsequent entry with the consent of the defendant and leave of the court. *Stevens v. Bailey*, 58 N. H. 564.

It does not appear that Eaton changed his position in any respect in consequence of the error in Brown's action. The fact that Eaton's action was begun first, tends very strongly to negative all ground for an estoppel. The defendant cannot object to the course taken. He was a nonresident, and no service was made upon him before entry. The action was continued from the February term with an order of notice returnable to the May term, which was complied with. The order undoubtedly related to the action as amended, so that the defendant was fully informed of the situation, and had an opportunity to protect his rights. If he had had notice of the action as originally brought, and no notice of the amendments, the case would present a different aspect. The trustee was not prejudiced by the amendments. He had notice of them before he had changed his position in any respect. Eaton was not entitled to notice. He could not appear in Brown's action without leave of the court, and leave would not ordinarily be granted to enable him to abate the action for defective form, or for other cause of a dilatory nature. Justice might require that he should be allowed to appear and defend the action upon its merits, and thereby prevent a wrongful diversion of the funds from him; but it would not require that the action should be dismissed for the sole purpose of giving his attachment priority. *Martin v. Wigglin*, 67 N. H. 196, 29 Atl. 450. The trustee should be charged for the funds in his hands in the order of the attachments.

Case discharged. All concurred.

(72 N. H. 216)

ELA et al. v. ELA.

(Supreme Court of New Hampshire. Merrimack. April 7, 1903.)

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION OF TRIAL COURT—PRESUMPTIONS—SCOPE OF NEW TRIAL.

1. Under Pub. St. 1901, c. 230, § 1, providing for the granting of a new trial when through accident or misfortune justice has not been done, and a further hearing would be equitable, it will be presumed, in the absence of evidence to the contrary, on appeal from a judgment granting a new trial for newly discovered evidence, that any departure from the strict rules of evidence in the production and identification of papers on the hearing of the motion was permitted in the exercise of a sound discretion.

2. On appeal from a judgment granting a new trial for newly discovered evidence, it will be presumed, in the absence of anything in the record to the contrary, that it satisfactorily appeared to the court that the petitioner would be able to make entries in books of account, relied on as evidence, available, or otherwise establish by competent testimony the facts indicated by them.

3. Where it appeared from the record, on petition for a new trial, that there was no evi-

dence that a further hearing would be equitable, except upon certain issues, the new trial should be limited to such issues.

Transferred from Superior Court; Peaslee, Judge.

James H. Ela and Jacob Ela filed claims against the estate of George W. Ela, which claims were allowed, and Robert L. Ela, administrator of the estate of George Ela, petitioned for a new trial. There was a judgment granting a new trial and denying a motion to limit the scope thereof to designated issues, and claimants except. Exceptions sustained in part and overruled in part, and case discharged.

The cases are reported in 70 N. H. 163, 47 Atl. 414.

The defendant alleged that he had in his possession newly discovered evidence tending to prove (1) that there was a statute of Alabama under which the plaintiffs were not entitled to any part of the rents; (2) that the rents paid were in fact less than found by the court at the former trial; (3) that the claim which was the subject of suit in the second case had been released. The petitions were granted, subject to exception. The plaintiffs moved that in the first case the new trial be limited to the question of damages, and in the second case to the question of damages and release. The motions were denied, and the plaintiffs excepted.

Sargent, Niles & Morrill, for plaintiffs. Mitchell & Foster and Martin & Howe, for defendant.

REMICK, J. "A new trial may be granted in any case, when through accident, mistake, or misfortune justice has not been done and a further hearing would be equitable." Pub. St. 1901, c. 230, § 1. "The question whether a new trial should be granted on the ground that, by reason of newly discovered evidence, a further hearing would be equitable, is a question of fact to be decided at the trial term." *Brooks v. Howard*, 58 N. H. 91; *Davis v. Dyer*, 62 N. H. 231; *State v. Stone*, 65 N. H. 124, 126, 18 Atl. 654; *Gray v. Bridge*, 11 Pick. 189; *Greene v. Farlow*, 138 Mass. 146. The superior court has found that "newly discovered evidence makes a different result at a future trial probable, and it is equitable that a further hearing be had." Upon the record presented, it cannot be said that there was no competent evidence to support the findings of the superior court. *Cox v. Leviston*, 66 N. H. 167, 20 Atl. 246.

It is urged that the books and release, which appear to have been the sole reliance of the court in granting the new trial, were not properly brought to its attention. It is not necessary that the evidence in support of a motion for a new trial should be produced with all the formality required at the new trial. Thus, affidavits are allowable in support of a motion for a new trial, while at such new trial they would be entirely in-

¶ 3. See Appeal and Error, vol. 3, Cent. Dig. § 4614; New Trial, vol. 37, Cent. Dig. § 12.

admissible. Upon a motion for a new trial upon the ground of newly discovered evidence, it is undoubtedly the rule to require the newly discovered evidence, if a proposed witness, to be shown by the affidavit of the witness himself as well as by the affidavit of the party or his counsel, and if a writing, to require the production of the writing; yet, notwithstanding this general rule, the court may order a new trial without such affidavit or writing, if not then obtainable, and if it satisfactorily appears from the showing made that justice so requires. The language and spirit of the statute, and the discretionary character of the right, forbid a hard and fast rule upon the subject. Pub. St. 1901, c. 230, § 1; Hill. New Tr. 835; Broadhead v. Marshall, 2 W. Bl. 956; White v. Trinity Church, 5 Conn. 187; Barrett v. Railroad, 45 N. Y. 628; Fisher v. People, 103 Ill. 101; Smith v. Cushing, 18 Wis. 310; Read v. Staton, 3 Hayw. 159, 9 Am. Dec. 740; Sorrel v. St. Julien, 4 Mart. (O. S.) 509, 512; Case v. Coddling, 38 Cal. 191, 194. In the present case, the books and release were produced at the hearing and identified. Whether they were produced and identified according to the strict rules of evidence, it is unnecessary to consider; for we must presume, in the absence of evidence to the contrary, that any departure from such rules was permitted in the exercise of a sound discretion, in view of the circumstances of the case, as presented by all the evidence.

Finally, it is insisted that the books cannot be made available at the trial, and therefore should not have been considered in support of the motion. If the conditions suggested by the defendants are all necessary to make the entries in question competent, it does not appear that those conditions will not be met. In the absence of anything in the record to the contrary, it must be presumed that it satisfactorily appeared to the court, upon all the evidence, that the defendant would be able to make the entries available, or otherwise establish by competent testimony the facts indicated by them. Of course, all evidence offered at the new trial, whether old or new, must be admitted or excluded according to the rules of evidence. If the entries in question are admitted or excluded at the new trial, and exception is taken, it will then be in order to consider the arguments advanced by the plaintiffs as to their competency. Gray v. Bridge, 11 Pick. 189.

By refusing the plaintiffs' motion to restrict the new trial, the superior court has found that equity requires a further hearing of the whole case. Upon the record presented, we are no more at liberty to revise the action of the superior court in this respect than upon the main question.

Exceptions overruled. All concurred.

(June 30, 1903.)

After the filing of the foregoing opinion on April 7, 1903, the plaintiffs moved for a re-

hearing, and obtained an amendment to the reserved case, to the effect that upon the first ground alleged there was no evidence which could not have been discovered before the former trial by the exercise of reasonable diligence.

REMICK, J. By the record as amended since the motion for rehearing, it clearly appears that there was no evidence that a further rehearing would be equitable, except upon the issue as to rent in the case of James Ela, and the issues as to rent and release in the case of Jacob Ela. It follows that the new trial should be limited accordingly. Lisbon v. Lyman, 49 N. H. 553, 582; Cox v. Leviston, 66 N. H. 167, 20 Atl. 246.

The exception to the denial of the plaintiffs' motion to limit the scope of the trial is sustained. The other exceptions are overruled.

Case discharged. All concurred.

(72 N. H. 206)

STONE v. BOSTON & M. R. R.

(Supreme Court of New Hampshire. Belknap.
June 30, 1903.)

RAILROADS — CROSSING INJURIES — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY — ADMISSIBILITY — TIME OF ACCIDENT — SPEED OF TRAIN — DUE CARE — DECLARATIONS OF DECEASED — OPINION EVIDENCE — SCOPE OF OBJECTION.

1. In an action against a railroad for negligent death at a crossing, testimony of deceased's widow that "times had been hard" was not so prejudicial as to require a new trial, especially in view of the fact that the court immediately instructed the jury not to heed such testimony.

2. In an action against a railroad for negligent death at a crossing, testimony of deceased's widow that in passing the crossing on previous occasions deceased had remarked upon its dangerous character, and taken precautions against collision, was competent on the issue of due care.

3. In an action against a railroad for negligent death at a crossing, an objection to testimony of a passenger on the train colliding with deceased that its speed "might have been 60 miles an hour," on the ground that witness was not qualified to give an opinion, goes merely to the weight and credibility of such testimony, and presents no question of law.

4. In an action against a railroad for negligent death at a crossing the watch in deceased's pocket, which was stopped, was competent, with other testimony, on the issues of darkness and whether the train which collided with deceased was running on schedule time.

5. In an action against a railroad for negligent death at a crossing, the testimony of passengers, who were not observing, that they did not hear the crossing whistle, was properly admitted.

6. In an action against a railroad for negligent death at a crossing, evidence as to the speed of the same train on other occasions before and since the accident, and as to observations on the strength of the reflection from the locomotive headlight a few days before the trial, was admissible.

7. In an action against a railroad for negligent death at a crossing, evidence that defendant did not give the 80-rod whistle required by

¶ 6. See Railroads, vol. 41, Cent. Dig. § 1127.

statute, and an admission by defendant that no warning whistle was given when deceased was discovered about 2 rods from the crossing apparently paying no attention to the approach of the train, was sufficient to justify a finding that death was caused by defendant's negligence.

8. In an action against a railroad for negligent death at a crossing, evidence examined, and held insufficient to show contributory negligence in law.

Exceptions from Superior Court.

Action by Edwin Stone, administrator of Fred Stone, deceased, against the Boston & Maine Railroad for injuries at a railroad crossing. Verdict for plaintiff, and defendant excepts. Transferred from the superior court. Affirmed.

The railroad curves toward the east as it approaches Winnisquam crossing from the north at a descending grade. From a point about 200 feet north of the crossing to a point about 750 feet north of it there is a bank on the easterly side of the track, which varies in height above the rails from $3\frac{1}{4}$ feet at the former point to 25 feet at the latter. The highway approaches the railroad from the east at a descending grade. A person standing in the middle of the traveled part of the highway 25 feet east of the easterly rail can see a locomotive at a point 500 feet north of the crossing. From a point in the highway 12 feet east of the easterly rail, a locomotive is visible when 579 feet north of the crossing. The accident occurred about an hour after sunset. The sky was somewhat cloudy. The ground was frozen. The train which struck Stone was the south-bound Montreal express, known as "No. 184," and at the time of the accident was running a few minutes behind its schedule. The plaintiff's evidence tended to prove the following facts: Stone was 34 years old, in good health, and possessed all his faculties. For three weeks immediately preceding his death he had been employed as a farm laborer by Martha Bowers, of Sanbornston, for whom he had worked on a former occasion. He frequently drove to Laconia, and on each trip passed over the Winnisquam crossing. At the time of the accident he was driving a safe horse attached to a hayrack containing an empty barrel and a tin washbowl. As he drove upon the crossing from the east, he was struck by the locomotive, and received injuries which caused his death. A witness for the plaintiff testified that he was listening for the whistle, and that it was not sounded. The defendants' evidence tended to prove the following facts: A traveling engineer of the defendants, who occupied the fireman's seat in the cab of the locomotive, first observed Stone when the team was about two rods from the crossing, and the train was about 300 feet from it. Stone was apparently looking straight ahead, and did not turn or seem to pay any attention to the train. The horse was trotting at a

rate of about five miles an hour. In response to the question whether Stone could have then stopped and avoided the collision, the witness replied that he did not know. It was admitted that no danger signal was given after Stone was first observed from the locomotive. The defendants' evidence also tended to prove that the crossing whistle was regularly sounded, that the headlight was burning, that the speed of the train was about 40 miles an hour, and that all means were employed to stop the train after Stone was observed in dangerous proximity to the track. The widow of the decedent was asked on direct examination if "there had been hard times in Laconia." An exception was claimed, but before it could be fully stated the witness answered in the affirmative. The court thereupon excluded the question, and said to the jury: "It will make no difference to you whether the times are easy or otherwise." Subject to the defendant's exception, the decedent's widow was permitted to testify that she rode over the Winnisquam crossing with her husband in the autumn of 1901; that he then drove slowly, listened, and said that the crossing was dangerous; and that he made the same remark at the same place at other times. Martha Bowers was permitted to give similar testimony in corroboration, subject to exception. Subject to exception on the ground that the witness was not qualified to give an opinion, George Plummer, who was a passenger on the day of the accident, and had traveled by the same train five or six times in three years, testified that the speed of the train "might have been sixty miles an hour." Subject to exception, a watch alleged to have been carried by the decedent at the time of the accident, was produced and shown to the jury for the purpose of showing the time at which it stopped. Three witnesses, who were passengers on the train, and who were not listening, testified that they did not hear a crossing whistle, subject to exception. Subject to the defendants' exception, Daniels, a witness called by the plaintiff, testified that many times before and since the death of Stone he had timed the speed of train No. 184 between stations a few miles south of Winnisquam crossing, and that a distance of three miles was frequently covered in $3\frac{1}{4}$ or $3\frac{1}{2}$ minutes. One witness testified, subject to exception, that a few days before the trial he made observations as to the speed of train No. 184, and computed it to be $50\frac{1}{2}$ miles an hour. Another witness testified, subject to exception, that a few days before the trial he made observations of the reflections from the headlight of a train supposed to be No. 184, and that the light was not thrown upon the highway at a point 30 feet distant from the crossing, nor upon any objects visible from that point. The defendants seasonably moved for a nonsuit, and that a verdict be directed in their

favor. Both motions were denied, and they excepted.

Shannon & Young and Beckford & Hibbard, for plaintiff. Jewett & Plummer and Streeter & Hollis, for defendant.

REMICK, J. 1. The question and answer regarding the condition of the "times" in Laconia were not "so inconsistent with legal fairness of trial as to make it a matter of law that there should be a new trial," especially in view of the immediate action of the court excluding the evidence and instructing the jury not to heed it. *Aldrich v. Railroad*, 67 N. H. 380, 382, 36 Atl. 252; *Gilman v. Laconia*, 71 N. H. 212, 51 Atl. 631.

2. Bearing upon the probability whether the decedent exercised care at the crossing upon the occasion in question, it was competent to show by the decedent's widow and Martha Bowers that in passing over the crossing upon previous occasions he had remarked upon its dangerous character, and taken precautions against collision. *Evans v. Railroad*, 66 N. H. 194, 21 Atl. 105; *Lyman v. Railroad*, 66 N. H. 200, 203, 204, 20 Atl. 976, 11 L. R. A. 364.

3. The objections to the testimony of George Plummer go entirely to its weight and credibility, and present no question of law.

4. Upon the questions of darkness, and whether the train was running on schedule time, the watch which was in the decedent's pocket when the collision occurred, and which was stopped, had some probative value, and was competent, in connection with the other testimony, upon those points.

5. The testimony of passengers who were not observing, that they did not hear the whistle, was open to no legal objection.

6. The observations of Daniels and others as to the speed of the train in question at other times and points presents no question of law, and the same is true of the testimony regarding the reflection of the locomotive headlight. *Parkinson v. Railroad*, 61 N. H. 416; *Proctor v. Freezer Co.*, 70 N. H. 8, 45 Atl. 713; *Whitcher v. Railroad*, 70 N. H. 242, 248, 46 Atl. 740.

7. The motions for nonsuit and verdict were properly denied. There was evidence that the defendants did not give the 80-rod whistle required by statute for the protection of travelers at railroad crossings, and it was admitted that no warning whistle was given by the defendants when they discovered the decedent about 2 rods from the crossing, approaching the crossing, and apparently paying no attention to the approach of the train. Upon the case presented by the record, we think reasonable men might find that the decedent's injury was caused by the defendants' negligence.

But it is urged that the decedent was guilty of contributory negligence. In view

of the evidence of the decedent's frequent recognition of the dangerous character of the crossing, and of his previous care in passing over it; that on the occasion in question he was traveling in a hayrack containing an empty barrel and tin washboller, over frozen ground, upon a night more or less dark; that the statutory whistle was not given; that the schedule time for the crossing of the train had passed; that the track was obscured by the lay of the land in the vicinity of the crossing so that the decedent could not see the train 300 feet away until he was within about 2 rods of the crossing; that his horse, attached to the rigging mentioned, was trotting at the rate of about five miles an hour when the two-rod point was reached—we think it cannot be said as matter of law that the decedent was guilty of contributory negligence, upon the mere evidence of the traveling engineer (the weight and credibility of which might be materially affected in the minds of the jury by the other evidence and circumstances bearing upon its probability), that he saw the decedent about 2 rods from the crossing, when the train was about 300 feet away, looking straight ahead, and apparently paying no attention to the approaching train, especially in view of the statement of the witness that he did not know whether the decedent would then have had time to stop and avoid the injury. The case is distinguishable from *Waldron v. Railroad*, 71 N. H. 362, 52 Atl. 443, and is more like *Smith v. Railroad*, 70 N. H. 53, 47 Atl. 290, 85 Am. St. Rep. 596; *Davis v. Railroad*, 68 N. H. 247, 248, 44 Atl. 388; *Folsom v. Railroad*, 68 N. H. 454, 38 Atl. 209; *Evans v. Railroad*, 66 N. H. 194, 21 Atl. 105; *Lyman v. Railroad*, 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364; and *State v. Railroad*, 52 N. H. 528.

Exceptions overruled. All concurred.

(73 N. H. 211)
HORNE et al. v. HUTCHINS et al.

(Supreme Court of New Hampshire. Carroll.
April 7, 1903.)

DEED—CONSTRUCTION—WATER RIGHTS CONVEYED—ESTOPPEL.

1. A deed conveyed a tract of land, with the grist and saw mill standing thereon, together with "the right to use the water power and mill privilege on said premises," etc. This was construed as conveying to the grantee and his assigns a right to the use of a reservoir situated a short distance above the mill property, and formed by the construction of a dam at the outlet of a lake. It was proposed to deepen the river and increase the capacity of the ponds forming the reservoir, but at the time the deed was executed the grantor did not own the necessary drainage rights, though it subsequently acquired them and made the improvement. *Held*, that the deed only conveyed rights in the reservoir as then existing, and could not be extended by implication so as to convey rights in it as improved.

2. The deed not having affirmed a present ownership in the drainage rights which the grantor subsequently acquired, and not having agreed to convey such rights, the doctrine of estoppel would not operate to pass them to the grantee.

3. The grantee was entitled to such use of the waters in the new reservoir as would be equivalent to his rights to the use of the waters of the old reservoir.

Exceptions from Superior Court; Young, Judge.

Bill by Lorenzo Horne and others against Frank Hutchins and others. Hearing had in the superior court to determine what orders were necessary to secure to plaintiffs their rights in the reservoir, as required by the former opinion in the case. *Horne v. Hutchins*, 71 N. H. 117, 51 Atl. 645. Plaintiffs saved exceptions to the exclusion of certain evidence, and the presiding justice reported some of the facts bearing on the issues submitted. Exceptions to evidence overruled. Case discharged.

The plaintiffs claimed that they were entitled to an equalized flow from the reservoir as it now exists. The defendants contended that the plaintiffs' right to an equalized flow was limited to and governed by the drainage rights the Winnipiseogee Lake Cotton & Woollen Manufacturing Company owned in the reservoir at the date of the Goodwin deed, November 29, 1854. Prior to the date of that deed, the Lake Company had purchased the reservoir dam, the mill privileges between Crooked Pond and the lake, and the right to deepen Whitten river as against one of the landowners on that river, and made a plan showing the work they proposed to do to deepen the river and to increase the capacity of the ponds. The building of the present dam at A. was completed by the Lake Company about November 29, 1854, but at that date the Lake Company had not purchased the right to drain all the lands adjoining Whitten river and Smith's and Crooked Ponds. Subsequently they purchased these rights from 37 abutters, paying therefor about \$10,000. It was admitted that these 37 abutters included all whose lands were drained by the ponds, except 2; and as against these it was found that the Lake Company had continuously exercised the right to drain their lands, under a claim of right and without objection, since 1855. In the summer of 1855, the Lake Company deepened Whitten river, connecting Smith's and Crooked Ponds, in accordance with their original plan. Prior to the improvement of these ponds and the building of the new dam there was only enough water in the reservoir to run the mills at dam C up to about the middle of June, but since then there has usually been enough to run all the machinery at that dam that the owners had occasion throughout the year. When Goodwin purchased privilege C, the mills and dam were old, out of repair, and nearly worthless. His grantees

removed the old structures and erected new ones, put in more machinery, and added other wheels from time to time, without objection from the Lake Company. The old reservoir dam was about five feet high, and about five feet above the bed of Whitten river, and the parties were accustomed to draw down Smith's and Crooked Ponds four feet below the top of the dam. November 29, 1854, it was practicable with the new dam to draw down Crooked Pond about nine feet (but the company did not then own that right), and Smith's Pond down about the same as with the old dam. The new or present dam is eleven feet and nine inches high, and at this time it is practicable to draw these ponds about eight feet below the top of the dam. The court construed the Goodwin deed so far as it was a question of fact, and held, so far as it was a question of law, that both parties to the conveyance expected that Goodwin would have the full benefit of the proposed reservoir, subject to the limitations in the deed in respect to mills on the lower rivers. The plaintiffs offered to show that the canal which ran the privileges at B was abandoned by the acts of the Lake Company in 1854, or by their predecessors, if any ever existed there that would interfere in any way with the reservoir, so far as they would interfere with the reservoir. They also offered the title deeds of the privilege at dam C from 1771 to 1854, for the purpose of showing title to the stream from Smith's Pond to the lake by grant, and that the privileges on the stream, including the right to make improvements in the stream, were appurtenant and a part of the privileges at dam C. They also offered the record title of the privilege at B from its creation, for the purpose of showing that that privilege, prior to the date of the Goodwin deed, had no rights in the reservoir appertaining to it, and that such rights were appurtenant to C before the union of title in 1854. This evidence was excluded, subject to the plaintiffs' exception.

Leslie P. Snow and Sewall W. Abbott, for plaintiffs. James A. Edgerly and Arthur L. Foote, for defendants.

BINGHAM, J. The deed of November 29, 1854, from the Lake Company to Ellisha Goodwin, has been construed by this court. *Horne v. Hutchins*, 71 N. H. 117, 51 Atl. 645. In that case it was found as a fact that no rights in the reservoir had been acquired, for the benefit of privilege C, by the conduct of the parties subsequent to the execution of the deed; and the construction placed upon the deed was, in substance, that, while it did not in express terms convey to the plaintiffs' grantor any specific rights in the reservoir at dam A, yet by reasonable intendment and construction "the grant of the right to use the water power

and mill privilege on said premises' had reference to the water power and mill privilege in their integrity, including * * * the use of the reservoir upon which they were and for seventy-four years had been wholly dependent"; that whatever right in the reservoir was acquired by the grantee under the grant "passed, not because such right belonged to privilege C by prescription, * * * but because it had been previously used in connection with and was reasonably necessary to the beneficial enjoyment of privilege C, and because 'the law conclusively presumes it to have been the intention of the parties that the grantee should enjoy beneficially the subject of the grant'"; that, "while property conveyed passes with all the incidents then rightfully belonging to it, or actually and usually enjoyed with it, * * * without any specification of them, and without the usual phrase, 'with all the privileges and appurtenances to the same belonging,' such incidents pass by implication only 'so far as they are necessary to the full benefit and perfect enjoyment of the property' expressly granted"; that "the privileges which pass by a grant * * * will depend upon the circumstances and conditions of the property at the time" of the grant; that although there was no "finding of previous abandonment" of privilege B, yet, "in the absence of any structures at B at the date of the deed by which to measure and apportion the rights in the reservoir as between privileges B and C, the grant must be understood" to convey, as appurtenant to privilege C, "the use of the reservoir, so far as reasonably necessary to the beneficial enjoyment of that privilege," subject to the right specifically saved in behalf of the lower rivers; "that the right to the use of the reservoir, beyond such reasonably necessary use by privilege C, remained, for any and all purposes, in the grantor; and that, in so far as the maintenance or management of the defendant's [present] dam at B interferes with the reasonably necessary use of the reservoir by C, it is unlawful, and should be restrained and regulated in accordance with the relative rights of privileges C and B as already defined."

It having been found as a fact that no rights in the reservoir had become attached to privilege C by the conduct of the parties subsequent to the execution of the Goodwin deed, and it having been decided that the rights in the reservoir which passed with the grant of C depended upon the conditions and circumstances surrounding the property at the date of the deed, and that by legal intendment only such rights therein passed as appurtenant to C as were then reasonably necessary to its beneficial enjoyment, subject to the limitation in favor of the lower rivers, the superior court was directed to "grant such further hearings and make such orders and decrees" as should be "necessary

to a final determination of the rights of the parties, in conformity with" the construction placed upon the deed. A hearing was had in the superior court, and the presiding justice has reported some of the facts bearing upon the issues submitted. He has also found that "both parties to the conveyance expected that Goodwin would have the full benefit of the proposed reservoir, subject to the limitations in the deed in respect to mills on the lower rivers." This finding was not material to the issues. It would become material upon an application to reform the deed, but its reformation is not sought, and the parties necessary to such proceeding are not before the court. The deed of privilege C does not in express terms convey any rights as appurtenant to C, either in the old reservoir or in the proposed reservoir. At the date of the deed the Lake Company did not own the drainage rights necessary to the maintenance and beneficial enjoyment of the proposed reservoir, and, as the deed did not expressly convey rights in such a reservoir, the grant of C will not be extended by implication so as to include them.

The doctrine of estoppel, contended for by the plaintiffs, is not applicable. The Lake Company, in the quitclaim deed to Goodwin, did not affirm a present ownership in the drainage rights which they subsequently acquired, or agree to convey such rights by their deed. *Logan v. Eaton*, 66 N. H. 575, 31 Atl. 13, and cases cited.

It is found, however, that, previous to the improvements at dam A and the execution of the Goodwin deed, the parties were accustomed to draw down Smith's and Crooked Ponds four feet below the top of the dam, which was about five feet in height and the same distance above the bed of Whitten river, and that the reservoir then stored only enough water to run the machinery at dam C up to about the middle of June. In view of these findings, and the absence of any structures at B at the date of the Goodwin deed, by which to measure and apportion the rights in this reservoir as between privileges B and C, privilege C was entitled to the use of the reservoir as it existed prior to the improvements, so far as was reasonably necessary to its beneficial enjoyment, subject to the limitations of the deed in favor of the mills on the lower rivers; and the rights in that reservoir, beyond such reasonably necessary use by C, remained in the grantors and their successors in title. And as the new dam did not raise the height of the water in the reservoir, but simply rendered it possible, after the channels of the streams were deepened, to draw the waters of the ponds forming the reservoirs down four or five feet lower, it should be decreed that privilege C has such a right in the use of the waters of the new reservoir as would be equivalent to its right in the use of the waters of the old reservoir, viz., the right to the reasonably

necessary use of the first four feet of water, reckoning from the top of the dam, subject to the limitations in favor of the mills on the lower rivers.

When the operation of the mills at C reasonably requires the use of the whole of the first four feet of water to run them during the day, and the raising of the gates at A, for the purpose of drawing water to operate the defendants' mill at B at night or Sundays, would so lower the water and retard the filling of the reservoir as to interfere with the reasonable enjoyment of privilege C as herein defined, such use would be unlawful and should be restrained.

While the owners of C cannot require the owners of A to draw down the water below the first four feet for use at C, the owners of A cannot make use of the water, either above or below the four-foot point, so as to interfere with the reasonable use of the first four feet of water by C, except for the mills on the lower rivers.

Whether the maintenance or management of the defendants' present dam at B deprives privilege C of its right in the reasonably necessary use of the reservoir as it existed prior to the reconstruction of dam A, is not found. If, upon a further hearing, its maintenance or management should be found to have that effect, such further orders should be made as the situation may demand.

In view of the finding that, prior to the improvements at dam A and the execution of the Goodwin deed, the parties were accustomed to draw down Smith's and Crooked Ponds four feet below the top of the dam, and that the reservoir then stored only enough water to run the machinery at dam C up to about the middle of June, and in view of the construction placed upon the deed, we are unable to see how the evidence offered by the plaintiffs, which was rejected, if material and found to be true, would in any way increase their rights in the reservoir beyond what it is herein held they have the right to. The plaintiffs, therefore, were not prejudiced by the exclusion of the evidence.

Exceptions to evidence overruled. Case discharged. All concurred.

(June 30, 1903.)

After the filing of the foregoing opinion on April 7, 1903, the plaintiffs moved for a rehearing upon the question of their rights in the reservoir at dam A, by reason of the estoppel of the defendant Hutchins and his predecessors in title by their conduct since 1854.

REMICK, J. The plaintiffs now contend that the defendants are estopped by conduct to set up any right in the reservoir, except to control it for the use of the mills upon the lower rivers, and certain findings of the referee upon the issue of prescriptive right are relied upon to support this contention.

It is conceded that the claim now made

was not presented or tried before the referee. If it had been, the defendants might have disproved it by evidence irrelevant and incompetent upon the issues actually tried. Furthermore, the findings of the referee, taken as a whole, are quite as susceptible of a construction against the plaintiffs' present contention as the reverse. Whether justice requires that the plaintiffs should have a new trial for the purpose of presenting the question now raised, is a matter for the consideration of the superior court.

Motion for rehearing denied. All concurred.

(75 Vt. 264)

BROWN'S EX'R v. DUNN'S ESTATE.

(Supreme Court of Vermont. Rutland. May 6, 1903.)

EXECUTORS—CONTRACT WITH SURETY—VALIDITY—CONTINGENT CLAIM—WHAT CONSTITUTES—VARIANCE—WAIVER.

1. B. was executor of an estate, the personal assets of which consisted principally of notes for \$4,200 signed by a firm of which he was a member. The notes were payable to the decedent's widow. B., to induce a third person to go on his bond, and to secure him from liability on these notes, agreed to loan him \$4,200, the interest thereon to be paid by the third person to B. during the life of the decedent's widow, and after her death the principal to be paid to the decedent's estate. Held to be a binding agreement, and on the death of the widow the decedent's estate had a valid claim against the third person for the \$4,200.

2. If the parties contracted with reference to the notes being assets of the decedent's estate and B.'s liability to account for them as executor or his liability as one of the makers for their payment, then, for the purpose of determining the third person's liability to the decedent's estate for the \$4,200, the questions whether the notes belonged to the decedent's estate or to the decedent's widow, or whether the money paid by B. to the third person was an asset of the decedent's estate while in the hands of B. and before it was paid to the third person, were immaterial.

3. An agreement to pay a sum of money to a decedent's estate on the death of the decedent's widow is an absolute undertaking to pay, provable before the commissioners as a claim against the estate of the deceased promisor under V. S. 2428, which provides, in part, for the allowance by commissioners of demands payable at a future day at their present value, and that, notwithstanding such allowance, the executor or administrator may pay the debt according to the terms and at the time specified in the contract.

4. A contingent claim within V. S. 2517, which provides for the presentation of contingent claims to the probate court or to the commissioners, who shall state in their report that such claim was presented to them, is one that cannot be proved as a debt before the commissioners or allowed by them, because the liability is dependent on some future event which may or may not happen, and therefore cannot be determined within the time allowed for proving claims before the commissioners.

5. Under the express provisions of V. S. 1630, in a case brought by exceptions to the Supreme Court no questions of variance between the pleadings in the suit and the evidence shall be heard, except such as appear from the exceptions were raised and passed on in the county court, unless such variance is material and substantial, affecting the right of the matter.

Exceptions from Rutland County Court; Munson, Judge.

Claim by the estate of Nelson Brown, deceased, against the estate of James C. Dunn, deceased. The claim was disallowed by the commissioners, and the claimant estate appealed to the county court, where judgment went for the defendant. Plaintiff brings exceptions. Reversed.

Argued before START, WATSON, STAFFORD, and HASELTON, JJ.

Joel C. Baker, for plaintiff. Lawrence & Lawrence, Butler & Moloney, and F. S. Platt, for defendant.

START, J. This is an appeal from the decision of commissioners upon the estate of James C. Dunn. The contention is over the liability of Dunn's estate to Amos C. Bates, as executor of the estate of Nelson Brown, for money claimed to have been paid to Dunn by Bates. At the close of the plaintiff's evidence, the court ordered a verdict for the defendant. This was error. The evidence tended to show that Amos C. Bates was executor of the estate of Nelson Brown, and, as such executor, was required to give a new bond; that the personal assets of the estate principally consisted of promissory notes for the sum of \$4,200, signed by A. C. Bates & Son, and payable to Nancy F. Brown, widow of Nelson Brown; that these notes were charged to Bates in his account as such executor; that Bates, as a member of the firm of Bates & Son, was holden for their payment; that the estate could not be settled until the decease of Mrs. Brown; that Bates asked Dunn and Joel C. Baker to become sureties upon his bond; that Baker told Dunn they ought not to sign a bond whereby they would, in effect, become sureties for the payment of A. C. Bates & Son's notes, which were then understood as belonging to, and to constitute the principal personal assets of, the estate; that Dunn told Bates that he felt that the bondsmen ought to be secured; and that Bates thereupon made and submitted to Dunn, in writing, the following proposition: "In consideration of J. C. Dunn signing A. C. Bates' bond, with others, as executor of the estate of Nelson Brown, I, A. C. Bates, agree to lend to J. C. Dunn the sum of forty-two hundred dollars in such sums and at such times as I can spare the money, but all of the above amount shall be paid in on or before four years from this date, April 13, 1886. Interest to be paid on all sums paid in from date, except eight hundred dollars this day paid in. No interest on this until the forty-two hundred has all been paid in. The interest paid to A. C. Bates during the life of Mrs. Nelson Brown, at her death all the money above mentioned is to be paid to the executor of Nelson Brown's estate. [Signed] Amos C. Bates, Executor." The evidence further tended to show that this proposition was accepted by Dunn, and that, un-

der it, he signed the bond, and Bates paid to him various sums of money.

If the notes of Bates & Son were assets of the estate of Brown, on the decease of Mrs. Brown, Bates, as executor, would be held accountable for them; and if any loss came to the estate by reason of his failure to collect them, when by reasonable attention and diligence he might have done so, his bondsmen would be holden for his neglect. Bates being the executor of the estate, as such, he could contract for the payment of money to the executor of the estate, provided he contracted with reference to his own assets or those of the estate. He could, in view of his liability for the payment of the notes and the duty he was under as executor to account for them, pay his own money to Dunn, and stipulate for its payment by Dunn to the executor of the estate on the decease of Mrs. Brown; and Dunn, by contract with Bates, as executor, could bind himself to thus receive and pay over the money, and thereby secure indemnity for the liability he was assuming by signing Bates' bond. The evidence tended to show that the contract was made with reference to such liability on the part of Bates and the sureties upon his bond. From the facts and circumstances disclosed by the evidence, the jury might have properly found, if the case had been submitted to them, that the contract was entered into, and payments made, under a mutual belief that the notes belonged to the estate, and that the sureties upon Bates' bond would be holden for any shortage of duty on his part respecting them; that the contract was concluded, and payments made, with reference to such ownership and liability; that Bates paid the money to Dunn in consideration of Dunn's promise to pay it to the executor of the estate on the decease of Mrs. Brown; that Bates, in doing this, was providing for the payment of notes that were held by him as executor, and placing himself in a situation to properly account for them; and that Dunn promised Bates, as executor of the estate, that he would pay over to the executor of Brown's estate, on the decease of Mrs. Brown, all sums of money that should be paid to him by Bates under the contract. If the parties contracted with reference to the notes being assets of the estate and Bates' liability to account for them as executor, for his liability as one of the makers for their payment, then, for the purpose of determining the liability of Dunn's estate to Bates as executor, the question of whether the notes belonged to the estate of Brown or to Mrs. Brown, and whether the money paid by Bates to Dunn was an asset of Brown's estate while in the hands of Bates and before it was paid to Dunn, were immaterial, and the claim could be presented to and allowed by the commissioners in the name of Bates, as executor of Brown's estate. *Davenport v. Mutual Life Association*, 47 Vt. 528; *Clark v. Employers' Liability Assurance Co.*,

72 Vt. 464, 48 Atl. 639; *Phelps v. Conant*, 30 Vt. 277; *Bank v. Burton*, 58 Vt. 426, 8 Atl. 756; *Rutland & Burlington R. R. Co. v. Cole*, 24 Vt. 33; *Pangborn v. Saxton*, 11 Vt. 79; *McPeck v. Moore*, 51 Vt. 269; 15 Ency. Pl. & Pr. 509.

The evidence also tended to show an absolute debt in favor of the claimant, provable before the commissioners under V. S. 2428, which provides, in part, for the allowance by commissioners of demands payable at a future day at their present value, and that, notwithstanding such allowance, the executor or administrator may pay the debt according to the terms and at the time specified in the contract. Dunn's undertaking, if any, was to pay at the decease of Mrs. Brown—an event which was sure to occur sooner or later. This was an absolute undertaking to pay. His liability was not made to depend upon some future event which might or might not happen. The fact that the time of payment is uncertain does not make a claim contingent, when, as in this case, the time of payment is sure to arrive at some future day. A contingent claim, within the meaning of V. S. 2517, is one that cannot be proved as a debt before the commissioners, or allowed by them, because the liability is dependent upon some future event which may or may not happen, and therefore cannot be determined within the time allowed for proving claims before the commissioners. *Sargent's Adm'r v. Kimball's Adm'r*, 37 Vt. 321; *Curley v. Hand's Estate*, 53 Vt. 524.

It does not appear that the question of variance between the declaration and the evidence was raised in, and passed upon by, the court below, nor does it appear that such variance is material and substantial, affecting the right of the matter; therefore the question cannot be considered by this court. V. S. 1630; *Bank v. Burton*, 58 Vt. 426, 8 Atl. 756; *Shanks v. Whitney*, 66 Vt. 405, 29 Atl. 367; *Dano v. Sessions*, 65 Vt. 79, 26 Atl. 585.

Judgment reversed, and cause remanded.

(97 Md. 696)

STATE, to Use of JETER et al., v.
SCHWIND QUARRY CO OF
BALTIMORE CITY.

(Court of Appeals of Maryland. June 30,
1903.)

MASTER AND SERVANT—NEGLIGENT DEATH—
COMPLAINT—SUFFICIENCY.

1. In an action for negligent death the complaint alleged that it was defendant's duty to provide deceased with a reasonably safe place and tools in and with which to work; that deceased was directed by an employé of defendant having authority over him to extract a charge of blasting powder, for which deceased was not skilled, fitted, or employed, and of the danger of which he was ignorant, and in the execution of which he was killed. It was further alleged that the death was directly due to the negligence of defendant in failing to provide him with a safe place to work and safe tools, and to employ competent co-employees, and to refrain from exposing him to unnecessary

danger, etc. *Held* demurrable for failure to specifically state precisely what acts or omissions of defendant constituted the alleged negligence.

2. The complaint was further objectionable because it affirmatively appeared therefrom that the injury was caused by the negligence of a fellow servant, who was not shown to be a vice principal.

Appeal from Superior Court of Baltimore City.

Action by the state of Maryland, to the use of Mary Jeter and others, against the Schwind Quarry Company of Baltimore City. From a judgment sustaining a demurrer to the declaration, plaintiff appeals. *Affirmed*.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, and SCHMUCKER, JJ.

Ward P. Littig, for appellant. Wm. L. Marbury, for appellee.

PEARCE, J. This appeal is taken from a ruling of the superior court of Baltimore City sustaining a demurrer to a declaration, the substance of which is as follows: "For that the defendant corporation at the time of the commission of the wrong and injury hereinafter mentioned was operating a stone quarry in the city of Baltimore, and Edward Jeter, the husband and father of the equitable plaintiffs, was employed by it as a stone-cutter. And it was the duty of the defendant corporation to provide the said Jeter with a reasonably safe and proper place in which to work, and with reasonably safe and proper tools with which to work, and to employ reasonably competent co-employees, and to promulgate rules for their government, and to refrain from exposing the said Jeter to unnecessary risk and danger while at work. And the plaintiff in fact says that on the day and date mentioned the said Jeter was directed by one of the employees of said corporation, then and there in command of said quarry, and having authority over him, to extract a charge of blasting powder therefore placed in a hole drilled in a rock in said quarry, for which work the said Jeter was not skilled, fitted, or employed, and of the danger of which he was ignorant and unwarned, and in the execution of which he was killed. And the plaintiff further says that the death of the said Jeter was directly due to the negligence of the defendant corporation in discharge of its aforesaid duties towards him, to wit, the duties to provide him with a reasonably safe and proper place in which to work, and with reasonably safe and proper tools with which to work, and to employ competent co-employees, and to promulgate rules for their government, and to refrain from exposing him to unnecessary risk and danger whilst at work; and that the said Jeter used due care, but the defendant corporation did not use due care. And by reason of the killing of said Jeter, the equitable plaintiffs were

¶ 2. See *Master and Servant*, vol. 34, Cent. Dig. § 838.

deprived of his support, and the plaintiff claims \$5,000 damages." The plaintiff declining to amend the declaration after the ruling on the demurrer, judgment for costs was entered for defendant.

Mr. Poe, in section 562 of his work on Pleading, speaking of the degree of precision required in pleading, says: "The declaration should always describe the contract for the breach of which the suit is instituted, or the tort for which redress is sought, with such reasonable degree of certainty as will give fair notice to the defendant of the character of the claim or demand made against him, so as to enable him to prepare for his defense." And in *Gent v. Cole*, 38 Md. 110, this court said: "It is one of the first principles of pleading that facts should be stated for the purpose of informing the court, whose duty it is to declare the law arising upon those facts, and to apprise the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it." Tested by these principles, we think, as was said by Judge Alvey in the case just cited, that "the statement of the tortious acts complained of, and the manner in which they effected the injury to the equitable plaintiffs, are altogether too general and indefinite to be good on demurrer." After stating the employment of the deceased by the defendant, and his relation to the equitable plaintiffs, the declaration sets out in the first part the several alleged duties of the defendant to the deceased, and in the latter part charges that the death was directly due to the negligence of the defendant in the discharge of these duties, reciting them again in the most vague and general terms, and charging the death to be due, not to the neglect of any one of these duties, but to the neglect of all combined. The intervening part of the declaration will be referred to later, but, passing that for the present, we think it is plain that without that intervening part the declaration is not sufficient in law. The defendant is not told what specific duty is claimed to have been neglected, but is required to meet a charge of general misconduct in the alleged neglect of every duty imposed upon it by the law. Not only so, but there is no averment of the manner in which any one of these duties has been violated. It does not specify in what respect the place provided for work was unsafe, or how the want of safety caused the death. It does not specify what tools provided for work were unsafe, in what respect they were unsafe, or how their unsafe condition was connected with the accident. It does not state what co-employees were incompetent, or how their incompetency contributed to cause the death of the deceased. It does not show what rules should have been promulgated for the government of employees, or how the failure to promulgate them is connected with the accident; nor does it state what was the risk and danger

to which the deceased was unnecessarily exposed while at work. Such a lumping aggregation of general charges of neglect of duty, without a single specification upon which to prepare a defense, cannot be regarded as gratifying the fundamental principles of pleading which are still recognized and enforced in our simplified system, as we have recently had occasion to observe in *Edger v. Burke* (to be officially reported in 96 Md. 715) 54 Atl. 986. In *Waldhiser v. Hannibal & St. J. R. Co.*, 71 Mo. 514, a petition by an employé, stating, without any specific facts, that plaintiff was injured in consequence of the negligence of a railroad company in using defective machinery and in running and managing its railroad and cars, was held fatally defective; the court saying, "We may well ask, what is the cause of action?" So in *Smead v. Lake Shore Railway*, 58 Mich. 200, 24 N. W. 761, where the negligence alleged was the failure to provide a sufficient cattle guard, it was said: "Certainly the violation of, or neglect to perform, some specific and well-defined duty must be shown before any liability is incurred, and good pleading requires that this should appear in the declaration. The plaintiff utterly fails to point out any specific defect, but contents himself with relying upon the allegations of general insufficiency." That these principles of the common law, as applicable to the case before us, have been retained in our own Code system, will be seen upon reference to article 75, § 23, subsec. 36, Code Pub. Gen. Laws, where a form is given for a declaration claiming damages for personal injuries to a passenger on a railroad due to negligence of the railroad company. It will be observed that it does not permit the averment in general terms that the defendant failed to provide safe machinery or conveyances, but requires some specific defect to be pointed out, such as the insufficiency of an axle of the car in which the plaintiff was riding, and in a note to that subsection states that this form may be varied so as to adapt it to other cases "by changing the allegation as to the cause of the accident."

The only statement of any specific facts in this declaration is found in that part which is hereinbefore transcribed in italics. This italicized passage intervenes between these part of the declaration which we have already considered, and is in no wise aided by them. Its sufficiency, therefore, may be considered as if the preceding and succeeding parts of the declaration, so far as they relate to the cause of death, had been wholly omitted, and, when analyzed, it will be found scarcely less general and vague. It does not state what was the nature of the danger against which he should have been warned. It does not charge that it was unknown to the servant, or not open and obvious to ordinary observation, and therefore one against which it was the master's duty to warn the servant. There is no averment that his death

was caused by his want of skill for the work he was directed to perform, or by the failure to warn him of the danger. There is in fact no statement whatever of any cause of his death, but a mere averment that he was killed in the execution of the work. If the danger was open and obvious, the servant, being an intelligent adult, is held to have assumed the risk, the rule not requiring instruction and warning as to dangers which can be seen by common observation. 2 Bailey's Personal Injuries Relating to Master and Servant, § 2730. He may have been unskilled and unfitted for this work, and yet the accident may have happened from a cause which would have been equally fatal to the most skilled and experienced workman, or from one against which any instruction or warning would have been futile to protect him. Every fact alleged in the language we are now considering may be true, and yet there might be no right of action against the defendant. There was no right of action unless the death was directly due to some tortious act of the defendant, and upon demurrer both some such specific act and its causal connection with the injury complained of must clearly appear in the declaration.

But another fatal objection to the declaration is that it shows the alleged negligence, even if the cause of the death, was the negligence of a fellow servant. It expressly states that he was ordered to do this work by "one of the employés of the corporation," though it adds that he "was in command of the quarry, and had authority over him." But it is said in 2 Bailey's Personal Injuries, § 2106, that "it makes no difference that the offending servant is a servant of superior authority, unless such superior servant rises to the grade of alter ego of the principal." And in *Yates v. McCullough Iron Company*, 69 Md. 384, 16 Atl. 280, this court said, "Nor is the liability of a master enlarged or made different by the fact that the servant who has suffered the injury occupied a grade in the common service inferior to that of the servant whose misconduct caused the injury complained of." If this be a correct principle to be applied to rulings upon prayers framed upon the evidence, it must be equally correct when applied to the sufficiency of a declaration like the present, which, upon its face, attributes the injury to the negligence of a fellow servant. He might have charged that he was directed by the president of the corporation, or by some one bearing to the corporation the relation of vice principal, to extract the charge of powder; but he has chosen to allege that he was so directed by one of its employés. He has thus alleged that the cause of his injury was the negligence of a fellow servant, without stating any fact which could take the case out of the rule exempting the master from liability for such negligence. In other words, he has stated

a cause of injury for which the master is not liable, and, if so, his declaration is bad on demurrer.

The appellant relies in this aspect of the case upon the case of *East Brooklyn Box Co. v. Nudding* (decided in this court at the last January term) 54 Atl. 132, where there was a demurrer to a declaration on the ground that it showed the plaintiff was guilty of contributory negligence, in which case we said, "Where the declaration clearly shows the plaintiff was guilty of contributory negligence, advantage may be taken by demurrer;" but we sustained that declaration, because it did not clearly appear there was contributory negligence. Here, however, the averment is clear and emphatic that the negligence complained of was that of a fellow servant.

Judgment affirmed, with costs to the appellee above and below.

(97 Md. 673)

PAYNE v. PAYNE et al.

(Court of Appeals of Maryland. July 2, 1908.)

LUNATICS—SALE OF PROPERTY—SUIT TO SET ASIDE—SHOWING OF FRAUD—SUFFICIENCY.

1. A bill to set aside a decree ratifying a sale of complainant's interest in a firm, made while complainant was a lunatic, alleged fraud, setting up that in ascertaining the value of certain partnership realty it was appraised on the erroneous assumption that an ordinance for widening the street where it was situated would be repealed, whereby the value of the property was lessened, and complainant failed to receive his share of the damages which were paid by the city when the street was opened. It was further alleged that the appraisement of the merchandise of the firm was made upon false statements rendered by complainant's partner, so as to cause the appraisement to be for less than one-half their value, and that no valuation was made for the good will of the firm, and that the proceedings on which the decree was based had been conducted through the influence which complainant's partner, who purchased at the sale, exercised over complainant's brother, who was his committee. The bill asked that the record in the former case be considered as a part of it, and from that it appeared that the appraisement of the real estate mentioned stated upon its face that it had been made on the assumption that the ordinance would be repealed; that the appraisement of the stock was made by persons thoroughly familiar therewith, who testified that it would be to the interest of the lunatic to consummate the sale; and that it was apparent that no allowance had been made for good will. Held that, as the bill set up no matters not apparent from the record in the former case, and did not charge intentional fraud on the part of complainant's former partner, it was demurrable.

Appeal from Circuit Court of Baltimore City; Henry Stockbridge, Judge.

Bill by R. Kemp Payne against Margaret J. Payne and others. From a decree for defendants, plaintiff appeals. Affirmed.

Argued before BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Thomas Hughes, for appellant. George M. Upshur and Alfred Niles, for appellees.

SCHMUCKER, J. The bill of complaint in this case was filed by the appellant in the circuit court of Baltimore City on the 10th of January, 1903, to set aside for fraud a final decree which had been passed by that court in another case on the 28th of February, 1896. The appellees demurred to the bill for want of equity in its allegations and for laches in filing it, and the present appeal is from the decree of the circuit court sustaining the demurrer and dismissing the bill.

The decree passed in 1896, which the appellant now asks to have set aside, ratified a sale to his brother and partner, E. Scott Payne, of the interest of the appellant, who was at that time a lunatic in charge of a committee, in the assets, real and personal, of the late hardware firm of E. Scott Payne & Bro., at a valuation that had been fixed by an appraisement. In December, 1897—nearly two years after the date of the decree complained of—the appellant, having been restored to sanity, was by an appropriate order of court discharged from the custody of his committee, and again placed in control of his own estate. In January, 1902—more than four years after the appellant had been restored to the control of his own estate—E. Scott Payne, the brother to whom the sale of the partnership property had been made, died intestate, leaving a widow, who became his administratrix, and one child. One year later the present suit was brought against his widow in her own right and as administratrix and his child, and they are the appellees now before us.

The substantial allegations made in the bill in the present case as the grounds of the application to have the decree of 1896 set aside for fraud are as follows: (1) That in ascertaining the value of certain of the partnership real and leasehold property on Gay street, in Baltimore City, for the purpose of the sale to E. Scott Payne, it was appraised "on the erroneous assumption" that the ordinance for the widening of Gay street would be repealed (it being then generally believed that such would be the case), whereby not only was the value of the property lessened, but the appellant lost his share of the damages which had been theretofore allowed, and were afterwards paid by the city to the purchaser when the street was in fact opened. (2) That the appraisement of the stock of merchandise was made by the appraisers upon statements rendered to them by E. Scott Payne, which "were so different from the true character and quality of the goods so appraised" as to cause the appraisal to be for less than one-half their true value. (3) That "no valuation was ascertained for the good will of the partnership," although it was in fact very valuable, and that it was thereby obtained by E. Scott Payne without compensation. (4) That certain property owned by the two brothers was ascertained by the decree of 1896 to be partnership property, "in pursu-

ance of testimony that said property had been treated by the partners as if it was partnership property," ignoring an existing understanding and arrangement between them that it was to be treated as property held by them individually as joint tenants. (5) That all of the proceedings in the case of E. Scott Payne v. R. Kemp Payne, in which the decree of 1896 was passed, had been conducted in such a way "through the influence which the said E. Scott Payne had over his brother, Wm. James Payne, who was the committee of the appellant," that the decree was arrived at and executed to the serious injury of the appellant, and in violation and fraud of his rights.

In explanation of the delay in bringing his suit, the appellant avers in the bill that he had such unbounded confidence in his brother E. Scott Payne's integrity, and in his interest in him, that it never occurred to him to question the rectitude of his brother's conduct relative to the purchase of the partnership property until a few weeks prior to filing the bill, when he was informed that a certain gentleman (not naming him) had been requested by E. Scott Payne to act as an appraiser of the partnership merchandise, but that he, upon observing the method of the appraisement, had said that "the method was unfair and unjust in that the cost was estimated in such large job lots as to render it impossible to arrive at their correct value," and he had therefore declined to act as an appraiser; that the appellant, having thus had his suspicions aroused, employed counsel to examine the former case, and by that means discovered the matters hereinbefore stated. The present bill asks that the record in the case of E. Scott Payne v. R. Kemp Payne, a lunatic, in which the decree of 1896 was passed, be taken and considered as part of it; and a synopsis of the proceedings in that case, containing copies of portions thereof, appears in the present record. We must, therefore, take into consideration the contents of those proceedings in determining whether or not the present bill is demurrable. From an inspection of them it becomes apparent that the former case was an amicable suit to procure the court's ratification of the sale to E. Scott Payne of the lunatic's interest in the partnership estate on the ground that it would be for his interest and advantage. The bill in the former case averred the previous existence of the partnership, the adjudication of the lunacy of R. Kemp Payne, and the appointment and qualification of his brother, Wm. James Payne, as his committee. It contained a detailed statement of all the real and leasehold estate in question, and a reference to the record of the conveyance by which the title to each lot had been acquired, and also an allegation that all of the real and personal property had been purchased with partnership funds, and used and enjoyed as partnership property, although the legal title to

three of the lots stood in the names of the two brothers as joint tenants, and the title to the other three lots stood in their names as tenants in common. It further alleged the ownership by the firm of merchandise and debts due to them of great value, and the practical absence of any indebtedness from them to other persons. The bill then averred that the partnership had been dissolved by the insanity of the defendant, and that, with a view to protect the firm property from the sacrifice incident to a public sale, the plaintiff and the defendant's committee had entered into an agreement, subject to the approval of the court, for the sale of the lunatic's share and interest therein to the plaintiff at a price which had been fixed by separate appraisements of the real estate and the merchandise and personal assets. The agreement for the sale, stating its terms in detail, and also the written awards of the appraisers as to the value of the several classes of the partnership property, were filed as exhibits with the bill.

It further appears from the proceedings in that case, that, after the lunatic had been served with process, and had answered by his committee, testimony was taken in support of the allegations of the bill. From this evidence it appears that the real and leasehold estate had been appraised by Hiram Woods and George H. Sargeant, real estate agents of large experience and familiar with the value of real estate in the locality where the property in question was situated, and that they had made the written report; filed as an exhibit, of their appraisal, and that the report stated on its face that the valuation had been made upon the assumption that the ordinance for the widening of Gay street would be repealed, and further stated that the prices fixed by them were fair, and expressed the value of the property. It also appears that the stock of merchandise consisting of hardware had been appraised by Lloyd Cole, of Wm. H. Cole & Son, and Henry Keldel, of Henry Keldel & Co., leading hardware merchants of Baltimore, after a full and complete inventory of it had been made by two persons connected with their respective firms at their direction. Adam Wagner, one of the two persons who made the inventory, testified that it was full and complete, and contained all of the stock of the firm, and both he and Henry Keldel, one of the two merchants who appraised the merchandise, testified that they were thoroughly familiar with the prices of hardware, and that the prices put upon the goods were fair, and were the full value of the goods. Both Mr. Sargeant and Mr. Keldel testified that they had examined the agreement between E. Scott Payne and the committee of the lunatic for the proposed sale of the latter's interest in the partnership property, and that its terms were fair, and that it would be to the advantage of the luna-

tic to consummate it. Wm. James Payne, the brother and committee of the lunatic, also testified that it would be to his interest and advantage to consummate the sale. Testimony was also taken in support of the other allegations of the bill.

The case was then submitted for decree, but the court before acting upon it, referred it to one of the standing auditors and masters of the court, who made a very full report, stating that he had carefully examined the proceedings in the case, and that it appeared therefrom that the valuations of the partnership property as therein set forth were just and fair, and that all of the real and leasehold lots had been purchased with the partnership funds, and were partnership property, and that it would be to the advantage of the lunatic that the agreement for the sale of his interest in the partnership estate to his brother and former partner, E. Scott Payne, be ratified and confirmed, which was accordingly done by the court in its decree of February 28, 1896.

The question now presented for our consideration is whether, assuming the allegations of the present bill to be true, they make out a proper case for the cancellation for fraud of the decree of 1896, which was passed under the circumstances already mentioned by us. This question we are compelled to answer in the negative. It is well settled that a court of equity has power, upon an original bill filed for that purpose, to set aside judgments or decrees for a positive and intentional fraud in obtaining them; but it is equally well settled that the final decrees and judgments of courts of competent jurisdiction will not be lightly interfered with, nor be set aside for any matter which was actually presented and considered in the case in which the assailed decree was rendered. The acts for which a court will set aside for fraud a former decree between the same parties must relate to frauds extrinsic to the matters tried by the first court. We have so plainly stated this doctrine, with a full citation of the authorities sustaining it, in the recent case of *Maryland Steel Co. v. Marney*, 91 Md. 360, 46 Atl. 1077, that we deem it unnecessary to here repeat what we have there said. See, also, the discussion of the same subject in *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, which we have heretofore held to be a leading case upon this question.

It is apparent upon the face of the proceedings in which the assailed decree of 1896 was passed that almost all of the matters now relied on as grounds for setting it aside were presented and considered in that case. It is plainly stated in the award of Messrs. Sargeant and Woods that they had appraised the real and leasehold estate upon the assumption that the ordinance for opening Gay street would be repealed. It was averred and proven to the satisfaction of the master and the judge that the real and leasehold estate

had been purchased with partnership funds, and was in equity partnership property. It was apparent on the face of the contract of sale that nothing was allowed for the good will. It was proven that the inventory of the merchandise was made by the employes of the two highly respectable and competent hardware merchants, who valued and appraised the goods, when inventoried, at what they regarded as fair valuation.

The remaining allegation that all of the proceedings in that case were so conducted through the influence of E. Scott Payne over his brother William, who was the committee of the lunatic, as to deprive the latter of his rights, is the only one which brings forward transactions extrinsic or collateral to the matter tried in the former case. That allegation, when tested by the demurrer, is defective, because it does not definitely charge intentional fraud on the part of E. Scott Payne; merely averring that through his influence over his brother, who was the committee of the lunatic, the decree of 1896 was arrived at and executed to the serious injury of the plaintiff, and in violation and fraud of his rights. The fraud relied on to set aside a decree must be actual and positive, amounting to the use of an intentional contrivance to take an undue advantage. *Patch v. Wood*, L. R. 3 Chy. App. 203, 212; *Kerr on Fraud & Mistake*, p. 365. The charge last referred to is also insufficient, as made in the bill, because it is too general, and fails to state the circumstances of the alleged fraud with which E. Scott Payne is charged. All charges of fraud in bills of complaint must be definitely made, and the particular acts of fraud pointed out and stated, as it is from the facts alleged that the court derives its jurisdiction. *Grove v. Rentch*, 26 Md. 367, 377; *Townsend v. Duncan*, 2 Bl. 48; *Beach*, Mod. Eq. Pr. vol. 2, § 884. The proceedings in the case in which the decree of 1896 was passed seem, from the portions of them filed with the present bill as part of it, to have been conducted fairly, and with due regard to the interests of the present plaintiff, who was then a lunatic. The allegations of the bill were supported by the testimony of competent and respectable witnesses, and the action of the court in decreeing the confirmation of the sale of his share of the partnership property was deliberately taken, after requiring an examination of the entire proceedings by one of its auditors and masters, and receiving from him a report that, having carefully examined the proceedings and proof, he found that the valuations of the partnership property were fair and just, and that the evidence established the fact that it would be for the interest and advantage of the lunatic to ratify the sale. The allegations of the bill of complaint in the present case present no sufficient grounds for disturbing a decree thus passed.

Having determined that no sufficient case is presented by the bill of complaint to jus-

tify the granting of the relief for which it prays, we deem it unnecessary to pass upon the question of laches in filing it.

The decree appealed from will be affirmed. Decree affirmed, with costs.

(97 Md. 347)

GARRISON v. UNITED RAILWAYS & ELECTRIC CO. OF BALTIMORE.

(Court of Appeals of Maryland. June 29, 1903.)

STREET RAILWAYS—TRANSFERS—TIME LIMIT —PASSENGER—REFUSAL TO PAY FARE—EXPULSION.

1. Acts 1900, p. 463, c. 313, requiring the street car company of Baltimore City to give, on request, each passenger paying a cash fare a transfer for a "continuous" ride, does not prohibit the company from limiting the time within which a transfer can be used.

2. When the time limit of a transfer issued by a street railway has expired, the transfer is void on its face, and a conductor is justified in refusing to honor it and demanding a fare.

3. When a conductor of a street railway has given a passenger a reasonable time and opportunity to pay his fare, and the passenger has refused, and the conductor has commenced the process of ejecting the passenger, the ejection may be completed, even though a fare be tendered, as the passenger has forfeited his rights as such.

Appeal from Court of Common Pleas; Henry D. Harlan, Judge.

Action by Robert M. Garrison against the United Railways & Electric Company of Baltimore. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, and SCHMUCKER, JJ.

Hyland P. Stewart, for appellant. J. Pembroke Thom and B. Howell Griswold, for appellee.

McSHERRY, C. J. There are two controlling questions arising on this record, and they are presented by the prayers submitted at the conclusion of the evidence. The bill of exceptions brings up for review only the rulings on the prayers. The first question is this: Was the trial court right in ruling that a transfer delivered to the appellant by the conductor of the appellee's Lombard street line was void after the expiration of the time limited on its face for its use? The court below held that the transfer was void, and accordingly granted the appellee's second prayer, and rejected the appellant's first prayer. The second question is this: Was the conductor of the Wilkins avenue car, upon which the appellant attempted to use the transfer, justified in ejecting the appellant when the latter refused to pay his fare, and after the conductor had stopped the car in order to eject the appellant, though, after the car had been stopped for that purpose, a companion of the appellant offered to pay the fare? This question was an-

¶ 2. See *Carriers*, vol. 9, Cent. Dig. § 1435.

swered by the trial court in the affirmative by the granting of the defendant's fifth prayer. Besides the two controlling questions just stated, there are some subsidiary inquiries which will be considered later on.

1. It appears that the appellant, with two friends, boarded a car of the appellee at the corner of Lombard and Carey streets, in Baltimore, about 3:40 or 3:45 on the afternoon of March 6, 1901. They paid their fares, and asked for transfers to the Wilkins avenue line going south. The conductor gave the transfers as requested, and punched the date, the hour, 3:50, and the transfer point, Gilmor and Lombard streets. The transfers were limited as to the time within which they could be used, and the time thus limited was indicated by the punch marks which the conductor made. It is alleged by the appellant—and for the purposes of this discussion it will be assumed to be true—that no car passed south on Wilkins avenue until after the time limited for the use of the transfer had expired. By the act of assembly of 1900 (page 463, c. 313) the street car company of Baltimore City is required to issue transfers. The first proviso in that enactment reads: "Provided, that such company shall give a free transfer, when the same shall be requested, upon the payment of each cash fare, which transfer shall be good at all points of intersection of lines of said railway for a continuous ride." The appellant and his friends boarded the first car going south on the Wilkins avenue line, and presented the transfers. The time within which they could be used had then elapsed, and the conductor refused to take them. He demanded the payment of the regular fare. This was refused, and the car was stopped, and the conductor went in search of a policeman. When the conductor returned with a policeman and re-entered the car, he requested the appellant and his companions to get off the car. This they refused to do, and one of them offered to pay the fare, which the appellant alleges the conductor refused to receive. According to the appellant's testimony, the conductor grabbed the appellant viciously by the shoulders, and shoved him violently out of the door of the car, and up against the heavy metal controller, severely hurting his left arm. The fare was again tendered by the appellant's companions, and after much parley was accepted, and the car was started, and the appellant proceeded to his destination. The policeman flatly contradicted the statement of the appellant with respect to the alleged use of force.

It has been insisted by the appellant, against whom the jury rendered a verdict, and against whom a judgment for costs was entered, that the appellee company had no authority to limit the time within which a transfer must be used. We cannot accede to this contention. Whilst the act of 1900 (page 463, c. 313) contains no specific provi-

sion declaring for what length of time the transfer shall be good, it is obvious that it does not contemplate that no reasonable regulation shall be made upon the subject. In the nature of the case, regard being had to the character and the magnitude of the business of conveying on street cars hundreds of thousands of passengers, it would seem to be a very proper precaution for the company to protect itself against imposition by affixing to the transfers which it is required to issue a limit beyond which they should not be available for use. When thus limited, they are void, and do not entitle the holder to ride on the cars after the expiration of the time specified by the punch marks. The statute makes the transfers good for a continuous ride. That language would seem to exclude the notion that there can be no time limit affixed. A continuous ride does not mean a ride interrupted by a considerable interval of time. If the time within which the transfer may be used expires by reason of the failure of the company to run its cars frequently enough, that fact does not make the transfer good, or authorize a conductor to honor it. In such circumstances it is the plain duty of the passenger to pay his fare. But he is not without remedy. If, by the company's fault, the transfer expires before the holder has had an opportunity to use it, and in consequence he is required to pay and does pay his fare, he would have his action against the company. But if it were held that, in spite of the expiration of the transfer, the conductor was still obliged to accept it, the company would be exposed to flagrant imposition without any means of protecting itself. The transfer, like a railroad company's ticket, is the evidence of the passenger's right to ride. *U. Rys. & E. Co. v. Hardesty*, 94 Md. 661, 51 Atl. 406, 57 L. R. A. 275; *W. M. R. R. Co. v. Stocksdales*, 83 Md. 245, 34 Atl. 880; *B. & O. R. R. Co. v. Blocher*, 27 Md. 277. If the transfer, like the ticket, is void on its face, it is not a token of the holder's right to be transported on the carrier's conveyance. In *P. W. & B. R. R. Co. v. Rice*, 64 Md. 63, 21 Atl. 97, the liability of the company was placed upon the ground that the ticket was apparently good on its face. This is distinctly pointed out in *W. M. R. R. Co. v. Stocksdales*, *supra*. In the case at bar the transfer was void on its face when the appellant attempted to use it. It therefore did not entitle him to ride on the Wilkins avenue car, and the conductor was justified in demanding the appellant's fare, and, upon the refusal of the latter to pay, the conductor was warranted in ejecting him. There was, consequently, no error committed in rejecting the appellant's first prayer and in granting the appellee's second prayer. The appellee's third and fourth prayers were also properly granted. The legal propositions which they embody are fully sustained by what has been said thus far in this judgment.

2. Both upon authority and principle it is clear that, when the conductor has given the passenger a reasonable time and opportunity to pay the fare, and the passenger has persistently refused to comply, and the conductor has begun the process of expulsion by stopping the car or by applying force to the passenger, when necessary, "the passenger thereupon forfeits his rights as a passenger, and his ejection may be completed, even though he may thereafter tender the performance demanded." Hutchinson on Carriers, § 591a. This doctrine is supported by many adjudged cases. Geo. S. & F. R. Co. v. Asmore, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53, and notes; 5 Am. & Eng. Ency. L. (2d Ed.) 597, note 1. There was, consequently, no error committed in granting the appellee's fifth prayer.

The appellant's third prayer related to punitive damages. It was rejected. The jury having decided that the appellant was not entitled to recover any damages at all, it becomes unnecessary to consider whether the prayer correctly defined the measure of exemplary damages.

What we have said in treating of the appellee's second prayer is all that is required to show that the court was entirely right in overruling the appellant's special exception to that prayer.

Finding no errors in the record, the judgment will be affirmed, and it is so ordered. Judgment affirmed, with costs above and below.

(97 Md. 305)

WHEELING STEEL & IRON CO. v. EVANS.

(Court of Appeals of Maryland. June 30, 1903.)

SALES—CONTRACT—CORRESPONDENCE—CONSTRUCTION—EVIDENCE.

1. In reply to a request for sale price of 100 tons of tack plate plaintiff wrote defendant, offering Nos. 12 and 14 at \$2.72 and Nos. 15 and 16 at \$2.80. Defendant wired, "Enter our order at prices quoted, specifications to follow," to which plaintiff answered that they had entered the order. Defendant never sent specifications. *Held*, that there was no contract.

2. A conversation between agents of the respective parties, in which defendant's agent said that he would send specifications, or settle for failure to do so, was not evidence supplementing or making more certain the alleged contract, but merely evidence of a breach of the agent's promise.

Appeal from Superior Court of Baltimore City; Charles E. Phelps, Judge.

Action by the Wheeling Steel & Iron Company against William H. Evans. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, and SCHMUCKER, JJ.

Wm. Reynolds and Paul M. Burnett, for appellant. Ferdinand C. Dugan, for appellee.

McSHERRY, C. J. This is an action of trespass on the case, instituted by the Wheeling Steel & Iron Company against William H. Evans for a breach by the latter of his alleged warranty of the authority of William J. Driscoll to contract on behalf of the Evans Marble Company for the purchase of 100 tons of tack plate for the manufacture of tacks. The Evans Marble Company is a corporation, of which Evans was president. He was also the owner of 995 of the 1,000 shares of its capital stock. It is averred in the declaration that Driscoll had made such a contract with the steel and iron company in the name and for the use and behoof of the marble company, but that he had no authority to do so, and that the marble company, when sued for a breach of the contract, repudiated the contract upon the grounds: First, that it had not made the purchase; and, secondly, that the buying and selling of manufactured iron was not within its corporate powers. It is not claimed that Evans is liable for the price of the iron as purchaser of it, but it is insisted that he is answerable for the damages sustained by the steel and iron company by reason of the failure of the marble company to take the iron; and that he is so answerable because he warranted that Driscoll had authority to contract for the marble company, when in point of fact he had no such authority.

It is obvious at the threshold of the case that, if no contract was in reality made by Driscoll for the marble company with the steel and iron company, there could not be, by any possibility, a breach of either an express or an implied warranty of Driscoll's authority to make that contract; and consequently the first inquiry that suggests itself is this: Was there any legally sufficient evidence adduced to establish such a contract? The superior court of Baltimore City ruled that there was no such evidence before the jury, and thereupon peremptorily instructed them to find a verdict for the defendant. From the judgment entered upon that verdict the pending appeal was taken by the steel and iron company.

It appears without contradiction that a partnership consisting of E. E. Williams and W. J. Driscoll conducted in Baltimore the business of manufacturing tacks, and that they traded under the name of the Southern Tack Company. The concern became indebted to Evans, and finally made an assignment, and ultimately the Evans Marble Company continued the business in its own name, with Driscoll as foreman at a salary of \$10 per week. Several orders were given by the marble company to the steel and iron company for tack plates, and the prices charged were paid.

On September 13, 1899, the following letter was sent to the steel and iron company:

"Baltimore, Knoxville, Chicago.

"Evans Marble Company.

"Baltimore, 9-13-99.

"Wheeling Steel & Iron Co., Wheeling, W. Va.—Gentlemen: Please quote us your best price on 100 tons of tack plate from 12 to 17 gauge, regular width, and greatly oblige, yours truly, Evans Marble Company,

"Baltimore, Md.

"Driscoll."

On the 15th this reply was mailed:

"Copy.

"Wheeling, W. Va., Sept. 15th, 1899.

"Evans Marble Co., Baltimore, Md.—Gentlemen: Answering your favor of the 13th, we have very little room for more business for prompt shipment. We quote you for 100 tons tack plate rolled in grooves 15¼ wide cut about 3 feet lengths for shipment say about 25 tons per month Nos. 12 and 14 \$2.72 f. o. b. Wheeling. No. 15 and 16 \$2.80. Net cash from date of shipment. We have discontinued the making of No. 17 gauge. We make this quotation subject to wire reply not later than Monday, the 18th. inst.

"Very truly yours,

"[Signed] Wheeling Steel and Iron Co.

"Dictated by H. G. Tinker."

On the 20th the Marble Company telegraphed:

"5 G T C W 21 Paid 5P

"Baltimore, Md. Sept. 20, 1899.

"Wheeling Steel and Iron Co.: Enter our order for 100 tons tack plate if at prices quoted on 15 specifications to follow.

"The Evans Marble Co."

And on the 22d this answer was forwarded:

"Copy.

"Wheeling, W. Va., Sept. 22d, 1899.

"Evans Marble Co. Baltimore, Md.—Gentlemen: We have your telegram of the 20th inst. and have entered your order for 100 tons of tack plate at prices quoted by us on the 18th inst. Very truly yours,

"[Signed] Wheeling Steel and Iron Co."

These papers constitute the contract, if there be a contract at all, for we do not consider that the verbal interview between the general sales agent of the steel and iron company and Driscoll in Baltimore on March 21, 1900, supplements or makes more definite the written evidence. This, however, will be alluded to a little later on. It will be noticed that the telegram of September 20th, purporting to have been sent by the marble company, is not an acceptance of any antecedent definite offer. The letter of September 15th quoted the prices of four grades of tack iron, viz., Nos. 12 and 14 at \$2.72 per 100 pounds, and Nos. 15 and 16 at \$2.80 per 100 pounds; whilst the telegram of the 20th simply directed the steel and iron company to enter the marble company's order for 100 tons of tack plate, "specifications to follow." No specifications—that is to say, no designation of the number of tons of

any of the four grades—were ever furnished. The purchaser, as the steel and iron company proved, had the right, under the contract, to elect which sizes it would specify, and whether all the material which was sold was to be paid for at \$2.72 or some of it at \$2.80; and the vendor was unable to tell, for want of specifications, the exact contract, though it regarded the contract as closed for the sale of 100 tons of tack plate, the purchaser having the option to specify for any or all of the four gauges. This testimony, adduced by the vendor, correctly interprets the written evidence. If the purchaser had the option to specify for any or all of the four gauges, it is clear that, until such specifications had been made, there could be no definite agreement, because it was the purchaser's privilege and right to designate 100 tons of No. 12, or of No. 14, or of No. 15, or of No. 16, or 25 tons of each gauge, or any other of a vast multitude of different proportions of the whole four gauges, or of any two or three of them. The price of each gauge was definite; the total quantity of tons was definite, and the times of delivery were definite; but the proportion of each gauge, as well as which of the four would be required, is wholly indefinite and uncertain. As to that element of the alleged contract there was obviously no consensus ad idem. The telegram of September 20th was not a direct and unequivocal acceptance of any definite and unequivocal proposal, which, by acceptance, could become a complete contract. So far as the price and the gross number of tons were concerned, the telegram may be treated as an acceptance of an antecedent offer; but the superaddition of the words "specifications to follow" left something essential for future action by the purchaser, and therefore constituted, in legal effect, a new and independent offer, requiring an acceptance by the vendor. The test of this lies in considering what would have been the measure of damages in a suit instituted by the vendor against the vendee for a breach of the alleged contract. Would the vendor have been entitled to recover the difference between the contract price and the market price of the whole 100 tons, reckoned on the basis of \$2.80 per 100 pounds, or on the basis of \$2.72 per 100 pounds, or on some other basis founded on an arbitrary apportionment of the whole number of tons amongst the four different gauges? And would not the difficulty of fixing a correct measure of damages have sensibly increased if the market prices of the four gauges had fallen in an unequal ratio and in different rates of percentage? What quantity of each gauge could a court or jury declare that the vendee ought to have specified? If either court or jury had undertaken such a task, it would have supplied a term of the contract which the parties themselves failed to incorporate, and manifestly such a pro-

ceeding would have been unwarranted. *Thomson v. Gortner*, 73 Md. 482, 21 Atl. 871.

The case at bar is clearly distinguishable from those cited in the brief of the appellants. Thus, in *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218, it appeared that an offer to furnish coal for a year at a certain price to three steamers described by name, and which were then employed on a particular steamship line, was accepted; and the court held that the offer thus made and the acceptance of it constituted a definite and binding contract for the amount of coal required to supply those steamers for one year in their ordinary employment. This decision was placed on the distinct ground that the contract itself furnished the means to determine the quantity of coal to be delivered, and therefore there was no uncertainty. But it was argued that it was "apparent that it could not have been in the contemplation of the parties that the coal should be furnished in one lot, but rather at different times, as the steamers required it for their several voyages; nor could the plaintiff know the amount which each steamer would require at the successive loadings. Therefore the defendants were to determine the time and quantity for each delivery, and, as the contract contained no promise to give the plaintiff notice, the defendants were bound to take only such coal as they notified the plaintiff to furnish." But the Court of Appeals of New York said: "It may be doubted whether there is anything in the record to warrant a determination that the plaintiff would not know the several amounts and times when coal would be needed, but, if it were otherwise, we do not deem it controlling. As we have already said, the evident intention of the parties was that the plaintiff should furnish to the defendants all the coal which the steamers named should require in the work in which they were employed for the year ensuing, and that the parties should perform all needful acts to give effect to the agreement. Therefore, if a notice was requisite to its proper execution, a covenant to give such notice will be inferred, for any other construction would make the contract unreasonable, and place one of the parties entirely at the mercy of the other." This part of the court's judgment has been strongly relied on in the pending case. But that contention of the defendants in *Wells v. Alexandre* was an obvious attempt to write into the completed contract a term which it did not contain; whilst here the effort is to treat the telegram of September 20th as a definite acceptance of a prior offer, and then to permit a court or jury to speculate as to the proportions of the four gauges which the marble company ought to have ordered. In *Wells v. Alexandre* the quantity, quality, and price of the coal were definite, and the times within which deliveries were to be begun and finished were

specifically stated. The vendor had the right to deliver the whole supply at once, and, if the vendees wished to avoid that inconvenience, they probably might have requested partial deliveries. Notice to make such deliveries would have served their own convenience merely, but the contract was complete, and could have been performed without such notice; whereas here there was no perfected contract, because there was no designation of the quantity of any of the four gauges of the iron.

In *Hinckley v. Pittsburg Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 987, the contract was for the manufacture of a certain quantity of steel rails at a specified price per ton, to be delivered at designated times, the drilling of the rails to be made as directed by the vendee. The latter not only neglected to give drilling directions—the drilling being part of the manufacture—but he refused to take the rails. In a word, he repudiated the contract, and he was held liable in damages for the breach. The precise point decided was that the request of the vendee to have the delivery of the rails postponed, and also the notice given by him that he was not ready to accept and pay for them, and his assertion that he would decline to take any rails under the contract, and that he had made arrangements to purchase rails from other dealers at a lower price, excused the vendor from actually manufacturing and tendering them. The case did not turn upon the mere failure of the vendee to give directions for the drilling of the rails, but upon his flat refusal to abide by the contract. The failure to give drilling directions did not in any way control the vendors, because they could have made the rails and had them ready for being drilled but for the refusal of the vendee to comply with the contract.

It was suggested in the argument here that to allow the *Evans Marble Company* to escape its obligation to accept and pay for the 100 tons of tack plate it had ordered, simply because of its failure to perform its other obligation to furnish promptly specifications of the size to be sent, would be a monstrous perversion of justice, for it would be allowing it to take advantage of its own wrong. That argument would be clearly right and unanswerable if the premises it includes were accurate. The very point at issue, however, is assumed by the argument as established. If there had been a valid contract, then it would be a serious perversion of justice to permit the marble company to escape its obligation by relying on its own wrong. But there can be no escape from an obligation if no obligation exists; and the fundamental question is, was there an obligation on the part of the marble company? If there was not, then no injustice can be done by holding that there was not, but palpable injustice would be inflicted by declaring that there was. Controversies like the pending one can easily be avoided if parties would put their

contracts in plain and simple language, leaving nothing to conjecture or speculation. Courts cannot make agreements for persons who are competent to make them for themselves; and when attempts to enter into obligations fail because of the obscurity of the terms employed it is far better that the parties be left where they have placed themselves than for the judicial tribunals by forced interpretations to construct agreements for them.

Now, as to the verbal interview heretofore alluded to. Mr. Tinker, the general sales agent of the steel and iron company, went to Baltimore March 21, 1900, called at the office of the Evans Marble Company, and inquired for the president, Mr. Evans. He was told by the gentleman in the office that Mr. Evans was out, and then he presented his card, and, on being asked his business, stated that he wished to see Mr. Evans in regard to the contract which the Wheeling Steel & Iron Company had with them for tack plate. He was told that Mr. Driscoll had charge of that part of the business. The gentleman stepped to the door and pointed out Mr. Driscoll's office, which was in the rear of the marble company's yard, and upstairs. Tinker told Driscoll he had come to see why they had not specified for the tack plate they had bought. He answered that the business had been disappointing, and they had not been able to use it. Tinker insisted that they give plaintiff the specifications, or pay it the difference between the price at that time and the contract price. Driscoll promised that they would write plaintiff, with specifications, or a proposition for settlement, before April 1st. Plaintiff did not hear further from Driscoll, and suit was brought later on. This testimony, instead of proving the contract declared on, proves merely that Driscoll promised to send specifications, or to settle the demand made by the agent of the steel and iron company. But the suit is founded, not on a breach of a contract to send specifications, but on an alleged breach of a warranty that Driscoll had authority to bind the marble company by a contract.

As we concur in the ruling which withdrew the case from the jury, the judgment appealed against will be affirmed, and it is so ordered. Judgment affirmed, with costs above and below.

(97 Md. 639)

HERBERT v. BALTIMORE COUNTY COM'RS.

(Court of Appeals of Maryland. July 1, 1903.)

JUSTICES OF THE PEACE—COMPENSATION—STATUTORY PROVISIONS—CONSTITUTIONALITY—PUBLIC LOCAL LAWS—SUBJECT AND TITLE OF ACTS.

1. In view of Const. art. 4, § 42, providing that justices of the peace shall have such compensation "as hath been heretofore or may hereafter be prescribed by law," Acts 1900, p. 182, c. 147, providing, among other things, that no justice of the peace appointed to sit in any sta-

tion house in Baltimore county shall be entitled to receive from the county commissioners more than \$40 for his services in criminal cases in any one month, and that no other justice of the peace of the county shall receive from the county commissioners more than \$10 for his services in criminal cases in any one month, does not conflict with the state Constitution so far as it prescribes the compensation of the justices.

2. The act does not conflict with Const. U. S. Amend. 14, prohibiting any state from depriving any person of life, liberty, or property without due process of law, or denying to any person the equal protection of the law; the act being general in its operation to all justices within the classes fixed by the act.

3. The claim that justices, in order to increase their compensation under the operation of the act, will be induced to convict prisoners brought before them when they should acquit them, affords no ground for declaring it invalid.

4. The act does not grant to the commissioners of Baltimore county privileges that no one else enjoys, they acting merely for the benefit of the county, so that the provision limiting the liability of the commissioners is, in effect, a provision for the benefit of the state.

5. The act, being a local public law, applicable to all persons within the prescribed territorial limits, does not violate Const. art. 3, § 33, prohibiting the enactment of a special law in which provision has been made by an existing general law.

6. Act 1900, p. 182, c. 147, passed to repeal certain sections of the local law of Baltimore county relating to justices of the peace and constables, and to re-enact said sections with amendments, and to add new sections, and to repeal certain acts which had not been codified, relates to but one subject, the regulation of justices of the peace and constables, within Const. art. 3, § 29, providing that every law shall embrace one subject, which shall be described in its title.

Appeal from Circuit Court, Baltimore County; N. Charles Burke, Judge.

Action by Joseph B. Herbert against the county commissioners of Baltimore county. From a judgment for defendants, plaintiff appeals. Affirmed.

Argued before MCSHERRY, C. J. and FOWLER, BRISCOE, and BOYD, JJ.

Z. Howard Isaac, for appellant. Osborne I. Yellott, for appellees.

FOWLER, J. This is a novel suit, but the questions presented are, we think, free from difficulty; for they may be briefly disposed of by appealing to principles which have been frequently announced by decisions of this and other courts.

The facts out of which this controversy arises are as follows: The plaintiff is a justice of the peace for Baltimore county, duly commissioned and qualified. Shortly before the institution of this suit the plaintiff presented his account against the county commissioners for his services in criminal cases. The commissioners refused to pay him the amount he claimed, but tendered him the sum of \$91.25. He refused to accept this sum in payment, and claimed that he was entitled to \$291.70, and has brought this suit against the commissioners of Baltimore county to recover that amount.

The sole question is whether the act of

1900, p. 182, c. 147, and especially the sections thereof numbered 142c and 142d, are valid and constitutional. If they are, it is conceded the plaintiff is entitled to recover only the sum the defendants offered to pay; but if they are not valid, the plaintiff is entitled to \$291.70, the amount he claims.

The case was tried before the court without a jury on an agreed statement of facts. The facts, however, which we have stated are sufficient to present the one question here involved.

During the trial below the plaintiff reserved one exception, and that was to the ruling of the court upon the prayers. The effect of this ruling, as we have said, was that the validity of the act in question was maintained, and it will be unnecessary, therefore, to refer with greater particularity to the action of the court in this respect. There was a verdict and judgment for the defendants, and the plaintiff has appealed.

The counsel for the defendant has given in his brief a synopsis of the various local laws regulating the charges and fees of magistrates in Baltimore county, from which it appears that prior to 1890 this subject was governed by the provisions of the General Code. In the year 1900 the act in question was passed repealing all existing laws, and re-enacting the entire local law of Baltimore county, on the subject of "Justices of the Peace and Constables," as it now exists. By section 142c of this act it is provided that no justice of the peace, except station house justices, shall receive from the county more than \$10 for his services in any one month in criminal cases. This is the feature of the act which the plaintiff assails so vigorously; but, when it is remembered that it touches him in that spot which is so proverbially tender, the earnestness and the apparent full conviction in the justice of his cause, with which he has enforced his contentions, are calculated to win a more patient consideration than perhaps the case would otherwise be entitled. But whether in themselves or for any other reason the questions here presented are entitled to serious consideration, they have received it at our hands, and we proceed to state our conclusions and our reasons therefor as briefly as possible.

The validity of the act of 1900 is assailed, as we understand the argument of the plaintiff, upon three grounds: First, that it is class legislation, and violates the provisions of the fourteenth amendment of the Constitution of the United States, because it denies to the citizen the equal protection of the law; second, that it is in violation of section 33, art. 3, of our state Constitution, which prohibits the passage of a special law for any case for which provision has been made by existing general law; and, lastly, because it violates section 29 of article 8 of our Constitution, which provides that every law passed by "the General Assembly shall

embrace but one subject, and that shall be described in its title." It will be perceived, therefore, that the plaintiff plants himself upon the fourteenth amendment of the Constitution of the United States and certain provisions of our state Constitution, and hence it will not be surprising if, as we have already said, the questions at issue can be solved by the application of established principles which have been announced in well-considered adjudications of this and other courts of last resort.

1. Can the act in question be considered such class legislation as is prohibited by the provisions of the fourteenth amendment? The principles involved in this inquiry have so recently and so fully been examined and declared in the cases of *Ulman v. Balt.*, 72 Md. 587, 20 Atl. 141, 21 Atl. 709, 11 L. R. A. 224, and *State v. Broadbelt*, 89 Md. 565, 43 Atl. 771, 45 L. R. A. 433, 78 Am. St. Rep. 201, that we do not deem it necessary to discuss them elaborately. In the first place, before considering the effect of the fourteenth amendment, it can hardly be contended that the sections in question, so far as they regulate or prescribe the compensation of the plaintiff for services rendered by him as a justice of the peace, are invalid under our Constitution; for by article 4, § 42, of that instrument, it is provided that all justices of the peace shall have such compensation "as hath been heretofore or may hereafter be prescribed by law." Unless, therefore, plaintiff's contention be based upon one or other of the remaining grounds relied on, namely, either because it is a special law or its title is defective, he must fail, unless his position is sustained by the fourteenth amendment.

We have been unable to understand in what manner our legislation violates this amendment. By this legislation no person is deprived of life, liberty, or property without due process of law, nor is any one denied the equal protection of the laws, unless it be true, as contended by the plaintiff, that he is deprived of just compensation, "and the citizen is placed in serious jeopardy of being torn from his family charged with crime, and brought before a tribunal, which tribunal will receive no remuneration for its services, except by conviction of the traverser, however innocent."

The plaintiff surely has no right to complain so long as he receives such compensation as the state chooses to prescribe. While his office is one which existed at common law, yet our Constitution places it within the power of the Legislature to prescribe his duties and compensation. It would certainly be an extreme and hitherto unheard of extension of the fourteenth amendment to hold that by it the state is deprived of the power to say whether a justice of the peace shall receive \$10 or \$100 per month in criminal cases. It is one thing to prescribe what salary a public officer shall receive for serv-

ices to be performed, and a very different thing to undertake by legislation to deprive him of legal compensation for services already rendered. This act provides only for the former, and so long as the plaintiff, and those like him, hold the state's commission and authority to act as a justice, he and they must be satisfied with the compensation provided by the Legislature. Or, as was said in a case in which it was contended, as it is here, that it was illegal, wrongful, and unjust to deprive a public officer of compensation for his services: "While it may be that justices of the peace have in fairness a right to be paid for services which they render to the people in the discharge of duties imposed on them by law, it must be remembered that they take their offices cum onere, and they hold them under an implied contract to perform the duties upon the terms, as to costs and fees, ordained by the statute. If they shall receive nothing for the performance of certain duties, they suffer in common with many other officials in various instances, who have duties, and sometimes some new and onerous ones, imposed upon them, without any provision for remuneration being made." *Bruner v. Madison County*, 111 Ill. 111.

But it is said the citizen may, by the operation of this law, be denied justice and deprived of his liberty because by its operation the justice, in order to increase his compensation, may be induced to convict when in justice he should acquit. We cannot recognize the force of this suggestion, founded, as it is, upon the assumption that the justices will violate their oaths and the duties of their office, and not upon anything that the law authorizes to be done. Such conduct, resulting, it is said, in a denial, of justice and a deprivation of liberty of the citizen, would be such a gross violation of every moral as well as legal duty that it is not necessary to say it is not authorized by the legislation complained of, and therefore affords no ground for declaring it invalid. *Ulman v. Mayor*, 72 Md. 593, 20 Atl. 141, 21 Atl. 709, 11 L. R. A. 224.

Again, it is suggested that the provisions of this act are more favorable to some justices who render but slight services for the prescribed compensation than to others who for the same compensation render greater and more valuable services. Under no form of government or system of laws known to man is it possible for every individual to possess the same privileges as every other person. Hence, as is said in *State v. Broadbelt*, supra, the scope of the fourteenth amendment, so far as it guaranties the equal protection of the law, has been thus stated by Judge Cooley, and the proposition is supported by abundant authority: "The amendment contemplates classes of persons, and the protection given by the law is to be deemed equal if all persons in the same class are treated alike under like circumstances and conditions, both as to privileges conferred

and liabilities imposed. The classification must be based on reasonable grounds; it cannot be a mere arbitrary selection." It does not follow, therefore, that because the act in question limits the plaintiff's compensation it is unconstitutional if it affects, as it does, all other justices in his class in the county in the same way.

And so it may be said that, as the act is general in its operation as to the class to which the plaintiff belongs as public officer, so it is equally general and equal in its application to every citizen of the state who becomes amenable to the criminal law. We can see nothing unfair, unjust, or unreasonable in these classifications.

It was also urged that this law favors specially the commissioners of Baltimore county, and grants that body privileges and rights that no one else in the state enjoys. But this argument seems to ignore the fact that these commissioners are acting as the legal representatives of that political division of the state known as Baltimore county, and assumes without any warrant for such assumption that they are parties to all criminal proceedings before magistrates. When the state declares that the commissioners shall be liable for costs only to a limited extent, it is the same as if it had made such a provision for its own benefit. It cannot be doubted that if it thinks proper to do so the state can declare by the Legislature that neither it nor the county shall pay any portion of such costs. The whole question of compensation has by our Constitution been placed in the hands of the Legislature, and if none is provided none can be recovered. "It is doubtless true," said the Supreme Court of Illinois in *Bruner v. Madison Co.*, supra, that compensation for official services rendered in behalf of the state or for any public corporation must rest upon statutory enactment or contract." And this is unquestionably so when, as we have said, the power to prescribe compensation has been given to the Legislature. In fact, the claim set up by the plaintiff in this case is based entirely on statute; but the same power which enacted the law relied on can repeal it, or repeal and re-enact with amendments, unless prohibited by our Constitution.

2. This brings us to the second question: Is the act of 1900 a special law, within the meaning of section 33, art. 3, of the Constitution of Maryland, which provides that no special law shall be passed for any case in which provision has been made by an existing general law? This question is controlled by the leading case upon this subject of *State v. Co. Com'rs of Balt. Co.*, 29 Md. 519, in which it was held that the act of 1868, p. 777, c. 411, relating to roads in Baltimore county, is not a special law in any sense of the term, but a public local law, as distinguished from a public general law, and is not in conflict with section 33 of article 3 of the Constitution. The act of 1900, here

in question, is a public local law of Baltimore county, and belongs to the same class of statutes as those it repealed, which are confessedly local laws of that county. In the language of Judge Alvey in the case just cited: "The special laws contemplated by the Constitution are those that provide for individual cases. Local laws of the class to which the act under consideration belongs, on the other hand, are applicable to all persons, and are distinguished from public general laws only in that they are confined to a certain prescribed or defined territorial limits, and the violation of them must, in the nature of things, be local. It is not, therefore, by any means necessary, in order to give a statute the attributes of a public law, that it should be equally applicable to all parts of the state. All that is required to make it a public law of general obligation is that it shall apply to all persons within the territorial limits described in the act. That is the character of the act before us, and of that large portion of the statute law of our state comprised in the codified division under the title of 'Public Local Laws.'" See, also, *Co. Com'rs of Dorchester Co. v. Meekins*, 50 Md. 39.

3. Finally, does the act of 1900 violate article 3, § 29, which provides that "every law enacted by the Legislature shall embrace but one subject, and that shall be described in its title"? The learned judge below disposed of this question briefly and satisfactorily thus: "The subject of this legislation, in my opinion, is one, viz., the regulation of the number, jurisdiction, duties, and compensation of certain public officers in Baltimore county, to wit, justices of the peace and constables." With this view we agree. We discover no defect in the title of this act. It was passed to repeal certain sections of the local law of Baltimore county, subtitle "Justices of the Peace and Constables," and to re-enact said sections, with amendments, and to add certain new sections, and to repeal certain other acts which had not been codified. The law relating to and regulating the duties of justices and constables has been always considered as one subject, and has been so treated in the Constitution of the state and the local law itself.

Judgment affirmed, with costs.

(97 Md. 716)

FINDLAY v. BALTIMORE TRUST & GUARANTEE CO. OF BALTIMORE CITY.

(Court of Appeals of Maryland. July 2, 1908.)

SALES — RESCISSION OF CONTRACT — FRAUD AND FALSE REPRESENTATION — EXECUTED CONTRACT — INABILITY TO RESTORE STATUS QUO.

1. A rescission by the buyer of an executed sale of certain bonds for fraud cannot be defeated by the seller on the ground that the buyer has parted with the bonds, and so cannot restore the status quo, where he parted with them on the advice of the seller.

2. Defendant, the promoter of, and a large stockholder in, an enterprise, and also the trustee under a mortgage securing bonds issued to finance the same, issued a circular advertising the bonds, stating that it had made a careful investigation of the property and a conservative estimate of its earning capacity, which representations were false in fact, and made with fraudulent intent. Defendant also suppressed material information as to the value and safety of the bonds as an investment. *Held*, that plaintiff, who purchased bonds on the faith of such representations, was entitled to a rescission of the contract.

Appeal from Circuit Court No. 2 of Baltimore City; Henry Stockbridge, Judge.

Bill in equity by John V. L. Findlay against the Baltimore Trust & Guarantee Company of Baltimore City. From a decree dismissing the bill, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, and JONES, JJ.

John V. L. Findlay and Thomas Mackenzie, for appellant. Edgar H. Gans and John N. Steele, for appellee.

BRISCOE, J. This is a bill in equity filed by the appellant against the appellee, the Baltimore Trust & Guarantee Company, to rescind a contract of purchase of certain bonds of the Nashville Railway Company, sold by the latter to the former, on the ground of alleged fraud, false representation, and concealment. The case was heard on bill, exhibits, and demurrers, and from an order of the circuit court of Baltimore City passed on the 24th of December, 1902, sustaining the demurrers and dismissing the bill, this appeal has been taken.

The real question in the case, and the one presented on the record by the demurrers, is whether the appellant has stated such a case as entitles him to equitable relief and which requires an answer. As the demurrers admit the truth of the allegations of fact contained in the bill, in so far as they are relevant and well pleaded, it will be necessary to state them here somewhat in detail for a proper understanding of the case as presented on the appeal.

The bill alleges that the appellee is a Maryland corporation, and has its place of business in the city of Baltimore; that sometime in February, 1900, it issued and sent the appellant an advanced circular or prospectus, wherein it stated that it was the owner of part of an issue of the first consolidated mortgage 50-year 5 per cent. gold bonds of the Nashville Railway, of Nashville, Tenn.; that the bonds were not redeemable before maturity, but might be purchased for the sinking fund at not over 110 and interest, and the interest was payable on the 1st of February and August in each year; that the prospectus issued by the company stated the different properties owned by the railway company, their earning capacity, accompanied by an engineer's estimate, and recom-

mended the purchase of the bonds, as follows: "The Baltimore Trust and Guarantee Company has never yet given its unqualified recommendation to any security that has not invariably paid both interest and principal with exact and unfailing promptness, and after careful investigation of the above property, and after the most conservative estimates of its earning capacity, the Baltimore Trust and Guarantee Company unhesitatingly recommends these bonds to investors as a safe security." And that, in addition to this circular, other representations of a public character as to the safety and value of these securities were made by the company, and that Mr. Robt. O. Davidson, its president, recommended them orally to the appellant, and advised him to become a subscriber for them; that, relying upon these representations, he purchased three of the bonds at the sum of \$3,003.34.

The bill further avers that the Nashville Railway was formed by a syndicate of which the appellee was a member, and that the purpose of its organization was to purchase all of the then existing street railway companies in the city of Nashville and to consolidate them under one management, and the consolidated company as made up was controlled and governed by the appellee and others.

The bill further alleges that the Nashville Railway only paid one installment of interest on its bonds, and is now in the hands of receivers during the pendency of proceedings instituted at the instance of the appellee for foreclosure under a mortgage given to secure the bonds, and in which mortgage the appellee is appointed trustee for the purposes therein named.

The bill also alleges that after the default in the payment of interest a committee representing the bondholders of the railway was constituted, and the appellant, in entire ignorance of the fact, and without any cause to suspect the good faith of the appellee, and without knowledge of the fact, subsequently acquired, and acting on the advice and recommendation of the appellee company, its officers and agents, surrendered the bonds which he had paid for to the appellee company, acting as a depository of bonds for the committee, and took therefor the negotiable receipts and certificates of the company which he holds, and also sold to it the coupon for the six months' interest falling due on the 1st of February, 1901.

The bill then charges: First. That the representations made in the advanced circular or prospectus, that the appellee company had made a careful investigation of the property of the railway company and a conservative estimate of its earning capacity, were not and could not have been true and made in good faith, in view of the immediate default of the company to meet and pay the interest on its obligations, and that in fact it offered for sale and sold the bonds by means of false rep-

resentations made in the circular, and with the fraudulent intent and purpose of appropriating the money of the appellant and others to its own use and benefit, and in disregard of the rights of the bondholders. And that it was upon the faith of the statements and representations so made by the appellee, as trustee under the mortgage, that the bonds were purchased by him. Second. That the appellee withheld and suppressed facts as to the value and safety of the bonds as an investment; that the representations as to the earning capacity of the railway were false in fact; and that these, with other alleged misrepresentations and concealments on the part of the appellee company, charged in the bill, were made with a fraudulent intent to deceive, and were made for the purpose of inducing, and did deceive and did induce, the appellee to purchase the bonds, to his great injury and damage.

The prayer of the bill is for a discovery, and for a decree requiring the appellee to restore the amount of money paid by him for the bonds, less the amount of coupons purchased, the appellant tendering a surrender of the negotiable certificates issued at the time of the deposit of the bonds with the company.

The appellee demurred to the bill, stating several grounds for demurrer, which may be considered under two heads, namely: (1) That the plaintiff upon the face of the bill discloses the fact that he is not in a position to ask for a rescission of the contract between him and the defendant, as he is not able upon such rescission to restore to the defendant the bonds bought by him; (2) that the plaintiff has not stated in his bill such a case as entitles him to any relief in equity against this defendant.

The case, then, before us, is a suit in equity to rescind a contract for alleged fraud and misrepresentation, and for equitable relief. The general rule is well settled that courts will not rescind executed contracts, except in a clear case. The rule is thus stated by the Supreme Court of the United States in the case of *Atlantic Delaine Co. v. James*, 94 U. S. 207, 24 L. Ed. 112, that the canceling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured thereby. And in *Grymes v. Sanders et al.*, 93 U. S. 62, 23 L. Ed. 798, it is said that a court of equity is always reluctant to rescind, unless the parties can be put back in statu quo. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it. Now we think it is clear that the bill demurred to states such a case as the defendant should be required to answer.

The principal ground relied upon by the appellee to defeat the relief sought is that the plaintiff is not entitled to rescind the contract of purchase, because, having disposed of the bonds, he cannot restore what he purchased, and restore the precise statu quo. It is quite apparent that this case does not fall within the application of the principle here relied upon, because the cause of the change of the situation of the parties as to the bonds is alleged by the thirteenth paragraph of the bill to have been brought about by the advice and recommendation of the defendant company. It is true, as stated by Chief Justice Marshall in *Pratt v. Carroll*, 8 Cranch, 475, 3 L. Ed. 627, "that equity will not relieve where it is impossible to place the parties in the same situation, and when the real fault is imputable to the person praying the aid of the court." But it is also well settled that, when the situation of the parties is altered and changed by the fraud of the vendor, the defrauded party will be granted relief in a court of equity.

In the case of *Erlanger v. Sombrero Phosphate Company*, 3 App. Cas. 1278, Lord Blackburn, in speaking of the rescission of contracts in equity, says: "The practice has always been for a court of equity to give this relief, whenever by the exercise of its powers it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy. * * * I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question, more or less depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, of whether the balance of justice or injustice is in favour of granting the remedy or withholding it."

And in *Savery v. King et al.*, 5 House of Lords, 687, it is said that: "It is impossible, therefore, as to that policy, to restore Mr. Savery exactly to the position in which he stood before 1835; but he cannot be heard to complain of this, for, by the arrangements which he had made or concurred in, he had led Richard to suppose that all the policies had become his own, and that he might deal with them as he thought fit; indeed, he himself suggested a sale of one or more of the policies as a step which it might be advisable for Richard to take. All, therefore, which can be done as to the policy which was sold, is to charge Richard in account with Mr. Savery with the sum which

it produced, together with interest from the time when it was sold." And we may add that this is the well-established law in this country. *Grymes v. Sanders*, 98 U. S. 55, 23 L. Ed. 798; *Pratt v. Carroll*, 8 Cranch, 471, 3 L. Ed. 627; *Taymon v. Mitchell*, 1 Md. Ch. 496; *Refining Company v. Campbell & Zell Co.*, 83 Md. 55, 34 Atl. 369.

We come, then, to the second objection raised by the demurrer, and that relates to the sufficiency of the averments of the bill. We think it is clear that this bill states the facts relied upon with reasonable accuracy and with sufficient certainty, as required by the rules of equity pleading. The object of pleading is to give the parties notice of the ground of claim and defense, and, when this is done, the object of the rule is attained. *Crain v. Barnes*, 1 Md. Ch. 156; *Ridgely v. Bond*, 18 Md. 433. The bill alleges, in the fourth paragraph, that the representations made in the circular or prospectus, that the company had made a careful investigation of the property, etc., and a conservative estimate of its earning capacity, were not and could not have been true and made in good faith; that, in fact, it offered for sale and sold the bonds by means of false representations made in the circular, with the fraudulent intent and purpose of appropriating the money to its own use and benefit without giving an equivalent therefor. Furthermore, it is stated that the appellee withheld and suppressed material information as to the value and safety of the bonds as an investment, and that it was upon the faith of the representations contained in the prospectus that he purchased the bonds; and further charges that the representations so made were false in fact, and made with a fraudulent intent to deceive. And these averments of the bill are admitted by the demurrer to be true.

It seems to us, then, that the averments just referred to are sufficient in themselves, without stopping to consider the other paragraphs of the bill, to require an answer from the defendant company in this case. In *Savage v. Bartlett*, 78 Md. 565, 28 Atl. 414, this court adopted with approval the rule laid down by the English cases, where it is stated: "Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as a fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares."

In the case at bar, the appellee company not only stood in the relation of promoter

and trustee under the mortgage, but, it is stated by the bill, it was a stockholder of the company to the extent of one-third interest therein.

In the recent case of *Tompkins v. Sperry, Jones & Co.*, 96 Md. 560, 54 Atl. 254, this court emphatically declared that promoters of corporations are bound to practice no concealment toward persons whom they invite to become interested in the enterprise, and are required to give them all desired information as to their own relations to the company. And in *Wenstrom Con. Co. v. Purnell*, 75 Md. 120, 23 Atl. 134, in a case where a bill was filed to rescind a contract for alleged false representations, Judge Alvey thus states the law: "It is now settled that, where a subscriber to stock has been deceived and induced to enter into a contract of subscription by misrepresentation and fraud of an agent acting for the corporation, such contract, while not absolutely void, is voidable at the election of the party deceived; and he will be entitled to have the contract of subscription rescinded and declared void, and to have restitution made of all money paid thereon, provided he elects to repudiate the contract at once upon the discovery of the fraud, and he is guilty of no unnecessary delay in coming to a court of equity for relief. This relief will be afforded even after the complete execution of the contract, if the rights of creditors or of innocent third parties do not intervene and give rise to equities superior to those of the stockholder alleging himself to have been defrauded. But in all such cases the rule is uniformly declared and applied that the particulars of the misrepresentations and fraud must be distinctly alleged, and fully and clearly proved, to entitle the party to relief, and that relief will only be granted in those cases where it plainly appears that the misrepresentation or undue suppression of material facts actually occasioned and brought into existence the contract. *Hallows v. Fernie*, 3 Ch. App. 467; *New Brunswick & Canada Railway Co. v. Conybeare*, 9 Ho. L. Cas. 711; *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 317; 1 *Moraw. Corp.* §§ 100-102, and cases there cited."

We think, then, without prolonging this opinion, that this case comes within the reasoning of the authorities here cited, and that the court below committed an error in sustaining the demurrers and dismissing the plaintiff's bill. It follows that, if the material averments of the bill are supported by the necessary proof, the plaintiff will be entitled in a court of equity to the relief here sought. The decree of the circuit court No. 2 of Baltimore City, sustaining the demurrers and dismissing the bill passed on the 24th of December, 1902, will be reversed, and cause remanded for further proceedings.

Decree reversed, and cause remanded, with costs.

(97 Md. 539)

SUIT et ux. v. SUIT.

(Court of Appeals of Maryland. June 30, 1903.)

RELEASE—CONSTRUCTION AND OPERATION—CLAIMS RELEASED—EQUITABLE TITLE.

1. A., the owner of land, was indebted to B., whose claims were placed in C.'s hands to enforce them, so that the proceeds would inure to the benefit of A.'s son after B.'s death. A. executed to C., as trustee, a deed of the land in part liquidation of B.'s claim, and C. some years afterwards conveyed to A.'s son the legal estate. Previous to this conveyance, and subsequent to the conveyance to C. in trust, A. and his son entered into an agreement whereby, for a certain consideration, the son agreed to release all "claims and demands" against A., and to make to him and to C., as trustee, full receipts for the same. Held, that the son's equitable title or claim to the land conveyed by the deed to C. was not a "claim or demand" against A. released by the agreement.

Appeal from Circuit Court, Prince George's County, in Equity; Geo. C. Merrick, Judge.

Bill by Arthur B. Suit and wife against Rosa Pelham Suit, executrix and trustee. From a decree for defendant, plaintiffs appeal. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

M. Hampton Magruder and F. Snowden Hill, for appellants. Charles H. Stanley and Joseph K. Roberts, for appellee.

PAGE, J. This appeal is from a decree of the lower court declaring that the estate of S. Taylor Suit is entitled in equity to the property in dispute, and restraining Arthur B. Suit from setting up any further claim thereto. The questions involved arise in the following manner: Arthur B. Suit filed a bill of complaint charging that he is entitled to a one-third undivided interest in certain land, particularly described in the bill (and which will be referred to hereafter for convenience as the "Brown dower land"), and that the defendants named in the bill are entitled to the other two-thirds. The prayer of the bill is for a sale for the purpose of division. After proper proceedings, a decree for the sale of the property was passed. The trustee named therein made and reported a sale of part of the land, and an audit was made, wherein one-third of the proceeds of sale were assigned to Arthur Bingham Suit. The trustee thereupon reported to the court that Rosa P. Suit claimed the amount which had been allowed by the audit to Arthur B. Suit, that only a small part of the land had been sold, and that by reason of Rosa suit's claim the trustee cannot make sale of the residue, and prayed that Arthur B. Suit and Rosa P. Suit, as widow and trustee of her children (whose names are unknown to the petitioner) may be required to answer, etc. Both of these parties answered this petition, and asked the court to determine to whom the proceeds

of the sale of the one undivided third interest of the Brown land legally and equitably belonged. Testimony was taken by both parties, and on the 28th day of August, 1902, the court decreed that "the estate of S. Taylor Suit was entitled to the property and the proceeds of any sale thereof." From this decree Arthur Bingham Suit has appealed.

There is no dispute about the chain of title. James L. Brown, as heir at law of his father, was entitled to a one undivided third interest in the land, subject to a life estate in his mother, who held her interest under and by virtue of an assignment of dower out of the lands of her deceased husband. Brown's interest was conveyed to S. Taylor Suit, and the contention of the parties now grows out of transactions occurring subsequently between S. T. Suit and his son, Arthur. S. T. Suit was indebted to one Charles K. Bingham in a large amount. His claims were placed in May's hands, as trustee, with power to sue for the same or arrange "in some mode that would secure them, and to hold the proceeds" for the benefit of Arthur Bingham Suit after Bingham's death, as per letter following:

"Jacksonville, Fla., November 30, 1875.

"George T. May—My Dear Sir: Mr. Suit will place some papers in your hands on which I wish to bring suit, or settle in some shape that will secure same, and hold the proceeds for the benefit of Arthur B. Suit after my death. Please so arrange it that I may have the benefit of the interest on the same during my life, and then go to Arthur Bingham Suit. I wish you to act as trustee for him. Manage this as you may think advisable for all parties as above required. My regards to your family. My health is miserable at this time, but hope soon to improve.

"Most respectfully yours,

"C. K. Bingham."

This indebtedness of Suit to Bingham, on the 25th day of March, 1876, amounted to the sum of \$13,615.52; and for the purpose of liquidating this "in part" May, trustee, on that day purchased for \$3,800, and received a conveyance in fee from Samuel of, the "Joy land," 15¼ acres, and also of 7¼ acres, and, in addition, the Brown dower land, 101 acres. "To have and to hold the same in trust for A. B. Suit, and to be managed for his benefit, as the said trustee may think advantageous, as manifested and set forth in said declaration of trust." It appears from the recital in this deed that it was conveyed to May, trustee, for the use of the said Arthur B. Suit, and for the purpose of liquidating in part the said indebtedness of S. T. Suit to the said Bingham. This deed, which indicated an out and out purchase of the property described therein for the sum of \$3,800, placed the beneficial and equitable ownership of the property in Arthur B. Suit, which equitable estate was converted into a legal estate by the deed of George T. May, trustee, to Arthur B. Suit,

dated the 18th of August, 1900. It thus appears that by these conveyances the legal and equitable title to the land in question was in Arthur B. Suit, and must still be in him, unless by some means it has been taken out of him. On the 27th day of June, 1884, Arthur B. Suit and his father entered into an agreement in writing, the effect of which, it is contended by the appellee, was to discharge the Brown dower land from any claim in equity which Arthur might otherwise have had upon it. That agreement provides that, "whereas Arthur Bingham Suit holds certain claims and demands" against the said George T. May and Samuel T. Suit "as trustee," and whereas he has agreed "to relinquish all such claims and demands, and to make to the said May and Suit," and to each of them, as trustees as aforesaid, full receipts, acquittances, and discharges for the said claims and demands," therefore in consideration of the same, and for divers other good and valuable considerations moving from Arthur B. Suit to them, Samuel T. Suit agreed to convey and assign to Arthur B. Suit, "by good and sufficient deeds," all that part of "Suitland" which is fully described in the agreement, and also "to put Arthur B. Suit in the full and undisputed possession" of the tract, by January 1, 1885, and to free the same "from all and every incumbrance," within two years from the date of the execution of the agreement, and to the performance of this agreement the parties severally bound themselves, each to the other, in the sum of \$2,000.

Now, what claims and demands "were in existence" when this agreement was made? The trust in May was created by the letter of Bingham and the deed from S. T. Suit. By the former, dated November 30, 1875, certain claims against Suit in favor of Bingham were placed in May's hands, to sue upon or secure, in some shape, with direction "to hold the proceeds for the benefit of Arthur B. Suit" after his death. By the deed of Suit to May, it appears that at that time—that is, on the 25th day of May, 1876—the amount due on the Bingham claim was \$13,615.52; and for the purpose of liquidating in part this indebtedness, the trustee, May, purchased in fee the tracts and parcels of land mentioned in the deed (including the Brown dower land) "at and for the sum of \$3,800." So that, after the execution of this deed, the condition of the trust in May's hands was a claim against S. T. Suit for the Bingham notes for the sum of \$13,615.52, less \$3,800, and the lands conveyed to him by Suit, which by the terms of the deed he held in fee, in trust for Arthur B. Suit. In view of this statement, it is impossible that the parties to the agreement could have supposed that the title or claim to the dower land could form a "claim or demand" against Samuel. It had been conveyed by the father to May, in trust for Arthur, in payment of \$3,800, part of the debt due by him to Bing-

ham; and under the terms of the trust, as declared in Bingham's letter, May held it in trust, after Bingham's death, for the use and benefit of Arthur. It seems to be clear that this deed to the land in question was received by May in discharge of his duties as trustee, under the Bingham letter, "to settle in some shape" Suit's indebtedness, and hold the proceeds for the benefit of Arthur B. Suit; and the effect of it, as against Samuel, was to discharge \$3,800 of his indebtedness. S. T. Suit, therefore, had, at the date of the agreement in 1884 (and could have had), no claim, legal or equitable, to the Brown dower land; and Arthur B. Suit, having then an equitable fee, could have had no demands against his father in respect to it. Bingham did not die, it is true, until 1891; but Suit parted with his title in 1876 to the trustee, who held it thereafter in accordance with the terms of said trust.

But the appellee, Rosa Suit, contends that by the agreement of the 27th of June, 1884, Arthur B. Suit relinquished all right to claim any interest in the land in question, and for the purpose of sustaining her position offered evidence of verbal agreements between A. B. Suit and his father (by which the latter was to build a house on the land specifically referred to in the agreement), also an entry in the diary of S. T. Suit, and also of certain transactions in reference to two policies of life insurance upon the life of S. T. Suit, wherein A. B. Suit was the beneficiary named. Much of this evidence has been excepted to, for reasons specially stated in the exceptions. It is not necessary, however, to refer to these, further than to say that such proof cannot be material, because of the fact that, as we have seen, the Brown dower land, at the time of the agreement, had been conveyed to May in fee, in trust for Arthur Suit, in consideration of the liquidation of \$3,800 of the indebtedness due by S. T. Suit to Bingham, and was not, therefore, property in which Samuel had any interest whatsoever. Evidence of what occurred between the parties as to the insurance policies, or in relation to property upon which Arthur Suit held "certain claims and demands," could not affect the title to the Brown dower land, as to which S. T. Suit had then parted with all title and interest. Arthur then held the equitable fee in the property, and in respect to it did not have any claim or demand as against his father. It may be true, and doubtless was, that Arthur may then have had "certain claims and demands" against May, the trustee, and also against his father. After the completion of the transaction stated in Samuel T. Suit's deed of the 25th of March, 1876, to May, trustee, there still remained due to the latter a large sum on account of the Bingham notes, in the payment and settlement of which Arthur may have had a deep interest. It may well be, therefore, that on the 27th of June, 1884, the day the agreement was entered into, there were

outstanding demands and claims of his, as against May, trustee, and his father, for the settlement of which the agreement was made. The record does not furnish us with any explanation as to the manner in which this balance, due by the father to May, trustee, was settled. The deed of May, trustee, to A. B. Suit, of the 18th day of August, 1900, refers to the trust as having then been fully executed, except as to the Brown dower land, and the record shows some of the negotiations between the Suits, which resulted in the conveyance of the land specifically described in the agreement, and the transactions with reference to the policies of insurance; but it does not contain the facts from which it can be now fully understood how that large balance was adjusted. Nor is it material to the present controversy whether the title to the land described in the agreement was, or not, relieved of incumbrance within the time mentioned; nor that the father, by his last will, bequeathed to Arthur a sum of money, which the latter applied to the payment of the mortgage upon this property. These are doubtless some of the transactions (and they have been numerous) which finally resulted in the settlement of the Bingham notes, and enabled May to finally execute his trust. But they do not affect the title of Arthur to the Brown dower land, which was bought of Samuel by May, trustee, and paid for by crediting \$3,800 upon the Bingham indebtedness.

In view of what we have said, it follows that we are of the opinion that the proof shows that the title and interest to the property in dispute is in Arthur B. Suit. The decree must, therefore, be reversed, and the cause remanded for further proceedings in conformity with the views herein expressed.

Decree reversed, and cause remanded for further proceedings.

(97 Md. 608)

RICARDS et ux. v. SAFE DEPOSIT & TRUST CO. OF BALTIMORE.

(Court of Appeals of Maryland. July 2, 1903.)

TRUSTS—BILL TO SET ASIDE—RATIFICATION—LACHES—REMAINDERS—POSSIBILITY OF ISSUE EXTINGUISHED—EXPERT EVIDENCE—ADMISSIBILITY.

1. Where, after the creation of a trust in which the settlor and his wife were made beneficiaries, said settlor directed the trustee to pay the whole income to his wife, and later they both joined in a bill to procure the appointment of a new trustee, there was a ratification of the trust, precluding them from subsequently maintaining a bill to set it aside on the ground of mistake.

2. Where a trust was created in favor of the settlor and his wife, and no attempt was made to impeach it for over 12 years, the lapse of time was a bar to a suit to set aside the trust on the ground of mistake.

3. A trust was created for the benefit of the settlor and his wife for their joint lives, with a provision that, if said settlor should die leaving his wife and a child or children surviving him, the property should be distributed to the widow and the child or children as if said settlor

had died intestate and owning the property, and that, if said settlor should survive his wife and die leaving children, the trust should be discharged, and the children take absolutely. Subsequently the settlor and his wife joined in a bill to have the trust set aside, there being no children. *Held*, that expert evidence was inadmissible to prove that it was impossible for the wife to bear children.

Appeal from Circuit Court of Baltimore City: George M. Sharp, Judge.

Bill by P. Sidney Ricards and wife against the Safe Deposit & Trust Company of Baltimore, as trustee. From a decree for defendant, complainants appeal. Affirmed.

Argued before MCSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Arthur P. Gorman, Jr., and Alonzo Miles, for appellants. Louis J. Burger and John Hinkley, for appellee.

MCSHERRY, C. J. The bill of complaint which inaugurated this proceeding was filed on August 11, 1902, in the circuit court of Baltimore city by P. Sidney Ricards and Virginia, his wife, against the Safe Deposit & Trust Company of Baltimore. It states in substance that in 1871 the grandfather of Ricards died, leaving a will by the terms of which a trust was created. By the provisions of this trust one half of the income arising from the trust property was directed to be paid to the widow of the testator during her life, and the other half to the testator's daughter, Frances Virginia, during her natural life. It was further provided that on the death of the daughter, leaving the widow surviving her, the share of the income bequeathed to the daughter during her life should be payable to her children living at the time of her death, until they attained the age of 21 years. The will further declared that after the death of the widow and daughter, and upon the children of the daughter reaching the age of 21 years, the trust should cease, and the property covered by it should belong absolutely to the children. In February, 1902, the daughter of the testator died, leaving the plaintiff, P. Sidney Ricards, and George P. Ricards her only surviving children; they both being above the age of 21. The proportion of the mother's share of the trust estate to which the plaintiff was entitled is about \$20,000. The widow of the testator is still living, but upon her death the plaintiff's half of her share of the trust estate will be something in the neighborhood of \$22,000 more. In August, 1890, before either share of the trust estate had come into the possession of Ricards, he executed a deed of trust which he and his wife now seek, by these proceedings, to have annulled and vacated. By that deed the plaintiff granted, assigned, and conveyed to Charles Lake all the right, title, interest, and estate which the settlor then had or might thereafter be entitled to under the provisions of his grandfather's will. This

grant was upon the following trust, namely: "He shall collect the income and profits of the said trust property, and shall, first of all, during the natural life of the said P. Sidney Ricards, apply and appropriate such profit and income to the proper support and maintenance of the said P. Sidney Ricards and his wife, Virginia S. Ricards, and for the proper support and maintenance, as well as education, of any children that may be born of their marriage, without any claim and to the exclusion of all rights that may be set up by any creditors of the said P. Sidney Ricards; and the said trustee shall return to the said grantor a full account of his disbursements at least once a year, and, after the payment of all charges incurred by the said trustee in the premises, any surplus income shall be paid over into the hands of the said P. Sidney Ricards, or to his order, and not otherwise. If the said P. Sidney Ricards should die, leaving his said wife surviving him, without children born of their marriage, the said trustee shall become discharged, and the said trustee shall convey, assign, and transfer all the property covered by this deed absolutely unto the said Virginia S. Ricards; but if the said P. Sidney Ricards shall die, leaving his said wife and a child or children, born of their marriage, surviving him, the said trustee shall at once distribute the said property between and to this said wife and child or children just as the law would dispose of it, if it were owned by him free of any trust and he had died intestate. If he should survive his said wife, and should die, leaving children of their marriage, then the said trust shall be discharged, and the said children shall become absolutely entitled to the said property covered by this deed." This deed was placed on record in the office of the clerk of the superior court of Baltimore city shortly after its date. Mr. Lake having neglected or declined to act as trustee, the plaintiff and his wife, on the 11th of April, 1902, filed a bill in the circuit court of Baltimore city wherein the trusts hereinbefore mentioned were set forth, and a certified copy of the deed of trust was exhibited. It was alleged in the bill that Mr. Lake had declined to act as trustee, and that it would be necessary for a new trustee to be appointed "to perform and carry out the said trusts in said deed mentioned"; and the plaintiffs nominated the Safe Deposit & Trust Company of Baltimore as such trustee. On the same day the court passed a decree, by consent of the parties, appointing the trust company substituted trustee, and directed the new trustee to administer the trusts created by the deed under the direction of the circuit court. The bill of complaint upon which this last-named decree was founded was signed by both Ricards and his wife. In March, 1902, Ricards gave to Lake, trustee, and to his successor, an order directing the whole of the income arising from the trust

estate to be paid to his (Ricards') wife for their joint support and maintenance. After the events thus far narrated had transpired, the bill of complaint now before us was filed, as we have said, in August, 1902.

The grounds upon which it is sought to set aside the deed of trust are: First, that the settlor misunderstood the scope and purport of the conveyance in this: that he believed it was intended to, and did in fact, transfer his interest in the trust estate to his wife absolutely; secondly, that inasmuch as the possibility of his wife having issue was extinct, and inasmuch, therefore, as there could be no persons entitled in remainder under the terms of the deed of trust, the trusts ought to be terminated upon the joint request of the settlor and the only possible beneficiary—the wife—she having received from her husband, shortly before the bill was filed, an absolute assignment of all his interest in the trust property. It must be noted at the outset that the case is entirely free from any charge of fraud, misrepresentation, or deceit.

With regard to the averment of mistake, we deem it necessary only to say that the evidence contained in the record fails in our judgment to establish it. It would serve no useful purpose to go into an analysis of the evidence, because, even were there room to question the accuracy of the conclusion just announced, there are two distinct acts of ratification of the deed which would preclude the plaintiffs from now impeaching it, although the settlor might not have comprehended its full significance and effect when he executed it. Those two acts of ratification are: First, the order directing the trustee to pay the whole income to the settlor's wife; secondly, the bill of complaint filed by the plaintiffs to procure the appointment of a new trustee. Both of these acts of necessity imply that the settlor and the life beneficiary were fully aware of the contents of the deed. Not the faintest protest was entered against its terms, but, on the contrary, the request made of the circuit court to designate a new trustee to carry out the trusts declared in the deed of itself involved a recognition and an affirmation of those trusts, and was tantamount to an assertion that the deed correctly represented the intention and the object of Ricards. In the face of these emphatic acts of ratification, it would be useless to further consider or discuss the averment of mistake. We may add, however, that inasmuch as the deed of trust was executed as long ago as August 4, 1890, and no attempt was made to impeach it until August 11, 1902, such a long delay and acquiescence, under the circumstances heretofore stated, are a complete bar to relief on the ground of mistake. *Hewitt's Appeal*, 55 Md. 517; *Beard v. Hubble*, 9 Gill, 431.

We now come to a much more serious and delicate question. Is it competent to the plaintiffs to prove by medical testimony that

Mrs. Ricards is incapable of bearing children? It may be conceded that, where all the parties in interest are in being and all are sui juris, they may agree to terminate the trust, and, if no reason appears for denying their request, a court of equity will terminate the trust. *Beach on Trusts*, § 761. Lying behind this legal proposition is the inquiry above propounded, because, unless there is no possibility of Mrs. Ricards having issue, and unless this physical condition can be lawfully proved in the way and by the means by which it has been attempted to be established in this case, all persons who might have an interest in the trust funds, and who, if in being, would have such interest, are not in being, and the rights which they would have, on coming into being, cannot be affected or interfered with. Consequently this branch of the controversy turns and depends upon the answer that may be given to the inquiry as to whether the medical proof set out in the record, and objected to by the trustee, is competent and admissible. We refrain for obvious reasons from setting forth the details of this testimony. Mrs. Ricards is 53 years of age. Her husband is several years younger. There are some early English cases which upheld or sanctioned a presumption that a woman of Mrs. Ricards' age was incapable of bearing children. The more modern English cases have not adopted or relied on this presumption. In *re Dawson*, L. R. 39 Chan. Div. 155; In *re Sayer's Trusts*, L. R. 6 Eq. 319. In *Lawson on Presumptive Evidence*, p. 302, it is said: "In a number of cases the English courts have acted on the presumption that a woman beyond a certain age is incapable of child-bearing. No case can be found in the American courts in which such a presumption has been given effect to." At best, such a presumption is speculative. It is, as the very term "presumption" implies, a mere inference, and not a certainty; and it would be exceedingly unsafe to permit property rights to depend upon so precarious a basis. But the proposition here goes further. It does not contemplate reliance on a simple presumption. Physical conditions have been testified to by medical witnesses who have expressed the opinion that there was no possibility of the life tenant being the mother of children. Can such evidence be received in a court of justice to affect the devolution of property, or to divert the course marked out for it to follow? The admission of such evidence in a case like this, where the avowed purpose of the proceeding is to cut out or strike down an estate in remainder, would or might be productive of most disastrous results. If, because of physical degeneracy, atrophy, or decay, a medical man may, in a controversy involving title to an estate, testify that a woman is incapable of bearing children, so that a trust deliberately created for her benefit during her life only may be brought to an end, with a view of vesting

an absolute interest in her, or so that the vesting of a remainder may be accelerated, no one can foretell to what lengths such a precedent would lead. A surgical operation extirpating the uterus, for instance, would make it absolutely certain that no issue could be borne. If proof like that now under consideration were admitted, upon what principle could evidence showing that an operation of the kind indicated had been performed be excluded? And, if not excluded, what would prevent interested parties from resorting to such or similar operations, if by a resort to them a mere equitable life estate could be converted into an absolute interest? It is wholly immaterial whether the inability to bear children arises from natural or from artificial causes. It is not the cause, but the fact, that alone controls the question, and the single fact to which the law looks is death.

Upon a case of first impressions, as this case is, we are bound to examine and weigh the results that may lie beyond the narrow horizon of an isolated controversy, and to consider the moral aspects of the situation, in reaching a conclusion which, when reached, may be fraught with such dangerous and demoralizing consequences. It is obviously not the province of courts of justice, and especially courts of equity, to encourage in any way a resort to a method like this for defeating a settlement or terminating a trust. If the evidence set out in the record should be received, no line could be drawn restricting or marking its limits, and no satisfactory reason could be given for the exclusion of the other species to which we have alluded; and, if the latter sort of evidence be admitted, a court of conscience would be made the instrument for the promotion or encouragement of acts most manifestly subversive of good morals. Even had the question as to the admissibility of this kind of testimony been decided in other jurisdictions adversely to the view we take, we should feel constrained, upon grounds of a sound public policy, to exclude the testimony in a contention like this.

In *re Dawson*, supra, Justice Chitty, in dealing with a trust alleged to be void for remoteness, said: "Thereupon this argument is raised: that the parties are at liberty, when the will is brought before the court, to give other evidence of the state of things existing at the testator's death, for the purpose of showing that some person mentioned in the will whose issue are to take can have no issue born after the testator's death. Death, of course, in the testator's lifetime, proves the fact of the impossibility of having any issue born after his death, and it is said the law cannot be so one-sided as to confine itself in point of principle to the mere case of death. It cannot be suggested, it is argued, that there is any difference between showing the impossibility of issue by death and in any other way, and that con-

sequently evidence is admissible to prove that a person named in the will whose issue are to take, and with regard to whose issue the question of perpetuities arises, can have no issue born after the testator's death, and consequently that in this case I ought to admit evidence to show that the lady had attained that age at which it was impossible she could have issue. If I thought this point could be taken, and that evidence was admissible, I should require it to be proved as a fact, as any other fact must be proved to the satisfaction of the court; that is to say, I should not assume, by reading textbooks on the subject, that I had mastered the whole subject, and that I was in a position myself to determine such a question as this without the testimony of experts. This question, then, is whether such evidence is admissible. The question came before Lord Kenyon rather more than 100 years ago, and he decided this exact point in the case of *Jee v. Audley*, 1 Cox, 324. It is said that it is not a decision, but a mere dictum. I think it can be shown by a slight examination of the case to be a decision, and the ground of his holding that the will violated the rule against perpetuities. In that case there was a gift to the children of John and Elizabeth Jee, which was limited to take effect upon an event which was too remote according to the law as it then stood. The words used in the testator's will, which introduced this condition, were words which imported a general failure of issue. The gift, then, was to persons who could then have been ascertained, who must have come into being within lives in being—that is to say, within the lives of John and Elizabeth Jee—because the limitation was to their children. But it was not a limitation to their children at birth. It was a limitation postponed as to vesting, when the case is examined, to the same point of time as that which was denoted by the indefinite failure of issue of the preceding taker. Consequently it ran thus: On the happening of an event which was too remote, I give to the unborn children of my kinsman, John, and his wife, Elizabeth, who were then living; not to those children at 21, not to those children at birth, but to those children, it might have been, some 50 years after the death of the testator. The point of the case turned on the words 'then living,' and the Master of the Rolls said that, if it had been to the daughters of John and Elizabeth living at the time of his will, or the time of his own death, the gift would have been very good; but he decided the case on the ground that it was possible, in point of law, that John and Elizabeth should have children born after the testator's death. The argument was that there was no real possibility—I am using the words from the report itself—no real possibility of their having any children born after the testator's death, because they were both 70 years of age; and, if the Master of

the Rolls had accepted the proposition that there was no possibility of issue, then he must have decided that the gift was good. But this is what he says: After speaking of the law against perpetuities being one of the landmarks, he goes on: 'It is grown revered by age, and is not now to be broken in upon. I am desired to do in this case something which I do not feel myself at liberty to do, namely, to suppose it impossible for persons in so advanced an age as John and Elizabeth Jee to have children; but, if this can be done in one case, it can be done in another, and it is a very dangerous experiment, and introductive of the greatest inconvenience to give a latitude to such sort of conjecture.' It is clear that Lord Kenyon was considering the case generally, and it is clear that if he had admitted the evidence in this case, or admitted any argument with regard to the impossibility of issue, it would have followed that he must, and that the court must, in every other case make an inquiry into the possibility of issue other than that which arises from death. As I pointed out in the argument, if medical testimony was admitted in this case for the purpose of showing that the lady was past child-bearing, it would equally be admitted as a matter of law in the case of a woman of younger age; and it may be medical testimony could show that she was incapable of bearing a child, and evidence of that class might, therefore, consistently with the supposed principle, be adduced in the case of a woman of 30, or even younger, and if the principle is pursued in this way, there could be no ground for rejecting evidence in the case of a man. It is unnecessary to pursue that. Of course, the probability is not great; but there are cases, I take it, in which it could be proved that it was impossible for a man to have children. The Master of the Rolls appears to me to have deliberately rejected this argument on grounds which appeared to him to be sufficient, and he speaks of the danger of the experiment, and the great inconvenience and the latitude which would be introduced into the law. That is a decision pronounced, as I have said, more than a century ago, and it is cited in the text-books without any adverse comment. It has also been mentioned by several eminent judges since, and with approval. It may be that sometimes rhetorical phrases are applied even by eminent judges to propositions of law. In Lord Dungannon v. Smith, 12 Cl. & F. 631, Lord Brougham in eloquent language described it as 'one of the cornerstones of the law,' and I understand the Lord Chancellor in the same case to have considered the decision in *Jee v. Audley*, 1 Cox, 324, to be one of the landmarks."

The testimony of the medical witnesses being excluded, there is nothing in the record to show that there may not be children born who would be entitled under the deed of trust to the estate in remainder. It there-

fore follows that Mrs. Ricards is not entitled under the assignment from her husband to the entire estate, if the deed of trust is not void on the first ground we have discussed. Having reached the conclusion that the deed is not void on that ground, none of the other questions so very ably argued by the learned counsel for the appellants need be alluded to. The court below dismissed the bill of complaint, and thereby upheld the validity of the deed of trust. We fully concur in that result, and accordingly affirm the decree in all particulars.

Decree affirmed, with costs; the costs to be paid out of the trust estate.

(97 Md. 647)

KNIGHT v. MAYOR, ETC., OF BALTIMORE.

(Court of Appeals of Maryland. July 1, 1903.)
CITIES—DEFECTIVE STREET—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—DIRECTION OF VERDICT.

1. Where in an action for personal injuries the facts are undisputed, or but one reasonable inference can be drawn from them, the question of negligence is for the court.

2. Where plaintiff was injured by driving his wagon into a hole in a street which he had passed over but two days before the accident, and testified that he had then noticed the defective condition of the street, though he had not observed that particular defect, and that the hole could have been seen at a distance of a block or so, but that he did not see it because he was not looking, but talking with a companion, he was guilty of contributory negligence.

Appeal from Superior Court of Baltimore City; Charles E. Phelps, Judge.

Action by William T. Knight against the mayor and city council of Baltimore. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Carroll T. Bond, for appellant. Albert C. Ritchie, for appellee.

PEARCE, J. This suit was brought by William T. Knight in the superior court of Baltimore city against the mayor and city council of Baltimore to recover for personal injuries sustained by him while driving a wagon or truck, heavily loaded, upon Eastern avenue, in said city, where it crosses President street. The declaration alleges that the highway or street at the point of the accident had been for a long time badly out of repair, and in an unsafe and dangerous condition, and that while driving thereon, and using due care, the wheels of his wagon were caught in a hole in the street, and he was thrown from his seat into the street, receiving a bad fracture of his right arm, and permanently disabling him. At the close of the plaintiff's case, the defendant declined to offer any testi-

¶ 1. See *Negligence*, vol. 37, Cent. Dig. §§ 290, 291.

mony, and offered the following prayer: "The defendant prays the court to instruct the jury that it appears from the undisputed evidence in this case that the plaintiff, while driving his wagon on Eastern avenue, at its intersection with President street, at the time and place the injuries complained of are alleged to have been sustained, did not exercise reasonable care to avoid the accident, but by his own negligence contributed directly to the injuries whereof he complains, and that the verdict of the jury must therefore be for the defendant." The plaintiff offered three prayers. The first asked the court to instruct the jury that it was the duty of the defendant to keep its streets in such good repair as to afford free, safe, and easy passage over the same, and that if this duty was neglected, and the plaintiff was injured in consequence thereof while using due care, he was entitled to recover. The second was the usual prayer as to damages, and the third asked the court to instruct the jury that Eastern avenue and President street, at the place where the accident occurred, are public streets of Baltimore city. This prayer was conceded, and the court granted the defendant's prayer, and rejected the plaintiff's first and second prayers. There can be no question that these last would have been correctly granted if the case had been one to be submitted to the jury, but they could not, of course, be granted, if the case was properly withdrawn from the jury. The only question, therefore, requiring our consideration, is the ruling upon the defendant's prayer, and this requires us to examine all the evidence.

The plaintiff was the principal witness, was examined at much length, and testified with great frankness. His evidence in chief was that he was 37 years old, a driver by occupation, and in the employment of the Thomson Chemical Company. "That at the time of the accident he had upon his wagon eight barrels of soda, and that while driving east on Eastern avenue, after passing the railroad track on President street, which crosses Eastern avenue, one of the wheels dropped down into a hole, and threw him off from the seat of the wagon, which was quite high from the ground, into the street. That some one picked him up and set him on the sidewalk, washed and tied his head up, and that his injuries consisted of a cut on the head and a broken right arm. That he was driving at a slow dogtrot, and he could not drive too fast, because the street was in a very bad condition, and he had a big load on. That the hole was in the middle of the street, right alongside of the car track. That the wagon stopped still to pitch him off, and did pitch him off in the street, and, as soon as the wagon stopped, the horses went in the collar again and kept on. It stopped about a second, and the jar kind of jerked it back, and they kept on

again. That he fell towards the horses' heads, and struck the street pretty hard on his head and arm." When asked whether he was familiar with the condition of this street, he replied that he went down it about two or three times a week; that he was never in that hole before, and never noticed that particular hole before, and that at the time of the accident an ice wagon and a barrel wagon, were approaching him and met him, one on either side, about two feet distant; that the ice wagon had just passed him, and the barrel wagon was alongside of him. On cross-examination he said he drove over the very place of the accident two days before, but did not notice this hole, and did not know whether it was then there, though it looked like an old hole, and as if it had been there three or four months; that it was two or three inches from the track, six inches long, twelve inches wide, and six or seven inches deep; that his wagon was a big two-horse truck, but he could have stopped it in a second, or could have turned it aside quickly; that there was nothing ahead to obstruct his vision, and he had a perfectly clear view of the street; that the hole could be seen at a distance of a square or half a square, but that he did not see it until he struck it, and that he did not see it because he was not looking for it; that he had been talking with a companion on the wagon seat until he fell off, and that the hole was visible to any one going in the direction he was going, but that he was looking out for his team, and was not looking out for the hole. Three other persons who witnessed the accident, and were familiar with the locality, testified that the hole had been there from three to five months, that it could be easily seen at a distance of half a block, and variously fixed the size of the hole at from one to two feet in width, from two to five feet in length, and from six to ten inches in depth. This evidence is abundant to establish gross negligence on the part of the defendant in the discharge of its duty to keep its public streets in such good repair as to afford safe passage over the same; but the testimony of the plaintiff is that of a man who values truth and candor more than a verdict in his favor, and we are constrained to hold that it convincingly shows such contributory negligence on his part as must defeat his recovery.

It is true that one using a highway has a right to assume that it is safe for ordinary travel, and to conduct himself accordingly, and therefore that he is not required to look far ahead for defects which should not exist. 15th Amer. & Eng. Enc. of Law (2d Ed.) pp. 416, 417. But this does not authorize him to close his eyes to open and obvious dangers in the highway, or to pay no attention whatever to the condition of the highway, in which defects may, though they should not, exist. Still less does it warrant

him, when he has previous actual knowledge of the general bad condition of the highway, in failing to keep a watch, not only for such defects as he may know and remember, but for others which exist and may not be fixed in his memory. The test for such an instruction as we are now considering is thus briefly stated in 7th Amer. & Eng. Enc. of Law, p. 456: "When the facts are undisputed, and but one inference regarding the care of the plaintiff can be drawn from them, the question is one of law for the court. But when the facts are disputed, or more than one inference can be fairly drawn from them as to the care, or want of care, of the plaintiff, the question of contributory negligence is for the jury." Or, as more fully stated by the Supreme Court of the United States, in *Schofield v. Chicago, Milwaukee & St. P. R. R.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224: "When the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." Or, as expressed by this court in *State, use of Harvey, v. B. & O. R. R.*, 69 Md. 344, 14 Atl. 685, 688: "Where the facts are undisputed, or where but one reasonable inference can be drawn from them, the question is one of law for the court; but where the facts are left by the evidence in dispute, or where fair minds might draw different conclusions from them, the case should go to the jury."

The appellee in his brief seems to have cited all the Maryland cases bearing upon the question, and we have examined them, but in none can we find that it appeared, either from the plaintiff's own admissions or otherwise, that in the exercise of due care he could have seen the defect in time to avoid injury. In *Pendleton's Case*, 15 Md. 12, where the injury was caused by the horse falling in a trench filled with earth and covered with paving stones, the court said: "There was no evidence going to show, or from which the jury could infer, any want of caution or care on the part of the driver at the time of the accident; but, on the contrary, the evidence went to prove that the appearance of the place where the trench had been was such as to conceal the danger of any attempt to cross it." In *Elliott on Roads and Streets*, p. 470, note 1, speaking of the presumption that the highway is reasonably safe for travel, the author says that this statement of the law is correct only in a limited sense, since the presumption does not warrant the omission of such care as ordinary prudence requires; and we think this qualification of the rule is a salutary and necessary one. In *Yahn v. City of Ottumwa*, 60 Iowa, 429, 15 N. W. 257, the plaintiff and his wife were just starting with their team on a street in the city, when the wheel

struck a stone, and the wife was thrown from the wagon and injured. The court below refused an instruction to the effect that "it was the duty of the plaintiff's husband to use care in driving, and look where he was driving, and to avoid all obstacles which were dangerous in their character, and which were plainly visible and not obscured; and if he failed to do so, and the plaintiff was thereby injured, then she cannot recover." The appellate court said the instruction should have been given, and said: "When an obstruction is in the street, in plain view of the driver of a vehicle, and his attention is in no manner diverted so as to excuse him for not seeing the obstruction, and he drives against it or into it, he is clearly guilty of contributing proximately to any injury which may result." This case was reviewed in *Mathews v. City of Cedar Rapids*, 80 Iowa, 459, 45 N. W. 894, 20 Am. St. Rep. 436, and was discriminated from that case, in which the plaintiff was walking on a city sidewalk, and, while looking at a display of goods in a show window, stepped into an areaway which was under and projected beyond the window. The court held that, in fixing his gaze upon the display of goods in the show window, "the plaintiff was answering the manifest design of their being placed there, and that, as placed, they were a standing invitation to passers-by to view them," and that, when persons are passing along the sidewalks of a city, allowance must be made for their attention being attracted to those things displayed for the very purpose of so attracting it, and that, though they may be negligent as a matter of fact in permitting their attention to be thus attracted, the law will not arbitrarily determine them to be so. But the court was careful to say that "what might, as matter of law, be diligence on a sidewalk, would not be in driving a team on a public thoroughfare in a city. Greater watchfulness to avoid accident in the latter case is certainly demanded, and for manifest reasons." Without committing ourselves to the ruling made by the Iowa court in that case upon the particular instruction under consideration, we concur in its statement that greater watchfulness is required of the driver of a team upon a city street than of a pedestrian upon the sidewalk, and that what would be negligence in law in the former case might not be in the latter. So in *Wilkins v. City of Wilmington*, 2 Marv. (Del.) 132, 42 Atl. 418, it was held that one who drives into an obstruction while looking in another direction, without any special necessity for so doing, cannot recover. These cases suffice to show the correctness of the statement in *Elliott on Roads and Streets*, supra, that the presumption that the highway is reasonably safe for travel must be taken with the qualification that the driver of a vehicle must use such care as ordinary prudence requires. Here the undisputed evidence of the plaintiff shows that he neither

exercised the degree of care required of one who knew the general bad condition of the road, nor such ordinary care as is required of one using a highway not known to be unsafe or out of order. The only inference that can be drawn from a careful consideration of all this testimony, by any reasonable mind, is that he exercised no degree of care whatever, and that he either mistakenly supposed he was bound to none, or recklessly omitted to use such as he supposed he was bound to. As was said in *Indianapolis & St. L. R. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824, 5 Am. St. Rep. 578: "Where, as here, there is only one witness upon a pivotal point, it is our duty to apply the law to his testimony; and if, under the law, the testimony is not sufficient to sustain a recovery, to so adjudge. Where there is no conflict of testimony, the court must necessarily decide the legal effect of the testimony in the record. * * * Where, as here, there is only one witness to a material fact, we must act upon his testimony; and, in applying a principle to it, we do not weigh the evidence."

Judgment affirmed, with costs above and below.

(38 Md. 1)

BROWN et al. v. RASIN MONUMENTAL CO. OF BALTIMORE CITY.

(Court of Appeals of Maryland. July 2, 1903.)

CONTRACTS — TERMINATION — FORFEITURE — SUSPENSION OF WORK — COMPUTATION OF TIME — SUNDAY.

1. Where a contract authorizing plaintiffs to remove tar from the lands of defendants provided that, if plaintiffs should at any time suspend for 10 days the work of removing the tar, defendants might terminate the agreement, re-enter upon the premises, etc., Sundays should not be counted in computing the suspension.

2. Defendant contracted to allow plaintiffs to remove tar from its land, the contract providing that, if plaintiffs should suspend work for 10 days, defendant might terminate the contract, and hold any buildings or improvements made by plaintiffs. Plaintiffs suspended work for nine days, and on the tenth day were ready to resume operations, and would have done so had it not been for the fact that defendant had given its employes a holiday, so that there was no one to do the weighing. *Held*, that defendant was not justified in terminating the contract.

Appeal from Circuit Court of Baltimore City; Henry D. Harlan, Judge.

Suit by Thomas R. Brown and others against the Rasin Monumental Company of Baltimore City. From a decree for defendant, plaintiffs appeal. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Bernard Carter and Edgar Allan Poe, for appellants. Randolph Barton and James M. Ambler, for appellee.

BOYD, J. This is an appeal from a decree dissolving an injunction issued at the

instance of the appellants against the appellee, and dismissing the bill. The appellee entered into an agreement with Messrs. Brown and Butcher, by which it authorized them to remove and sell the tar in a pond on its premises in Anne Arundel county. Messrs. Brown and Butcher subsequently assigned their interest in the agreement to the Impervious Product Company of West Virginia, with the consent of the appellee. The injunction restrained the appellee from interfering with the appellants entering on the premises of the appellee and removing therefrom the tar from the pond, and from hindering them in any way from exercising their rights under the contract. The appellee answered, alleging that the appellants had failed to perform their part of the contract, and admitting they had notified them not to remove any of the tar, and that it proposed to assert its rights under the contract. In order that the points in controversy may be better understood, we will quote in full the second and seventh paragraphs of the agreement, as they are particularly involved. They are: "Second. The parties of the second part [Brown and Butcher] shall without delay erect, and within forty days complete, a plant to work up the said tar, and as soon as said plant is completed begin and thereafter diligently and continuously remove the tar from said pond. * * * Seventh. In case the parties of the second part shall fail to complete said plant within forty days, as above provided, or shall at any time suspend for ten days the work of removing said tar from pond, or shall fail to make payment in full of any accounts when due, as above provided, or to observe or perform any other condition, or undertaking on their part herein, then the party of the first part shall have the right, without further notice, to terminate this agreement, and to re-enter upon said premises and hold the same, together with any buildings or improvements made or placed there by parties of the second part, as if this agreement had not been made." It is admitted that no tar was actually removed from the pond after December 12, 1902, before this injunction was issued (January 5, 1903), but the appellants contend that they were ready to remove some on December 24th, but were prevented by the appellee's failure to have some one weigh it; and it is admitted that they attempted to do so on December 26th, but were prevented by the appellee. The default on the part of the appellants relied on by the appellee is their alleged suspension for 10 days of the work of removing tar from the pond.

1. As there were two Sundays between December 12th and 24th, it will be well to determine at once whether they are to be included in the 10 days, for, if they are, it will be useless to examine the evidence to ascertain what was done on the 24th of that month. In *American Tobacco Company v.*

Strickling, 88 Md. 500, 41 Atl. 1083, we held that, when a statute provides that an act shall be done within a certain number of days exceeding seven, the general rule is that Sundays will be included in computing the time; but, after quoting from the Encyclopædia of Law to that effect, we said, "Of course, that rule will not apply when Sundays are expressly excluded by the statute, or the intention of the Legislature to exclude them is manifest." In construing written contracts it is proper to look at the whole instrument to ascertain the sense in which words or expressions are used, and, if we there find the intention of the parties to give a particular meaning to them, that should, as far as possible, be adopted. Sunday is "a day," and therefore may be one of "ten days," but the question is whether the "ten days" mentioned in this agreement include the kind of a day Sunday is, and, in order to do that, we must bear in mind the connection in which that term is used. When the plant was completed, the appellants were at once to "begin and thereafter diligently and continuously remove the tar from said pond." It cannot be contended that it was contemplated by the parties, in the use of those terms, that the appellants should work on Sundays. To do so unnecessarily would be a violation of the statute law of the state, and hence it cannot be presumed that the parties so intended. When, then, a forfeiture of their property was authorized, if the appellants "shall at any time suspend for ten days the work of removing said tar from pond," the parties manifestly referred to the kind of days when the appellants ought to be engaged in removing tar; that is to say, working days. They could not have meant that the appellants would be liable to the forfeiture if they suspended work on the days it was known, and must be presumed to have been understood, that it was to be suspended. The suspension prohibited was on the days they were under obligation to work, and not on those on which no work was contemplated. There is no provision in the agreement that indicates that the parties had any other intention in the use of this term. In the sixth paragraph they provided for payment "on or before the tenth day of each and every month," but there is only one "tenth day" of each month, and there could be no question about what they there meant. If there be any doubt about the meaning of the expression under consideration, and to suspend 10 days must result in a forfeiture, which is never favored in equity, it would be proper to resolve the doubt against the party seeking to enforce it, as far as the language of the parties and the principles of the law permit. As there were two Sundays between the 12th and the 24th of December, we are of the opinion that the appellants could have avoided the forfeiture by removing tar from the pond on the 24th,

it being conceded that they did work on the 12th.

2. The next inquiry is, did they save a forfeiture by what they did, or were ready to do, on that day? It must be admitted that the appellants had not, up to this time, done very much in the way of removing the tar, as they had only taken out 397 tons from the time they started on September 3, 1901, to December 24, 1902, but it is evident that both parties regarded the enterprise as somewhat of an experiment. Mr. Doggett, the general manager of the Impervious Product Company, testified that it was a new thing; that there was no demand for this particular product; and their competitors "tried to decry the character and quality of it, and interfered with us in making a market for it." The tar had been on the property of the Rasin Company for 18 or 20 years without profit or use to it during that time, and the conditions inserted in the agreement, together with the parol testimony, show that the representative of that company was doubtful about the success of the enterprise. The appellants agreed to pay the Rasin Company \$3 per ton for the tar taken out, and \$250 per annum for the use of its property. They paid it "for tar, rental, and for the use of their cars and other articles" "somewhere in the neighborhood of \$2,700." The appellants had expended about \$25,000 in their plant and in carrying on and developing the business. The plant consisted of two receiving tanks, a finishing tank, a one-story brick building 65 by 30 feet, a warehouse, a boiler, a small engine, and some other property. The tar is dug out of the pond, placed in small cars, and emptied into the receiving tanks. It remains in them "a sufficient length of time under the action of heat to liquify it," so that it can be treated with lime to neutralize the acid in it, and when that is done it is pumped into the upper or finishing tank. The testimony shows that the process takes two or three days to treat it in the receiving tanks, and five or six in the finishing tank, the time varying somewhat according to circumstances. When the receiving tanks were full, there was no place to put the tar, unless it was dumped on the ground, which would not only add to the expense, but would be unsatisfactory in other respects. There are coils of pipe in the tanks, which have to be repaired from time to time, and which can only be done when the tanks are empty. There is no provision in the agreement requiring the appellants to take out any stated quantity per day, month, or year. Mr. Doggett said he explained fully to Mr. Crenshaw, the representative of the Rasin Company, before the contract was executed, the method they proposed to follow; and, as the plant was erected on the premises of that company, its size and capacity were, of course, known to him. It was not completed within the time agreed upon, but the

Rasin Company did not take advantage of that, and acted with leniency towards the appellants during the first year the plant was in operation. Mr. Doggett testified that the prospects of the success of the enterprise had improved, and that his company was arranging for larger facilities when the appellee attempted to terminate the contract. He swore that an offer of \$35,000 was made in the presence of Mr. Crenshaw for their plant and business, although he admitted it was to be paid "on the installment plan, so much on every ton worked up in the plant." On December 13th the tanks were full, and the tar in them was not finished until the 19th. When it was taken out, it was found that the tanks were out of repair, some of the pipes had been injured by the acid, and there were a number of breaks. They began to make the repairs on the 20th, and they worked on them constantly, Sunday included, until about 2 o'clock on the 24th, when they finished them. Although no tar had been removed from the pond since the 12th of the month, the hands were kept regularly employed in work of some kind about the plant, and worked the morning of the 24th. When the men left for dinner, the foreman, James Sanders, told them to come back in the afternoon to dig tar, and two of them came for that purpose. Mr. Doggett got to the works about 2 or 3 o'clock, and told the foreman to have tar dug, and resume operations, but he said the Rasin Company had given its men half holiday, and there was no one to do the weighing. The contract provides, "Weights to be taken by the party of the first part as the tar is removed from the pond," and Mr. Doggett testified, "They notified us not to remove any tar until we have given notice to the office so that it should be weighed before removed." That is not contradicted, and much of the testimony in the record is on the question whether there was any one present to take the weights, and whether there was really any bona fide effort to start that afternoon. Mr. Doggett did not rest on the information he had received that there was no one there to weigh the tar, but he and Sanders both swore that they went to the office of the Rasin Company to ascertain whether there was, but could find no one there, and were informed by some of the men in the "fire room" that those in the office had gone home, as the company had allowed them to go to do some shopping for Christmas. Logan Flannigan, who was one of the men who went back to dig tar that afternoon, testified that he saw Messrs. Doggett and Sanders go that way, but he did not go with them to see whether they went to the works of the Rasin Company. Unless those two witnesses deliberately perjured themselves, there can be no doubt they went to the office of the Rasin Company to ascertain whether there was any one to weigh the tar, and

found no one. Mr. Nash, the superintendent of the Rasin Company, testified that he left the office at 2 o'clock. Mr. Bosman, a clerk of the company, said he was at the office until 2 o'clock. Mr. Weihsrauch, another clerk, said "he was in the office until one o'clock, and then came back again at half past two, and stayed there about fifteen minutes, and went out again, and came back fifteen minutes after four." Mr. Doggett said the two firemen in the employ of the Rasin Company, whom he and Sanders found, were named McQueen and Spencer. The latter was not called as a witness, but a man whose name is given in the record as Vencullen testified that Doggett did not ask him if there was any one to take the weights, but he said Doggett was talking with Spencer, although he did not hear the conversation. The only other witness who was put on the stand to show that Doggett and Sanders did not go to the office that afternoon made some broad assertions about it, but his testimony is too self-contradictory and uncertain to authorize us to accept his statement as sufficient to overcome the evidence of the appellants. According to Mr. Nash, those who had previously weighed the tar were Essex, Weihsrauch, Bosman, and himself. Essex was not put on the stand, and we have already seen that the others were not in the office after 2 o'clock, excepting Weihsrauch, and he was not there much that afternoon, being engaged at work 800 yards from the office. There was one other man that Mr. Nash said was authorized by him to take the weights, but it is not claimed in the testimony that he ever did so, or that the appellants had any knowledge that he was so authorized, and he was not at the office when Doggett and Sanders called. There was no real contradiction of Doggett and Sanders about their going to the office of the Rasin Company, as can be seen from the evidence above stated, and the great preponderance of the testimony shows that they were informed that those accustomed to weigh the car had gone, as the superintendent of the company himself admits he had. They both swore that they were ready and anxious to get out tar that afternoon, and had two men there ready to do the work, who could have gotten out one or two car loads, and in that they were corroborated by those men. It was the day before Christmas, which probably accounted for the absence of those usually about the office; and the testimony shows that, although there were some men engaged in loading a boat with fertilizer, and probably some doing other work, those who had been in the habit of weighing the cars were undoubtedly absent from the office throughout the afternoon after 2 o'clock, excepting Weihsrauch, who was only there occasionally. Having been notified not to remove any tar until notice was given at the office, and having agreed that the weights were to

be taken as the tar was removed from the pond, Doggett naturally and properly hesitated to do so. It is true they might have filled the cars, and let them remain at the pond until they were weighed, but it would not have been in accordance with the terms of the agreement; certainly not as construed by the defendant. That would, perhaps, have been the best plan to have pursued, although, if it be true that those whose duty it was to weigh the tar had gone, it would have seemed a useless proceeding to load the cars, which would doubtless have had to remain loaded until the day after Christmas.

The question, then, is whether the appellee was entitled to declare the contract forfeited under this clause, when the facts established by the testimony are such as we have stated. After being engaged for several days in making repairs, which were necessary, and are to be expected in any business of this character, the appellants finally completed them on the last of the 10 days allowed by the contract, and attempted in good faith, as we believe from the evidence, to have the work done, but through no fault of theirs they were unable to do so on account of the absence of the appellee's agents to do the weighing. Under such circumstances we are of the opinion that a court of equity should not permit the party asserting and seeking to take advantage of a forfeiture to do so. It was said by Chancellor Kent in *Livingston v. Tompkins*, 4 Johns. Ch. 431, 8 Am. Dec. 598, that "it may be laid down as a fundamental doctrine of the court that equity does not assist the recovery of a penalty or a forfeiture"; and in 2 Story's Eq. Juris. § 1319, that "it is a universal rule in equity never to enforce either a penalty or a forfeiture"—both of which are cited in *Cross v. McClenahan*, 54 Md. 24. We are, of course, aware that there is a distinction between giving the active, affirmative aid of a court of equity to declare a forfeiture, and simply recognizing that a forfeiture has taken place, under a contract made between the parties, which the court must recognize and be controlled by. But a court of equity can and ought to require a party claiming the benefit of a forfeiture such as this to do his full duty, and not in any way be responsible for the failure of the other party to strictly comply with the contract before he should be permitted to assert it. There is nothing in this agreement requiring the appellants to remove a given amount of tar per day, and, if they had only taken out one car load on the 24th, and were prevented from taking more by reason of being engaged in necessary repairs, it would have been a technical compliance with this provision, and, inasmuch as they were then ready to take it, and were only prevented because the appellee's

agent was not there to do its part—weigh the tar—the appellants must be considered as having done what they were ready and willing to do.

We have not thus far questioned the construction placed on this clause by the appellee, excepting as to whether Sundays are to be included in the 10 days, as we are of the opinion that the testimony sustains the appellants' contention as to what was done on the 24th, and, that being so, we have no doubt as to the duty of a court of equity in the premises. But without basing our conclusion on it, we think there is force in the position taken by the appellants that this clause did not contemplate simply a failure on their part to dig tar for 10 days. When the contract speaks of suspending "the work of removing said tar from said pond," it may well be questioned whether the parties intended to confine that to the mere digging of the tar out of the pond, or whether it did not have reference to the work in which the appellants were engaged, including the manufacture as well as the digging of the tar. We have seen that in the second paragraph they were required to "diligently and continuously remove the tar from said pond," and by the seventh they are liable to a forfeiture if they fail to perform any undertaking on their part; but it is not pretended that, if they failed to remove tar for less than 10 days, that would be a forfeiture. If such was the result, then a failure "to remove the tar" for one day would be cause for forfeiture, as well as a failure for three, five, or nine days. But we have seen that it was understood by both parties that the method to be pursued in the business of the appellants was such that there would necessarily be some days when the tar would not be taken out of the pond, as the tanks would be full, and when that was the case there was no occasion to take any out until they were again empty. It would, therefore, not be an altogether unreasonable construction to place on the clause we have under consideration to hold that it referred to a suspension for 10 days of all work connected with the removal of the tar, including the treatment of it in the tanks as well as the digging it out of the pond, when we are called upon to determine what the parties intended to be such an abandonment of the contract as to cause a forfeiture. But as what was done by the appellants on the 24th of December entitled them to relief, it is not necessary to pursue this point further, or to rely on it in the disposition of the case we have determined on. The decree will be reversed, and the cause remanded, in order that a decree may be passed continuing the injunction heretofore issued until final hearing.

Decree reversed, and cause remanded; appellee to pay the costs.

(97 Md. 598)

AMERICAN BONDING CO. OF BALTIMORE v. NATIONAL MECHANICS' BANK OF BALTIMORE.

(Court of Appeals of Maryland. July 1, 1903.)

CLERKS OF COURT — INTEREST ON PUBLIC FUNDS—MISAPPROPRIATION—RECOVERY BY STATE—PAYMENT BY SURETY—SUBROGATION—EXTENT OF RIGHT.

1. Where a bank has participated in a clerk of court's breach of trust in receiving to his personal credit and converting to his own use interest allowed to him for the use of the state's money deposited to his credit, a surety on the clerk's official bond, who has paid a judgment recovered by the state, is subrogated to the rights of the state against the bank.

2. Where a surety on a clerk's official bond has paid a judgment recovered by the state for appropriating to his own use interest on state funds, and seeks by subrogation to the state's right to recover it of the bank which paid the interest, it affords no defense that it was a custom among the banks to allow clerks of court interest for their individual use on deposit of public funds.

3. Where a surety on a clerk's official bond has paid the state a judgment recovered for the clerk's breach of trust, it is subrogated to every right of the state in respect to the claim, including the state's exemption from the running of limitation against it.

Appeal from Circuit Court No. 2 of Baltimore City; John J. Dobler, Judge.

Bill by the American Bonding Company of Baltimore against the National Mechanics' Bank of Baltimore to recover money paid on a judgment as surety. From a decree in favor of defendant, complainant appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

W. Irvine Cross and Edward Duffy, for appellant. Randolph Barton and Randolph Barton, Jr., for appellee.

SCHMUCKER, J. On October 18, 1902, the state of Maryland recovered a judgment for \$4,951.80 against the American Bonding Company of Baltimore as the surety on the official bond of James M. Vansant as clerk of the court of common pleas of Baltimore City. The breach for which the suit was brought was the failure by Vansant to account for and pay over to the state certain money which had been paid to him by various banks as interest on funds received by him in his official capacity and kept on deposit with such banks. Of the money which he so received as interest on funds belonging to the state, the sum of \$3,774.70 was paid to him by the present appellee, the National Mechanics' Bank of Baltimore. The American Bonding Company as surety paid the judgment to the state, and then filed the present bill to recover \$3,774.70 of it from the National Mechanics' Bank. The bill alleges the appointment of Vansant as clerk on the 15th of November, 1895; the filing by him of an official bond with the bonding company as sole surety, in the penalty of \$50,000, and the retention of the office by

him until December 1, 1897. It also avers that he on or about November 18, 1895, at the solicitation of the appellee bank, and in pursuance of his official duties, opened an account with it in the name of "James M. Vansant, Clerk," in which he from time to time deposited money belonging to the state of Maryland, collected by him in the performance of his official duties, and that in addition he, in each year, opened an account with the same bank entitled "James M. Vansant, Clerk Special," in which he deposited the license fees received by him as clerk, and that this money was afterwards transferred by him to the first-mentioned account, standing in his name as "James M. Vansant, Clerk"; that Vansant, during his occupancy of the position of clerk, also kept an individual and personal account in said bank in his own name. The bill then alleges that the bank, well knowing that the moneys deposited in the two official accounts of Vansant as clerk belonging to the state of Maryland, and had been collected by him in the performance of his official duties, allowed and paid to him individually interest at about the rate of 2 per cent. per annum on the daily balances of the said state funds, and the bill states in detail the amounts of interest so allowed, amounting in all to \$3,774.70, with the respective dates of the several allowances. It is alleged that the said payment was accomplished by the bank's crediting the interest on the public funds to the individual account of Vansant, and permitting him to draw it out on his individual check, and misappropriate it, and that it was the intention of the bank in so doing to pay such interest on the public funds to him for his own personal use. It is also alleged that the interest was so allowed by the bank in pursuance of its habit of dealing with various previous clerks of the same court who had deposited with it the public funds under their charge. It is then alleged that Vansant failed to account for and pay over to the state the interest so allowed to him on the public moneys by the bank, in consequence of which the suit was brought by the state against the bonding company as his surety, and the judgment already mentioned was recovered against it, and that it satisfied and paid the same to the state; that the judgment was thereupon, according to law, entered to the use of the bonding company, and it caused execution to issue thereon, which was returned nulla bona; and that Vansant is insolvent. The bill then charges that the bank, by knowingly paying to Vansant individually interest on the public funds deposited with it by him, participated in the misapplication thus accomplished of such interest, and thereby became and was responsible to the state of Maryland for the amount of the interest, and that the bonding company, by the payment of the judgment recovered against it for the entire interest so misappropriated, was subrogated to the right

of the state against the bank, and is now entitled to recover from the latter the \$3,774.70 interest paid by it which forms part of the amount of the judgment.

The answer admits the deposit in the bank of the public money by Vansant to his credit as clerk as in the bill alleged, and the payment to him individually of the several sums of money in the bill charged and at the times therein set forth, and also the recovery of the judgment by the state against the appellant and the satisfaction thereof by it. It denies, however, that the money was paid in pursuance of any agreement, but asserts that it was "spontaneously and gratuitously" credited to Vansant's personal account. The answer then, by way of explanation of the transaction, asserts that for more than 80 years prior to the institution of the suit it had been the custom of the banks, including the appellee, in which the clerk of the court of common pleas deposited the public money collected by him, to allow to the clerk making such deposits "a sum of money which was equivalent to what would have been interest at the rate of about 2 per cent. per annum" thereon; that such an allowance had been made to Gray, the clerk who preceded Vansant, and that when the latter came into office the same custom had been followed by the appellee with him, and that in that way the money referred to in the bill had from time to time been placed to his individual account, and he had been allowed to check it out for his own use. The answer asserts that such custom of dealing with the said clerks by the banks was well known to, and acquiesced in by, the state and its officers, and also by the appellant at the time it became surety upon Vansant's bond, and that by reason thereof the state would have been estopped from making any claim against the appellee for the money so paid by it to Vansant, and that the appellant is for the same reason estopped from asserting the claim set up by it in the present suit.

Charles Hahn, the paying teller of the appellee, testified in the court below that, not wishing the bank to lose the clerk's account, he called to see Vansant about the time of his appointment to the clerkship, but did not find him in his office. He, however, saw several other bank men in the office for the same purpose as his own; whereupon he, in order "to clinch the matter," wrote to Vansant as follows: "My Dear Vansant: I am happy to congratulate you on your appointment, which I heard this morning with satisfaction. I called to talk with you as to the 'Clerk's Account' with the Mechanics' Bank, where you now have it. We desire the cordial relation to continue, and you may ever command us as of old. If convenient, we would be pleased to have you call at bank, and see our Mr. Ramsay, President of the Bank. Yours, Charles Hahn, Paying Teller."

John B. Ramsay, the president of the bank, testified that he had no recollection of Vansant's having seen him in reference to the allowance of the 2 per cent. on the amount of public money to be kept on deposit with the bank, or of having made any agreement on the subject; but he frankly admitted that 2 per cent. on those deposits had been paid by the bank to Vansant individually in return for the use of the state money, and said that it had been done "along the line of the custom."

James Bond, the president of the appellant, testified that he did not know when his company became surety on Vansant's bond that interest was allowed to the clerk on deposits of state money, but he said that a general impression or understanding prevailed that such was the case; as he expressed it, "It was in the air."

It has already been decided by us in *Vansant v. State*, 96 Md. 110, 53 Atl. 711, that under the circumstances appearing from the record in this case the sums of money thus from time to time paid by the bank to Vansant individually were the property of the state, and that it was his duty to account to the state for them. We also held in that case that his failure to account for them constituted a breach of his official duty for which the surety on his bond was liable, and affirmed the judgment which the state had obtained against the surety for the damages sustained by the breach. The question now to be determined is whether the surety on the clerk's bond, having satisfied the state's judgment, is entitled to be put, by way of subrogation, in the place of the state, and granted a decree against the Mechanics' Bank, the present appellee, for the \$3,774.70 of the state's money which it paid to Vansant individually, and which was included in the amount of the judgment.

The theory of the appellant's case is that the bank so aided and participated in Vansant's diversion to his own use of the interest on the deposits as to have been equally guilty with him of the breach of duty thereby made, which, in view of his relation to the deposits, amounted to a breach of trust; that under those circumstances the state could have recovered from the bank the amount of the diverted interest, and that the appellant, having as surety satisfied to the state the amount of its loss, is entitled to be subrogated to its rights against the bank in the premises.

As we said in *Duckett v. Mechanics' Bank*, 86 Md. 403, 38 Atl. 984, 39 L. R. A. 84, 63 Am. St. Rep. 513: "There can be no dispute that, as a general principle, all persons who knowingly participate or aid in committing a breach of trust are responsible for the money, and may be compelled to replace the fund which they have been instrumental in diverting. * * * There is in such instances no primary or secondary liability as respects the parties guilty of or participating in

the breach of trust, because all are equally amenable." The participation by the bank in the breach of trust in that case consisted in permitting the trustee to deposit to his own credit a check drawn to the order of its cashier, containing on its face the words, "to deposit to the credit of Henry W. Olaggett, trustee," and then to draw out of bank the amount of the credit by his individual checks. The trustee converted the money to his own use. The words which we have quoted as appearing on the check were held to have been an explicit notice to the bank that Olaggett was not the owner of the money, and that it should not be placed to his individual credit, and to have thus imparted to the bank the requisite knowledge to affect it with responsibility. We cited in that connection the cases of *Bundy v. Monticello Co.*, 84 Ind. 119, and *Am. Ex. Bank v. Mining Co.*, 165 Ill. 109, 46 N. E. 202, 56 Am. St. Rep. 283.

In *Vansant v. State*, 96 Md. 110, 53 Atl. 711, when considering the very transactions now before us, we determined that Vansant, as clerk, "held a fiduciary relation to the state, although not a technical trustee," and that, although he did not occupy the precise relation that a trustee or administrator does to his cestui que trust, his position was one of that nature in respect to this public money held by him, and that he was to be deemed as holding it in trust for the state. We think it necessarily follows that he and the bank, which had undoubtedly knowledge of the state's ownership of the funds deposited by him as clerk, should be held liable, in dealing with those funds and with the sums allowed as interest thereon, or as a return for their use, to the same measure of responsibility that was applied to the dealings of the bank with the trust fund in *Duckett's Case*. In that case the successor in trust of the trustee who had converted the trust fund to his own use was allowed to recover the amount of the converted fund from the bank. Upon the same principles the state would have been able to recover from the present appellee the interest on public money which Vansant with its aid converted to his use.

It remains to be determined whether the appellant, having as surety paid to the state the amount of its money thus converted by Vansant to his own use, is entitled to be subrogated to the rights of the state, and recover from the appellee the \$3,774.70 of that money which consisted of interest paid by it to him on the state's deposits. The general equitable doctrine of subrogation, by which a surety who has paid the debt of his principal becomes entitled to all of the rights of the creditor against the principal debtor and to the benefit of all securities for the debt held by the former against the latter, is universally recognized. We are, however, in this case asked to go a step further, and hold that under such circumstances the right of subrogation is not restricted to the rights and remedies to which the creditor was entitled

against the principal, but extends to his rights and remedies against other persons who were liable for the debt which has been satisfied by the surety. We are not aware that this court has ever been called upon to pass on that precise proposition, but the expressions which it has used in defining the right of subrogation are broad enough to include the principle upon which the proposition rests. In *Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep. 286, the court say of the doctrine of subrogation: "It is not founded on contract, but has its origin in a sense of natural justice. So soon as a surety pays the debt of the principal debtor, equity subrogates him to the place of the creditor, and gives him every right, lien, and security to which the creditor could have resorted for the payment of his debt." In *Ghiselin v. Fergusson*, 4 Har. & J. 522, it is said that, if a surety paying the debt of his principal shall be considered to stand in the place of the creditor "for any one purpose to answer the ends of justice, the court cannot understand why he may not be so considered for every purpose, where the same ends are in view."

That the doctrine of subrogation does go to the extent of giving to the surety, who has paid the debt of the principal, the benefit of the rights and remedies of the creditor against all persons who were liable for the debt, is both asserted by text-writers and sustained by the authority of many decided cases. *Baylies on Sureties and Guarantors*, p. 358; *Rooker v. Benson*, 83 Ind. 250; *McCormick's Adm'r v. Irwin*, 85 Pa. 111; *Blake v. Traders' Bank*, 145 Mass. 13, 12 N. E. 414. This is especially held to be true of the sureties of a fiduciary who are compelled to answer for his breach of trust, and they have repeatedly been subrogated to the rights and remedies of both the trustee and the cestui que trust against the fiduciary and those participating in the wrongful act. *Sheldon on Subrogation*, § 89; *Am. & Eng. Encyl. of Law*, Vol. 24, p. 216 et seq., and cases there cited; *Wilson v. Doster*, 42 N. C. 231; *Edmunds v. Venable*, 1 Patton & Heath, 121; *Boone Co. Bank v. Byrum (Ark.)* 56 S. W. 532; *Blake v. Traders' Nat. Bank*, supra.

The facts of the present case, in our opinion, bring it within the class of cases last referred to, and we think, both upon principle and authority, the appellant should be subrogated to the right of the state to recover from the appellee as a participant in Vansant's breach of trust in receiving to his personal credit and converting to his own use the \$3,774.70 allowed to him by the appellee in return for the use of the state's money deposited to his credit as clerk of the court of common pleas. Without the aid of the appellee, the \$3,774.70 never would have been deposited to his individual credit, and could not have been drawn out by his individual check. Not only was the first step in the diversion of this money, which of right belonged to the state, taken by the appellee in

entering it to Vansant's credit, but, in view of the facts surrounding the deposit of the public funds with the appellee, the letter written to him by its teller amounted to a virtual invitation to him to deposit those funds with it for a consideration to be enjoyed by him as an individual. The practice and custom of the appellee and other banks in allowing clerks of court interest for their individual use on deposits of public funds set up in the answer can afford no defense to the appellee. It was distinctly held in *Vansant v. State*, supra, that such custom interposed no obstacle to a recovery by the state of the very money now in question from Vansant, and the same principle must be applied to the present suit to enforce, by way of subrogation, the state's right to recover it from the appellee as a participant in Vansant's breach of trust.

The appellant, being subrogated to the right of the state in respect to its claim against the appellee, is entitled to the benefit of every right, lien, and security which existed in favor of the state in reference to the claim. Among these may properly be classed the state's exemption from the running of limitations against it. In *Orem v. Wrightson*, supra, it was held that a surety who had paid the debt of the principal to the state was entitled to enjoy by subrogation the right of priority over other creditors in the distribution of the assets of the principal debtor which would have existed in favor of the state as a creditor had the claim been asserted by it. The reasoning which led our predecessors to the conclusion there arrived at requires us to hold that the present appellant is entitled to stand in the state's position in reference to its claim against the appellee, and enjoy its exemption from the operation of the statute of limitations.

For the reasons stated by us, the decree appealed from must be reversed; and, as it is apparent that the appellant is entitled to recover, we will not remand the case, but will enter judgment in its favor for the principal amount of its claim.

Decree reversed, and decree entered in this court in favor of the appellant against the appellee for \$3,774.70, with interest from this date, and costs above and below.

(97 Md. 665)

GILL v. STAYLOR.

(Court of Appeals of Maryland. July 2, 1908.)

MASTER AND SERVANT—RECOVERY OF WAGES—LIMITATIONS—PROMISE TO PAY—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS.

1. In an action for services rendered, testimony as to the plaintiff's manner of living, his appearance, and the condition of his clothing, is inadmissible to prove the nonpayment of his wages.

2. A witness who worked for defendant may state, in an action by another for services, how she came to go there, as showing the opportunity she had of becoming acquainted with facts to which she deposed.

3. In an action for services, testimony as to what another employé received is inadmissible to show any agreement to pay plaintiff the same amount or what her services were worth.

4. An instruction, in an action for services, that if there was no agreement as to price the plaintiff was entitled to recover such sum as the services were worth, not exceeding the price named in the account, is warranted where the evidence was sufficient to justify a finding on the quantum meruit, if there was no contract fixing the amount of the wages.

5. Where plaintiff's instructions in an action for wages are susceptible of the interpretation either that the promise to remove the bar of limitations was made within three years, or that the original promise was only intended to be performed after the promisor's death, the granting of an instruction restricting it to the former theory eliminates the latter alternative.

6. In an action for services, an instruction that, if there was no agreement as to price, plaintiff was entitled to recover such sum as the services were worth, if a promise to pay was made within three years prior to the suit, is not sustained by evidence of declarations of the promisor indicating a purpose to provide for plaintiff after her death, since to remove the bar of limitations an acknowledgment of a present subsisting indebtedness must be proved.

Appeal from Superior Court of Baltimore City; Charles E. Phelps, Judge.

Action by John Staylor against Roger T. Gill, administrator of Catharine L. Staylor. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

William S. Bryan, for appellant. Charles Morris Howard, for appellee.

McSHERRY, C. J. This case is here for the second time. The former appeal will be found reported in 93 Md. 453, 49 Atl. 650. The judgment against which the first appeal was taken was reversed, and a new trial was awarded. The new trial resulted in a second verdict and judgment for the plaintiff, and hence the pending appeal.

The suit was instituted to recover from the administrator of Catharine L. Staylor, deceased, wages alleged to have been earned by the plaintiff in the service of the decedent during her lifetime. The period over which the services are alleged to have extended covered 13 consecutive years, from the fall of 1886 to October, 1899, when Mrs. Staylor died. With the declaration there was filed a bill of particulars wherein the plaintiff claimed \$5 a week for each week of those 13 years. The defendant pleaded never promised, never indebted, and the statute of limitations. The plaintiff set up a special oral contract by the terms of which he was to receive \$5 per week, and he insisted that no part of the sum earned by him had been paid. The defendant, on the other hand, insisted that the contract price for the services was \$3 per week, which had been

¶ 6. See Limitation of Actions, vol. 22, Cent. Dig. § 601.

paid. During the progress of the second trial six bills of exception were signed, five of which relate to rulings on the admissibility of evidence, and the sixth to the action of the trial court on the prayers for instructions to the jury.

The first, second, and third exceptions, presenting cognate, if not identical, questions, will be considered together. For the purpose of proving that the wages sued for had not been paid, a witness testified that the plaintiff "was a moderate liver, and not an extravagant man any way, because the way his living showed it." Thereupon the plaintiff's counsel asked: "In what respect did his living indicate that?" To that question objection was made, but the court overruled the objection, and the witness answered: "I judged from his appearance; I speak from the observation I saw of the man on the street and the dress he has got there;" and the witness then went on to describe the plaintiff's clothes. In the second exception another witness was asked: "What can you say during the time that John was living with Mrs. Staylor, after the death of Mr. Staylor, about his condition and appearance?" The witness replied, when the objection to the question had been overruled: "I never knowed him to have any money nor any clothes but one suit, to my knowledge." He described the plaintiff's clothes as ragged, and said they were fastened with sticks. In the third exception another witness was asked: "What did you observe in regard to his appearance, as indicating prosperity or otherwise, or anything?" Over the defendant's objection the witness was permitted to answer, and he replied: "John's appearance of prosperity was very bad, so far as I saw; any other young man around was dressed better than he was."

We think it quite clear that there was error in each of these rulings. The testimony was wholly irrelevant to any issue joined in the cause. It did not prove that the services alleged to have been rendered were performed, nor did it establish their value, nor did it tend to show that the plaintiff had not been paid, or that the deceased within three years before the suit was brought had promised to pay for them. If it were universally and invariably true that every individual who earned and was paid his wages always dressed well, and always had money in his pocket, then the fact that he did not dress well, and that he was without money, might tend to show that he had not been paid. But there are too many careless and improvident persons in the world to permit indifference in dress or impecuniosity to be treated as evidence in any way tending to prove the non-payment of a debt alleged to be due to them. There is not the slightest relation between those very common conditions and the conclusions sought to be drawn from them.

Mrs. Donavin was called as a witness. She testified that she had worked for her

aunt, Mrs. Staylor, and the fourth exception was taken to the action of the court in allowing her to be asked this question: "Just state how you came to go there and what you were doing there." The witness went to do house work for Mrs. Staylor shortly after the plaintiff had been hired to do the butchering which Mrs. Staylor carried on after the death of her husband. The question was merely preliminary, and was evidently designed to lay before the jury a description of the opportunities which the witness had had to become acquainted with the facts to which she later on deposed. We do not see any error in the ruling.

Mrs. Staylor also had in her employ her brother, Albert W. Lutz, to assist in the butchering business. In the fifth exception Mrs. Donavin was asked: "Do you know anything about Mr. Lutz's payment, as to how much wages he got?" That question was allowed to be asked over the defendant's objection, and the witness replied: "He got five dollars a week." Proving what wages Lutz got did not tend to show that Mrs. Staylor had agreed to give the plaintiff the same amount, nor did it throw any light on the inquiry as to what the services of the plaintiff were worth. The question should have been excluded.

We now come to the prayers set out in the sixth exception. The plaintiff presented one, and the defendant, seven, besides two special exceptions to the plaintiff's prayer. The plaintiff's prayer was granted, the special exceptions thereto being overruled, and the defendant's second, third, fourth, and sixth prayers were granted, whilst the first, fifth, and seventh were rejected.

The plaintiff's prayer is nearly identical in terms with the defendant's seventh modified prayer as granted on the first trial. It proceeds upon two theories, namely: First, if the jury should find that there was a contract of hiring at a stipulated price, and that the services were rendered, and that the decedent in her lifetime promised to pay therefor, then the plaintiff was entitled to recover the agreed price; and, secondly, if the jury should find there was no agreement as to price, then the plaintiff was entitled to recover such sum as the services were worth, not exceeding the price named in the account filed, provided in each instance the jury should further find that said promise was made to take effect within three years prior to the institution of the suit. There were two special exceptions filed to the granting of that prayer: First, that there was no legally sufficient evidence to authorize a recovery on the quantum meruit; secondly, that there was no legally sufficient evidence of any new promise made to take effect within three years prior to the institution of the suit. If neither of these special exceptions prevails, the prayer must be held to be sound, because it is a substantial reproduction of the defendant's modified

seventh prayer in the first trial, and that prayer was decided by this court to be correct on the former appeal. 93 Md. 458-475, 49 Atl. 650.

We must now turn to the record to ascertain whether either of the special exceptions is well founded. With respect to the first special exception we need only say that there was sufficient evidence of the value of the plaintiff's services to justify a finding on the quantum meruit, if the jury were satisfied that there was no contract which fixed the amount of the wages. The second special exception presents a more difficult question. The concluding proviso of the plaintiff's prayer is susceptible of two interpretations, namely, either that such a promise as would remove the bar of the statute of limitation was made within three years prior to the institution of the suit, or that the original promise to pay for the services was intended to be performed only after the death of Mrs. Staylor—that it was a post obit promise. The defendant's sixth prayer, which was granted, obviously restricts the proviso to the first of the two named alternatives, or else the two prayers are hopelessly inconsistent, because the sixth prayer distinctly instructed the jury that under the pleadings, before the jury could return a verdict for the plaintiff for any wages earned more than three years prior to the institution of the suit, they must find that within three years before the suit was brought Mrs. Staylor either expressly promised to pay such wages, or that she made a distinct acknowledgment that such wages were due and were an existing obligation. Now, if an express promise or a distinct acknowledgment made within three years before the bringing of the suit was necessary to enable the plaintiff to recover for any wages earned more than three years prior to the institution of the suit, it was clearly so because but for such promise or acknowledgment the statute of limitation would have defeated a recovery for any wages earned more than three years before the suit was brought, and this could not have been the case if the undertaking on the part of Mrs. Staylor had been to pay only after her death, the suit having been brought on February 9, 1900. Excluding, then, the post obit contention, because even upon the concession that the evidence supported it the defendant's sixth prayer eliminated it, is there any legally sufficient evidence to show such a promise or acknowledgment as would remove the bar of the statute to that part of the claim which accrued more than three years before the suit was brought?

The law of Maryland is definitely settled as to what promise or acknowledgment will remove the bar of the statute. To remove the bar of the statute, an acknowledgment of a present subsisting indebtedness must be proved, and it must not be accompanied

by any qualification or declaration which, if true, would exempt the promisor from a moral obligation to pay. *Stewart v. Garrett & Maus*, 65 Md. 392, 5 Atl. 324, 57 Am. Rep. 333; *Dawson v. King*, 20 Md. 442; *Ellicott v. Nichols*, 7 Gill, 85, 48 Am. Dec. 546. Several witnesses testified to sundry statements made by Mrs. Staylor considerably more than three years before her death, and we will consequently not pause to consider them. There are only three witnesses who profess to give declarations of Mrs. Staylor within three years before the suit was brought, and they are Mrs. Donavin, Christian Brandau, and John McKewen. Mrs. Donavin testified: "Mrs. Staylor never paid Johnny anything at all. Q. State how you came to know that. A. Of course, I would see them if he got anything. He would ask Mrs. Staylor for 25 cents or 10 cents to get a piece of tobacco or anything. If he had any money, I don't think he would come and beg her for it. Johnny would come to Aunt Kate and say, 'I want some money;' and she said, 'Oh, Johnny, you don't want it now; wait till I die.' She said, 'I will leave it to you and Maggie—all to you and Maggie—when I die;' and Johnny says, 'I don't think I am going to get anything at all;' and she said, 'Yes, you will; I will leave it all to you and Maggie; don't take it away now while I am living;' and of course Mr. Staylor didn't bother her any more talking about it. I have heard her say that lots and lots of times. I remained there four and a half years. I stayed there until 1890. I was married in 1891. I left there about six months before I was married. I visited my aunt right often after I was married. I had conversations with her on the subject of Johnny after I left. The month before she died she said to me, 'Maggie, won't you come here and take care of Johnny?' She said, 'I don't think I am going to live much longer, and won't you come here and keep house for him—take care of him?' I said, 'Yes, auntie, I will certainly take care of Johnny as long as he lives;' and she said, 'All right, I will be satisfied if I take care of Johnny; everything I have got is Johnny's and yours.' That was about a month before she died." Brandau testified: "I don't know anything about their relations or what wages he was getting or wages promised. Mrs. Staylor said he didn't get anything outside of a little spending money and his board, and she would fix him at the end of her death. Q. She said he didn't get anything outside of a little money? A. And board. Q. But she would fix him at her death? A. That was what she told me. Q. She told you that herself? A. She told me that directly. Q. When did she tell you that? A. Well, as late as 1898—about a year before her death." On cross-examination witness said: "Q. What was it she said? A. She said she had fixed Johnny at the end of her death. Q. She

had fixed Johnny at the end of her death? A. Yes, sir; and he wasn't getting anything outside of board and a little spending money. It was verbal conversation; she didn't write a letter to me." McKewen testified as follows: "A. She said she was saving his money, and after this, one day about 18 months before she died, I was at the place, and could hear her. She was talking to Johnny and Mrs. Staylor—had a little quarrel—and she says— I was sitting at a fence between us, and she was scolding with John, and I said, 'Mrs. Staylor, it don't look like you are going to do what you said'—she was saving the money there for him, and the business was his when she died, and that was the remark I related to her over the fence. Q. You said they had a little quarrel. A. Yes, sir. Q. What do you mean? A. Words, you know; jawing about something—some private matter, inside there. I don't know what it was; something the matter, or something. I couldn't tell whether it was money he wanted her to give him. I don't know what it was, but she quarreled, and she was giving him a jawing, and this remark that she said to him, when I says, 'That don't look like you were going to do what you said,' and she said, 'I have got to do something with him to stop him.' Q. She said, 'I have got to do something with him'? A. She said she had to do something to John when he had got the 'humps,' anyhow, to stop him. She meant to cool him down, and go to work, so she said; but whatever the dispute was about I don't know, and John made believe, I think, he was going away, and he would leave there, or something of the character. Q. Did she or not at a later time than after this ever tell you anything about saving his money? A. Yes, sir; she told me that after. She said, 'I am saving his money for him,' right there. Q. Right in the yard there? A. Yes, sir; right afterwards. Q. In the yard, that day? A. Yes, sir; right afterwards; yes, sir."

We do not think that any of this testimony can be strained into a promise to pay or into an acknowledgment of a subsisting debt. At best, it consists of loose and inconclusive declarations of a purpose on the part of Mrs. Staylor to provide for the plaintiff after her death, and that could only mean by will, as he was not one of her next of kin. It falls very far short of showing either a promise to pay a debt or an acknowledgment of a subsisting debt, and the special exception we are now considering should have been sustained. On the former appeal there was no special exception to the plaintiff's prayer, and therefore no question as to the legal sufficiency of the evidence to support its hypotheses arose or was considered. Of course, it must be understood that the rejection of this first prayer would not preclude the plaintiff from recovering the value of the services he ren-

dered within three years before the suit was brought.

The defendant's first and fifth prayers, which were rejected, restricted the right of recovering to the value of the services rendered within three years before the suit was brought. Both prayers refer to the pleadings, and, in view of the conclusion we have reached in considering the plaintiff's first prayer, ought to have been granted, unless the evidence justified the jury in finding that by the terms of the employment the plaintiff was not to be paid until the death of Mrs. Staylor. But that theory was distinctly excluded by the granted sixth prayer of the defendant. There was no error in rejecting the defendant's seventh prayer. The credibility of the testimony tending to show payment was for the jury, and not for the court, to pass upon.

Because of the errors indicated, namely, the rulings in the first, second, third, and fifth exceptions, and the granting of the plaintiff's prayer in the teeth of the second special exception, and the rejection of the defendant's first and fifth prayers, the judgment must be reversed, and a new trial will be awarded; and it is accordingly so ordered.

Judgment reversed, with costs above and below, and new trial awarded.

(65 N. J. E. 138)

MACON KNITTING CO. et al. v. LEICESTER MILLS CO. et al.

(Court of Chancery of New Jersey. July 6, 1903.)

PATENTS—LICENSE—DEFECTS IN PATENT ARTICLE — PRESUMPTION — EVIDENCE — BURDEN OF PROOF—STIPULATION—LICENSEE OR ASSIGNEE—EVICTION OF LICENSEE—SUBSEQUENT AGREEMENT—WARRANTY—RESCISSIION AND ABANDONMENT—SPECIFIC PERFORMANCE—DECREE—RELIEF GRANTED.

1. Where knitting machines for which a patent had been secured by complainant were to be constructed from the same design and delivered to defendant in three installments, to be used by defendant under a license, proof of the inefficiency of the first installment, due to defects in design, will raise a presumption that every machine which was to be built under the license was similarly inefficient.

2. To constitute a knitting machine "practically operative," within the meaning of a contract by the patentee to construct the same for the use of defendant in the manufacture of certain woolen goods specified in the contract, and which were manufactured and sold by defendant in its business, such operativeness must be tested by the purpose for which the machine is built, by the work of other knitting machines, by the quantity and quality of the goods produced, and by the durability of the machine and its freedom from liability to become disarranged or to waste material.

3. Evidence examined, and held insufficient to show a disapproval within the required time of machines constructed by the patentee for the use of a manufacturer.

4. Where a licensee of a patented machine used the same for six months after an expert appointed by the patentee to install the machines and give instructions in their use had ended his supervision and left the establishment

of the licensee, the burden of proving that the machines were defective and practically inoperative, in breach of the terms of the license, was on the licensee.

5. Evidence examined, and *held* sufficient to show that knitting machines, constructed by a patentee for the use of a manufacturer, were practically operative, in compliance with the provisions of a contract granting a license for their use in the manufacture of woollen goods.

6. A recital in a judgment that a stipulation had been entered into between the parties to the action amounts to an admission in open court that the stipulation had been executed by them; the relief granted by the decree being in conformity thereto.

7. One who accepts from a patentee of a machine a license to use a certain number of machines for the manufacture of a specified article, and for no other purpose, is not, as respects his right to withhold the payment of the license fee or royalty, on the ground that the machine is an infringement of the patent right of a third person, an assignee of the patent right, instead of a licensee, within the meaning of the rule relating to the right of such an assignee to set up the invalidity of the patent, since the licensee neither transfers the whole or an undivided part of the patent, nor the exclusive right to use the patented article.

8. A decree against the licensee of the patentee of a machine, which determines that the machine is an infringement of another patent, in so far as it includes the generic novelty of the latter, is an eviction of the licensee, which will relieve him from the payment of royalties.

9. After a licensee of a patentee had been evicted by a decree enjoining the use of the patented machine as an infringement on the patent right of a third person, an agreement was entered into between the latter and the licensor, by which the licensor was authorized to grant to its former licensee the right to make such machines and use them for the manufacture of a specified article, but for no other purpose. *Held*, that the agreement nullified the effect of the decree, in so far as it constituted an eviction of the licensee and relieved it from the payment of royalties, though the rights acquired by the licensee under the agreement were more restricted than those acquired under the original license.

10. A patentee, in granting a license to use the patented article, impliedly warrants that he possesses the title to the patent right, and that the licensee will not be evicted therefrom; but he does not warrant the validity of the letters patent.

11. Where a licensee of a patent right receives information that the patent is an infringement of the patent right of a third person, he need not wait until he is actually evicted, but may abandon the license at once, and avoid the further payment of royalties.

12. In a suit to specifically enforce an agreement by the licensee of a patent right to deliver to the licensor the last installment of certain corporate stock and bonds in payment of royalties, the defense to which suit is that the defendant abandoned the license, after using it for some time, on the ground that the patent infringed the patent right of a third person, the court will not refuse to grant relief on the sustinment of such defense, but will render a decree for specific performance, with an allowance to the defendant of a pecuniary compensation equal to the royalties which would have accrued during the period that the license was not used.

Bill by the Macon Knitting Company and others against the Leicester Mills Company and others, to compel specific performance of a contract to pay royalties for the use of a patented article. Decree for complainants.

The following preliminary statement will disclose the general features of the cause to be determined: On January 2, 1896, and on November 18, 1895, patents were allowed to Joseph Bennor for certain improvements in straight knitting jackets for making fashioned hosiery. On September 14, 1894, Bennor conveyed a one-half interest in this invention to the Macon Knitting Company, the other complainant. On February 10, 1896, the complainants entered into an agreement with the defendant the Leicester Mills Company, by which they granted to the latter company an exclusive license to manufacture in the United States, for its own use therein, to the end of the term for which such letters patent were or might be granted, knitting machines containing the above-mentioned patented improvements, granting it the sole right in the United States to use the said machines in the manufacture of knitted goods of wool, worsted, and merino, and of no other material and for no other purpose. By said agreement complainants contracted to build and furnish to the defendant 20 knitting machines, of the construction specified in the application for said patents, for a cash price amounting to 10 per cent. above the cost of their construction, but not to exceed \$200 each, which said machines the defendant was to have the right to use in the manufacture of the specified goods, and which machines it was agreed should be practically operative and built in a workmanlike manner. Complainants agreed to assist the defendant in placing said machines in its factory, and to impart to a competent person, to be designated by said defendant, proper instructions for operating the machines. The defendant agreed that upon the delivery to it of the 20 machines, and upon the practical operation of said machines, the defendant would forthwith assign to the complainants 50 shares of the capital stock of the said Leicester Mills Company, of the par value of \$100 per share, together with the bonds of the said company of the value of \$5,000. The defendant also agreed that on January 1, 1898, or before that time, if it had constructed 80 machines, it would assign 100 more shares of its capital stock and the same amount of bonds. The first installment of stock and bonds was delivered; but the second installment has not been delivered, and it is to compel the delivery of the latter stock and bonds that this bill is filed. The answer, as well as the answer by way of cross-bill, sets up that the defendant was induced to execute the agreement by the false representation of the complainants that the machines would produce stockings that would be shaped in process of manufacture, and would be marketable as first-class goods; that it delivered the first installment of stock and bonds, relying upon the contract and upon the further assurance already mentioned; that it cost \$400 to make each machine; that they were not particularly operative; that the manufactured product was not first-class and merchantable, but had to

be darned and sold as second-class goods. The cross-bill sets up the same facts, and prays that the stock and bonds already delivered may be redelivered to the defendant, and that damages may be awarded for the expenditure made by defendant in reliance upon the representations made and the written covenants executed by the complainants. The supplemental answer sets up that the patents were infringements of a preceding patent owned by the Powells, and so the complainants had no title to convey, and that that question was then being litigated in a federal court. By a stipulation this last question was held in abeyance until a decision by the federal tribunal, which decision was to be regarded as decisive in this court. A decision has been rendered in favor of the defendant, the character and effect of which decree will be presently considered.

F. C. Lowthrop and Hector T. Fenton, for complainants. Edward H. Murphy, Joshua Pusey, and Joseph Jenkin, for defendants.

REED, V. C. (after stating the facts). Of the two complainants, the Macon Knitting Company and Joseph Bennor, each owning a one-half interest in the machines sold, and in the right to manufacture and use like machines, Mr. Bennor was the inventor and patentee of the machines sold to the Leicester Mills Company. Previous to the sale, the latter company was a dealer in woolen yarns, and for about two years had been selling these goods to the Macon Knitting Company. Mr. Bennor, then interested in the business of the Macon Knitting Company, in his intercourse with the officers of the Leicester Mills Company concerning the purchase of woolen yarn, spoke to them about the knitting machines. In consequence of his talk with them, Mr. Wilson H. Brown, the vice president and treasurer of the Leicester Mills Company, accompanied Mr. Bennor to Macon, and saw the machines in operation. The result of the conversation and of this visit was that the contract already mentioned was entered into between Mr. Bennor and the Macon Knitting Company on the one side and the Leicester Mills Company on the other side. Of the 20 machines sold, 6 were sent to Germantown, where the Leicester Mills factory was located, on July 25, 6 on September 11, and 8 on November 4, 1896. In the latter part of July, or the first part of August, of that year, Joseph N. Bennor, Jr., the son of the patentee, went to the Leicester Mills to superintend the setting up and putting into operation of the machines sold, and remained there until July, 1897. The Leicester Mills people constructed a shop for the purpose of building the additional machines mentioned in the contract. Mr. Bennor, who arrived at Germantown before the arrival of the first installment of machines, devoted his time to starting up the machines shipped, making the tools, putting in the shafting, and preparing for the purpose of manufacturing

machines. He says he set up the first arriving machines as soon as they got the shafting in, but that it took some time to get ready to run them. He had to experiment on yarns. Some of it was twisted too hard, some had little pieces or burrs on it, and some was irregular in size, "and we had to get our samples of proper weights before we could start the machines." It is to be remarked here that the machines, while at Macon, had run on cotton, excepting in those instances where samples were made from yarn sent to them. Mr. Bennor further says that he got the first of these machines started in the latter part of September, 1896, and he had them all at work by the 1st of December. Much of Mr. Bennor's time was given to the machine shop, and therefore, to assist him, Mr. James T. Hall was sent from the Macon Knitting Company about the 1st of February, 1897. Mr. Hall was the foreman of the knitting room at the Macon Mills. Mr. Hall ran the knitting machines from the time he came until he left, which was some time in March. Before Mr. Hall came, Mr. Bennor had a boy whom he taught to help him run the machines. This boy remained until the first week that Mr. Bennor was there, and then another boy was hired, who remained two or three weeks after Mr. Hall left. He was discharged by the officers of the Leicester Mills Company. After Mr. Hall left, the Leicester Mills Company employed Mr. Thomas W. Tustin, who began to work in the second week in May, and remained about one year. Mr. Bennor and he were there together from the second week in May until about July 4th, when Mr. Bennor left, and Mr. Tustin was alone until the Leicester Mills Company ceased using the machines. The machines ran until December. On December 21, 1897, Mr. Wilson H. Brown, the treasurer of the Leicester Mills Company, wrote to Mr. Bennor, stating that the machines were not "practically operative," and notifying him that the Leicester Mills Company rescinded the agreement, and asked him to reinstate them in the same position as before the agreement was made. On December 24th Mr. Bennor replied, refusing to entertain the proposition. On March 8, 1898, Mr. Bennor and the Macon Knitting Company filed the bill in this cause, and on April 29th the defendants filed their answer and cross-bill.

The bill, as already observed, asserts that the machines were "practically operative." The answer and cross-bill charged that they were not "practically operative," and further charged that there were false representations made, which induced the execution of the contract. In detailing these representations, the answer states that the defendants were induced to enter into the contract by the statement that the machines would, could, and should produce stockings that would be shaped in process of manufacture, and would be marketable as first-class goods. The answer then states that the stockings produced required to be darn-

ed, which made them unsalable as first-class goods. The prolonged operation of these machines by the defendants is explained by the statement that they notified Mr. Bennor in July, 1897, that the machines were not in accordance with the agreement, and that Mr. Bennor requested defendants to give them a further trial, and agreed that, if they were not found to be satisfactory by January 1, 1898, they would be taken back, and the defendants would be reinstated in their original position. The cross-bill charges that at the time of the execution of the agreement it was agreed that the words "practically operative" meant that the machines would produce fashioned stockings that would be marketable as first-class goods. It charges that all the stockings produced by the machines had holes in them, which required to be darned, and so made them unsalable as first-class goods; that frequent and constant complaints were made to complainants of this state of affairs, and as frequent promises were made by them that the defects would be remedied, and that the complainants would demonstrate that the machines would produce first-class goods. The cross-bill restates the conversation in July, already set out in the answer. The cross-bill also sets up that large sums of money were expended in buying special tools, etc., to equip the shop and run the machines, at a large expense, and that they also lost much in the manufacture of unsalable goods. It charges a failure of consideration and a failure to perform the conditions to be performed by the complainants. It asks that the complainants may be decreed to return the stock and bonds and interest already received, and also to pay the amount expended by the defendants, already mentioned.

It is to be observed that the cross-bill does not ask for the rescission on the ground of fraud, nor do I find any fraudulent representation of any subsisting fact by the complainants. Whether the machines were or were not "practically operative" in fact, in the sense in which the words are used in the contract, I am quite clear that Mr. Bennor thought the machines would do what he said they would do. The primary question in the case is whether the machines delivered were "practically operative." In that question is also involved the practical effectiveness of the machines to be manufactured, and consequently the value of the license to manufacture. Inasmuch as the inoperativeness of the 20 machines is attributed to defects in design, and not to defects in construction, the proof of the inefficiency of the first 20 machines carries with it the presumption of similar inefficiency in every machine which was to be built under the license. Practical operativeness is to be tested by the purpose for which the machine is built and sold. A machine may operate practically to make

bricks; but, if sold for the purpose of making tiles, it would be absurd to speak of it as "practically operative." The contract itself recites the grant to Mr. Bennor of the patents for an improvement in stockings and the art of making them, and improvements in straight knitting machines for making fashioned hosiery, and recites that the Leicester Mills Company were desirous of manufacturing knitting machines containing those improvements, and acquiring the exclusive right to manufacture thereon knitted stockings of wool, worsted, and merino, together with other knitted goods of wool, worsted, and merino. Then there follows a license to manufacture such knitting machines, with the sole right to use the said machines in the manufacture of knitted goods of wool, worsted, and merino, but of no other material. It thus appears that the machines were to be "practically operative" in making knitted woolen goods, including fashioned hosiery. It is apparent, also, that the machines were to make seamless hose. Now, a machine might make a fashioned seamless hose, and yet not be "practically operative." Its operativeness must be measured by the work of other knitting machines, in respect to the quantity and quality of the goods produced, the durability of the machine, its freedom from liability to disarrangement, and its liability to waste yarn.

In the consideration of the question whether these machines were "practically operative" to accomplish the purpose for which they were sold, the first fact that strikes the attention is that these machines were run for over a year before any written complaint of their inefficiency was made. They were put into operation by the 1st of December, 1896, some before that date, and not until December 21, 1897, was there any written expression of dissatisfaction. It is true, that the Messrs. Brown say that there were repeated verbal statements to Mr. Bennor that the machines were not working satisfactorily. One occasion is particularly pointed out, namely, when the Messrs. Brown and Mr. Bennor were returning together from the meeting of the stockholders of the Leicester Mills Co. at Point Pleasant, in July, 1897. Mr. Bennor, however, denies that then, or at any time before the 1st of December, 1897, the Messrs. Brown expressed any disapproval of the work of the machines. In respect to the conversation on the train on the return from Point Pleasant, in July, he says that it solely concerned the proposition of the Messrs. Brown to purchase the right to use the machines on cotton, as well as upon woolen fabrics. It is entirely clear that this topic was discussed at that time, and it is not clear that any other topic was debated. The denial of Mr. Bennor, in connection with the written correspondence between the parties covering the period in which the machines were

running, leave it unproved that any disapproval was interposed before December 21, 1897. This fact, in my judgment, leads to the conclusion that there could not have been any such radical defect in the machines as would have arrested attention. It is true that the Messrs. Brown claim that they were induced to persist in running the machines by the promise of Mr. Bennor that their defects would be remedied. Mr. Bennor denies this. It is also to be observed that Joseph N. Bennor, Jr., who had been sent to install the machines and teach some person to operate them, left on July 4, 1897. The adjusting and teaching function of Mr. Bennor was then understood to be ended. The machines were at that time turned over to the Leicester Mills Company. That company ran them for about six months thereafter before complaint was made. In view of this conduct, it is incumbent upon the defendants to show the existence of those defects in the machines which rendered them practically inoperative.

The principal witness offered for this purpose is Mr. Thomas W. Tustin. Tustin went to the Leicester Mills the second week in May, 1897, as superintendent of the hosiery department. Tustin says that the character of the product of those machines was very unsatisfactory, and that in his opinion the stockings produced were seconds. The imperfections, he says, were in the side of the foot, where the widening was done on the needles; that every pair of stockings had to be darned, and that there were seven or eight holes for about three-fourths of an inch. He says that he does not allude to the hole in the heel, for any machine will do that. Then he says there were drop stitches at the front of the toe that required mending; that, if only one was dropped, it might be mended so as to be imperceptible, but for two or more no one could make it perfect; that 80 per cent. of the goods had drop stitches. He says that the cause of the drop stitches was that there is a mechanical piece of work, a rod going across called a "latch opener," and that this piece of rod would not open the latches and the needles in time to take the yarn as it was delivered from the yarn bag. He proceeds: "I had a machinist all the time. He would not have one hour in the machine shop, but what I was after him; and when he went away from the machine, after repairing it, the machine was just about the same as before. There were always 3 or 4 out of the 20 machines out of order. We had trouble with the shaping of the hose. In some cases the sinkers did not work properly, and in others the jacks threw the needles up too far." Upon being shown Exhibit D 1, he said that the average quality of goods was a little worse than that. He also says that, because of the imperfections of the machines in setting up the stockings, there was more waste of yarn than he ever saw in any other machine. This is the substance

of the testimony of Mr. Tustin. Another witness for the defendants is Rudolph H. Hunter. He is a lawyer, and testifies as a mechanical expert. He was taken to see these machines in December, 1898, just before the trial of this cause. Mr. Tustin and Mr. Evan M. Brown accompanied him. He was an hour and a half attempting to run one machine. Mr. Tustin and his assistants tried to run the machine while Mr. Hunter watched it. Mr. Hunter says that his aim was to make it work with proper effect, if they could do so. He says that he did not make any material portion of a stocking, because it was impossible to get the machine to knit properly, even from the start. The needles would not take the loops and the thread, so that the course was invariably imperfect. He afterwards said that a setting up might be had at the start, in some cases; but those cases would be exceptional. He says that this results from an inherent defect in the design of the machine, and proceeds to describe the specific imperfections in its operations. Another witness for the defendants is Mr. Henry Beal, who was a buyer of hosiery for Hood, Fulkrode & Co. Mr. Beal says that in the spring of 1897, he ordered 122 dozen of hose from the Leicester Mills Company, which hose were delivered about July of that year; that these goods were not first-class; that he bought them by sample, and that they were not as perfect as the sample; that the defect was in the big mark on the side, which they called "fashioning." When asked if he observed any slipping of stitches, he said: "Yes; there were some imperfect goods in the lot." When shown the stocking marked Exhibit D 1, he said that they were imperfect, and he would consider them seconds. It does not appear that any complaint was made to the Leicester Mills Company of the character of these goods. All the stockings were sold; but witness says that he did not wish to buy any more. The testimony of these three witnesses constitute the case of the defendants respecting the inoperative character of the machines.

For the complainants there is the testimony of Joseph Bennor, the patentee, under whose supervision the 20 machines were made at Macon and tested; the testimony of Joseph N. Bennor, his son, who was sent to the Leicester Mills to install them and teach some one to operate them; and the testimony of Mr. Hall, who was in charge of the machines for six weeks in 1897. They all testify to the efficiency of the machines. Joseph Bennor, who visited the Leicester Mills occasionally while his son was in charge, says that the Messrs. Brown did complain of the cost of the machines which they were building, and of the fulling and scouring of the goods, which is an after process, but that no complaint of the work done by the machines themselves was made. Mr. Hall testifies that the machines, while he was there, operated all right so far as he knew,

and made good hosiery. He says that they ran the 20 machines at the Macon Knitting Company before they came up, and that he started every one of them there; that he ran the 20 machines, with the exception of one, which they did on small hose for which they had no orders. He also says that just before he left, in the middle of March, 1897, Mr. Everitt Brown said that he was perfectly satisfied. This Mr. Brown denies, and says that, on the contrary, Mr. Hall asked for a commendatory letter, which he declined to give. Mr. Joseph N. Bennor first explains the manner of running the machines. The machines are operated by a boy, and kept in running order by a fixer, whose duty it is, not to mend, but fix and replace screws or parts which are wrong. The machine has to be timed, which is done by a chain in a pattern wheel. The boys become proficient in time, but not in fixing the machines. Mr. Bennor then describes the setting up of a course at the toe, and also what will cause a drop stitch in setting up a course, namely, where the latch opener is not straight. The duty of the latch opener is that, when the cams raise the needles, the latch opener opens the latch of the needles, and slides under it. It will be recalled that one of the criticisms which the defendant's expert witness made upon these machines was that the stitches were dropped because of the defective operation of the latch opener. Mr. Bennor says that, while he and Mr. Hall had the fixing and adjusting of the machines, they ran all right.

In analyzing the conflicting testimony, I will first allude to that of Mr. Beal, the purchaser of the 122 dozen of the stockings delivered in July, 1897. He first states that the eyelet holes produced by the fashioning of the hose are a defect. Now, it is entirely clear that the presence of these eyelet holes in the stocking knit by these machines was known to the defendants before the machines were purchased—certainly before they were delivered. It appears that in a letter of July 14th the defendants, in speaking of some stockings which had been sent from Macon as samples, say that they would advise having all samples made in future with the holes closed. Mr. Bennor answered: "If you prefer to have them closed, or if the trade demands to have them closed, they will have to be mended, the same as the balance of the goods sent to you. But, in my humble opinion, I think it will not be necessary after the goods are introduced. These holes are made by any machine which makes fashioned seamless hose; that is, hose with varying diameters, to conform to the shape of the leg. If the market does not call for the hose as made, the holes can be closed by mending, which is a technical term for closing them, or they can be concealed by clocking." From this it appears that, before the machines were delivered, the defendant knew that these machines would so knit the holes, and it appears that for a year after-

wards they practically operated in this way. Mr. Beal also thinks that there were imperfections in other parts of the stocking, darned places, and says that Exhibit D 1 is imperfect, in that it has been darned on the side opposite the heel, the same as in Exhibit C 7. Mr. Beal admits, however, that all machines will drop stitches. His main complaint, however, is respecting the mending on the heels in the fashioning.

If there were other defects, other than those on the heels, the complainants insist that it was because of the unintelligent operation of the machines, and not from any defect in the machines themselves. The goods sold to Hood, Folkrode & Co. were made while Mr. Tustin had charge of the machines. Mr. Tustin says that he did not run the machines himself, but only superintended the work. The machines were run by a boy, Harry, who had never seen a knitting machine before he came there. Mr. Tustin did not ever fix the machines; for Mr. Bennor did that before he left, and it was afterwards done by a machinist. The fixer is one who keeps the machines in order. Now, Mr. Bennor, as already remarked, left about July 4th, and seems not to have had much to do with the machines which Mr. Tustin was superintending for some weeks before he left. Who the machinist was, who acted as fixer in place of Mr. Bennor, does not appear; nor is he produced in the cause. Whatever defects may have appeared in the hosiery bought by Mr. Beal are attributed by the complainants to the inexperience of the boy who ran the machine, and of those whose business it was to keep the machines in time and otherwise properly adjusted, and also in feeding lumpy worsted. Much significance, it seems to me, is to be accorded to these views, from the fact that, of the thousands of pairs of hose that were knitted and sold, Mr. Beal is the only buyer who testifies to the imperfections of the purchased goods.

I will now turn to the testimony of Mr. Hunter, the expert. The purport of his testimony is that the machine was radically defective in design—so defective that he found it impossible to knit a perfect stocking. He admits that the eyelet holes made by the fashioning process are not an imperfection. The defects of which he complains is that the machines would not set up a stocking without dropping stitches. He asserts that for an hour and a half they tried over and over again to start a stocking, and they did not succeed in knitting one complete. His language is: "They could not make one perfect setting up; not one first course. The needles would not take all the loops—would not take the thread—so that the first course was invariably defective." Then, on further examination, defendants' counsel said to him: "I presume a setting up might be made at the start in some cases. There might not be trouble of dropping stitches?" To which he answered: "Yes, sir." He was then asked: "And that would be, from what I understand you to say, ex-

ceptional?" To which he answered: "That would be exceptional." The testimony of this witness must be viewed with the circumspection with which the testimony of any person who is paid to support a certain position is viewed. It is to be recalled that most of the machines had been idle for a year, and all for 11 months. It does not appear what, if anything, had been done in the way of oiling, cleaning and adjusting the examined machines beforehand. The only explanation possible of this testimony is that the machines did not work for Mr. Hunter as they had worked for Mr. Bennor. The testimony of the Bennors, the fact that thousands of dozens of hose had been made upon these machines, and the specimens of its work presented, seem to prove either that the witness overstates the defects of the machine he saw, or that it was not properly adjusted to do its work. It is also to be observed that the witness attributed the inability of the machine to set up the first course to a defect in design, namely, that the needles did not always take the yarn, which was due to the fact that the latches would not open. Yet, according to the testimony of Mr. Bennor who built the first one of the Powell machines, the latch-opening device upon the Powell and Bennor machines were alike, and Mr. Hunter says that the Powell machine had none of the defects which he found in the Bennor machine.

Now, respecting the testimony of Mr. Tustin: He was with Mr. Hunter and ran the machine when the latter made his observations. From Mr. Tustin's statement, particularly that part which described the alleged defective operation of the machines, I surmise that the tone of his testimony is influenced by what he saw and heard while with Mr. Hunter on that occasion. Mr. Tustin had had no experience with this kind of knitting machine before he came to the Leicester Mills in May, 1897. He took some instructions from Mr. Bennor, but, as Mr. Bennor says, "He soon knew it all." He admits that he never started to operate a machine; that he went to superintend the hosiery plant, not as a fixer, or to run a machine, but to see that the machines were run; that he never fixed one of these machines, and either sent for a machinist or Mr. Bennor to do it. So the fixing after July 4, 1897, was left to this unknown machinist, and the running of the machines to the boy Harry. It was while Harry was running the machines that the goods sold to Mr. Beal were turned out, and it appears that goods with drop stitches will be produced by lumpy yarns, as well as by any maladjustment of parts of the machinery.

I think that the testimony of both Mr. Hunter and Mr. Tustin is overdrawn and intemperate. It is opposed by the conduct of the defendants themselves; for it is utterly impossible to believe that the radical inoperativeness of these machines, testified to by these witnesses, could have existed, and yet that the defendants would have kept

these machines in operation, and put their products upon the market for a year, with no written complaint. Even after the letter of December 21, 1897, defendants used some of the machines in working up some yarn on hand, making about 100 dozen pairs of stockings. In fact, the defendants have made a case against themselves by conduct which refutes their present insistence. Not only were the 20 machines used whenever there was yarn to knit, but the defendants proceeded with their construction of new machines. When Mr. Tustin came to Germantown, he found 21 machines, and when he left there were 40. Again, in July, 1897, defendants tried to purchase from the Macon Knitting Company people the additional right to make cotton hose on these machines. The machines had then been running about seven months, and the goods sold to Mr. Beal, I presume, had been made upon them. Again, the contract provides that upon the delivery and practical operation of the 20 machines, \$5,000 worth, par value, of the capital stock and bonds should be delivered to the complainant. These were delivered on December 20, 1896, after the machines were in operation. The interest on the bonds accrued in June and December, and it appears that the interest due June 1 and December 1, 1897, was paid by the defendants when due. From the case thus made, I am constrained to the conclusion that the machines sold must be regarded as practically operative.

There are, however, other questions in the case. After the original cross-bill and answer were filed, mainly attacking the operativeness of the machines, a supplemental cross-bill and an answer were filed, setting up, in substance, that the machines in question were in some material part infringements upon the rights of Messrs. Powell, the owners of a patent for an improvement in the web-holding actuating mechanism for automatic knitting machines; that on November 12, 1898, the Messrs. Powell had begun a suit against the defendants, among other things, because of such infringement. In the complainant's answer to the cross-bill they admit the pendency of the suit, but denied the fact of infringement. Upon the trial of the present case, it was stipulated that the decision of the issue raised by these supplemental pleadings should be suspended until after the decision of the federal court in the suit mentioned, and that the decree of the court in that case might be pleaded in this, as to its legal effect in this court, subject to an appeal in the Powell case. On appeal to the Circuit Court of Appeals, the decree of the Circuit Court (103 Fed. 476) holding that there had been no infringement was reversed (108 Fed. 386), and the record was remitted to the Circuit Court, where, on October 25th, it was decreed that the Browns had infringed the Powell patents, and their exclusive right thereunder, by the manufacture and use of knitting machines having web-holding actu-

ing mechanism, substantially the same in construction and operation as in the Powell patents. This decree has been pleaded and is in evidence by stipulation in this suit. The conclusion of this decree of the federal Circuit Court is this: "It being shown to the court by stipulation this day filed, and now made a part of this decree, that the intervening defendant, the Macon Knitting Company, has made settlement with complainants for said infringement, and has taken a license under said letters patent, as in and by said stipulation appears, and complainants having thereupon waived an account of profits and damages and injunction, it is decreed that the complainants do recover of said defendant [Brown] and intervening defendant [Macon Knitting Company] the costs of suit."

Now, this stipulation is not a part of the judgment, but is recited to show why there is no injunction order and decree for an accounting, namely, because the complainant waives his right to such decree. The recital amounts to an admission in open court by the parties that the annexed stipulation had been executed. The decision of the Circuit Court of Appeals was rendered on April 4, 1901, and the stipulation annexed to the final decree is dated July 3, 1901. The stipulation or agreement witnessed that the Powells, owners of letters patent of the United States No. 510,934, dated December 19, 1893, for improvements in web-holder actuating mechanism for knitting machines, "for and in consideration of the sum of five thousand dollars (\$5,000) and other good and valuable considerations to us in hand paid, have authorized and empowered, and do hereby authorize and empower, the Macon Knitting Company to sublicense and empower the Leicester Mills Company, and no other party or parties, retroactively from the date of the said letters patent, and hereafter during the remainder of the term thereof, to make for its own use only, and to use, said patented web-holder actuating mechanism in or upon, or as part of, knitting machines heretofore employed or hereafter to be employed by the said Leicester Mills Company exclusively in the knitting of hosiery or other goods from woolen, worsted, or merino yarns, and for no other purpose or purposes. The intent of this instrument is to authorize and license, subject to the terms, conditions, and limitations hereinabove expressed, as well the use heretofore by the said Leicester Mills Company as the continued use hereafter during the term of said letters patent No. 510,934, of said patented web-holder actuating mechanism to and upon twenty (20) knitting machines heretofore made by the said Macon Knitting Company and Joseph Bennor, and by them sold and delivered to the said Leicester Mills Company, under a certain license agreement made by and between the said Bennor and the said Macon Knitting Company, of the one part, and the said

Leicester Mills Company and Wilson H. Brown of the other part, dated the 10th day of February, A. D. 1896, and also to authorize and license the said Leicester Mills Company, subject to the same restrictions and limitations as to use, as well the manufacture and use by said Leicester Mills Company heretofore as also the manufacture and use hereafter, during the term of said letters patent, of other specimens of said patented device in or upon or as part of any knitting machines made or to be made, and used or to be used, by the said Leicester Mills Company, under and in accordance with the terms of said agreement of February 10, 1896, copy of which is hereto annexed, marked 'Exhibit A,' and for no other purpose or purposes, to the end that said Leicester Mills Company, as the sublicensee of the said Macon Knitting Company hereunder, shall not be evicted, disturbed, or interfered with, by reason of said recited letters patent No. 510,934, owned by said licensors herein, from and in the full enjoyment of all the rights and privileges granted to it, the said Leicester Mills Company, by the Macon Knitting Company and Joseph Bennor, in and by said recited licensed contract or agreement, nor be held liable to the said licensors herein in damages for infringement or costs of suit in any action brought or to be brought by them under said recited letters patent for any acts rightly done by the said Leicester Mills Company in the exercise of such license rights as by the said recited contract of February 10, 1896, have been granted to or vested in them; it being the further declared intent and object of this instrument to settle and adjust the claim and demand for which a suit in equity was lately brought by the said licensors as complainants in the Circuit Court of the United States for the Eastern District of Pennsylvania, of October sessions, 1898, No. 20, against the said Leicester Mills Company and its officers as defendants, with the said Macon Knitting Company and Joseph Bennor as interveners, and to discharge, release, and acquit, as well said defendants as also said intervening defendants, of and from all liability for damages and costs which have been or might be adjudged, ascertained, or assessed therein."

The question, which presents itself is, what are the rights of the parties, in view of the decree, coupled with the agreement just displayed? It is first insisted by the defendants that they are assignees, and not licensees, and that the rule respecting the failure of consideration resulting from the invalidity of the patents should be applied as if the agreement for the use of these patent rights was an assignment. Whether the rule respecting the right of an assignee to set up the invalidity of a patent differs from the right of a licensee to do the same is not to be considered; for the defendants are clearly licensees, and not assignees. Any assignment, which does not transfer the

whole patent, or an undivided part of the whole patent, or an exclusive right to some part of the country, is a mere license. *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923. This transfer did neither of these three things. It did not transfer the whole or an undivided part of the patent and it did not transfer an exclusive right to use the same in the whole or any part of the United States. It only transferred the exclusive right to use the patented machine for one use, namely, for the manufacture of woolen goods. What, then, is the privilege of the defendants as licensees? There is a line of cases holding that a licensee cannot set up the invalidity of a patent, the right to use which he holds by license, unless there has been something equivalent to an eviction of the licensee. Judge Lowell in *White v. Lee* (C. C.) 14 Fed. 780-791, said: "The law is, I think, that a plea or answer that a patent is void is not of itself a sufficient defense, but that evidence of what may be called an 'eviction' is such defense. The difficulty is to ascertain what amounts to an eviction in patent cases. It is easily discovered whether the tenant of a certain piece of land has or has not been evicted; but, if a patent is void, still the licensee may have had all the benefit of a valid patent, because his exclusive title may never have been disputed." In that case there was no suggestion that the exercise of the pretended right conferred by license was any violation of the rights of a patentee superior to the licensor. The invalidity of the licensor's patent defeated the exclusive right of the licensee, and put him upon a footing equal with the world, but did not expose him to liability for infringement. He could still recognize and use his license and receive the protection of what the world might suppose or recognize as an exclusive license in fact. In this group of cases, so long as a licensee recognizes the license and uses it, he must pay the royalties which accrue under the terms of his license. If, however, the patent was adjudged invalid, or was repealed by judicial decree, this amounts to an eviction. In my judgment, the decree of the Circuit Court of Appeals must be regarded as an eviction.

It is, indeed, insisted that the Bennor patents have not been annulled. It is said that the decree in the infringement suit only established the fact that in some respects only the Bennor were infringements of the Powell patents. It is true that the decree in the infringement suit only establishes the fact that the Bennor patent is invalid only so far as it includes the generic novelty already obtained by Powell. In no other respect was the Bennor patent directly or inferentially annulled. But it is manifest that no one could use the Bennor machines without infringing the Bennor patent, as well as the Powell patent. It is obvious

that the licensees could not use the machine without liability to Powell for damages for every day's use; and I am unable to understand how the effect of a decree for infringement differs this from any other case, except in respect to the amount of damages recoverable by the superior patentee. The decree for infringement amounted to an eviction. An eviction occurs whenever a licensee is enjoined from acting on it at the suit of the owner of a senior patent; and by parity of reasoning it occurs whenever a judgment or decree is obtained by the owner of a senior patent against the licensee for an infringement which consists of acting under the license. *Walker on Patents* (3d Ed.) § 307. It is clear, therefore, that, putting aside for a moment the effect of the agreement entered into between the Bennors and the Macon Mills Company on the one part, and the Powells on the other, the complainants cannot compel the delivery to them of the remaining bonds and stock of what constituted the consideration for the license.

The question, then, recurs, what is the effect of the agreement thus referred to? By this agreement the Powells licensed and empowered the Macon Knitting Company to sublicense and empower the Leicester Mills Company to make for its own use only, and to use, said patented web-holding actuating mechanism upon or as a part of the knitting machines heretofore or hereafter employed by the Leicester Mills Company exclusively in the knitting of hosiery or other goods from woolen, worsted, or merino yarn. Now, the defendants insist that this agreement does not restore them to the position which they would have occupied, had the original license protected them from all liability to a suit for an infringement. This appears to be so. First, the license purported to give the complainants the exclusive right to use the web-holding actuating mechanism. The stipulation only confers the right to use it in common with others who may acquire the same rights from the Powells. Again, the Powell patents expire before the Bennor patents, and so the use of the device mentioned will be thrown open to the world before the end of the period of exclusive use which the original license granted to the complainant. What the stipulation does is to release the complainant from liability for past infringement, and to entitle it to use in future the Bennor machines free from any claim by the Powells. But by doing this the agreement, I think, nullified the effect of the eviction proved by the decree of infringement. This is the effect of the rule, as I understand it, that, while there is an implied warranty of title by the licensor, there is no warranty of the validity of the letters patent. All that the licensor warrants is that the licensee shall not be evicted from his enjoyment of his rights under his license. *Walker on Patents*, p. 257. The licensor absorbed the force of

the decree which would have otherwise amounted to an eviction. By force of the agreement with the Powells, the disturbing force of the decree was arrested at the moment of its birth. Therefore, if the eviction rested solely upon the entry of the decree in the Powell suit, there would exist no defense whatever.

But there is another aspect of the case to be considered. The defendants ceased to use the license from the Macon Knitting Company in January, 1898. On November 21, 1898, the defendants filed their supplemental answer and cross-bill, praying for a rescission of the contract on the ground that the Bennor patents were invalid and because they infringed the Powell patent. From that date the cessation from use by the defendants of their license must be regarded, in part at least, as caused by the paramount title claimed by the Powells. It is perceived, therefore, that from November 21, 1898, until October 25, 1901, the date of the infringing decree, the defendants not only did not use the machines, but could not use them without being liable for infringement, and it appears that they had asked for a rescission of the license agreement upon that ground. There is a class of cases in which a licensee can successfully defend against an action for royalties when there has been no eviction. If the patent which he is licensed to use is an entire nullity—if it is inoperative, not merely in respect to some of its claims, but in all of its claims—the licensee need not wait until some act equivalent to an eviction occurs. In this class of cases, the weight of authority is that without an eviction, where there are no recitals in the license recognizing the validity of the patent, the licensee can cease to recognize and act under the license, by notice to the licensor of his determination to repudiate the license. Thereafter, if the patent proves to be invalid, the licensee is free to use and manufacture without liability to pay royalty. If the patent proves to be valid, the licensee thereafter is liable to the licensor for damages as an infringer.

In *Crossley et al. v. Dixon*, 20 Eng. Rul. Cases, 764, 10 H. L. Cas. 293, Lord Chancellor Westbury said: "The license being the foundation of the claim (for royalties), and being, of course, determinable by it, if he chooses to put an end to that license, it follows that the present appellants, if he [the licensee] continues to use the machine, must treat him as a person infringing their patent rights." Lord Chelmsford said: "He [the licensee] cannot act under the agreement and at the same time repudiate it. He may, if he pleases, put an end to the agreement; and he may use the machine which he has purchased from the appellants [the licensors], but he must do so at his peril. He must do it under the liability to be treated as an infringer, and be subject to an action for damages for that infringement." In *Marston v. Swett*, 82 N. Y. 526-534, the rule laid down

by Judge Earle in *Lawes v. Purser*, 38 L. & E. Rep. 48, was adopted, namely, that if the plaintiff believed the patent to be valid, and the defendant believed so too, the defendant must pay for the privilege until after he can show that the patents have been rescinded or revoked, or that notice has been given to the plaintiff that the defendant will not pay any more under the contract. And in *Mudgett v. Thomas* (C. C.) 55 Fed. 645, the judicial language was that if the exclusive licensee, under a license which contained no recitals as to the validity of the patent, repudiates and abandons the license, he is not estopped from setting up the invalidity of the patent for lack of invention or want of novelty as a defense to an action for royalties alleged to have become payable subsequent to the repudiation. The cases are reviewed by Judge Sage in his opinion in this case. Upon this point are the cases of *Harlow v. Putnam et al.*, 124 Mass. 553; *Standard Button Fastening Co. v. Ellis et al.*, 159 Mass. 448, 34 N. E. 682; *Edison Gen. Electric Co. v. Thachara Mfg. Co.*, 167 Pa. 530, 31 Atl. 856.

This rule seems inapplicable, however, when the patent, while invalid as to some of the points claimed, is valid as to others. The continued use of a license under such a patentee would leave the licensee liable for royalties and also responsible for infringing the rights of any paramount patentee. But, while he may not free himself from liabilities, if he continues to use the license, I am of the opinion that such a licensee can cease to use and repudiate his license. He is not bound to wait until he is actually evicted by a paramount owner. The doctrine of estoppel which is applied to a licensee is analogous to that applied to a tenant. The well-known rule as to the latter is that, so long as he remains in undisturbed possession, he is estopped from attacking the title under which he entered, unless his entry was induced by the fraud of the landlord, or by mistake, or for some unlawful purpose. The fact that the lease is void, or that the lessor has no title whatever, makes no difference. If a lessee is in possession as a tenant, he must pay for what he enjoys. If his possession is disturbed by what amounts to an eviction, either by the landlord or by the owner of a paramount title, the right of the landlord to rent from that moment ceases. Nor is it necessary for the tenant to await the entry of a judgment against him. In case some claimant of a paramount title asserts his right against a tenant, the latter is not bound to remain in possession, and so become liable to pay rent to his landlord and also damages to the claimant. He can abandon the possession of the leased premises, and take his chance of establishing his liability to be ejected by the paramount claimant. If he proves the existence of such liability, there can be no recovery for rent from the time of the tenant's abandonment. So a licensee, who may become aware of a claim of a right paramount

to that of his licensor, may upon the same principle repudiate his license, and abandon its use; and, if the existence of the paramount right is established, the licensee is discharged from the payment of royalties, subsequent to the date of his cessation from use. This is the posture of the defendants. From November 21, 1898, until October 28, 1901, their abandonment of the use of the license discharged them from any liability to pay royalties for that period.

The question then arises, what is the equitable course to be taken in dealing with this situation? Should the court refuse to grant any relief, or should it decree specific performance, with an allowance to the defendants of a pecuniary compensation equal to the royalties which would have accrued during the idle period? The allowance of compensation in suits for specific performance is a familiar feature in the administration of equity jurisprudence. When jurisdiction to decree a specific performance exists by reason of the character of the contract to be performed, a court, if it finds that it is beyond the ability of a party to specifically execute its terms, will compel him to do so, as far as he can, and will compel him to compensate in money for so much of the contract as he cannot specifically perform. Even if the party cannot perform any part of the contract, equity does not hesitate to decree compensation for the whole.

That this court has jurisdiction in this case is clear. Jurisdiction rests upon two grounds: First, because the subject-matter of the contract is a patent; and, second, because the consideration was securities not listed, and so without a market value. The power of this court to decree compensation in this class of cases cannot be doubted. The instances in which this power has been exerted have been generally where the defendant has been unable to deliver what he had bargained to deliver, and the complainant is content to accept pecuniary compensation. When, however, it is sought to compel a defendant to accept that for which he has not contracted, the case presents quite another aspect. There must be circumstances rare and peculiar when a court will so decree. The present case is *sui generis*. The contract has been partially performed. The securities have been in part delivered. The license has been for a time enjoyed. There is nothing to indicate that the existence of a paramount title in the Powells was suspected by the licensors until suit was brought for an infringement. The conditions which its existence created were remedied as soon as it was judicially determined that there was a paramount right. Then, too, it is to be particularly observed that the cessation from use began, not because of a knowledge of the claim made by the Powells, but because of defendants' insistence that the machines were inoperative. It is quite likely that, had the Powell claim been the only objection to the further use of

the license, the licensor would have indemnified the defendant at once against liability for any infringement.

In view of these conditions, I have concluded to advise a decree that the defendants shall deliver the remaining stock and bonds upon being compensated in money for the loss of the use of the license for the period beginning when the defendant filed its amended answer, and ending with the final decree in the Powell suit, at which time the defendants first had knowledge of the execution of the new license by the Powells. There will be a reference to a master to find the amount of such compensation.

A decree will be framed upon notice by the counsel of the complainants to the counsel of the defendants.

(97 Me. 512)

MELCHER v. INSURANCE CO. OF PENNSYLVANIA.

(Supreme Judicial Court of Maine. May 18, 1903.)

RELEASE—COMPROMISE AND SETTLEMENT—REQUISITES—CONSIDERATION—FIRE INSURANCE—TRANSFER.

1. The compromise of a doubtful claim is a sufficient consideration for a promise to pay money for the settlement of such claim, and it is immaterial upon which side the right ultimately proves to be.

2. The surrender of a groundless claim, which is known by both parties to be unenforceable, is not a sufficient consideration to uphold a promise to pay money for the settlement of such a claim.

3. To support such a promise the claim must be made in good faith, with a belief by the claimant that there is some chance of its successful enforcement. It is necessary that the parties should at least have supposed, at the time of the compromise, that the validity of the claim made was doubtful, either on account of uncertainty as to what facts might be proved or as to the law applicable thereto.

4. A policy of insurance which provides that it shall become void if the property insured be conveyed without the assent in writing of the insurer is equally avoided although the conveyance by the insured is to his wife.

(Official.)

Report from Supreme Judicial Court, Oxford County.

Action by Richmond L. Melcher against the Insurance Company of Pennsylvania. Case reported. Judgment for defendant.

Assumpsit on an alleged agreement by defendant insurance company to pay \$400 as a compromise settlement of plaintiff's claim of \$500.

Plaintiff made his claim as mortgagee of the wife of the insured, to whom the destroyed premises were conveyed without the consent of the company required by the terms of the policy.

Plaintiff's declaration was as follows:

"In a Plea of the Case. For that whereas, the said defendant company, on the thirteenth day of January, 1897, in consideration of a premium in money, then and there paid

¶ 4. See Insurance, vol. 28, Cent. Dig. § 797.

to it by one Simon P. Baker of Andover, in said county, made a policy of insurance, number 80,285, upon a certain dwelling house of the said Baker, situated on Farmer's Hill in said Andover, at the corner of the Andover and Rumford roads; and the said defendant company by said policy promised the said Baker to insure five hundred (500) dollars thereon from the said thirteenth day of January, 1897, until the thirteenth day of January, 1900, against all loss or damage by fire originating from any cause except invasion, foreign enemies, civil commotions, riots, or any military or usurped power whatever; and the plaintiff avers that afterwards, and before the expiration of the time limited in said policy, to wit, on the second day of August, A. D. 1899, the said dwelling house was accidentally and by misfortune totally consumed by fire; and the plaintiff avers that he was then, and still is, interested in said real estate as mortgagee, and that the amount of the debt secured by said mortgage was and is the sum of seven hundred (700) dollars and interest, which mortgage is still unpaid or satisfied; and the plaintiff further avers that after the destruction of the said dwelling house by fire as aforesaid that he duly notified the said defendant company that he held a mortgage of the said real estate, and claimed a lien on the said policy of insurance, by virtue of the statutes in such case made and provided, for the full amount of the insurance, to wit, five hundred (500) dollars, whereupon a dispute arose between the said plaintiff and the said defendant company as to the liability of the said company to pay said claim, and also as to the amount that should be so paid; and the said plaintiff was about to sue said company to recover said five hundred (500) dollars; and the said defendant company on, etc., to wit, on the eleventh day of October, 1899, and on divers other days and times, at, etc., to wit, at said Paris, with full knowledge of the premises, and after due investigation of the plaintiff's claim, in order to settle and compromise the same, and to avoid litigation, and in consideration of the said plaintiff's promise to forbear to sue said claim, and to forever relinquish and release to the said defendant company all his right of action by reason of the same, promised the said plaintiff, both orally and in writing, to pay him the sum of four hundred (400) dollars, which offer the said plaintiff agreed to accept in settlement and in compromise of his said claim of five hundred (500) dollars against said defendant company; and the plaintiff avers that, confiding in the said promise of the said defendant company, he has hitherto foreborne to sue the said defendant company, and never commenced an action against the said defendant company on this behalf; and, although a reasonable time for the payment of the said sum of four hundred (400) dollars, so owing by the said defendant company, has long since elapsed, yet the said defend-

ant company, though often requested, has not paid the same, but neglects and refuses so to do, to the damage of said plaintiff, as he says, the sum of eight hundred dollars."

The plea was the general issue with no brief statement.

The facts are stated in the opinion.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and POWERS, JJ.

Geo. D. Bisbee and R. T. Parker, for plaintiff. A. M. Goddard, for defendant.

WISWELL, C. J. By a policy of insurance dated January 13, 1897, the defendant company insured one Simon P. Baker against loss by fire upon his dwelling house, for a period of three years from that date, in the sum of \$500. By the same policy the furniture therein was also insured. At that time Baker was the owner of the property, real and personal, covered by the insurance, but the real estate was subject to a mortgage to one Caldwell. The policy contained a provision to the effect that it should become void if the property insured be conveyed without the assent in writing of the insurer. January 7, 1898, while the policy was in force, Baker conveyed the real estate to his wife, Dorothy A. Baker, but the policy was never assigned, and no notice was given to the insurance company, or its agent, of this conveyance. On January 8, 1898, Mrs. Baker mortgaged the premises to Richmond L. Melcher, the plaintiff, and on August 2, 1899, during the period of time covered by the insurance policy, the dwelling house was entirely destroyed by fire.

At the time of the fire, therefore, Baker had an unexpired policy of insurance, but had entirely parted with his title to the property insured. Mrs. Baker owned the property, subject to a mortgage, and the plaintiff held a mortgage upon the property given by Mrs. Baker after the conveyance from her husband to her.

It is clear from the foregoing statement that the policy of insurance, so far as it covered the dwelling house, had become void prior to the loss by the conveyance of the property without the knowledge or consent of the insurance company, and without the assignment of the policy. Neither the husband, the wife, nor the mortgagee could maintain an action upon the contract of insurance to recover for the loss of the property insured, because the person with whom the contract of insurance was made had ceased to own the property, while the owner and the mortgagee were not insured. *Richmond v. Phoenix Assurance Company*, 88 Me. 105, 33 Atl. 786. And the policy was equally avoided although the conveyance by the insured was to his wife. *Clark v. Dwelling House Insurance Co.*, 81 Me. 373, 17 Atl. 303.

But this action is not brought by the insured, nor by the owner of the equity of

redemption, upon the policy, but by Melcher, the mortgagee, to recover upon a promise alleged to have been made by the defendant corporation to pay him the sum of \$400. made after the destruction of the buildings by fire, and, to quote from the declaration, "after due investigation of the plaintiff's claim, in order to settle and compromise the same, and to avoid litigation, and in consideration of the said plaintiff's promise to forbear to sue, and to forever relinquish and release to the said defendant company all his right of action by reason of the same," which offer, it is alleged, was accepted by the plaintiff, who thereafter forebore to commence an action upon the policy.

The case comes to the law court upon report. It appears from the testimony that shortly after the fire the plaintiff wrote a letter to the defendant's agent, notifying him of the loss by fire, and saying: "Now, I hold a mortgage on the place, and Baker wishes the insurance to be paid to me. I simply write you so that you can act accordingly." The agent replied to this, acknowledging the receipt of the letter, and said: "This loss will not be paid until the mortgagee joins in the receipt for the insurance. I will see that you are protected in it." It is evident that, at the time this letter was written, the agent had no knowledge of the transfer of the property from the insured to his wife, nor of the mortgage from the latter to the plaintiff. On September 4, 1899, the agent replied to another letter of the plaintiff, in which reply he said: "When I went to settle this loss, I found that Mr. Baker had deeded the property to his wife a year ago last January, and she in turn had mortgaged it to you, without transferring the policy from Mr. Baker, or making the policy payable to you in case of loss. Now, this left Mr. Baker without any insurance except on his personal property. The conveyance of this property to his wife, of course, vitiates the policy without transferring it." He goes on in this letter to say that he had submitted the facts to the company, and asked to be allowed to settle the loss, and said that he had no doubt that his request would be granted. On September 25, 1899, the agent again wrote the plaintiff, saying: "I have received word from the company that insured Mr. Baker's building, that, under the circumstances, they would pay what they considered the actual cash value of these buildings at the time of the fire—that is, that the actual cash (value of the) buildings at the time of the fire was \$400, and they will pay that on the building. If this is satisfactory to you, please advise me, and I will come to Andover and close it up. The company denied any liability under the circumstances, but I made the suggestion to them that they should protect your mortgage, and they have decided to do it, which I think myself is very liberal." Further correspondence and communication, orally and by telephone, followed between the plaintiff and

the agent of the insurance company, from which it appears that the plaintiff sought to have the company pay the remaining \$100, and that the agent was making efforts to have the company assent to this. Later the matter was put into the hands of counsel by Mr. and Mrs. Baker and by the plaintiff, with full authority to adjust this matter in any way that seemed best to him, and on October 11, 1899, this counsel saw the insurance agent, and unconditionally accepted the offer to pay \$400; but subsequently the offer was withdrawn.

The question is as to whether or not there was any consideration for this promise. The plaintiff's contention is, as shown by his declaration, that the offer was made and accepted as a compromise of the plaintiff's claim against the company. It is abundantly well settled that the compromise of a doubtful claim is a sufficient and valid consideration for a promise to pay money for the settlement of such claim. It is immaterial upon which side the right ultimately proves to be, provided the parties believe, at the time of the compromise, that there is a doubtful question involved, and, for the purpose of settling the dispute and of preventing litigation, one of the parties to the controversy promises to pay a sum of money in compromise of such doubtful claim, which offer is accepted by the other party.

But in order for such a compromise to constitute a sufficient consideration for the promise, it is necessary that the parties should at least have supposed, at the time of the compromise, that the validity of the claim made was doubtful, either because of a question as to what facts might be susceptible of proof, or of a doubt as to the law applicable thereto. The claim must be one that is made in good faith, with a belief by the claimant that there is some chance of its successful enforcement. The surrender of a mere groundless claim, which is known by both parties to be unenforceable, is not a sufficient consideration. This limitation of the rule is recognized by all the decisions upon the subject, a few of which only we cite. *Allis v. Billings*, 2 Cush. 25; *Kidder v. Blake*, 45 N. H. 530; *Pitkin v. Noyes*, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218; *Bellows v. Sowles*, 55 Vt. 391, 45 Am. Rep. 291; *Smith v. Farra*, 21 Or. 395, 28 Pac. 241, 20 L. R. A. 115.

In this case we do not think that the offer relied upon by the plaintiff was made for the purpose of effecting a compromise, or that there was any doubt whatever as to the claim made by the plaintiff against the insurance company, if he made any claim. The plaintiff could not have supposed that he had any chance of successfully maintaining a suit against the company upon the contract of insurance. It cannot be believed that, under the circumstances of this case, he would have commenced any action against this company, if the offer had not been made. We do

not think that he made any claim to recover the insurance, as a matter of legal right. He simply sought a gratuity from the company because of the fact of the previous insurance. Nor could the insurance company have supposed, in making this offer, that it was attempting to settle a doubtful claim. The company and its agent must have known that no claim could be enforced against it, and that there was no danger of its being involved in litigation. The first letter of the agent to the plaintiff, after he had become aware of the fact of the transfer of the property, clearly states the fact, about which there was no question, that "the conveyance of this property to his wife, of course, vitiates the policy without transferring it." There is no suggestion in any of the correspondence that this was an offer of a compromise. Upon the contrary, the whole correspondence shows that the agent was endeavoring to get the company to pay, notwithstanding that there was no liability, and the offer made by the company, through its agent, was not to pay a sum of money for the sake of settling a claim about which there was any question or doubt, but to pay the full cash value of the property destroyed, according to its estimate of such value. The case does not come within the limitation to the rule, above stated, that the parties must at least have believed that there was some doubt as to the validity of the claim.

Under these circumstances we are forced to the conclusion that the promise sued in the plaintiff's writ was not a binding and enforceable one, because it was made without any consideration whatever. According to the stipulation of the report, the entry will be:

Judgment for defendant.

(97 Me. 519)

WHITMAN v. CITY OF LEWISTON.

(Supreme Judicial Court of Maine. May 18, 1903.)

CITY — DEFECTIVE STREET — WANT OF DUE CARE—CONTRIBUTORY NEGLIGENCE.

1. A statutory action to recover damages caused by a defective highway cannot be maintained if the negligence of the plaintiff, or any other efficient cause for which neither the plaintiff nor the municipality is responsible, contributes to produce the injury.

2. While the plaintiff was being driven by her husband, in an open wagon drawn by one horse, along one of the public streets of Lewiston, the wheels upon one side of the carriage struck an obstruction in the traveled way, so that the carriage was overturned, the plaintiff as well as her husband thrown out, and she sustained some bodily injury.

3. The accident occurred at about 9 o'clock in the evening. At the time, the moon, nearly full, was shining very brightly, and there was not a cloud in the sky, so that objects in the street could be seen for a considerable distance. The horse that the plaintiff's husband was driving was wholly blind, and had to be entirely guided by the driver.

4. The court is satisfied, from the situation and the undisputed facts, that if the plaintiff's husband had been exercising, just prior to the accident, such a degree of care as was made necessary by the fact that his horse was totally blind, he could not have failed to see, and could have easily avoided, the obstruction in the street.

Held, that the alleged defective condition of the street was not the sole cause of the accident, and the plaintiff was not entitled to a verdict in her favor.

(Official.)

On Motion from Supreme Judicial Court, Androscoggin County.

Action by Susan R. Whitman against the city of Lewiston.

Action on the case, under Rev. St. c. 18, § 80, to recover for bodily injuries sustained by plaintiff by reason of the overturning of the one-horse open wagon in which plaintiff was traveling with her husband, who was driving. The wheels next to the northerly sidewalk curbing struck a pile of dirt extending into the traveled portion of Main street, in Lewiston. Both occupants of the wagon were thrown out. The accident occurred on a clear, moonlight night, four days before the full of the moon, about 10 minutes before 9 o'clock. The horse was totally blind. Verdict for plaintiff. Motion for new trial sustained.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and SPEAR, JJ.

Tascus Atwood, for plaintiff. A. T. L'Heureux, City Sol., and Ralph W. Crockett, for defendant.

WISWELL, C. J. While the plaintiff was being driven by her husband in an open wagon drawn by one horse along one of the public streets of Lewiston, the wheels upon one side of the carriage came in contact with, and went onto, an obstruction in the street, so that the carriage was overturned, the plaintiff, as well as her husband, thrown out, and she sustained some bodily injury. In the trial of the action to recover damages for the injuries sustained by reason of the alleged defective condition of the street, the plaintiff recovered a verdict. The case comes here upon the defendant's motion for a new trial.

Assuming, without deciding, that the jury may have been authorized in its finding that the condition of the highway was defective in the respect complained of, we come to the equally important question as to whether or not the jury was also authorized in its finding, necessarily involved in the verdict, that the defective condition of the highway was the sole cause of the accident; because it is well settled in this state that in this statutory action, if the negligence of the plaintiff, or even if any other efficient cause for which neither the plaintiff nor the municipality is responsible, contributes to produce the injury, the action cannot be maintained.

The defective condition complained of was a quantity of earth taken from an excava-

¶ 1. See Municipal Corporations, vol. 36, Cent. Dig. § 1672.

tion made for the purpose of obtaining connection with the public sewer, and left upon the side of the street. The pile of earth was estimated to be about four feet in height at the highest place, and extended for several feet from the curbing into the street. It was to some extent guarded by at least one barrel, and perhaps by some boards or planks, but upon the evening of the accident there was no lantern placed at the obstruction.

The accident occurred at about 9 o'clock in the evening of the 24th of September; at the time, the moon, nearly full, was shining very brightly; there was no cloud in the sky to obstruct the moonlight, so that objects in the street could be seen for a considerable distance. All the witnesses upon both sides agree that it was an, especially clear and bright night. The street at this point was about 54 feet wide, with a street car track nearly in the center. The horse that the plaintiff's husband was driving was wholly blind, so that it had to be entirely guided by the driver.

Under these circumstances, we think that it necessarily follows that the negligence of the driver contributed in some degree to the accident. In driving a blind horse, which has to be entirely guided by the driver, a great degree of care is required. In this case the plaintiff's husband could not have failed to see the pile of earth, with the barrel or barrels about it, if he had exercised such a degree of care as the occasion demanded. The fact that he did not see the obstruction upon his side of the street, in the very bright moonlight, is almost conclusive evidence that he was not looking, although it was especially necessary for him to look. In fact the husband testified, when asked if he saw the pile of earth before he struck it, "No, sir; I was looking for nothing but teams ahead." This is not reasonable care for the driver of a blind horse; he should also have been on the lookout, especially when no reliance in this respect could be placed upon the horse, for such temporary obstructions as are liable to exist at any time through the necessity of making repairs upon the streets and of making excavations for various purposes. If he had exercised the care that was necessary because of the situation, he would certainly have seen, and could have easily avoided, the obstruction. Although this question of negligence is primarily for the jury, we are satisfied that in this case the jury erred in its finding that no cause, other than the alleged defect, contributed to the injury.

Motion granted. Verdict set aside.

(97 Me. 532)

BURGESS v. SHEPHERD et al.

(Supreme Judicial Court of Maine. May 27, 1903.)

WILL—CONSTRUCTION—BILL BY EXECUTOR.

1. A bill in equity to obtain the construction of a will cannot be sustained unless the construction may affect the rights of the com-

plainant in person or property, or unless it may affect the performance of his duties, under the will, as executor, trustee, or otherwise.

Held, that the complainant, who is executor, has no personal interest which may be affected by a construction of the will; nor can the performance of his duties as executor be in any way aided or affected by such a construction.

Baldwin v. Bean, 59 Me. 481, examined.
(Official.)

Report from Supreme Judicial Court, Penobscot County.

Bill by Frank E. Burgess, executor, against Alvah J. Shepherd and others. Case reported. Bill dismissed.

Argued before WISWELL, C. J., and STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

F. D. Dearth, F. J. Martin, and H. M. Cook, for plaintiff. D. D. Stewart and E. C. Ryder, for defendants.

SAVAGE, J. Bill in equity under Rev. St. c. 77, § 6, to obtain the construction of the will of Joseph M. Haseltine, deceased. The bill is brought by the executor of the will, and the widow and other devisees are made parties defendant. The clause in the will which it is sought to have construed is as follows:

"To my beloved wife, Catherine F. Haseltine, I give, bequeath and devise all the rest and residue of my estate, both real, personal and mixed, and all rights and credits thereunto belonging, to have and to hold to her sole use and benefit during the full term of her natural life, unless she shall marry again, in which event her rights in said property shall cease and determine the same as if she were dead. But until said death or remarriage she shall have the full power to control and dispose of said property or any part thereof, if needed for her support and benefit.

"To the children of my daughters Mary and Elizabeth before named, I give, bequeath and devise whatever may remain of said property at the decease or remarriage of my said wife, Catherine F. Haseltine, the same to be divided equally among them."

And the prayer of the bill is that the court will determine (1) "whether said Catherine F. Haseltine, the devisee named in said will, can sell and convey said real estate in fee simple in her lifetime, before remarriage," and (2) "whether the rights and interests of said Catherine F. Haseltine to the property bequeathed and devised in said paragraph of said will above quoted will terminate should she marry again."

We are met in limine by the objection that the court, under the statute named, has no jurisdiction to construe a will on a bill brought by an executor who has no interest as such in the estate, nor any duties to perform with relation to it, which may be affected by a construction of the will, and whose rights and duties will remain the same whatever may be its proper construction.

In fine, these defendants, or some of them, say that this executor can have no possible reason for needing to know in his said capacity whether the widow has the right to convey the real estate in fee, or what the effect of her remarriage might be; that his sole duty is to administer under the plain provisions of the will, to convert the personal estate, so far as necessary to pay debts, into cash, and pay the debts and expenses, and turn over the remainder to the widow as life tenant; or, if the personal estate is insufficient, to cause the real estate, or enough of it, to be sold to pay the debts; that his right to administer the personal estate, and to have enough of the real estate sold under license of probate court to pay the debts, is absolute, and does not in any way depend upon the construction of the will; that he has no other interest in or under the will; and that when he has performed his duties as his position requires, regardless of the construction of the will, his office will be *functus officio*. These defendants claim that, as to this executor, the questions raised are moot questions, and his interest merely a speculative curiosity, and they earnestly ask that the widow and other devisees or heirs may be left to settle their own controversies as they will, in their own way.

If the defendants' premises are sound, we think that their position is impregnable. The statute is silent as to who may bring such a bill. But it is a bill in equity, and, on general principles, such a bill cannot be maintained by one who has no interest in the subject-matter of the controversy. So it would follow that a bill for the construction of a will cannot be maintained unless the plaintiff has such interest, personal or official, legal or equitable, in the estate, or under the will, as would be served by a construction of the will. If an executor has no such interest, why should he be permitted to maintain a bill and interfere with the interests of others? He has no more rights in that respect than a neighbor would have. He is an intermeddler. Non constat that those who are interested in the will have any controversy about it, or care to have it construed.

But the complainant says that *Baldwin v. Bean*, 59 Me. 481, was on all fours with the case at bar, and that, inferentially at least, the right of an executor or an administrator with the will annexed to maintain such a bill, without allegation or proof of interest, was recognized by that case. It will be noticed, however, that in *Baldwin v. Bean* no question was raised as to the interest of the complainant, and that the sole question decided, besides construing the will, was that, in enacting the statute in question, "it was the intention of the Legislature to secure to the parties in interest the right, in all cases of doubt, to have the opinion of the court as to the legal effect of a will, even in advance of any actual controversy." That was all.

The case of *Baldwin v. Bean* is, in a sense, imperfectly reported. No statement of facts accompanies the opinion, and, indeed, there was need of none, in view of the questions actually decided. But, inasmuch as the case has been cited as a precedent, we have examined the papers on file in the court in Androscoggin county, and we find that the bill was brought originally by Abby A. Richardson, who was both executrix of the will and widow of deceased. Afterwards she intermarried with Baldwin, and her marriage, under the law as it was then, terminated her powers as executrix. Later, Baldwin, the husband, represented as being the administrator with the will annexed of Richardson's estate, was summoned to appear and prosecute, and thereafter the case was docketed in his name as complainant. Clearly the widow had such an interest as would have supported the bill. Just how she was regarded with reference to it after her marriage does not appear. The question probably was not thought of. Under the circumstances, we do not think that *Baldwin v. Bean* can be regarded as authority for the plaintiff's position. We have been unable to find a case—unless *Baldwin v. Bean*, in its remodeled condition, was one—in which the complainant did not have an interest, present or remote, vested or contingent, either as heir, legatee, or devisee, or as trustee, or as executor or administrator with the will annexed, having duties to perform concerning which he sought the construction of the will and the advice of the court. And, unless a complainant can bring himself within one of these classes, we should be unwilling to sustain a bill. It is a statutory proceeding, and should not be carried beyond the fair intent of the statute. Even if the objection seems to be a technical one, it is one which parties have a right to make, and, if well founded, must be sustained. Orderly procedure in litigation is the safeguard of the personal and property rights of the litigant.

But the court has given a liberal construction to the statute, as it indicated in *Baldwin v. Bean* it would do, and any interest that was real has served, and when the complainant has been properly in curia, and the court has had jurisdiction, it has usually answered all his pertinent questions.

We must now inquire whether this executor has such interest in the subject-matter of his questions as entitles him to answers. It will not be necessary to elaborate fundamental and familiar principles which must control. One is, as already stated, that the executor, unless some duty is imposed upon him by the will (and there is none in this case), has no interest in the real estate, except the right to have so much of it as may be necessary appropriated to the payment of legacies, debts, and expenses; that this right is in no way contingent upon the construction of the will, and that when the right has been exercised, or where there is no occasion

for its exercise, he has no concern in what becomes of the real estate. Another principle is that when, as we assume in this case, it is or will be true that he has paid all specific legacies, debts, and expenses out of proceeds of the estate in his hands, and has turned over the remainder to the life tenant of the same, he has completed his duty. He will have administered the estate according to the will. He will be no longer responsible. The receipt of the life tenant will be his sufficient voucher in the settlement of his account. If the testator saw fit to authorize the life tenant to hold the life estate without giving security to the remaindermen, he had that right, although this court will under some circumstances require a life tenant to give such security. But the point is this: that, whatever happens to the property after the executor has administered upon it according to the will, it is nothing to the executor. If the life tenant here should die, questions might arise between her estate or her assigns and the residuary legatees; or, if she should marry, questions might arise between her or her assigns and the legatees. But we think the executor now is not entitled to seek an answer to those questions. And we are the less unwilling to come to this conclusion for the reason that our decision will not bar the widow or the legatees from seeking a construction of this will by the court hereafter, if they may be thereto advised.

While such bills are bills of prevention, and are, in a literal sense of the word, bills of peace, the line must be drawn somewhere, and we must draw the line where we think the Legislature intended to draw it. We think in this case the line has been crossed. A bill to construe a will cannot be sustained upon the complaint of any person, executor or otherwise, unless the construction may affect his rights in person or property, or unless it may affect the performance of his duties under the will as executor, trustee, or otherwise.

Bill dismissed, with one bill of costs for the resisting defendants.

(97 Me. 536)

BOWDEN v. DERBY.

(Supreme Judicial Court of Maine. June 16, 1903.)

NEGLIGENCE—MASTER AND SERVANT—ROAD COMMISSIONER—PUBLIC OFFICER—PLEADING.

1. The relation of master and servant is not created between a road commissioner and the men employed by him in repairing a street, although he has the right to select and discharge them, and to determine what work shall be done, and the way and manner in which it shall be done.

2. Sound public policy forbids that public officers should be held responsible for the negligence of those whom they are obliged to employ in the discharge of their duties in the execution of public works, when such officers are not chargeable with any want of diligence or due care on their part.

55 A.—27

3. The defendant, a road commissioner, supplied to the plaintiff and other men employed by him in repairing the street a derrick as a completed appliance, to be used in doing the work in which they were engaged. While he may have been under no obligation to furnish the derrick, yet, having done so, he assumed the obligation towards those who were to use it of exercising reasonable care to see that it was safe and suitable, and so maintained.

4. In the execution of public works, he who selects the place in which the work is to be done, and invites and directs the workmen who labor therein, assumes towards them the obligation of seeing that such place is reasonably safe.

See *Bowden v. City of Rockland*, 51 Atl. 815, 96 Me. 129.

(Official.)

Exceptions from Supreme Judicial Court, Knox County.

Action on the case by Herbert Bowden against Samuel Derby for personal injuries.

At the return term, defendant filed a general demurrer to the declaration.

The presiding justice, without argument, in order that the law of the case might be first settled, sustained the demurrer. To this ruling plaintiff alleged exceptions. Exceptions sustained.

Argued before WISWELL, C. J., and EMERY, STROUT, POWERS, PEABODY, and SPEAR, JJ.

O. E. & A. S. Littlefield, for plaintiff.

D. N. Mortland, for defendant.

A street commissioner or superintendent of streets is a public officer. Such obligations as rest, to an extent, upon employers to their employes, do not apply to public officers in the discharge of public duties. *Prince v. City of Lynn*, 149 Mass. 193, 21 N. E. 296.

The plaintiff was not in the employ of defendant, but in the employ of the city. Unless defendant injured plaintiff by some malfeasance or misfeasance individually and aside from the discharge of his duties as a public officer, he cannot be held liable. The doctrine of respondeat superior does not apply here.

The declaration charges defendant simply with a nonfeasance in failing to do what the declaration states to be his duty as street commissioner or highway surveyor, but which is not required by statute law. Defendant is charged with failing to do what the law does not require him to do.

POWERS, J. Exceptions to a pro forma ruling of the presiding justice sustaining a demurrer to the plaintiff's declaration.

The declaration alleges "that on the 6th day of August, A. D. 1900, the defendant was, and for a long time prior thereto had been, the duly elected and qualified street or road commissioner of the city of Rockland, and received from said city for the performance of his duties as such a salary of eight hundred dollars per year; and having prior to said date, in performance of his said duties as road commissioner, determined that repairs were necessary upon a certain street in

said city, known as 'Maverick Street,' and having determined to build a retaining wall in repairing said street, said defendant undertook to construct and was constructing said retaining wall for the purpose of supporting the southerly side of said street.

"That said defendant selected and employed the workmen engaged thereon, had the power to remove and discharge them, and directed what work should be done, and the way and manner in which it should be done, and procured necessary tools and machinery to be used in prosecuting said work, and had full charge and power over and control thereof, and of all details entering into said work.

"That the plaintiff was employed as a laborer on said work, and during all the time he worked upon said wall was under the direction and control of said defendant, who was doing said work in the discharge of his duties as road commissioner.

"That in constructing said wall certain heavy rock and large stone had to be moved, handled, and placed therein, for the handling of which said commissioner had procured, erected, and equipped a derrick upon the bank far above the place where this plaintiff was at work, and nearly on a level with said street.

"That the plaintiff knew nothing as to the sufficiency of said derrick or of its equipment, and had never been near to or examined the same, but had been instructed and directed by the said defendant to work at the base of said wall, and far below the level on which said derrick was erected and operated.

"That it was then and there the duty of said defendant to the men employed by him and under his control in doing said work, he having full and immediate charge, control, and direction of said work, to provide a suitable and safe derrick and equipment, erect and set the same up in a suitable and safe manner, and keep and maintain it in a safe and suitable condition, and to employ only suitable and careful persons in erecting and maintaining said derrick and in the prosecution of said work; and it was the duty of said defendant to this plaintiff, having undertaken to provide a derrick for use in doing said work, to provide only such derrick as was safe and suitable for the purpose, and such as was, when prepared for use upon said work, in a safe and suitable condition, and such as would not endanger the employes working thereon.

"That said defendant, unmindful of his duty in this behalf, did not provide, as plaintiff avers, a suitable and safe derrick, nor did he cause it to be set up in a suitable and safe manner, and did not cause it to be kept and maintained in a safe and suitable condition, and did not employ suitable and careful persons in erecting and maintaining said derrick, and in the prosecution of said work.

"That upon the 6th day of August, A. D. 1900, the plaintiff, relying upon the perform-

ance by the defendant of his duty in this behalf, and being himself then and there in the exercise of due care and diligence, and without any knowledge or means of knowledge of the defective, unsuitable, and unsafe condition of said derrick, was at work near the base of said wall when the boom of said derrick, by reason of the defective, unsuitable, and unsafe condition thereof, and by reason of its being an unsuitable appliance for the work there being done, and the negligent and unsafe manner in which it had been set up for use, all of which was, or by the exercise of reasonable care and skill might have been, known to said defendant, and the failure of said defendant to employ suitable and careful persons to erect, maintain, operate said derrick, all of which was result of the failure of said defendant to perform his duty aforesaid, suddenly fell a great distance, striking" and injuring plaintiff.

There can be no negligence where there is no duty. Does this declaration charge defendant with a failure to perform any duty which the facts therein averred show that he owed to the plaintiff?

While the defendant was a public officer the work in which he was engaged was not the less ministerial. It is claimed that the relation existing between the defendant and the plaintiff was that of master and servant, and, if this be the true construction of the facts set forth in the declaration, the defendant is undoubtedly liable under the well recognized principles of law applicable to that relation. In repairing the street and building the wall the defendant was acting solely for the public. He had no interest in the work other than that which arose from the discharge of his duty as a public officer. The nature of that duty was such that he could not perform it alone. It could not be executed without availing himself of the services of others. Not that he was obliged to employ any particular man or men. He had the right to select and discharge the men, the power to determine what work should be done, and the way and manner in which it should be done. None the less he was compelled to employ men who were paid, not by him, but by the city, who labored, not for his benefit, but for the public. He should not be held liable for the misconduct of those whom he is thus obliged to employ. Such employes are not his servants, and the rule of respondeat superior does not apply. *McKenna v. Kimball*, 145 Mass. 555, 14 N. E. 789. The foundation of the liability of one person for the acts and negligence of another is found in the doctrine of principal and agent. The fact that the defendant had the right to select and discharge the men whom he was compelled to use might be a good reason why he should be held to exercise reasonable care in their selection, but we do not think that under the circumstances of this case it is suffi-

cient to establish the fact that the plaintiff was the defendant's servant, and charge him with the onerous consequences which flow from that relation. Few men would be found willing to accept an office whose burdens were so disproportionate to its benefits. Sound public policy forbids that public officers should be held responsible for the negligence of those whom they are obliged to employ in the discharge of their duties in the execution of public works, when such officers are not chargeable with any want of diligence or due care on their part. *Bailey v. Mayor, etc., of N. Y.*, 3 Hill, 531, 38 Am. Dec. 660.

The declaration charges that an unsafe and unsuitable derrick was furnished as a completed appliance for the prosecution of the work, that the place in which the plaintiff was set to work was dangerous and unsafe, and that all this was, or by the exercise of reasonable care might have been, known to the defendant. These matters pertain to the conduct of the defendant himself. The plaintiff had nothing to do with fitting up the derrick. The defendant supplied it to him as a complete appliance to be used in doing the work in which he was engaged. He had a right to rely that it was all right; that it was not subject to such defects as could be discovered by the exercise of reasonable care on the part of the defendant, who furnished it. *Poor v. Sears*, 154 Mass. 530, 28 N. E. 1046, 26 Am. St. Rep. 272. The defendant may have been under no obligation as road commissioner to furnish the derrick, but, having done so, he assumed the obligation towards those who were to use it of seeing that it was reasonably safe and suitable, and so maintained.

The defendant selected the place in which the plaintiff was to work. He invited and directed him to work there. When the defendant did this he assumed toward the plaintiff the duty of seeing that the place was reasonably safe, and he must answer for any injury suffered through his failure to perform that duty. In *Breen v. Field*, 157 Mass. 277, 31 N. E. 1075, the defendants were the selectmen of the town of Greenfield engaged in building a public sewer. They hired the plaintiff, and set him to work in the bottom of the trench. He was injured through the sides of the trench falling in for want of proper support. It was held the defendants were liable, if the injury was due to any neglect on their part to take proper precautions for the plaintiff's safety. Mr. Justice Morton, in delivering the opinion of the court, says:

"The defendants were not bound to hire the plaintiff and set him to work in the bottom of the trench, but, having done so, they are liable to him for any injury which occurred to him in the course of his employment through any negligence on their part. Whether they were acting as public officers

or agents, or not, could, under the circumstances, make no difference as to their duty to the defendant. They were bound, when they hired him to work in a particular place, to see that it was reasonably safe, and that materials were furnished to make it so, and, if any injury occurred to him through their neglect in these respects, they are liable. They voluntarily assumed the responsibility of setting him to do a particular kind of work in a particular place, and they cannot avoid the duty which that act imposed upon them as to him."

The dictates of humanity, and a proper regard for the lives and safety of the workmen engaged upon public no less than private works, require that some one should be bound in law to furnish a reasonably safe place in which to do their work. Upon whom, then, does this duty rest? We think it rests upon the man who selects the place in which the work is to be done, and invites and directs the workmen to labor therein. His is the master mind. It is for him to command and the workmen to obey. He is not an insurer, but the laborer has a right to rely, whether the work be public or private, that the man who directs and selects the place, means, manner, and method of his work shall use reasonable care to see that the means and the place are reasonably safe. If the defendant failed in this, it was his own fault, and not that of another, and he cannot shield himself behind the defense that he was a public officer. That plea cannot be interposed to shield him from the consequences of his own negligence. While he need not answer for another, he must answer for himself. A personal liability attaches to him for his failure to exercise reasonable care in providing safe machinery with which, and a safe place in which, the defendant might work.

In regard to the other ground claimed by the plaintiff—failure to exercise reasonable care to select the men who set up, maintained, and operated the derrick—we find no sufficient allegation in the writ. The only allegation is that it was the defendant's duty to employ suitable and careful persons, and that he did not employ suitable and careful persons. This is not enough, even from the plaintiff's standpoint. The duty of the defendant in this respect cannot be an absolute duty to employ suitable and careful persons. At the most, he can only be liable for the want of reasonable care in this particular, and there is no allegation that he failed to exercise such care in their selection and retention.

It is further urged against the declaration that it is bad for duplicity, but this objection is not open to the defendant upon general demurrer. The same is true of the other claims which relate to the form of the declaration.

Exceptions sustained. Demurrer overruled.

(97 Me. 528)

DAY v. BOSTON & M. R.

(Supreme Judicial Court of Maine. June 11, 1903.)

DIRECTING VERDICT—PRACTICE—TRIAL—RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

1. The court is not bound to submit a case to the jury, but may direct a verdict for the defendant, when all the inferences which a jury may justifiably draw from the testimony are insufficient to support a verdict, so that it would be the duty of the court to set aside such a verdict if it had been rendered.

2. A new trial having been granted on general motion, the case was heard a second time before the jury, and the presiding justice, at the close of the evidence, directed a verdict for the defendant.

Held, that the conclusion announced in the former opinion was justified and required by the established principles of law applied to the facts there stated, and that the evidence, with the additional testimony before the court, does not warrant a different result.

Also, that the inference from all the testimony, considered in the light of the undisputed situations, is almost irresistible that the plaintiff's intestate did either see or hear the approaching train, but, overestimating its distance or miscalculating its speed, with an absence of caution which is incomprehensible, inconsiderately and rashly undertook to cross the track in front of the train, instead of waiting for it to pass. If so, the consequences of such mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind, and, if one chooses in such a position to take risks, he must bear the consequences of failure.

3. If the positions most favorable to the plaintiff be assumed to be correct, the accident cannot be attributed wholly to the negligence of the defendant, if the plaintiff's intestate, after discovering the train, might have avoided the fatal consequences by the exercise of reasonable and ordinary vigilance and caution on his own part. In such a case, the negligence of the injured party is deemed a proximate cause which contributes to the injury and bars his right to recover.

Day v. B. & M. Railroad, 52 Atl. 771, 96 Me. 207, 90 Am. St. Rep. 335, sustained.

(Official.)

Exceptions from Supreme Judicial Court, York County.

Action by Lottie I. Day, administratrix, against the Boston & Maine Railroad. Verdict for defendant, and plaintiff excepts. Exceptions overruled.

Upon a second trial of this case granted by the court, as reported in 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335, the presiding justice ordered a verdict for the defendant.

The parties agreed that, if a verdict in favor of the plaintiff would have been authorized by the evidence, judgment should be rendered for the plaintiff for such sum as the law court believe the plaintiff was entitled to.

The case is stated in the opinion.

Argued before EMERY, WHITEHOUSE, STROUT, SAVAGE, and SPEAR, JJ.

R. P. Spinney, for plaintiff. G. C. Yeaton, for defendant.

WHITEHOUSE, J. This action is founded on the statute of 1891 giving a right of ac-

tion for injuries causing death, and is brought against the defendant company to recover damages for negligently causing the death of the plaintiff's intestate, Edwin Day, at the Junkins railroad crossing, in North Berwick, on the 21st day of July, 1899. The former trial of the action at the September term of court, 1900, resulted in a verdict of \$4,000 in favor of the plaintiff. This verdict was set aside by the law court, for reasons clearly and sufficiently stated in the opinion of the court. 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335. The cause came on for trial a second time at the September term of court, 1902, and, after the evidence had been introduced for both the plaintiff and the defendant, the presiding judge directed the jury to return a verdict for the defendant. The case comes to this court a second time on the plaintiff's exceptions to this ruling, with a stipulation that, "if a verdict in favor of the plaintiff would have been authorized by the evidence, judgment shall be rendered for the plaintiff for such sum as the law court believes the plaintiff is entitled to."

After a careful examination of the evidence disclosed by the record now presented, it is the opinion of the court that the conclusion announced in the former opinion was justified and required by the established principles of law applied to the facts there stated, and that the evidence, with additional testimony now before the court, will not warrant a different result.

The leading and most essential facts involved in the decision of the vital issue in the case do not appear to be in controversy. In the forenoon of July 21, 1899, a "bright and clear day," the plaintiff's intestate, Edwin Day, a man 35 years of age, with faculties and senses unimpaired, was driving a single horse attached to an unloaded hay cart along Wells street from North Berwick towards the grade crossing above named, which intersects the Eastern Division of the defendant's railway at an angle of 43½ degrees. He was leaning against the front rail of the hayrack, one rein in each hand, and driving at the moderate pace of about five miles an hour. When within about "thirty or forty" feet of the crossing he stopped his team for "two or three seconds," and then, urging his horse into a trot, attempted to drive over the defendant's railroad crossing, but was struck and immediately killed by a special train from Boston to Portland, approaching from a direction thus partially in his rear.

The railroad crossing in question was 1,832 feet from North Berwick railroad station, and the track of the Eastern Division is on a descending grade, and nearly straight, for a distance of about six miles towards Kennebunk. It was admitted that this crossing was not provided with gates, flagman, or automatic signals, and it may be assumed, though it was not conceded by the defendant, that it was "near the compact part of

the town." It was not in controversy that at the time of the accident the special train was running "at a greater speed than six miles an hour," the plaintiff contending that it was from 50 to 60 miles an hour, and the defendant conceding that it was from 20 to 25 miles an hour. Whether or not the bell was rung and the whistle blown on this train, as required by law, was one of the controverted questions in the case. The plaintiff's evidence, which was necessarily to a great extent of a negative character, tended to show that these statutory signals of the approach of the train were not given, while the defendant's evidence and the weight of all the positive testimony in the case showed that these customary warnings were duly sounded. But assuming that there was sufficient evidence to support a finding of the jury in favor of the plaintiff's contention respecting the speed of the train and the signals of approach, the defendant invokes the settled rule of law that no such omission of duty or violation of statute on the part of the defendant would relieve the traveler from the obligation to use his own senses of sight and hearing to inform himself of an approaching train, and confidently insists that the plaintiff's intestate either failed to exercise the requisite degree of care and vigilance to discover the train at the time in question, or, discovering it, rashly attempted to cross in front of it.

The distance on Wells street from its junction with Portland street to the crossing is 471 feet, and the defendant contended, and introduced photographs, with other evidence, to show, that at every point in this distance of 471 feet on Wells street some portion of the train or smokestack, or the smoke and steam rising from it, must have been plainly visible to the traveler throughout the entire distance of 911 feet on the railroad as the train approached from Drew's overhead bridge to the crossing. The plaintiff contends, however, that through a large portion of this distance the traveler's view of the train was obstructed by a high embankment on the northerly side of the railroad, and also by a tight board snow fence 27 feet from the center of the track, and that it was impossible for Mr. Day, standing on his hayrack at any point on Wells street between the crossing and a point 75 feet distant therefrom, to see the approaching train until it came within 253 feet of the crossing. But it could not reasonably be contended that no possible means were available to the traveler for the discovery of an approaching train in season to avoid a collision, and the existence of extraordinary difficulties in discovering it by sight should have suggested to a person of ordinary care and prudence the necessity of exercising greater precaution, and making stronger efforts to ascertain the facts in some other way. It is common knowledge that a vast increase in the speed of railroad trains has been required in re-

cent years in order to meet a constant demand for the most rapid transit consistent with the safety of public travel, and ordinary care and prudence accordingly demand of the traveler upon our highways greater vigilance and more thoughtful attention in order to discover the approach of railroad trains and avoid collisions on the crossings at grade.

In the case at bar it has been seen that Mr. Day was driving on Wells street at the rate of about five miles an hour, and, according to an average of the estimates of the distance made by the plaintiff's witnesses, he stopped at a point about 32 feet from the crossing, and just outside of the line of the snow fence, 27 feet from the center of the track. It is not in controversy, as already noted, that at any point on Wells street, within 75 feet from the crossing, some portion of the train must have been visible to Mr. Day after it approached within 253 feet of the crossing; and at a distance of 27 feet from the center of the track, being inside of the line of the snow fence, there was an unobstructed view of the whole train.

After stopping "two or three seconds," Mr. Day "hurried his horse right up into a trot" towards the crossing; and it is a reasonable inference that this "hurried trot" was not less than five miles an hour, or seven feet per second, the speed at which he was "jogging along" before he stopped. The plaintiff's evidence tended to show that the train was running at a speed of at least 50 miles an hour, or 73 feet per second. If so, it traversed the entire distance of 253 feet in $3\frac{1}{2}$ seconds, and the whole train must have been within the limit of 253 feet, and in plain view of Mr. Day, before he had advanced to a point within 15 feet of the track. Under the circumstances thus disclosed by the plaintiff's own evidence, it is inconceivable that if Mr. Day had been vigilant and alert, and exercised the circumspection of a careful and prudent man, he could have failed to see some indication of an approaching train, or, if he had listened attentively, that he could have failed to hear some signal or sound of an approaching train, before he reached the point of dangerous proximity to the railroad track.

In the former opinion in this case (96 Me. 213, 52 Atl. 771, 90 Am. St. Rep. 335) it is said: "There is no evidence that in approaching the railroad crossing Mr. Day took any precaution whatever to ascertain whether a train was also then approaching the crossing from either direction. True, he stopped momentarily some 20 feet from the crossing, but it does not appear that he looked or listened, or took any other measures to ascertain what might be approaching on the railroad tracks. There is no evidence for what purpose he stopped there." But the record now before the court, with the additional evidence presented at the second trial of the case, tends to modify this view, and

to strengthen the probability of the alternative, suggested at the close of the opinion, that, "being aware of the approaching train, he recklessly undertook to cross before it." James B. Walker was not a witness at the former trial, but testified at the second hearing that, as he was approaching the crossing from the opposite side, he saw Mr. Bragdon and Mr. Day pass each other, and in regard to the conduct of Mr. Day says: "Mr. Day hauled up and stopped and looked around, and then he came right along; he took his reins, and started his horse right into a trot. * * * He stopped two or three seconds; he turned his head and looked up the track towards the bridge. After he started the horse, he was looking ahead and crosswise, and he put the whip right on his horse; he took his reins and urged his horse up, and drove right onto the crossing. He was looking to the right, up towards the depot." This is corroborated by Mr. Bragdon, a witness at both trials, and also by the fireman, a witness for the defendant, who observed the movements of Mr. Day from the engine, and assumed that he would not attempt to cross in front of the train. He says: "When he approached the crossing he was looking up the track, and he drove up and stopped, looking towards us coming down the track. * * * When he hit the horse, I hollered 'Whoa' I thought. Mr. Day was going to stop. Instead of that, after he drove up there, he thought he had time to go ahead, and so I hollered to the engineer, when I saw he was going to drive ahead, to stop."

The inference from all this testimony, considered in the light of the undisputed situations, is almost irresistible that Mr. Day did either see or hear the approaching train, but, overestimating its distance or miscalculating its speed, with an absence of caution which is incomprehensible, inconsiderately and rashly undertook to cross the track in front of the train, instead of waiting for it to pass. If so, "the consequences of such mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind; and, if one chooses in such a position to take risks, he must bear the consequences of failure." *Chicago, Rock Island & Pacific R. R. Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Smith v. Me. Cent. R. Co.*, 87 Me. 351, 32 Atl. 967. When a railroad track crosses or is crossed by a highway, the traveler with a team and the railroad company have concurrent rights and obligations with respect to the use of the way at the place of intersection. It is not ordinarily reasonable or practicable for a train to stop and give precedence to a team approaching on the highway. It cannot be required to do so except in cases of manifest danger, when it is apparent that a collision could not be otherwise avoided. It is the duty of the traveler on the highway to wait for the train. The train has the preference and the right of way.

Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. Ed. 403; 2 *Wood on Railroads*, 1510; *Pierce on Railroads*, 342; *Lesan v. M. C. R. R. Co.*, 77 Me. 85.

On the other hand, the management of a railroad train must be conducted with due regard to all of the provisions of the statute designed to insure the safety of the traveler both upon the railroad and the highway. The train "is bound to give reasonable and timely warning of its approach to a crossing, but it cannot be reasonable and timely if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of a coming shot, but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell, and this caution is especially applicable when their sound is obstructed by wind and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable, watchmen should be stationed at the crossing." *Continental Imp. Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403. If, therefore, the special train in question was approaching a crossing near the compact part of the village at the great speed of 50 miles an hour, without flagmen at the crossing and without giving the statutory warnings of its approach, the officers and servants in charge of it were guilty of gross and culpable recklessness which would justly have subjected them to the severest censure. But if these positions, most favorable to the plaintiff, be assumed to be correct, the accident cannot be attributed wholly to the negligence of the defendant, if the plaintiff's intestate, after discovering the train, might have avoided the fatal consequences by the exercise of reasonable and ordinary vigilance and caution on his own part. In such a case, the negligence of the injured party is deemed a proximate cause which contributes to the injury and bars his right to recover. This principle has been so often enunciated in the recent decisions of this court that no further exposition of it is required at this time. *Atwood v. Bangor, O. & O. Ry. Co.*, 91 Me. 399, 40 Atl. 87; *Conley v. Me. Cent. R. R. Co.*, 95 Me. 149, 49 Atl. 668; *Ward v. Me. Cent. R. Co.*, 96 Me. 137, 51 Atl. 947. See, also, *Schofield v. Chicago, Milwaukee & St. Paul R. Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224, a case in which the court directed a verdict for the defendant, and one presenting striking analogies to the case at bar.

After a patient and critical examination of the case, it is the opinion of the court that, with all the inferences which the jury could justifiably have drawn from it, the evidence now presented is insufficient to support a verdict for the plaintiff, so that it would be the duty of the court to set aside such a verdict if it had been rendered. Un-

der such circumstances, it is the established rule of procedure in this state that the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Heath v. Jaquith*, 68 Me. 433; *Jewell v. Gagne*, 82 Me. 431, 19 Atl. 917; *Moore v. McKenney*, 83 Me. 80, 21 Atl. 749, 23 Am. St. Rep. 753; *Market & Fulton Nat. Bank v. Sargent*, 85 Me. 349, 27 Atl. 192, 35 Am. St. Rep. 376; *Bennett v. Talbot*, 90 Me. 229, 38 Atl. 112; *Coleman v. Lord*, 96 Me. 192, 52 Atl. 645. The mandate must therefore be:

Exceptions overruled.

(72 N. H. 170)

FOSTER v. SARGENT.

(Supreme Court of New Hampshire. Merrimack. June 2, 1903.)

PARTNERSHIP PROPERTY—REAL ESTATE—USE—INTENTION—INDIVIDUAL CREDITORS.

1. Real estate purchased with partnership funds, and always regarded as partnership property, taxed as such, and its income treated as such, but never used for partnership purposes, but rented to others, was partnership property, subject to creditors of the partnership, in preference to individual creditors.

Transferred from Superior Court; Wallace, Chief Judge.

Action by George A. Foster, trustee in bankruptcy of Prescott F. Stevens, against Harry G. Sargent, assignee of the firm of Stevens & Duncklee, composed of Prescott F. Stevens and Charles H. Duncklee, to determine whether certain real estate is the property of said Prescott individually or of the said firm. Judgment for defendant, and case transferred from the superior court on plaintiff's exceptions. Exceptions overruled.

In 1853 Prescott F. Stevens and Charles H. Duncklee formed an equal partnership, which has continued to the present time. September 29, 1902, the members of the firm, as copartners and individuals, made a common-law assignment of all their property to the defendant for the benefit of creditors. In December, 1902, Stevens was adjudged a bankrupt upon a petition of his creditors. The plaintiff was elected trustee, and thereupon demanded one-half of the rents collected by the defendant from certain real estate, claiming that the property was owned by Stevens and Duncklee as tenants in common. The defendant maintained that the realty was partnership property, and refused to comply with the demand. The real estate in question consists of five parcels, with buildings thereon, situate in Concord, and land in South Dakota; all the property having been acquired since the formation of the partnership, and none during the last 15 years. The partnership and its members were solvent when the various parcels were bought and paid for. A store building and a small portion of a block in the rear thereof have been used in carrying on the partnership business. The remainder of the

property has been rented. The grantees are described as copartners in only two of the deeds. When Stevens and Duncklee became partners, they had no property other than that invested in their business. During the continuance of the partnership no accounting was ever made. Each member drew such sums as he required from the partnership funds, and was charged therewith upon the books. The receipts from the store and the rentals of the real estate were deposited in bank in the name of the firm. The pieces of real estate in question, and all additions and improvements, were paid for out of the firm deposit, or by partnership notes afterward paid out of that deposit, except a house and lot in Concord and the land in South Dakota, which were taken in satisfaction of loans made out of the partnership funds. Stevens and Duncklee always regarded the real estate as partnership property. Each parcel has been taxed in the name of the firm from the time of its acquisition. The court ordered judgment for the defendant, and the plaintiff excepted.

Mitchell & Foster, for plaintiff. Sargent, Niles & Morrill, for defendant.

REMICK, J. The question in this case, speaking broadly, is whether individual or partnership creditors shall have priority in certain real estate. "It is a general rule that the funds of a partnership must be first applied to discharge the partnership debts, and that neither an individual partner nor his creditors have a claim to anything more than the surplus." *Ferson v. Monroe*, 21 N. H. 462, 466. Partnership real estate is subject to this rule like other partnership property. *Jarvis v. Brooks*, 27 N. H. 37, 59 Am. Dec. 359; *Messer v. Messer*, 59 N. H. 375, 377. Conceding the rule, the plaintiff contends that the real estate in question, excepting the store building and lot, designated in the record as "b," is not partnership property, and therefore not subject to the above rule of priority in behalf of partnership creditors. Is it partnership property? In determining this question it is well settled that the court is not concluded by the fact that the conveyance is to the partners in their individual character. Whatever the form of the conveyance, parol evidence is admissible to show a resulting trust in favor of the partnership. *Parker v. Bowles*, 57 N. H. 491, 495, 496; *Messer v. Messer*, 59 N. H. 375, 377; *Fairchild v. Fairchild*, 64 N. Y. 471, 477-479. It appears in the present case that all the real estate in controversy was acquired with partnership funds; that the partners have always understood and regarded it as partnership property; that it has always been taxed as such, and its income has always been so treated.

It is argued that the fund appropriated to the real estate in question should be treated by the court as so much surplus withdrawn from the partnership and applied to indi-

[1. See *Partnership*, vol. 33, Cent. Dig. §§ 101, 105.]

vidual purposes. However proper this might be under some circumstances, it is wholly inadmissible in the present case, in view of the agreed fact that the partners understood, regarded, and treated the real estate and its income, like the fund with which it was obtained, as partnership property. *Collumb v. Read*, 24 N. Y. 505; *Fairchild v. Fairchild*, 64 N. Y. 471; *Bank of England Case*, 3 De G., F. & J. 645.

It is further contended that, although the real estate was obtained with partnership funds, and was always treated as partnership property, still it cannot be so regarded consistently with the decisions of this court, because it has "never been used in any way in the partnership business, but has been rented to others"; and *Jarvis v. Brooks*, 27 N. H. 37, 59 Am. Dec. 359, *Parker v. Bowles*, 57 N. H. 491, and *Messer v. Messer*, 59 N. H. 371, are cited to this effect. In *Jarvis v. Brooks*, the real estate in question was used for partnership purposes; at least, the opinion proceeded upon that assumption. The question whether actual use in the partnership business must unite with purchase with partnership funds, on partnership account, in order to constitute real estate partnership property, was not before the court. Nor is what is there said inconsistent with the idea that real estate purchased with partnership funds may be partnership property, though not used in the prosecution of the partnership business. The court, adopting the words of *Story, J.*, in *Hoxie v. Carr*, 1 Sumn. 173, 182, 183, Fed. Cas. No. 6,802, say: "The circumstance that the payment has been made with partnership funds, especially if the property purchased be necessary for the ordinary operation of the partnership business, and be actually so employed, will afford a very cogent presumption that it was intended to be held as partnership property; and, in the absence of countervailing circumstances, it will be absolutely decisive." This is far from saying that actual use in the partnership business must concur with payment from partnership funds to warrant the conclusion that real estate is partnership property. The opposite of that is the more natural inference from the language used. In *Cilley v. Huse*, 40 N. H. 358, not cited by the plaintiff, the real estate in controversy was used in the partnership business; at least, such was the assumption of the court. Therefore the question whether use was necessary to constitute it partnership property was not involved. Furthermore, it is there said: "Being paid for out of partnership funds, it [the real estate there in controversy] will be treated in equity as vesting in them in their partnership capacity." In *Parker v. Bowles* the real estate in question was not purchased with partnership funds, and for that reason was held to be individual property. The question now under consideration was not present. Moreover, the court there say: "Where land is purchased with partnership

funds, and for partnership purposes, there is an implication of law that the land is held for the partnership." It is nowhere said that real estate, in order to have the character of partnership property, must be actually employed in the partnership business. In *Messer v. Messer* the real estate under consideration was actually used in the partnership business. The question whether such use was necessary to make it partnership property was, therefore, not involved. Although there is language in the opinion which gives support to the plaintiff's contention in the present case, an examination of the authorities there relied upon makes it quite evident that the court did not intend to hold that purchase with partnership funds, purchase for partnership use, and use in the partnership business are all three necessary to constitute real estate partnership property. In addition to the New Hampshire cases which we have already reviewed, the court cited *Parsons on Partnership*; *Dyer v. Clark*, 5 Metc. (Mass.) 562, 49 Am. Dec. 697; *Collumb v. Read*, 24 N. Y. 505; and *Fairchild v. Fairchild*, 64 N. Y. 471. In *Parsons on Partnership* (section 266) it is said "that the three elements * * * stated must unite in order to make the real estate *necessarily* partnership property." (The italics are the author's.) This is quite different from saying that real estate cannot be partnership property unless the three elements unite. It is plain from the context that no such idea was in the author's mind. Expressly to the contrary is the note to the statement quoted, namely: "Whether real property shall become partnership stock or not is a question of intention. * * * But this intention may, so far as all claimants except bona fide purchasers without notice are concerned, be held sufficiently established if the purchase is made with partnership funds, even without intended or actual use for partnership purposes, unless an express agreement appears, vesting the beneficial as well as the legal interest in the grantee or grantees in the deed." In *Dyer v. Clark* the real estate involved was used in the partnership business. The question whether such use was necessary was not in issue. What is there said, in a general way, is as consistent with the theory that it was not, as that it was necessary. In *Collumb v. Read*, spoken of as "the leading case in this country upon the subject," the court say: "Where the land was not purchased for partnership uses, and there was no agreement making it partnership property, and yet it was paid for out of funds of the partnership, or taken in payment of debts due to it, the question between the two classes of creditors would be one of construction as to the intent of the partner in making the purchase. It might be that such a purchase would be made as an investment of realized profits. If, for instance, the purchase price should be charged to the separate accounts of the partners, that would be an indication

that it was considered by them as an application of divided profits. If, on the other hand, the income should be carried into the books of the copartnership, or if the land itself should be included in the periodical inventories of stock in trade, there would be an inference more or less strong that it had been agreed to hold the estate as partnership property. * * * Where the price of land * * * is paid by copartnership money or effects, or it is taken in satisfaction of a debt due the concern, the real estate becomes partnership property, or is individual property, * * * as the intention of the purchase shall appear to have been. It may be either one or the other." In *Fairchild v. Fairchild* the court said: "When the land is conveyed to the several partners, it is not indispensable that it should be actually used for partnership purposes, nor that a positive agreement should be proved making it partnership property. If it has been paid for with partnership effects, it is then a question of intention whether the conveyance is to have its legal effect, and the parties are to be treated as tenants in common, or whether the property is to be treated as partnership property. The manner in which the accounts are kept, whether the purchase money was severally charged to the members of the firm, or whether the accounts treat it the same as other firm property as to purchase money, income, expenses, etc., are controlling circumstances in determining such intention, and from these circumstances an agreement may be inferred." Thus, instead of supporting the proposition that use in the partnership business is necessary to make real estate purchased with partnership funds partnership property, the authorities cited in *Messer v. Messer* are to the opposite effect. In the *Bank of England Case*, 3 De G., F. & J. 645, it is said: "There is no rule that, where lands are bought by partners in trade, and are paid for out of partnership assets, they, of necessity, become part of the joint estate; nor, on the other hand, that, if they are not bought for the purposes of the partnership business, they are not joint estate; nor does the form of the conveyance settle the question, which must be determined with reference to all the circumstances of the case." This conclusion of the English court, reached after full consideration of the various views urged by the plaintiff in the present case, accords, as we have seen, with the leading cases upon the subject in this country, and is, we believe, the correct conclusion. It is reasonable, and is supported by the weight of authority. *Providence v. Bullock*, 14 R. I. 353; *Buchan v. Sumner*, 2 Barb. Ch. 165, 47 Am. Dec. 805; *Deveney v. Mahoney*, 23 N. J. Eq. 247, 249; *Buck v. Winn*, 11 B. Mon. 320, 322; *Flanagan v. Shuck*, 82 Ky. 617, notes 54 Am. Rep. 792, 793, 27 L. R. A. 449, 455; *Par. Part.* 366, 367; 1 *Lind. Part.* 405, note 1; 1 *Bates, Part.* §§ 280, 283, 285.

The circumstances of the present case,

viewed in the light of the authorities to which we have called attention, leave no doubt that the real estate in question is all partnership property, and subject to partnership in preference to individual debts.

Exception overruled.

CHASE, J., did not sit. The others concurred.

(72 N. H. 49)

SEELY v. MANHATTAN LIFE INS. CO.

(Supreme Court of New Hampshire. Merrimack. Feb. 4, 1908.)

LIFE INSURANCE — FOREIGN POLICY — PROOF OF DEATH — WAIVER — NONPAYMENT OF PREMIUMS — FORFEITURE — NOTICE — PROOF — AFFIDAVIT — EVIDENCE.

1. Insured died March 18, 1894, and a writ in assumpsit to recover the insurance was dated March 14, 1900. The declaration consisted of the common counts, and, while the *ad damnum* was stated, the specific sum sought to be recovered was omitted. Amendments were filed April 26 and June 14, 1900, each setting out an action on a life insurance policy. *Held* that, as the declaration sufficiently stated a cause by which to amend, and the amendments did not change the cause of action, the action was not barred by limitations.

2. Where an insurance company were notified of the death of assured and twice requested to send blank for proofs of death, but replied that no proofs were needed, that the policy had lapsed, and they had decided not to allow the claim, the condition of the policy requiring proof of death was waived.

3. Where a life insurance policy was issued in the state of New York, the contract is governed by the laws of that state so far as they relate to its nature, validity, and interpretation.

4. Under the laws of New York, proof of payment of the premium is not essential to the maintenance of an action upon a life insurance policy, even though it contains a provision that a failure to pay the premium when due shall render the policy void, but it is only when there is evidence of nonpayment of premium, coupled with proof that the notice required by statute has been duly mailed to the assured, that a cause of action can be defeated; therefore, in an action in this state on a life insurance policy issued by defendant company in New York, it is incumbent on the company to establish these facts.

5. The laws of New York provide that no life insurance policy shall be declared forfeited for failure to pay premiums, unless a notice stating the amount of the premium due, the place where it should be paid, and the person to whom the same is payable, shall be duly mailed to the insured, or the assignee of the policy, at least 15, and not more than 45, days prior to the day when the same is payable. The statute further provides that the affidavit of an agent of the insurance company, that the required notice has been addressed and mailed, shall be presumptive evidence that such notice has been given. *Held*, that an affidavit stating that a notice has been duly served, but not showing that the notice stated the amount of the premium due, the place where it was payable, the person to whom payable, and that unless it was paid before the day it fell due the policy would become forfeited, was insufficient.

Exceptions from Merrimack County.

Action by Mary Seely against the Manhattan Life Insurance Company. Transferred

§ 2. See Insurance, vol. 23, Cent. Dig. §§ 1230, 1271.

from the trial term on defendants' exceptions. Exceptions overruled.

The assured died March 18, 1894. The writ was dated March 14, 1900, and contained the common counts, from which was omitted the specific sum sought to be recovered. By leave of the court, and without objection, two amendments were filed, one April 25, and another June 14, 1900, each setting out an action on a life insurance policy. The contract of insurance required satisfactory proof, at the company's office, of the death of the assured during the continuance of the policy. To prove the notice to the assured, required by the New York statute, of the time when the premium here in question would become due, a register book kept by the defendants, and containing an affidavit of the mailing of a notice to the assured, was admitted in evidence, subject to the plaintiff's exception. The other facts sufficiently appear in the opinion.

At the close of the evidence, the defendants' motion that a verdict be directed in their favor was denied, subject to exception.

Napoleon B. Hale and Martin & Howe, for plaintiff. Streeter & Hollis, for defendants.

BINGHAM, J. 1. The plaintiff's right of action accrued not earlier than March 18, 1894, and suit was brought within six years thereafter. The declaration contained in the writ consisted of the common counts. While the ad damnum was stated, the specific sum sought to be recovered was omitted. The court permitted the plaintiff, without objection, to amend her declaration by adding new counts. The declaration, as first drawn, sufficiently stated a cause of action by which to amend. The cause of action was not changed by the amendment, and no reason appears why the suit was not seasonably brought.

2. The uncontradicted evidence of the plaintiff was that after the assured's death the defendants were notified thereof, and requested to send blank proofs of death; that they replied that "no proofs were needed—that the policy had lapsed for nonpayment of premiums;" and, in response to a second notification, they replied that they "had decided not to allow * * * claim for insurance." This evidence, if believed, would establish a distinct denial of liability, and a refusal to pay, on the ground that the policy had lapsed, and would constitute a waiver of the condition requiring proof of death. Such a denial would be equivalent to a declaration by the defendants that they would not pay the insurance though proof of death were furnished. Under such circumstances, to require the proof would be an idle formality, the observance of which the law does not deem necessary. *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866; 2 May, Ins. (4th Ed.) § 469, and cases cited. It would seem, however, that the question whether the evidence establishes a denial of liability should be submitted to the jury.

Perry v. Insurance Co., 67 N. H. 291, 296, 33 Atl. 731, 68 Am. St. Rep. 668; *Farmers' Ins. Co. v. Moyer*, 97 Pa. 441.

3. The policy was issued in the state of New York, and the contract is governed by the laws of that state so far as they relate to its nature, validity, and interpretation. It is there held that proof of payment of the premium is not essential to the maintenance of an action upon a life insurance policy, even though it contains a provision that a failure to pay the premium when due shall render the policy void; that it is only when there is evidence of nonpayment of premium, coupled with proof that the notice required by statute (Laws New York, 1892, p. 1972, c. 690, § 92) has been duly mailed to the assured, that a cause of action can be defeated; that a policy is valid until duly forfeited, and cannot be forfeited until the statutory notice has been given, and the 30 days therein specified have elapsed, without payment of the premium. *Fischer v. Insurance Co.*, 167 N. Y. 178, 182, 183, 60 N. E. 431. It was therefore incumbent upon the defendants to establish these facts by competent proof, to entitle them to a verdict.

4. The statute in force when this policy was issued reads as follows: "No life insurance corporation doing business in this state shall declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest, or instalment, or any portion thereof, required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, instalment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, instalment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within the time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no policy shall in any case be forfeited or declared forfeited,

or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given."

The plaintiff's exception presents the question whether the affidavit was admissible in evidence. If the affidavit fully complied with the provisions of the statute, and would be competent evidence, in a suit brought in New York upon the contract, to prove that the required notice was duly mailed to the assured, it would not follow that it would be admissible for a like purpose in a suit brought in this state, if the statutory provision making the affidavit presumptive evidence of notice prescribes a rule of evidence, and is not a matter attaching to the rights of the parties under the contract; for, if it relates to the procedure for enforcing the contract, it would have no extraterritorial effect. While it is the general rule that the law of the place where the contract is made governs the rights of the parties, it is also a general rule that the law of the place where the action is brought "controls the admission of evidence and prescribes the modes of proof by which the terms of the contract are made known to the court, as well as the form of the action by which it is enforced." *Headley v. Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Baxter Nat'l Bank v. Talbot*, 154 Mass. 213, 28 N. E. 163, 13 L. R. A. 52; *Emery v. Burbank*, 163 Mass. 326, 39 N. E. 1026, 28 L. R. A. 57, 47 Am. St. Rep. 456; *Miller v. Brenham*, 68 N. Y. 83, 87, 88; *Pritchard v. Norton*, 106 U. S. 124, 134, 1 Sup. Ct. 102, 27 L. Ed. 104; *Yates v. Thomson*, 3 C. & F. 544, 586, 587; *Don v. Lippmann*, 5 C. & F. 1, 14, 16; *Bain v. Railway*, 3 H. L. Cas. 1, 19; *Sto. Conf. Laws*, § 634a. But counsel have not argued this question, and, as the case may be disposed of upon other grounds, it is not decided.

An analysis of the statute shows that the notice therein required should state (1) the amount of the premium due on the policy, (2) the place where it should be paid, (3) the person to whom payable, and (4) that, unless the premium then due shall be paid to the company, or its agent authorized to collect the same, by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to a right to a surrender value or paid-up policy. The statute also requires that the notice shall be duly addressed and mailed to the party insured, postage prepaid, at least 15 and not more than 45 days prior to the day when the same is payable, and makes the affidavit of the agent authorized to mail the notice, that the notice has been duly addressed and mailed, presumptive evidence that the notice has been duly given.

Did the affidavit offered in evidence com-

ply with the statute and show that the defendants had duly addressed and mailed the statutory notice? It affirms that a notice was duly addressed and mailed, postage prepaid, to the assured, at least 30 and not more than 45 days before the premium became due; that it stated when the premium would become due, and that, unless it was paid, the policy and all payments thereon would become forfeited and void. The pages of the register preceding the jurat, and which are a part of the affidavit, show the number of the policy, the date when the premium became due, the name of the assured, his post-office address, and the date of mailing, but failed to show that the notice stated the four requirements above enumerated. The affidavit, therefore, did not answer the requirements of the statute, and was incompetent testimony.

A statute conferring such privileges is to be strictly construed. It is in derogation of the common-law rules of evidence, and confers upon the company the privilege of making evidence for itself. Lord Brougham, in an opinion delivered in the House of Lords, construing a statute conferring similar privileges, said: "It is most important that everything should be done which the statute * * * requires to be done, and for this reason: A great privilege is bestowed by the act upon the company, neither more nor less than making evidence for itself. The books of the company are made evidence for the company, and, unless rebutted by counter evidence, will be sufficient to warrant a verdict in each case. It must be admitted that this is a very great privilege, and an exception to the ordinary rules of evidence. By those rules, and the rules of common sense and justice, what a man writes is evidence against him, but not evidence in his favor; but here the proposition is reversed. * * * This is a great privilege, and, in order to justify the exercise of it, the conditions on which it is given, namely, the provisions of the statute as to the making of these entries, must be strictly complied with; and I hold that it is much safer to consider each of those provisions as a condition precedent, as a provision imperative, and not merely directory, on account of the great privilege itself, and on account of its being an exception to all ordinary rules of evidence." *Bain v. Railway*, 3 H. L. Cas. 22. And this court, in passing upon a similar question, said: "Such evidence is admissible only by virtue of the exception which this statute has created to the general rules of the common law, and statutes in derogation of the common law are to be strictly construed. * * * Whoever, therefore, would avail himself of the provisions of the statute in question, must show a full compliance with its terms." *Wendell v. Abbott*, 43 N. H. 68, 73.

The affidavit not being admissible, the defendants' motion for a verdict was properly denied.

This result renders it unnecessary to consider whether the evidence introduced at the trial entitled the plaintiff to go to the jury upon the question of payment. At a subsequent trial the question may not be raised, and, if raised, the evidence offered may not be the same. That question will be seasonably considered when it is known what the evidence is.

Defendants' exception overruled. All concurred.

(97 Md. 332)

**UNITED RAILWAYS & ELECTRIC CO.
OF BALTIMORE CITY v. HERTEL.**

(Court of Appeals of Maryland. June 29, 1903.)

**CARRIERS—PERSONAL INJURIES—PASSENGER
ALIGHTING FROM STREET CAR—EVIDENCE.**

1. Alleged error in excluding a written instrument cannot be reviewed where the writing is not incorporated in the record.

2. In an action against a street car company for personal injuries from the starting of a car as plaintiff was getting off, in which defendant claimed that plaintiff attempted to get off the car before it reached its regular stopping place at a corner, evidence of a regulation of defendant company requiring motormen to stop at a certain schoolhouse located near the corner, at which plaintiff desired to get off, was not admissible to show a reason for stopping before reaching the corner, it not appearing that plaintiff was aware of the regulation or of any custom to stop at that place.

3. A notice on a street car that "no one is permitted to get off or on when the car is in motion," and that "cars stop to take on and let off passengers at near sides of cross-streets," is not sufficient to constitute a notice that the car stopped only at near sides of cross-streets so as to render it negligent per se for a passenger to attempt to get off elsewhere.

4. Where a passenger on a street car signaled the conductor to stop, and the car stopped not farther than 50 feet from a crossing at which the passenger desired to alight, it was negligence to start the car while the passenger was in the act of alighting.

Appeal from Court of Common Pleas; Henry D. Harlan, Judge.

Action by Mary E. Hertel against the United Railways & Electric Company of Baltimore City. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

B. Howell Griswold, Jr., and George Dobbin Penniman, for appellant. Edward L. Ward and William Colton, for appellee.

BOYD, J. This is an appeal from a judgment in favor of the appellee against the appellant for injuries sustained by her in getting off a car of the appellant, which she claims was started while she was stepping from it, at the corner of Lafayette avenue and Bloomingdale Road. There were notices posted on the cars on this line as follows: "Warning. No one is permitted to ride on

the platform, or to get off or on when the car is in motion. Persons are warned of the danger. Cars stop to take on and let off passengers at near sides of cross-streets. Those violating these orders do so at their own risk. No officer or agent of the company has authority to waive these regulations." The theory of the appellant is that the appellee violated this regulation by getting off the car before it had reached the corner, when the agents of the company in charge of it were not aware of her attempting to get off. There are two bills of exception, the first containing the ruling of the court on an offer of testimony by the appellant, and the other presenting the rulings on the prayers.

1. As a reason for stopping the car before it reached the corner of Lafayette avenue and Bloomingdale Road, near which the accident happened, the appellant proved that there was a schoolhouse on the corner, which extended back some distance on the Bloomingdale Road. After testimony had been produced tending to prove that the car on which the appellee had been riding had stopped in front of the schoolhouse, the appellant offered a paper to show that there was a regulation in force on this line requiring all motormen to stop at the schoolhouse, as they were accustomed to do. The trial judge stated that it was not admissible, unless the appellant showed that the conductor or motorman made this particular stop in pursuance of the regulation and custom, and counsel for the appellant replied that they did not know who they were. Thereupon the court sustained an objection to it, and declined to permit the paper to be read. It is not in the record, and therefore it would be impossible for us to determine whether the appellant was injured by its exclusion, or whether it was relevant. When the action of the trial court is under review for admitting or rejecting a written instrument, the writing itself, or at least so much of it as is necessary to enable the appellate court to ascertain its legal effect, must be incorporated in the record (2 Poe, § 314), and, that not having been done, the ruling of the court is not properly before us. But, if it was simply an order directing the motorman to stop the cars in front of schoolhouses, we cannot understand how it could be relevant. There is nothing to show that the appellee was aware of the regulation or of any custom to stop at such places, and, if this car in fact stopped by reason of such regulation, it would not reflect upon the main question in the case, which we will presently consider. In *Baltimore & Yorktown Road v. Leonhardt*, 66 Md. 79, 5 Atl. 346, this court said, "We do not see how the defendant can make its own instructions to its conductors a matter of defense," and under the facts of this case it would seem to be clear that such a regulation as this is said to be cannot reflect upon the alleged negligence of the appellant

¶ 4. See *Carriers*, vol. 9, Cent. Dig. § 1223.

or the contributory negligence of the appellee, especially as it is not even shown that the car did stop by reason of this regulation.

2. The plaintiff (appellee) offered 4 prayers, which were granted, and the defendant (appellant) offered 13, the third, fifth, tenth, eleventh, and twelfth of which were granted, and the others were rejected. Those marked "Sixth" and "Sixth and One-Half" present the questions most relied on by the appellant, and hence it will be well to first consider them. The sixth sought to instruct the jury that the regulation notifying passengers that cars stop for them to alight at cross-streets is a reasonable one, and that, if they found that said regulation was posted in all the cars of the line on which the plaintiff was injured, and that she had read or could have read it, and if they believed she was injured in the act of violating it, that was conclusive evidence of contributory negligence on her part, and the verdict must be for the defendant. The one marked "Sixth and One-Half" is the same, excepting it also called upon the jury to find "that such regulation notified passengers that cars stopped for them to alight at cross-streets only." The construction given the warning by the appellant, as indicated by the clause last mentioned, is not justified by its language. It does not notify passengers that cars stop for passengers to alight only at cross-streets. Reasonable regulations for the guidance and direction of passengers are not only upheld by the law, but oftentimes are of great importance for the protection of passengers; but if it was intended by this regulation to notify passengers that they could get on and off cars at cross-streets only, the appellant adopted very obscure terms to give such information, although it could have framed it in language so simple that no one could have mistaken it. There is not a word to the effect that cars would only stop at cross-streets. In some cities the cars stop at the far side and in others at the near side of cross-streets, but they often stop at other places—such as railroad stations, hotels, theaters, and other public buildings. In one of the cases much relied on by the appellant—*Jackson v. Grand Avenue Railway Company*, 118 Mo. 199, 24 S. W. 192—the notice posted was "in compliance with City Ordinance Number 848, revised, 'Cars will stop at far crossings only'"; and if this company intended to warn passengers that they were not permitted to get on and off at any other place than the near side of cross-streets, it could at least have inserted the word "only," or some similar term, in the warning. As it now reads, it might well be understood to mean that the cars would stop at the near side, and not at the far side of cross-streets. Those using cars represent all degrees of intelligence and experience in traveling, and a railway company should not be permitted to couch its regulations intended for the public in language of doubtful

meaning, if it proposes to relieve itself of the results of its own negligence by claiming that a passenger has been injured through the violation of one of such regulations. But, irrespective of that, the testimony shows that this car stopped at a point somewhere within 50 feet of the corner. One of the defendant's witnesses said, "It wasn't very far from the corner," and the other who testified on the subject said it stopped opposite the kitchen of his house, which was about fifty feet from the corner. The plaintiff said, in answer to the question whether she knew that the car was not at Lafayette avenue: "Well, I don't know about that part of it; I thought that was the crossing, because he stopped there"—referring to the conductor. Another witness for the plaintiff said, in answer to the question as to how far the car was from Lafayette avenue: "Well, about the same distance from there that any car should stop from the corner. No cars stop in the middle of the street, but they stop on the near side from the corner, and there is where that stopped." The schoolhouse spoken of is on the corner, and the defendant's testimony showed that the car stopped somewhere in front of that; and the house where Mr. and Mrs. Meushaw, the defendant's witnesses, lived, was also on the corner, and ran back about 60 feet. The uncontradicted evidence of the plaintiff and her companion, Mrs. Bordley, shows that the latter signaled to the conductor to stop the car, and that he did so. The latter, in answer to the question by the court whether she remembered any bells or signals being given at the time the car stopped, said, "Oh, we motioned to the conductor to stop, and he pulled his bell." There is no contradiction of the testimony of the plaintiff and her companion that the car was standing still when she started to get off, but, according to them, as she was in the act of stepping from the footboard, "the car gave a lurch, and threw her." The only witnesses to the accident offered by the defendant swore that the car was not moving when she fell. One of them said, "She had one foot on the ground, and was about to put the other foot down, when she went over backwards in the road." There is little or no conflict between the witnesses, excepting that those on the part of the defendant stated that the car did not move as the plaintiff fell, and they apparently placed the car further from the corner than the plaintiff and her companion seemed to think it was. If, then, we give the notice posted in the car the construction contended for it by the appellant (which we have indicated above is not the proper one), we cannot agree with it as to the effect to be given to it under the circumstances of this case. As we have seen, the greatest distance from the corner that any witness placed the car was about 50 feet. It was somewhere opposite the house that extended to the corner. There is nothing in the record to contradict the plaintiff in the statement that she

thought that she was at the crossing, and her companion was of the opinion that they had reached the place to get off the car for Lafayette avenue. If it be true that the signal was given to the conductor to stop, and he did so—which is not contradicted—and that the plaintiff then started to get off, it was unquestionably the conductor's duty to see that the car was not started until the plaintiff was off. To excuse his neglect in that respect by reason of this regulation posted in the car would be giving it an effect which no court should sanction. As the cars stop before reaching the crossings over the streets on which they are running, passengers are necessarily required to get out before they are actually on the crossing—it may be 10, 15, 20, or more feet from it where the passengers get on and off when the car stops near the crossing. In inclosed cars they use the rear platform, which necessarily requires them to get off the length of the car from the crossing, and if it stops, after notice is given to the conductor, several lengths of the car from the crossing, instead of one, and a passenger who gave the signal then attempts to alight, it would not do to permit the agent of the railway company to start the car in motion without ascertaining whether the passenger was safe; and to refuse relief to one injured under those circumstances merely because it was subsequently shown that the car was 40 or 50 feet from the corner, instead of 20 or 25 feet, would establish a most dangerous precedent. When a car stops so near the corner as even the testimony of the appellant shows this one stopped, it is not exacting an unreasonable precaution on the part of the company's agents to require them to ascertain whether any of the passengers are alighting, as they might well believe that the car had stopped for that purpose. They are frequently required to stop by reason of some obstruction on the tracks, and, if passengers undertake to get off at unusual places without notice to the conductor of their intention to do so, and are injured, they will ordinarily have no right to hold the railway company responsible, but when the car stops so near the regular stopping places as would probably cause the passengers to believe that they had reached the place for them to alight, it is asking very little of the company to require the conductor to warn the passengers, or see that none of them are in the act of alighting, before the car is again put in motion.

The case of *Railroad Company v. Grant*, 11 App. Cas. (D. C.) 107, announces the law in the clear terms that usually characterize the opinions delivered by Chief Justice Alvey. That learned judge said: "If a street car stops to take on or let off passengers, or stops at a place where passengers may get off or on, though not a regular stopping place, those in charge of the car must wait a sufficient length of time to enable passengers attempting to get off or on to alight or get on in safety by the exercise of reasonable

diligence; and must, in any event, see and know that no passenger is in the act of alighting, or is otherwise in a position which would be rendered perilous by the motion of the car when again put in motion. If the employes fail in any of these respects, and injuries result to the passenger from such failure, the company employer is liable." He had previously said that: "It is a settled principle that if a passenger voluntarily alights from a street car in motion, or when at a place or in a position where passengers are not intended or expected to get off the car, the passenger so getting off or on the car takes the risk of injury by the sudden starting up of the car, and the employes who so start the car are not negligent, if they are ignorant that the passenger is so alighting from or getting on the car. *Nichols v. Middlesex R. Co.*, 106 Mass. 463. But it is otherwise if such employes have knowledge or reasonable ground to suppose that the passenger is in the act of getting off the car at the time of so starting it up." Many authorities might be cited to sustain the law as thus announced.

The facts of this case clearly bring it within the above doctrines, as they not only show that the car stopped where the plaintiff might well have assumed it was intended and expected that passengers would get off, but there is ample evidence to show that the conductor knew the plaintiff was in the act of alighting. The prayers marked "Sixth" and "Sixth and One-Half" were, therefore, properly rejected. There is nothing in the cases of *Railroad Company v. Wilkinson*, 30 Md. 224, and *Baltimore & Yorktown Road v. Cason*, 72 Md. 377, 20 Atl. 113, in conflict with this conclusion. The regulations referred to in them were not only found to be reasonable and binding on the plaintiffs, but it was shown that the plaintiffs were injured by reason of the violation of those regulations, and hence they were not entitled to recover. The facts were, therefore, altogether different from those now before us.

From what we have said it is manifest that we think the court below properly rejected the defendant's first and second prayers—the first being that there was no evidence legally sufficient to show any negligence on the part of the defendant, and the second that from the uncontradicted evidence the plaintiff was guilty of contributory negligence. Without otherwise referring to the fourth, it is sufficient to say that the granting of the twelfth prayer gave the defendant the benefit of everything that it was entitled to that was embodied in the fourth, and therefore the rejection of the latter did it no injury. The seventh referred to the facts set forth in the sixth, which we have said was properly rejected, and therefore the jury could not have known what those facts were; but it ignores all knowledge of the conductor that the plaintiff was alighting, and was, therefore, properly rejected for

that, without stating other reasons. The eighth is defective for several reasons, but we need only refer to the concluding part of it, which asks the court to instruct the jury that there was no evidence that the plaintiff had notified the conductor of her intention to alight at that place. If what she and Mrs. Bordley said was true, he unquestionably had notice. It is sufficient to say that the ninth was properly rejected because there was no evidence that the employees in charge of the car started it without notice of the plaintiff's intention to alight, for, as we have seen, the only evidence offered by the defendant on the subject was to the effect that the car was standing still.

The appellant concedes that the principles announced in the first and second prayers of the plaintiff were correct, but contends that they were too general, and misleading under the facts of this case. But, there being no evidence that the plaintiff was violating a regulation of the company that was known to her, it was not necessary to refer to that question in the prayer; and, as the defendant had a prayer granted which instructed the jury as to the evidence it offered, namely, that the car was standing still when the plaintiff alighted, the fact that the first and second prayers of the plaintiff did not more specifically refer to the defense of the defendant did not injure it in any way that it was entitled to be protected from. The third only announces the degree of care required of a passenger, and we do not understand the fourth to be objected to. It relates to the measure of damages. As we find no error in the court's rulings, the judgment must be affirmed.

Judgment affirmed, the appellant to pay the costs.

(98 Md. 12)

DUVALL v. HAMBLETON & CO. et al.

(Court of Appeals of Maryland. July 2, 1903.)

EQUITABLE LIEN—EVIDENCE—SUFFICIENCY—WITNESSES—COMPETENCY.

1. Under Code Pub. Gen. Laws, art. 85, § 2, as amended by Acts 1902, p. 718, c. 495, providing that, in actions by or against administrators, no party to the cause shall be allowed to testify as to any transaction had with the intestate, unless called by the "opposite party," in an action by an administrator against the son of the intestate, his judgment creditor, and a corporation, to compel the corporation to issue a new certificate of stock in the name of the son, to require the latter to assign it to the administrator, and to order the sale of the stocks and have the proceeds applied to the administrator's claim against the son, the son was competent, when called by the administrator, to testify to an agreement between him and the intestate.

2. The testimony of an administrator as to statements made by his intestate with reference to the matters involved in the suit instituted by him is hearsay.

3. On the issue whether a son agreed to pledge stock with his mother as security for the money advanced by her to enable him to buy

the stock, the son testified that the "understanding" was that he should turn the stock over to her as collateral; that the arrangement was made when the money was advanced; that he had the "understanding" with his mother; that according to his recollection, though he would not swear to it, he assigned the certificate of stock over to his mother; and that the certificate was lost. An attorney testified that the certificates of stock were to be drawn according to the subscriptions, and that the son was to deliver his certificate to his mother; that several times thereafter he spoke to the son about the transfer of the stock; that he could not remember what the son said, but was "satisfied" on one occasion "that the matter had been attended to." The mother was dead. Held insufficient to warrant a decree to enforce an equitable lien on the stock in favor of the mother's estate:

Appeal from Circuit Court of Baltimore City; George M. Sharp, Judge.

Suit by Richard M. Duvall, administrator with the will annexed of Fannie M. Baldwin, deceased, against Hambleton & Co. and others. From a decree for defendants, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Robert Biggs, for appellant. W. Cabell Bruce and John William Marshall, for appellees.

JONES, J. The appellant in this case is the administrator c. t. a. of Fannie M. Baldwin, deceased, and as such filed in the circuit court of Baltimore city his bill of complaint, in which it was alleged that upon the organization of the William H. Crawford Company, a corporation formed under the general incorporation laws of the state, "George S. Baldwin, being about to subscribe for 50 shares of the capital stock of the said company, and not having the money necessary" to pay for the same, applied to the said Fannie S. Baldwin, who was his mother, to loan him \$5,000 to enable him to make payment for such stock, and agreed with his said mother that she should loan the said sum, and that he would assign to her the 50 shares of stock "as collateral security for the repayment of said loan, with interest"; that accordingly Fannie M. Baldwin, relying upon the agreement so made and upon the stock as security, on the 19th of March, 1898, loaned to the said George S. Baldwin the sum of \$5,000, which was at once paid over to the William H. Crawford Company for 50 shares of its capital stock; that thereupon the corporation issued one certificate for 49 shares of its capital stock in the name of George S. Baldwin, and one certificate for 1 share to one Willson to qualify him, as a stockholder, to be a director in said corporation to represent the interests of said Baldwin; that thereafter, in pursuance of said agreement with his mother, George S. Baldwin assigned and delivered to her the certificate for the 49 shares of stock issued to him, but the same was not transferred to her on the books

¶ 2 See Evidence, vol. 20, Cent. Dig. § 1191.

of the company, "being held only as collateral security for the repayment of the loan" made to him; that since the death of Fannie M. Baldwin diligent search for this certificate of stock has failed to discover the same; that on the 10th day of October, 1901, the appellees, who compose the firm of Hambleton & Co., recovered a judgment against George S. Baldwin, and on the 12th of the same month "issued an attachment thereon, and levied upon all the right, title, and interest" of Baldwin, the defendant in the judgment, in the shares of stock which have been mentioned, and which stood on the books of the corporation in his name, "and are proceeding to sell the same"; that the appellant has notified the corporation of the loss of the certificate of stock issued to him, and has applied to have a new certificate issued in the place of the one lost, but that the company has refused to issue a new certificate, assigning as a reason that the "stock is claimed by other parties, and the title is in litigation." The bill then charges that, under the agreement therein alleged and set out between George S. Baldwin and his mother, the certificate of stock issued to the former is charged with "a special lien" in favor of the latter to the extent of \$5,000, with interest, which is good against George S. Baldwin and his creditors, and prays for a decree requiring the corporation to issue a new certificate of stock in the name of George S. Baldwin, and that Baldwin shall assign the same to the appellant, and that the stock may be sold, and the proceeds of sale be applied to the payment of appellant's claim, any surplus to be distributed under the further order of the court.

The William H. Crawford Company, the appellees who compose the firm of Hambleton & Co., and George S. Baldwin, were made defendants to the bill and made answer thereto. The answer of George S. Baldwin admitted all the allegations of the bill. The corporation submitted itself to the orders of the court, offering to do as the court should direct. The answer of Hambleton & Co. admitted that judgment was obtained by them against George S. Baldwin, and proceedings had thereon as alleged in the bill of complaint, and averred that, not only had they proceeded to sell the stock in question, as alleged, but had actually sold the same, and had become the purchasers thereof, and insisted that they were protected in their title to the stock thus acquired by the provisions of our statutory law (article 23, § 277, of the Code of Public General Laws). They denied that the stock in question had ever been assigned to Fannie M. Baldwin as alleged, and insisted that the matters of controversy now brought forward by appellant's bill were res adjudicata by reason of facts set out in the answer.

Upon the issues made by the pleadings and the evidence submitted thereunder, the inquiry upon which all others depend is, has

the appellant established by satisfactory proof the allegations of his bill, upon which he bases the claim to an equitable lien on the stock which is the subject of controversy in the case. As preliminary to this inquiry, certain exceptions to testimony, offered by the appellant and pertinent thereto, will be disposed of.

George S. Baldwin, a defendant, as has been seen, in the case in the court below, was called as a witness by the appellant, the plaintiff below; and his competency to testify is made the subject of exception by the appellees upon the ground that he is not, under the circumstances of this case, an "opposite party" to the plaintiff within the intent and meaning of our evidence act, as amended and enacted by Acts 1902, p. 718, c. 495. It is insisted that his adverse position as a defendant on the docket does not make him competent as a witness at the call of the plaintiff, because of accord between him and the plaintiff as to the object to be accomplished by the suit. The exception to the competency of this witness, however, cannot be sustained. That he is, as a witness, not hostile to the plaintiff (appellant), and may be supposed, under the circumstances of the case, to have a bias in favor of the appellant, who called him, as respects the result of the suit, may be properly suggested as reason why the court should be cautious in weighing his evidence, and in the effect to be given to it; but his competency to testify is to be determined by his legal relation to the cause. Under the statute he was competent as a witness upon the call of the "opposite party," and his position in the case brings him within this provision of the statute. As respects the object of the suit, appearing from the allegations of the bill of complaint of the appellant and its prayer for relief, the defendant Baldwin had no such identity of interest with the appellant that he could have been properly joined as a plaintiff in the proceeding. On the contrary, his position is shown to be adversary, in legal contemplation, and he was a necessary party defendant. Relief was sought by the bill as against him; and to establish such right of relief as against him was the very foundation for the relief sought by the suit as against the other parties thereto. In the circumstances of the case the court would not have made a decree for the relief prayed in the bill of the appellant in the absence of George S. Baldwin as a defendant. As to the defendant corporation, no decree could have been safely or justly passed against it to issue a new certificate of stock, as asked by the bill, unless by such decree the title to the stock was settled as against Baldwin, as well as in favor of the appellant. If the appellant was to have a decree according to the relief asked, it was manifestly proper that Baldwin should be concluded by the decree as to his title to the stock which was the subject of the suit. Baldwin, being a

proper and necessary party defendant in the cause, was, as to the appellant, an "opposite party," within the meaning and purview of the statute to which reference has been made. As respects the question now being considered, this case would seem to fall clearly within the ruling made in the case of *Whitridge v. Whitridge et al.*, 76 Md. 54 (see pages 75, 76), 24 Atl. 645, as to the competency of Mrs. Whitridge as a witness in that case.

A further exception to testimony proper to be here considered is that presented by the appellees to the testimony of the appellant, who offered himself as a witness to testify in his own behalf. There is an exception directed specifically to his testimony as to statements made by Fannie M. Baldwin, deceased, which is the only one it is necessary here to notice. Testimony as to such statements was clearly inadmissible. That part of appellant's testimony as to statements made by the deceased, more immediately affecting the inquiry we are now making, is as follows: "Mrs. Baldwin informed me that she expected to loan George \$5,000, and that he was to assign to her the stock." This comes within the description of hearsay evidence. It was the declaration of the deceased in her own favor, and offered now in her own interest. If Mrs. Baldwin were alive and a party to the suit, she would have been competent to testify to the transaction about which she was speaking—that is, to what was said and what was done between the parties thereto, to show what the transaction really was, and could have called witnesses to do the same; but surely it would not have been competent for her to call the appellant, or any other witness, to show that she had expressed an intention to make a contract, as evidence tending to fasten an obligation upon other parties. No peculiar circumstances have been shown to take this offer of testimony out of the ordinary rule. It is not perceived how the fact of Mrs. Baldwin being dead, and of the suit here being brought by her administrator, can have that effect.

It is further objected that the appellant was not competent to testify at all in the case; but this broad question it is not necessary here to pass upon. Assuming, without deciding, that he was competent as a witness to give testimony not in itself obnoxious to other legal objection, some of his testimony will be noticed further on.

Whether the allegations of appellant's bill, relied upon to support his claim to a lien on the stock here in question, have been established or not by the evidence offered by him, will depend upon the effect to be given to the evidence of the two witnesses who have been named. This is so obviously the case, from an examination of the proofs, that it may be stated without undertaking to discuss the whole evidence in treating this question. Now, what is the proof to sustain these allegations? And it is well

at the outset to note the standard to which it must conform. As to the setting up of liens of the character of the one claimed in this case, our predecessors, in the case of *Alexander v. Ghiselin*, 5 Gill, 138-182, speaking through Judge Chambers, as to the agreements which will give rise to them, after saying they would be enforced in equity upon parol contracts, added: "If the contract be as well established, it imposes the same moral and equitable obligation to perform it, when made verbally, as if made in writing, and the legal effect of the terms of the agreement will be the same in the one case as in the other. The greater difficulty of proving the precise terms and import of the agreement is necessarily incurred by the party setting it up, and courts of equity have properly required that every agreement shall be clearly and explicitly established before they will lend their aid to enforce it." The agreement alleged in this case was not in writing. If there was an agreement, and whatever it was, it was entirely verbal. There is nothing to throw any light upon it, or to show what it was, except the parol testimony of the witnesses offered to establish it. It is in proof that George S. Baldwin borrowed \$5,000 from his mother, Fannie S. Baldwin, that he bought with this money 50 shares of stock of the defendant corporation, and that 49 of these shares were issued in his name. The proof as to his making an agreement for a pledge of the stock with his mother is as follows:

George S. Baldwin, in his testimony, in answer to a question, "State fully what was the transaction between you and your mother in reference to this loan?" answered, "The understanding was that I was to turn this stock over as collateral for the money loaned." Asked, "When was this arrangement made?" he answered, "When the money was borrowed." Asked, "With whom did you have the understanding?" he answered, "With my mother and Mr. Richard M. Duvall. I am not positive about Mr. Duvall." He further testified that Mr. Duvall was the legal adviser of himself and his mother. Asked what he did with the certificate of stock, he said he "left it in the stock book of the company in the safe until the time of expulsion from the company, and then took it home." Then adds, "Such is my recollection." This, he said, was about a year after the incorporation. Asked, then, if he had allowed the certificate to remain one year in the stock book "after its execution," he answered, "That is my remembrance." Asked why he had not turned the certificate over to his mother promptly, he said, "Careless procrastination is about all I know." Asked if his mother had spoken to him in reference to this stock, he said, "She asked me to attend to the matter," and that he said he would, and "let the thing run on." He was then asked to "State fully what you [he] finally did with the certificate," to which

he answered, "My recollection is (I don't swear this) that I took it home and indorsed it over to my mother." He then said, in answer to a question, he did not know where the certificate is now. It is manifest that this testimony fails to prove the appellant's case as he states it in his bill. It is there alleged that, "in compliance with the terms" of the agreement he sets up, "George S. Baldwin assigned and delivered" to his mother the "certificate for 49 shares of the capital stock" of the defendant company. Baldwin in his testimony expressly declines to swear that he did so assign and deliver it. There was no other witness who testified upon this point, and there is no evidence in the record which can be taken to show that the certificate of stock was ever in the possession of Fannie M. Baldwin, by assignment or otherwise.

But is this testimony satisfactory, even as to an agreement to assign and pledge the stock, and does it, in the language of this court, which has been quoted, "clearly and explicitly" establish such an agreement? It is to be noted that it came from a witness who ought to have been entirely conversant with the transaction of which he was asked to speak in all of its details, and that he was a witness of evident intelligence. Without meaning to attack his veracity, it is not possible, in reading his testimony, not to observe the uncertainty of his recollection of very important facts, nor that the testimony was elicited by questions at least somewhat suggestive, nor that to the questions he made rather vague and general answers as to matters with which he ought to have been familiar in every detail. When asked the important question as to what was the transaction between him and his mother in reference to the loan she made him, he answered generally, "The understanding was that I was to turn over this stock as collateral," etc. Though he was asked to "state fully" the transaction, he simply characterized it, and stated what he imputed to it as its effect. How did this understanding arise? What was there to indicate it as having a binding effect on the parties, and as establishing rights between them? It was for the court to know this, and to determine the effect of the transaction accordingly. What was the understanding between the parties—that is, the agreement—under which they acquire legal rights, results from what was said and done between them in reference to the subject of the agreement; and that is what the testimony ought to show. It is to be further observed that the conduct of this witness, after the understanding, as he describes it, was had, was entirely inconsistent therewith. It may be freely admitted that what appears in the testimony of George S. Baldwin would be sufficient, as against him, to estop him from denying that there was such an agreement between him and his mother as the appellant charges; but, if

we suppose him here as a defendant denying the alleged agreement and making it necessary for the appellant to "clearly and explicitly" establish it against him, could the evidence which has been reviewed, if delivered by an opposing witness, be accepted, under the circumstances of the case, as a satisfactory basis of a decree against him? As it is, he is here as a witness adverse to parties to the cause having interests to be affected by the decree, and they are entitled, as against them, to the clear, explicit, and strict proof which the law properly requires to establish these secret and undisclosed liens. His admissions, and the estoppel which these may work as against him, do not affect the case, as against other parties to the cause whose rights are to be passed upon, and who are here denying the existence of the agreement sought to be enforced.

Now, assuming, without deciding, as has already been said, that it comes from a competent witness, evidence given by Mr. Duvall will be referred to. This witness (the appellant), after giving evidence not pertinent to the present inquiry, and saying that he had aided in looking after the details of the organization of the defendant corporation, testified that "the certificates of stock were to be drawn according to the subscriptions, and Mr. Baldwin was to deliver the certificate that he got (I think) of \$4,900 to his mother." He further said he had nothing further to do with the matter until at the end of the first year; that in the meantime he met George S. Baldwin several times, "and asked him about the transfer of the stock." He could not remember what Baldwin said, but he was "satisfied on one of these occasions that the matter had been attended to." This evidence as to an agreement with reference to the stock in question is of the same vague and unsatisfactory character as that which has already been commented upon. It is a mere assertion of what was to be done, without reference to any fact upon which it is based. It may, for all that appears, be what Mr. Duvall heard from one of the parties alone, or, if based upon what he had from both, it is what he considered the effect thereof. It may again be said what the court is entitled to is to be made acquainted with the facts, from which its own conclusion as to the effect of the facts may be drawn. Certain it is that it does not appear from this testimony that George S. Baldwin was at the time much impressed with the fact of being under an obligation to turn the stock over.

Reference has been made by the appellant in his brief to the case of *Schwind v. Boyce*, 94 Md. 510, 51 Atl. 45, as, having been decided upon a condition of proof similar to that in the case at bar. In the case referred to the details of the transaction there involved were made to appear in evidence, and were present to be passed upon by the court as to their proper legal effect; and the court

found that the testimony was "in harmony with all the facts connected with the transactions of the parties." As we do not think the condition of the proof in the case is such as to afford a satisfactory basis for a decree to enforce the equitable lien which the appellant sets up against the stock here the subject of suit, the other questions which would otherwise properly arise upon the pleadings may be treated as not in the case.

It follows, from the foregoing views, that the decree of the court below must be affirmed.

Decree affirmed, with costs to the appellees.

(97 Md. 458)

VALLEY SAV. BANK OF MIDDLETOWN,
FREDERICK COUNTY, v.
MERCER et al.

(Court of Appeals of Maryland. June 30,
1903.)

NOTES—RELEASE OF JOINT MAKER—ASSIGNMENT—NOTICE OF DEFECTS—INSTRUCTIONS.

1. A parol release of one of several joint and several makers of a note from further payment thereon does not release the others.

2. An instruction in an action by the assignee of a note that there is no legal evidence from which it can be found that plaintiff had knowledge or notice of fraud or want or failure of consideration in the making of the note, and one authorizing the jury to find that plaintiff did not obtain the note in good faith, are conflicting.

3. Under Negotiable Instruments Act, art. 13, § 75, Poe's Supp. Code Pub. Gen. Laws, providing that the notice which will prevent an assignee of a note recovering of the maker is actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the note amounted to bad faith, mere suspicion of defect of title or knowledge of circumstances that would excite such suspicion in the mind of a prudent man, or gross negligence of the taker at the time of the transfer, or an indorsement on it reciting receipt of a certain amount from certain makers, and that they are released from any further payment on it, will not defeat the assignee's title.

Appeal from Circuit Court, Frederick County; John C. Motter and James B. Henderson, Judges.

Action by the Valley Savings Bank of Middletown, Frederick County, against Charles E. Mercer and others. Judgment for defendants, and plaintiff appeals. Reversed.

Argued before MCSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Edgar H. Gans and John S. Newman, for appellant. Milton G. Urner and John E. R. Wood, for appellees.

FOWLER, J. This is a suit by the Valley Savings Bank of Middletown on a promissory note for \$600. The makers of this note are the 13 defendants and J. W. Downey. The note is joint and several, dated April 11, 1901, and payable one year after date, to order of R. S. Delauder & Co. The following in-

dorsements appear on it: "Received of J. W. Downey thirty-three $\frac{33}{100}$ dollars on within note, and he is hereby released from any further payment on the same;" and "Received of E. D. Hobbs thirty-three $\frac{33}{100}$ dollars on within note." Neither of these was signed, but it appears by the evidence that Downey wrote the first, but there is nothing to show who wrote the second. Following these appeared the indorsement written on the note at the time it was delivered to the plaintiff.

It appears from the testimony that one Hanan, acting or pretending to act as agent for Delauder & Co., the payee of the note, undertook to sell a Spanish jack to certain residents of Frederick county for breeding purposes. The price of the animal was agreed to be fixed at \$1,800. The evidence shows, and, indeed, it is conceded, the whole transaction was a fraud on the part of the agent of the vendors, whose plan was to get subscriptions from 18 persons of \$100 each to purchase the animal. He persuaded Dr. Downey to subscribe in order that others might be induced to follow his example, and secretly gave him the money to pay his subscription. It is not necessary, however, to narrate all the facts relating to this fraudulent transaction. It is sufficient to say that the defendants, with Downey, signed and delivered to Hanan, the agent or alleged agent of the vendors, three notes, each for \$600, for the purchase money agreed to be paid for the jack, the note sued on in this case being the first of the series. It also appears that Hobbs never did sign the notes, because he agreed to pay his subscription in cash.

Having thus secured the execution of the three notes, Hanan applied to Mr. Coblenz, one of the directors of the plaintiff bank, to get his assistance in borrowing money on them. After some negotiation and examination into the financial standing of the makers of the note, the plaintiff decided to make a loan of \$1,600 to R. S. Delauder & Co., and take the three \$600 notes as collateral security. The proceeds of this loan were placed to the credit of Delauder & Co., and were subsequently checked out and used by them.

The defendants have all pleaded the general issue. During the trial the plaintiff took two and the defendants five exceptions, some of them relating to the rulings of the court upon objection to testimony, and some to the granting or refusal of their respective prayers. The precise points of the various exceptions will appear further on when we consider them. The verdict and judgment were in favor of the defendants, and, although we have before us in this record only the appeal of the plaintiff, we will, in accordance with the provisions of section 76, art. 11, of the Code Public Local Laws (Frederick county), pass upon all the exceptions of all the parties, inasmuch as our conclu-

sion is that the judgment must be reversed.

1. In the first place we will consider the question presented by the release of Downey, one of the joint makers of the note sued on. The defendants contend that the legal effect of this release was to discharge all the other joint makers. The general rule has often been said to be that where one or two or more joint or joint and several makers of an instrument are validly released all are discharged. But this general statement has frequently been somewhat restricted, and it is said, and we think the rule is supported by reason as well as authority, such a result will not necessarily follow unless the release is a technical one under seal. Thus, in the case of *State v. Gott*, 44 Md. 346 et seq., the rule as applicable to contracts is said to be, quoting from *Story on Contracts*: "A release under seal, if given to one of several debtors jointly liable, inures to the benefit of all. But a release by parol to one debtor will not operate as a discharge to other debtors jointly liable, and can only be pleaded by the debtor to whom it was given." The reason of this rule is said to be that an agreement not under seal to discharge a particular person or not sue him does not extinguish the debt, and therefore cannot bar the suit to recover it. *Line v. Nelson*, 38 N. J. Law, 358. But, whatever the reason may be, the rule itself, as announced in *State v. Gott*, supra, is firmly established, and, as was said in that case in 1875, we can say now we have not been referred to any satisfactory authority in which this doctrine has been overruled.

Several Maryland cases were relied on by the defendants to support their views, as to the effect of the release of Dr. Downey, but we do not think they do so. Thus, in *Claggett v. Salmon*, 5 G. & J. 351, was a case of principal and surety, and it was in considering the rights of a surety that the court used the general language relied on by the defendants. There was in that case no question before the court requiring any consideration of the effect of a parol release on the liability of joint debtors, when, as here, they are all principals. The same may be said in regard to *Oberndorff v. Union Bank*, 31 Md. 126, 1 Am. Rep. 31, and *Blackburn v. Beall*, 21 Md. 208. In *Yates v. Donaldson*, 5 Md. 389, 61 Am. Dec. 283, the joint debtors purchased certain property from their creditor for \$1,700, which they agreed in writing to pay at a stipulated time. Subsequently the creditor agreed to accept from one of them notes for two-thirds, and from the other notes for one-third, of the joint indebtedness. One of the joint debtors complied with his part of the agreement, and paid his notes at maturity, but the other failed to fully do so. The creditor sued both of them to recover the balance. It was held that while, if the parties had been principal and surety, such a contract would have released the one who was surety, yet, being both principals, it did not have that effect. It is true the court

used the language relied on by the defendants, and used it in regard to principals, namely, that "if one be released both will be, except in a case where the remedy against the other is expressly reserved." But the question still remains, how released? Of course, if the release is under seal, and shows, as in *State v. Gott*, that the indebtedness is satisfied, all the joint debtors would be released; but if the release is only by parol such release can be pleaded as a discharge only by the debtor so released. *State v. Gott*, supra. And in the very case relied on by the defendants (*Yates v. Donaldson*, supra) it was held that the matter relied on by one of the joint debtors was not a good defense, and that in a case like that and the one we are considering, where all are principals, it would be impossible to adjust the equities in a suit at law by the creditor. It would be impossible, said the court, to render a judgment upon any adjustment of these equities, because the only judgment in such a case must be for the same amount against all the defendants. Another Maryland case cited by the defendants is *Booth v. Campbell*, 15 Md. 569, in which it was said that a release or discharge of one of several defendants in a judgment jointly liable thereon operates as a discharge of all. Undoubtedly an effective and valid release must have that effect, but the question again arises, what kind of a release or contract did the court in that case hold would operate as a discharge? There was a parol agreement on the part of the judgment creditor and one of the judgment debtors that if the latter would pay 20 per cent. on the amount of the judgment, and secure a certain contract from another party (which latter condition was held to be a good collateral consideration), the judgment creditor would "release the judgment." The sum agreed upon was paid, and a receipt of the creditor therefor was filed in the cause, with an entry on the record of its being in full of said judgment. This, together with the additional collateral consideration, was held to be a good accord and satisfaction. In other words, the judgment having been satisfied, all liability therein was discharged. The very record which showed the existence of the judgment evidenced its satisfaction, and, being satisfied, the judgment, of course, cannot be made the basis of a suit against anybody. The case now before us presents a very different state of facts.

We do not think, therefore, that there was error in the various rulings of the court below refusing to recognize the release of Downey as a discharge of the defendants and a bar to this suit. What we have said above disposes of the defendants' first and second bills of exceptions relating to testimony, and to their fifth, so far as it is based on the rejection of their third, sixth, and seventh prayers.

The most important of the remaining ques-

tions is presented by the plaintiff's second bill of exceptions, which relates to the granting of defendants' fourth, and the rejection of their second, third, fourth, fifth and sixth, prayers.

First, then, in regard to the granting of the defendants' fourth prayer. In order to consider the question presented by this exception, we will have to refer to plaintiff's first prayer, which, as we have seen, was granted. By this prayer the jury were instructed that if they find from the evidence that the defendants signed the note sued on, and that said note was indorsed by the payee, and delivered to the plaintiff for a valuable consideration, before said note became due and payable, and shall find that said plaintiff at the time it acquired said note had no notice of any fraud in the obtaining of said note, or of any failure of consideration therein, then the plaintiff is entitled to recover the full amount of said note, less certain credits. The prayer thus concluded: "And there is no evidence in this case legally sufficient from which they can find that the plaintiff had any knowledge or notice of fraud, or want or failure of consideration in the making of said note." The fourth prayer of the defendants, which was also granted, embodies in it the general and well-settled doctrine applicable to negotiable paper, that if there is fraud in the origin of the note the burden of proof is upon the holder to show that it came to him before maturity, in good faith, for value, and without notice of any infirmity or defect in the title of the persons who transferred it to him. But, in addition to the assertion of this general proposition, the jury are informed that "unless they believe from the evidence that said note was thus acquired by the plaintiff their verdict should be for the defendants." It seems to us, in spite of the ingenious argument of the able counsel for the defendants to the contrary, that there is a direct and palpable conflict between these two instructions. By the first the jury are told that they cannot in this case find that the plaintiff had any knowledge or notice of fraud or failure of consideration in the making said note, while by the other they are permitted, if they will, to find from the same evidence that the plaintiff did not obtain the note in good faith. In other words, while they are told there is no legal evidence of knowledge or notice of fraud, they may yet find in point of fact that the note was not obtained in good faith. It is difficult, indeed, to understand how the holder of commercial paper can take it in good faith, without notice of defects in title, and without knowledge of fraud, and at the same time be in a position to have his good faith in the transaction questioned. This is what the fourth prayer, in our opinion, allows the jury to do. It is most desirable, if possible, to free a practical question like this from fine distinctions, and we think the decisions of this court have shown a strong tendency in that di-

rection. Thus, in the leading case of *Totten v. Busey*, 57 Md. 448, the former learned Chief Justice of this court said: "The question is not what facts will or will not be sufficient to put the party on inquiry, but the question whether the party had knowledge of the infirmity of the note at the time of the transfer to him; or, in other words, whether he procured the note in good faith for valuable consideration." *Maitland v. Bank*, 40 Md. 568, 17 Am. Rep. 620; *Bank v. Hooper*, 47 Md. 88; *Williams v. Huntington*, 68 Md. 590-601, 13 Atl. 336, 6 Am. St. Rep. 477. And so, in the case last cited, the present Chief Justice quotes the language of Judge Alvey with approval, and says: "The question is one of fraud or bad faith on the part of the taker of the note." In *Cheever v. Pittsburg R. R. Co.*, 150 N. Y. 65-67, 44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646, it is said: "The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence." Equally clear, simple, and broad is the rule expressed in section 75 of article 13 (our negotiable instruments act [Poe's Supp. Code, Pub. Gen. Laws]), by which, of course, we must be governed. The notice that section provides, which will prevent a holder of a note from recovering, is "actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. But the prayers in question, as we have seen, after telling the jury in the first that there is no legally sufficient evidence of any knowledge or notice of fraud in the making of the note, allowed them by the fourth to find either that the plaintiff was not a holder in good faith before maturity, or, second, that it had notice of infirmity or defect in the title of its indorser. The jury could under this prayer have found, and perhaps they did find, that in spite of the fact there was no legally sufficient evidence of knowledge or notice of fraud in the making of the note, yet that the evidence before them justified them in finding the plaintiff was not a holder in good faith because it had notice of some defect or infirmity in the title of its indorser growing out of the worthlessness of the animal purchased by the defendants. It is clear, however, that by the first prayer they were, in effect, told there was no legally sufficient evidence of knowledge or notice of any such failure of consideration. But if under any theory of the case such a prayer as the defendants' fourth could have been properly granted, submitting to the jury the question whether the plaintiff acquired the note in good faith for value, before maturity, and without notice, etc., then it was error to have rejected the plaintiff's third and fourth prayers, based upon the theory that mere suspicion of defect of title or knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross

negligence on the part of the taker of the note at the time of transfer, will not defeat his title." *Williams v. Huntington*, supra. We think, moreover, that, if the court could be justified by the facts of the case in granting a prayer like the defendants' fourth, it was error, under the facts of this case, to refuse the plaintiff's sixth, by which the court was asked to instruct the jury that if they should find that at the time the plaintiff acquired the note it had no notice of any fraud in the obtaining of said note, or any failure of consideration, other than the note itself showed, the plaintiff was entitled to recover. In other words, such an instruction would have been equivalent to a declaration by the court that if the indorsements on the paper were the only suspicious circumstance, or the only evidence to show knowledge of fraud, then such circumstance or evidence was not legally sufficient to show bad faith, and to prevent a recovery by the plaintiff. It does not appear that even if suspicion had been aroused by seeing the indorsements upon the notes, and the plaintiff or its officers had made inquiry, that any evidence of the fraud or failure of consideration or defect in title would or could have been discovered. It does appear, however, from the evidence that Mr. E. L. Coblentz, one of the officers of the plaintiff, made inquiry from the agent of the payee as to the meaning of the indorsements on the note, and he was informed what the circumstances were. The fraud was not thus disclosed, nor could it have been discovered by inquiry from the makers themselves, who were then ignorant of the trick that had been played upon them, by foisting upon them an animal totally unfit for the purpose for which he was purchased. Can we reasonably impute bad faith to the plaintiff merely because its officers saw the indorsements on the paper? If not, then when the question of good faith or knowledge of fraud is submitted to the jury the plaintiff was entitled to an instruction like its sixth prayer. Thus, in *Hamilton v. Vought*, 34 N. J. Law, 187, the court says: "When mala fides is the point of inquiry, suspicious circumstances must be of a substantial character, and if such circumstances do not appear the court should arrest the inquiry. Under the former practice, circumstances of slight suspicion would take the case to the jury; under the present rule, the circumstances must be strong, so that bad faith may be reasonably inferred." And again, the Court of Appeals of New York in *Cheever v. Pittsburg R. R. Co.*, supra, declares "the holder's right cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances." This is but the declaration of the same rule set forth in the 75th section of article 13 of our Code, and the same general principle which we have already said has been announced in *Totten v. Busey* and *Williams v. Huntington*, supra.

In conclusion we will indicate specifically the result of the foregoing considerations.

Plaintiff's first bill of exceptions: This exception related to the refusal of the court to allow the witness Coblentz to answer the question whether the plaintiff bank, at the time it received the note sued on, had any knowledge of fraud or failure of consideration in said note. By the action of the court in granting plaintiff's first prayer this exception became unimportant, and it was abandoned at the hearing.

Plaintiff's second and last bill of exceptions relates to the action of the court in granting defendants' fourth prayer, and refusing plaintiff's second, third, fourth, fifth, and sixth prayers. It follows from what we have said there was error in granting defendants' fourth, and in refusing to grant plaintiff's third, fourth, and sixth, if under the facts of the case the defendants' fourth could have been properly granted. Plaintiff's fifth submits to jury the question of the knowledge of fraud and failure of consideration, etc.; but this question was withdrawn from the jury, and the prayer was properly rejected.

The defendants' first bill of exception we have already considered. It related to the effect of the release of Dr. Downey. Defendants' second bill of exception related to the prayer they offered at close of plaintiff's case. This exception was waived. Defendants' third bill of exception related to the exclusion of certain testimony which was supplied by other witnesses.

The fourth bill of exception of defendants was taken to refusal to allow several witnesses to testify in reference to certain dealings had by them in relation to the note sued on, but counsel refused to offer to show that the plaintiff had notice of these transactions. We think clearly there was no error in this ruling.

Defendants' fifth bill of exceptions: This exception calls in question the rulings upon the prayers, namely, the granting of the plaintiff's first and the rejection of the defendants' prayers, with the exception of the fourth, which was granted.

From what we have already said, it will be seen that we are of opinion that the first prayer of the plaintiff was, as the case is now presented, properly granted. It also, of course, follows from what we have said that defendants' first asking to take the case from the jury and for verdict for the defendants was properly refused. Defendants' second was necessarily refused, if the plaintiff's first could have been properly granted, and we have said it should have been granted. Defendants' third relates to the release, and, as we have said, was properly refused. Defendants' fifth was properly refused, because it submitted to the jury the question whether the plaintiff took the note with knowledge of fraud, and they were instructed properly, as we hold, by plaintiff's first, that there was

no legally sufficient evidence of such knowledge. The defendants' sixth and seventh presented the question as to the legal effect of the release of Dr. Downey which we have already considered. Defendants' eighth prayer was, we think, properly rejected, if for no other reason because there was no evidence that the signature of Hobbs to the notes was a condition precedent to the liability of the defendants thereon. Some of the witnesses testified that the understanding was that all who signed the subscription papers were to sign the notes, and others testified their understanding was that they could pay in cash or give notes; but there is nothing, either in the testimony or the contract of subscription, that there was to be no liability unless all signed the notes. By reason of the errors indicated, the judgment will be reversed and new trial awarded.

Judgment reversed, with costs, and new trial awarded.

(37 Md. 703)

**COMMERCIAL & FARMERS' NAT. BANK
OF BALTIMORE v. McCORMICK.**

(Court of Appeals of Maryland, July 2, 1903.)

**GUARANTY—PARTIAL PAYMENT—COVENANT
NOT TO SUE—DISCHARGE OF GUARANTORS—
NUDUM PACTUM—PLEA IN BAR—ACCORD AND
SATISFACTION—EVIDENCE.**

1. Where a creditor accepts the payment of a sum less than that due from part of the guarantors, and agrees not to proceed against them for any further sum on account of the obligation, the agreement, not being under seal, and being based on no other consideration, is nudum pactum as to the balance due, and does not discharge the guarantors.

2. A covenant not to sue some of several guarantors on their paying a sum less than that due from them does not release the others, since to have that effect there must be a technical release under seal.

3. In an action against a guarantor to recover a portion of the debt, a covenant not to sue other guarantors, executed on their paying a proportion of the debt less than that due, not being pleadable in bar, is not admissible in evidence.

4. Where no exceptions are reserved to the refusal of instructions, they need not be noticed on appeal.

5. Where a declaration in an action against a guarantor sets up the breach relied on, a plea of general performance cannot be allowed, as issue cannot be taken on such plea.

6. Where a simple payment is made of a sum less than that due by a party whose duty it is to pay the whole in satisfaction of the greater sum, such payment will not sustain a plea of accord and satisfaction.

Appeal from Circuit Court, Harford County; James D. Watters, Judge.

Action by the Commercial & Farmers' National Bank of Baltimore against J. Lawrence McCormick. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Harry S. Carver and John L. G. Lee, for appellant. J. D. Worthington and Hon. S. A. Williams, for appellee.

BOYD, J. The appellant sued the appellee and 17 other persons on an instrument under seal, wherein the obligors, in consideration of the appellant discounting from time to time the promissory notes or other evidences of debt of the United Milk Producers' Association of Baltimore City, covenanted to guaranty the payment of each and every loan or advance of credit extended to the association, provided the loans made upon the faith of the guaranty should not at any time exceed the sum of \$20,000. The appellant loaned the association \$20,000 on two notes of \$5,000 each, and one of \$10,000, which it failed to pay. The appellee was the only defendant who was summoned, and the case proceeded against him alone, resulting in a judgment in his favor, from which this appeal was taken. The defendant filed a number of pleas, which were demurred to, and the rulings on the demurrers, as well as those on the admissibility of testimony and on prayers, are presented to us for review; but, inasmuch as the effect of an agreement dated April 10, 1901, made by the appellant with six of those obligors (the appellee not being one of the six), is the important question in the case, we will proceed at once to the consideration of it.

On that date the three notes of the Milk Producers' Association were overdue and unpaid. The agreement, after quoting the contract of guaranty, recites that whereas suits have been brought against the parties of the second part and other obligors in said guaranty, which suits are pending; and whereas, the parties of the second part have paid \$5,800 to the plaintiff "as the proportionate part of the obligation under the aforesaid agreement, which the said party of the first part doth hereby agree to accept": Therefore the bank covenants and agrees "that it will not in or by any suit or action, legal or equitable, instituted or to be instituted, seek to obtain or recover from them, or any of them, any further or other sum for or on account of the foregoing obligation," and that in case, by suit or otherwise, it shall receive or collect from any of the remaining obligors any sum or sums of money which will entitle them to any right of action against the parties of the second part, then it "will indemnify and save harmless the parties of the second part hereto from any judgment recovered against them or any of them by such remaining obligors or any of them." This agreement was executed in the name of the bank, by its president, but is not under seal. There are 18 obligors in the contract of guaranty, and it is not denied that the principal of the notes of the association held by the appellant amounted to \$20,000, all of which were due some months before April 10, 1901, when this agreement

was made. It is difficult to understand, therefore, why the sum of \$5,800 was fixed upon "as the proportionate part of the obligation," and it is manifest that it was not all that was due by the six parties, even on the theory that each one was only responsible for one-eighteenth of the whole debt, which was not the case. It is not claimed that this instrument is a technical release, and, inasmuch as it is not under seal, of course there can be no question about that, irrespective of the fact that it does not in terms profess to release the parties therein named. If it had been under seal, it would, at most, be a covenant not to sue and to indemnify those six persons. The case seems to have been tried on the theory that it was such covenant, but we will refer to that later.

The fourth prayer of the defendant, which was granted, presents the question which is of vital importance. It submitted to the jury the execution and delivery of the agreement, the payment and acceptance of the \$5,800, and instructed them that, if they found the facts stated, "then, under the pleadings and evidence in this case, the effect of said payment was to discharge the parties so paying said sum under the said agreement from liability to the plaintiff under said bond; and, if the jury further find that the acceptance of said sum by the plaintiff increased the risk of the other obligors under the bond sued on, then the effect of the said payment was to discharge the other obligors under said bond, and their verdict must be for the defendant." Without now determining whether the conclusion of the prayer would be correct, if the premise on which it is based is right, was the effect of the payment of the \$5,800 to discharge those parties? There is no consideration named in the agreement, and none attempted to be shown, and hence, as the agreement was not under seal, it would seem to be clear that the payment of the \$5,800, being less than was due by those parties, did not discharge them. If "a debtor, by paying part of his admitted debt, obtains from his creditor an agreement to discharge the residue, such an agreement is nudum pactum, and therefore inoperative, for the simple reason that the debtor is under a legal obligation to pay the whole debt.

* * * But a release under seal imports consideration, and such a release of an existing debt is a sufficient discharge, without anything more." *Ingersoll v. Martin*, 58 Md. 74, 42 Am. Rep. 322. In this state, where the distinction made at common law between parol contracts and those under seal is still recognized, a debtor is not discharged by payment of a sum less than he owes, unless by an instrument under seal, or there be some collateral consideration, such as in law is sufficient to support a contract. "Such collateral consideration superadded to the payment of part is a good accord and satisfaction." *Maddux v. Bevan*, 39 Md. 499. These

general principles have been frequently announced in this state, as will be seen in *Campbell, Trustee, v. Booth*, 8 Md. 107; *Booth v. Campbell, Trustee*, 15 Md. 569; *Rohr v. Anderson*, 51 Md. 205; *Emmitsburg R. R. Co. v. Donoghue*, 67 Md. 383, 10 Atl. 233, 1 Am. St. Rep. 396; *Obendorff v. Union Bank*, 31 Md. 126, 1 Am. Rep. 31; and other cases. "Payment of part of an admitted debt is neither in law nor equity a good consideration for abandoning all claim to the residue." *Gurley v. Hiteshue*, 5 Gill, 222.

There being no consideration other than the \$5,800 mentioned in the agreement, and it not being under seal, it was simply nudum pactum as to the residue, and did not discharge the six obligors therein named. If, as was said in *Ingersoll v. Martin*, supra, "an agreement to discharge the residue" is under such circumstances nudum pactum, an agreement not to sue or to indemnify against any indebtedness for the residue must be equally so. There can be no distinction between this case and those cited above, on the ground that these parties were mere guarantors. When these notes were not paid, they were liable for them, and there could be no reason why they should be discharged from the payment of the entire amount, without any consideration, any more than any other debtor should be. In *Hooper v. Hooper*, 81 Md. 155, 31 Atl. 503, 48 Am. St. Rep. 496, the measure of liability of guarantors is fully considered, and it is said to be coextensive with that of the principal, unless it be expressly limited. We have found no case in which it has been held that a guarantor after his liability is fixed could relieve himself from payment of the whole debt by paying part, unless he gets a technical release under seal, or there is some collateral consideration for the discharge. It is manifest, therefore, that the payment of the sum of \$5,800 did not discharge those six obligors from further liability to the plaintiff, and hence the prayer was erroneous in that respect.

Throughout the case this agreement seems to have been treated as a covenant not to sue. As we have already seen, it is not a technical covenant, as it is not under seal, but, treating it as a covenant not to sue, the authorities do not give it the effect contended for by the appellee. It is true that it was said in *Clopper v. Union Bank*, 7 Har. & J. 92, 16 Am. Dec. 294, that a covenant perpetual, as that the covenantor will not sue without any limitation as to time, is in law a release, and may be pleaded in bar as such; but the authority cited for that is 5 Bac. Abr. tit. "Release" (A2) 683; and on the same page it is said: "If two are jointly and severally bound in an obligation, and the obligee by deed covenants and agrees not to sue one of them, this is no release, and he may notwithstanding sue the other." There are many cases, and the principle would seem to be thoroughly settled, to the

effect that a covenant not to sue one of two obligors does not release the other, but to have that effect there must be a technical release under seal. *Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461; *Line v. Nelson*, 38 N. J. Law, 358; *Berry v. Gillis*, 17 N. H. 9, 43 Am. Dec. 584; *Bozman v. State Bank*, 7 Ark. 328, 46 Am. Dec. 291; *Crane v. Alling*, 15 N. J. Law, 423; and other cases that may be found in 20 Am. & Eng. Ency. of Law (1st Ed.) 741, 751, notes. The reason is that a technical release, being conclusive evidence of payment in full, is regarded as a performance and extinguishment of the bond, and consequently a discharge of all the obligors; while a covenant not to sue one of several obligors is not only no evidence of the payment of the bond, but implies, if it does not express, the very contrary. When a covenant not to sue is made with a sole obligor, it is permitted to be pleaded in bar to prevent circuity of action, but a covenant not to sue one of several obligors is not pleadable in bar. Such a covenant, therefore, not being pleadable in bar, and not preventing the covenantor from suing joint obligors, we do not find any authority for the position taken by the appellee in the latter part of his fourth prayer, above quoted. The case of *Kearsley v. Cole*, 16 M. & W. 133, and *Price v. Barker*, 30 Eng. L. & Eq. 161, cited by the appellee, do not support that contention. In that of *Owen v. Hanan*, 3 MacNaghten & Gordon, 378, referred to, Lord Truro was discussing the rights of a surety, and that case was in chancery, and, moreover, the remarks of the Lord Chancellor were not approved on appeal (4 H. L. Cas. 997).

It does not seem to be necessary, after what we have said, to discuss at length each of the exceptions. As the agreement was not pleadable in bar, it ought not to have been admitted in evidence. Of course, we are dealing with the case as we find it, and do not mean to preclude the appellee from introducing it at a new trial, if there be any ground on which it can be admitted, but as the case is now presented it is not relevant. It is unnecessary to speak of the testimony in the second bill of exceptions.

The third bill of exceptions states that the plaintiff excepted to the "ruling of the court in refusing the plaintiff's third prayer and granting the said fourth prayer"—meaning the defendant's fourth, as shown earlier in the exception. The plaintiff's third was granted, and as there is no exception to those refused it is not necessary to refer to them. The defendant's fourth was improperly granted for the reasons we have already given. It is proper to add that we do not understand how the conclusion of the plaintiff's first prayer, which was granted, can be reconciled with the claim in the bill of particulars filed—the former authorizes the recovery of the whole balance, while the latter only claims one-twelfth of that amount.

The first plea is one of general performance, and ought not to have been allowed. The declaration is not as full as is desirable, but it does set up the breach relied on. "Issue cannot be taken on a plea of general performance, and the plaintiff, if driven to reply, would be obliged to repeat his declaration." *Marshall v. Haney*, 9 Gill, 258. The second is a plea of release by deed, and follows, in substance, the form in the Code. The third alleges a release by deed of some of the obligors. A release under seal of some of the joint obligors without the knowledge or assent of the defendant, as the plea alleges, would inure to his benefit, as will be seen from what we have said above. See, also, *State v. Gott*, 44 Md. 346, and *Valley Savings Bank v. Mercer* (decided at this term) 55 Atl. 435.

The fourth and fifth were intended as pleas of accord and satisfaction. What we have said above will relieve us of any extended discussion of them. The fourth does not disclose the fact that those parties did not pay the whole debt, but it does not allege that they did or that there was any other consideration. Where there is nothing more than a simple payment, by a party whose duty it is to pay the whole, and acceptance of a less sum of money, in satisfaction of a greater sum due, that will not sustain the plea of accord and satisfaction. *Hardey v. Coe*, 5 Gill, 189. The form of the plea in 1 Poe, § 654, shows that where money is paid the additional consideration is set out, and in that section Mr. Poe refers to the necessity of some other collateral consideration when less than the amount due is paid in order to operate as an accord and satisfaction. The fifth plea shows affirmatively that only \$5,800 was paid. The demurrer to both of these pleas ought to have been sustained. Those to the sixth, seventh, and eighth were sustained, and hence it is unnecessary for us to speak of them. For the errors we have pointed out, the judgment must be reversed.

Judgment reversed, and new trial awarded, costs to be paid by the appellee.

(97 Md. 686)

SWAN et al. v. KEMP et al.

(Court of Appeals of Maryland. July 2, 1903.)
LANDLORD AND TENANT—LONG-TERM LEASES
—REDEMPTION BY TENANT—STATUTES—
REPEAL—EFFECT—VESTED RIGHTS.

1. Acts 1884, p. 649, c. 485, providing that leases of land for a longer period than 15 years shall be redeemable after the expiration of 15 years, at the option of the tenant, for a sum of money equal to a designated capitalization of the rent reserved, applies as well to leases of improved as of unimproved land.

2. Acts 1888, p. 645, c. 395, and Acts 1900, p. 299, c. 207, repealing and re-enacting Acts 1884, p. 649, c. 485, making leases for a longer term than 15 years redeemable at the option of tenant, and merely changing the time at which and terms on which such rents shall be redeemable, did not repeal the original act in the sense

of obliterating it, and thus did not relieve from its operation leases made between the passage of the original and amendatory acts.

3. The rights of parties making leases between the passage of the original and amendatory acts were fixed by the original act, and, though the amendatory acts did repeal the original, such repeal would not divest rights acquired thereunder.

Appeal from Circuit Court of Baltimore City; George M. Sharp, Judge.

Bill by Lawrence B. Kemp and others against Isabel A. Swan and others. From a decree for plaintiffs, defendants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Hon. Wm. Pinkney Whyte, for appellants. Joseph C. France, for appellees.

JONES, J. The material facts of this case are that Isabel A. Swan, one of the appellants, was the owner in fee simple of a lot of ground on Baltimore street, in the city of Baltimore, upon which there was a valuable improvement in the way of a building, which had long been used for business purposes. On the 5th of April, 1886, she, with her husband, executed to Alonzo Lilly a lease of these premises for 99 years, renewable forever, in the usual form, and with the usual covenants and conditions of that familiar mode of conveyance, subject to an annual rent, for the first two years, of \$2,400, and thereafter, during the continuance of the lease, of \$3,000, payable in monthly installments. On the 17th day of August, 1897, Alonzo Lilly and his wife executed to the appellees Lawrence B. Kemp and Christian Devries a deed of the premises so leased to the said Lilly, in trust for the uses and purposes set out in said deed, which authorized and involved a sale thereof by the said trustees. In execution of their trust, these trustees sold the premises in question to the appellee Henry Kirk for \$65,000. This purchase price was for the property in question as a fee-simple property, and it was agreed between the vendor trustees and the purchaser that \$50,000 of the purchase money—that amount being the capitalization, at 6 per cent., of the rent reserved by the lease of the 5th of April, 1886—should be applied to the extinguishment of the rent so reserved. There was no provision in the lease for redeeming the same; but the sale, which has been referred to, having been made in 1902, 15 years had expired between the date of the lease and the time of the sale, and the trustees (who made the sale) and the purchaser claimed the right to redeem the lease under the provisions of Act 1884, p. 649, c. 485. The sale of the property, made as has been stated, was reported by the trustees to the circuit court of Baltimore city, which had jurisdiction of the trust they were executing, and was ratified by that court on the 11th day of August, 1902. The trustees thereupon, to

consummate the sale as made, reported, and ratified, tendered to the appellants, the then owners of the fee-simple interest and reversion in the property in question, \$50,000, together with all arrears of rent and the current rent to the date of the tender, and requested from said owners (appellants here) a conveyance of said fee-simple interest and reversion. The appellants refused to make the conveyance requested, and based their refusal upon the claim that the act of 1884 (page 649, c. 485) did not apply in such a case as this, where a lease was made of property already improved; and that the said act had been repealed and made inoperative, as affecting this case, by the later act of 1888 (page 645, c. 395). To procure from the appellants the conveyance thus requested and refused, the appellees instituted in the court below the proceedings in the case at bar. These proceedings, as they appear in the record, consist of the bill of complaint of the appellees, with certain exhibits, and the answer of the appellants. From the allegations and admissions appearing upon the face of the pleadings, the facts which have been set out are shown. The court below decreed adversely to the contention of the appellants, and they have brought this appeal. The inquiries now to be made are suggested by the grounds set up by the appellants for their refusal to convey the reversion in the property in question upon the demand made upon them.

First, then, does the statute in question—Acts 1884, p. 649, c. 485—apply in the state of case we have here? That statute provides as follows: "That all leases or sub-leases of land hereafter made in this state, for a longer period than fifteen years, shall be redeemable after the expiration of fifteen years at the option of the tenant, for a sum of money equal to the capitalization of the rent reserved at the rate of six per centum in gold coin of the United States, or its equivalent, unless some other sum not exceeding four per cent. capitalization of said rent in said coin shall be specified in said lease, in which event said rent shall be redeemable for the sum fixed in said lease or sub-lease." A mere reading of the statute is sufficient to show that the lease we are dealing with here is within its letter. No attempt at argument or illustration could make that plainer. Now, is it not within the mischief the statute was intended to remedy? within the object it was intended to accomplish? within the policy it was intended to establish? In the case of *Stewart v. Gorter*, 70 Md. 242, 16 Atl. 644, 2 L. R. A. 711, the legislation we have now under consideration was before this court for construction as to its purport, object, and effect, and it was there declared that it "was the result of a well-grounded belief that these long leases, with their covenants of renewal, were injurious to the prosperity of the city of Baltimore, and that sound public policy demanded that all leases hereafter made, if for more

than fifteen years, might be ended at the option of the tenant or lessee, upon paying the capitalization of his ground rent at six per centum. It was the system of these long leases, irredeemable until the end of the term, that the Legislature wished to break up." This legislation was thus, in effect, pronounced remedial in its character. It is, therefore, by the settled rule of construction in such cases, to be liberally construed so as to advance the remedy, and suppress or prevent the mischief against which it is directed. Accordingly it was applied, in the case just cited, to a lease which, by its strict, literal terms, did not come within the wording of the statute. It was there also held that the policy of the law could not be contravened by a waiver of its provisions by the parties to the lease. This latter ruling was made in respect to an express provision inserted in the lease that was the subject of adjudication in the case referred to, to the effect that the lessee "would not avail himself of any right that he might have by virtue of any Maryland statute to redeem the rent at a less sum than that fixed in the lease." The effect of the ruling of the court in the case of *Stewart v. Gorter*, supra, is that the legislation in question shall be construed to carry out its policy, and will not be allowed to be thwarted by agreements or contractual provisions evasive of its purpose. If express agreements and provisions are not allowed to avoid the effect of the legislation in question, the courts will not be astute, in cases falling within the letter and terms of the law, to find reasons for wresting them from its operation by construction. In the case at bar, the reason urged for holding the lease in controversy not subject to the operation of the statute which has been set out is without force. By its terms, the statute applies to all leases of land for a longer period than 15 years. No exception or qualification appears in it as it reads. Its purpose, as this court has held, is "to break up" the system of irredeemable rents. Why is the lease here in controversy not within the reason and policy of such a law, as it is within its letter? What sound reason can there be for making a distinction in legislation against the system of irredeemable leases, between leases of land already built upon and leases of land that is forthwith to be built upon? To put upon a measure intended to be prohibitory of such leases a construction making such a distinction, would be to render the law utterly futile for the accomplishment of its object. The opportunity which would thereby be afforded for evading the operation of the law and nullifying its purpose is obvious, and is a controlling reason why such a construction should not be adopted.

The further inquiry now is, what effect

did Act 1888, p. 645, c. 395, which repealed and re-enacted Act 1884, p. 649, c. 485, and which, in turn, was repealed and re-enacted by Act 1900, p. 299, c. 207, have upon the rights of the parties to the lease in controversy? The act of 1884 in question was not, as has been contended, an act in any way providing or denouncing a penalty. It was designed to regulate the making of a class of contracts affecting property rights of those owning and dealing in real estate, and to establish a policy in relation thereto. The subsequent legislation of 1888 and 1900 repealing and re-enacting Act 1884, p. 649, c. 485, did not repeal it in the sense of obliterating it and doing away with its object and effect, but was enacted in furtherance of the object of the act which it thus repealed and re-enacted. The latter was substantially re-enacted, and the main and fundamental provisions thereof were preserved and embodied in the new law. The change made was only in regulations affecting the practical operation of the law. This brings the case at bar within the principle laid down in the cases of *Dashiell v. Mayor, etc., of Baltimore*, 45 Md. 615, *Watts v. Pres., etc., Port Deposit*, 46 Md. 500, and *Gable and Rusk, Trustees, etc., v. Scott et al.*, 56 Md. 176, 182, 183, which have declared the effect of laws repealing and re-enacting existing laws under article 3, § 29, of our Constitution, and the legislative practice thereunder, and have held "that, where a repealing law contains a substantial re-enactment of the previous law, the operation of the latter continues uninterrupted." It would, in itself, be a most unreasonable proposition that all leases made in the time intervening between the original and the amendatory acts here in question are to be held as relieved from the operation of the law which at the time of their creation regulated and determined their effect, and with reference to which the parties to them are to be supposed to have entered into them. Further than this, it has been held by this court, as "settled by authority, that, where rights are acquired, under a statute, in the nature of a contract, or where there is a grant of power, a repeal of the statute will not divest the right or interest acquired, or annul acts done under it." *Appeal Tax Court of Baltimore City v. West. Md. R. R. Co.*, 50 Md. 274-295. In this case the rights of the parties before the court, under the lease which is the subject of the controversy here, were fixed and determined by the law existing at the time of its creation, and are not affected by the subsequent legislation to which reference has been made. The decree of the court below is in accordance with this view, and the same will be affirmed.

Decree affirmed, with costs to the appellees.

(97 Md. 629)

UNITED RYS. & ELECTRIC CO. OF BALTIMORE v. WOODBRIDGE.

(Court of Appeals of Maryland. July 1, 1903.)

STREET RAILROADS—INJURIES TO PASSENGER
—NEGLIGENCE—WARNING TO PASSENGERS
—CONSTRUCTION—CONTRIBUTORY NEGLIGENCE—DUTY OF CONDUCTOR.

1. Testimony of plaintiff which showed that she was a passenger on defendant's street car and had received from the conductor a transfer to another line, that the conductor notified the passengers to change for that line, that the car stopped, and, while she attempted to alight, started and threw her to the ground, established a prima facie case of negligence on defendant's part.

2. A notice posted in a street car, which states that "cars stop to take on and let off passengers at near side of cross streets," and that those violating the notice do so at their own risk, not meaning that cars will stop only at such places, does not preclude a passenger getting on or off at any other place from recovering for injuries sustained by reason of the company's negligence.

3. A passenger on a street car had received a transfer to another line. As the car approached the transfer point the conductor called out the place, and directed the passengers to transfer to that line. The car came to a stop, and the passenger attempted to alight, but, while so doing, the car started and threw her to the ground. The car stopped because of a wagon in front of it, and when the wagon moved the car started up. The passenger received no notice to delay the transfer. The rear of the car, when it stopped, was from 50 to 100 feet from the street crossing where it usually stopped. *Held*, that the passenger was not guilty of contributory negligence, as a matter of law, in attempting to alight.

4. Where, after a conductor of a street car had given directions to transfer to another line, the car stopped, but not for the purpose of enabling the passengers desiring to transfer to alight, it was the duty of the conductor to warn the passengers to keep their seats till he should give further directions.

Appeal from Baltimore City Court; J. Upshur Dennis, Judge.

Action by Mary S. Woodbridge against the United Railways & Electric Company of Baltimore. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEAROE, and SCHMUCKER, JJ.

John C. Tolson, for appellant. Forrest Bramble, for appellee.

PEARCE, J. This action was brought by Mary S. Woodbridge in the Baltimore city court against the United Railways & Electric Company to recover for personal injuries sustained while a passenger upon a car of the defendant company. The declaration charges that the plaintiff paid her fare, and thereby became a passenger on the car of defendant, which was a common carrier of passengers for hire; that, when said car reached a point where plaintiff desired to leave the car, it was stopped to allow her and others to alight therefrom; that by reason of the negligence of the defendant when

plaintiff was alighting, with her feet on the steps of the car, and in the act of stepping down into the street, the car was prematurely started, whereby she was thrown down in the street and injured. The case was tried before a jury, under instructions from the court, and a verdict was given for the plaintiff for \$500. The only exception was to the ruling on the prayers.

The plaintiff testified that, with her son-in-law, Joseph Susco, she boarded the car on Pratt street, near Light; that they paid their fares, and asked and received transfers to the Edmonson Avenue line, the transfer point being at the intersection of Howard and Franklin streets; that, as the car was going up Howard street, when it got to Franklin it stopped, and the conductor called out, "Franklin street; transfer to Edmonson avenue"; that her son-in-law got off, and she got right up and started off right behind him; that as she was in the act of stepping down on the ground, with the handle bar in her right hand, the car started, and she was thrown flat on her back. She subsequently said the car was not up to the corner of Howard and Franklin streets when she fell, and that she guessed it was about 50 or 60 feet off. Joseph Susco testified that he paid the fares and asked for transfers to Edmonson Avenue line; that he was not well acquainted with the city, and did not know where he was, but when the conductor "holled" to transfer to Edmonson avenue, the car came to a stop, and he got off; that the plaintiff got off right behind him, but "kind of hung on the car," and the car started before she was on the ground. There was full proof of the plaintiff's injuries offered by her.

John B. Falk, for defendant, testified that he was a passenger on the car, and saw the accident; that the car was going slow, following a wagon, and that, when about 60 or 70 feet from Franklin street, a man got off, and a woman followed him and fell in the street; that the conductor was then forward on the footboard, collecting fares; that the passengers called his attention to the plaintiff falling off, and he stopped the car and went back to see if she was hurt, and that the car had only moved up five or seven feet.

William Urban, the conductor, testified that he was in front, collecting fares; that the car was going very slow, following a wagon; that as soon as the wagon got out of the way the car started up, and somebody shouted to him that some one had fallen off, when he looked around, saw plaintiff falling, and stopped the car.

Clarence Ryon, the motorman, testified substantially as Urban did as to the movements of the car.

William A. Decource, a passenger, testified that the car was going very slow, "kept inching up, and stopping (not quite); it had not exactly come to a stop, but it would make a lurch and catch up to the wagon, and

¶ 2. See Carriers, vol. 3, Cent. Dig. § 1382.

then lurch back"; that he saw her rise as if to get off, and he said "the car ain't stopped yet," and she took her seat; that when the car was about 100 feet from Franklin street she jumped up and tumbled out of the car; that he did not see any one with her or get off just before her, but he saw "several parties making a dive to get off." Dr. Trimble testified that he examined plaintiff and could discover no evidence of any injury, and Dr. Preston testified that he had examined her and did not think she was suffering from locomotor ataxia. There were no other witnesses, but the following notice was admitted to have been posted in the car:

"Warning."

"No one is permitted to ride on the steps or platform, or get on or off when the car is in motion. Persons are warned of the danger. Cars stop to take on and let off passengers at near side of cross streets. Those violating this notice do so at their own risk. No officer or agent of the company has the authority to waive these regulations. Smoking is permitted on the three rear seats.

"Wm. A. House, General Manager."

The plaintiff offered six prayers, all of which were granted, and the defendant offered four, all of which were granted except the first, which asked an instruction that there was no evidence in the case legally sufficient to entitle the plaintiff to recover, and to the rejection of this prayer, and the granting of each of the plaintiff's prayers, the defendant excepted. This rejected prayer will be first considered.

The testimony of the plaintiff which we have recited goes to show that, being a passenger on defendant's car, and desiring to transfer to Edmonson avenue, notice was given by the conductor to change for that line, and the car was stopped, apparently to enable her and others to do so, and that, while attempting to alight, the car was started, and she was injured as alleged in the declaration. In the recent very similar case of *United Railways v. Beidelman*, 95 Md. 483, 52 Atl. 914, this court said: "That this was evidence going to prove the allegations of the narr., in respect to the negligence of the defendant, needs no argument or authority to establish. Proof of 'the occurrence of an accident and injury to a passenger is prima facie evidence of negligence in the carrier, and throws upon him the onus of rebutting the presumption by proving there was no negligence on his part. *Pittsburg & Conn. R. R. v. Andrews*, 39 Md. 353 [17 Am. Rep. 568]; *Phil. Wtl. & Balt. R. R. v. Anderson*, 72 Md. 519 [20 Atl. 2, 8 L. R. A. 673, 20 Am. St. Rep. 483]." The proof adverted to, taken by itself, making a prima facie case of negligence against the defendant, it only remains to inquire what appeared in the other facts of the case to rebut, excuse, or relieve the defendant from the consequences of such

negligence, and whether, if anything, this was properly submitted to the trying tribunal." In the light of this emphatic language, which we find applicable to the facts of the present case, there can be no doubt that this prayer was properly rejected.

All the plaintiff's prayers are objected to, on the ground that the plaintiff disregarded the warning posted in the cars, that they stopped to take on and let off passengers at near-side cross streets, and that, as the car had not actually reached the near side of Franklin street, the plaintiff, in getting off before reaching that point, even if the car had stopped, was guilty of such contributory negligence as to preclude recovery; and the fifth prayer was further objected to on the ground that there was no evidence to support the hypothesis that "the defendant's servants and agents might have seen the position of the plaintiff by using ordinary prudence and care, and might have avoided the injury."

As to the last objection, it is sufficient to say that the record does not disclose any special exception on this ground. *Albert v. The State*, 66 Md. 334, 7 Atl. 697, 59 Am. Rep. 159.

The plaintiff's first, second, and third prayers have been so often approved that they cannot be questioned in this case, unless there was such contributory negligence as required the case to be taken from the jury on that ground. In view of the assertion of such negligence now, in the argument on the granted prayers, it appears singular that a prayer was not offered by the defendant withdrawing the case from the jury on that distinct ground. But we are not to deal with the case as presented by the record.

The fourth prayer instructed the jury that if they found the plaintiff's fare was paid and a transfer was given her for Edmonson avenue; that as the car approached the transfer point the conductor called out, "Franklin street; transfer to Edmonson avenue," and the car came to a stop; and that while the car was standing still, and plaintiff was alighting and using ordinary care, the car was prematurely started, whereby the plaintiff was thrown to the ground and injured—then she was entitled to recover. This instruction does not require the jury to find that the car had reached the near side of Franklin street, at which point alone, the defendant contends, under the regulation of the company posted in the cars, the plaintiff had a right to get off; so that the question involved is, first, whether such is the true construction of the rule, and second, whether the conduct of the defendant's agent, notwithstanding such construction, did not lead her to believe that she had reached the place of transfer, and that she was directed or invited to leave the car when the car stopped, as stated in the prayer. The defendant's contention is that the regulation means that cars will stop only at the near side of crossings

to take on or let off passengers, and that any one getting on or off at any other place, and under any circumstances, is precluded from recovery, if injured by reason of the negligence of the company. But we cannot agree that such an inflexible and inexorable rule, fraught with such far-reaching consequences, can be properly deduced from the language employed. It is doubtless true that they can be required to stop for such purpose only at such places, and it is an entirely reasonable rule that a passenger should not have the right to stop a car in the middle of the block nor at the far side of a crossing, but the passenger's rights are not necessarily controlled by that regulation under all circumstances when the car does actually stop elsewhere. The first and obvious reply to the defendant's contention is that, if this was meant to be the rule, the word "only" should have been inserted, or, what would have been clearer still, to say, "passengers will be received and discharged 'only' when the car stops at the near side of crossings." Whether even that language would afford protection to the company against its own negligence in all cases, and under any circumstances, is a question we are not required to consider. But further, as was said in *Cason's Case*, 72 Md. 381, 20 Atl. 113, citing with approval *Siner v. Great Western R. W. L. R.*, 4 Exch. 123, "Judges cannot denude themselves of the knowledge of the incidents of railway traveling which is common to us all." We know that the street railways of large cities are used not only by their inhabitants, who may be presumed to be familiar with their habits and customs, as well as with most of their established rules and regulations, but they are used daily by thousands of strangers who have no knowledge of either. We know that in some cities the rule is to stop at the far side of the crossing, while in others, as in Baltimore, the stop is made on the near side, and it is equally important for the convenience and safety of those using the cars, as well as of pedestrians using the street crossings, to know what is the rule in this regard. We think, therefore, it is plain that the primary and principal purpose of this notice posted in the car is to inform the traveling public at which side of the crossing the car will stop, and not to establish an inflexible rule that no one will be received or discharged elsewhere; by virtue of which rule the courts can be called on to declare any attempt to get on or off elsewhere to be negligence per se, precluding recovery. If such contention is to prevail, then, when a car is blocked by a coal cart making delivery, or delayed by reason of an accident, or any other cause, at any other point than directly at the near side of a crossing, a passenger who should attempt to leave a car while standing still, no matter how careful in other respects, and no matter what the necessity for leaving, would have no remedy for the grossest negligence of the company, since

there can be, and should be, no comparison of the negligence of the parties. We cannot adopt an inflexible rule leading to such consequences. In *Cason's Case*, *supra*, it was said, there is an obligation imposed upon the passenger to observe the reasonable regulations of the company in entering, occupying, and leaving the car, and if a party be injured in consequence of a known violation of such regulations, unless compelled thereto by some existing necessity beyond his control, the company is not responsible. Thus, in *Wilkinson's Case*, 30 Md. 224, the violation of the rule was in entering the car by the front platform; and in *Foreman's Case*, 94 Md. 226, 51 Atl. 83, the plaintiff was standing on the platform while the car was in motion, thus occupying by his own choice a position forbidden by the rule of the company, and unsafe in itself, and the facts were the same in *Cason's Case*, except that there the plaintiff stood on the front platform, while in *Wilkinson's Case* he stood on the rear platform. In all those cases the negligence was shown by an act so prominent and decisive that there was no room for ordinary minds to differ as to its effect and character. In *Maugans' Case*, 61 Md. 61, 48 Am. Rep. 88, it was said: "Accidents occur and injuries are inflicted under an almost infinite variety of circumstances, and it is quite impossible for the courts to fix the standard of duty and conduct by a general and inflexible rule applicable to all cases, so that a departure from it can be pronounced negligence in law. The rule that requires a party before he crosses a railroad track to stop, look, and listen for approaching trains, which has been generally adopted by the courts, is the only one that approaches universality of application to a particular class of accidents. But there is no such general accord of judicial opinion and precedent in reference to attempts to leave a car while it is in motion. The cases cited on the briefs of counsel on both sides show very clearly that the weight of authority is against the proposition that it is always, as matter of law, negligence and want of ordinary care for a person to attempt to get off from a car when it is in motion." This was the language of Judge Miller in an opinion affirming a ruling of the lower court refusing to take the case from the jury, where the defendant was negligent in not giving reasonable time to the passengers to alight, but where it was claimed the plaintiff was negligent in attempting to alight after the train had started, and while incumbered with a valise in one hand and a basket in the other; and we think the language is directly and strikingly applicable to the facts of the present case.

It must be remembered that upon the hypothesis of this prayer, which is abundantly supported by evidence, the car was "nearing" the crossing, that it had actually come to a stop, and that it is not denied that the conductor had called, "Franklin street; trans-

fer to Edmonson avenue." The car was an open summer car, which from common knowledge may be said to be from 35 to 45 feet in length over all, and we know that the cars rarely run directly up to the crossing before stopping, so that the rear of this car towards which the plaintiff was sitting may be assumed to be about 50 feet from the crossing at its usual stopping place, and in this case the highest estimate of the distance was 100 feet. Under these circumstances, then, was it unreasonable for her to conclude that the car had stopped for the purpose of the transfer, and that the call of the conductor was a direction to her to get off then and there? We think not. In *Anderson's Case*, 72 Md. 528, 20 Atl. 4, 8 L. R. A. 673, 20 Am. St. Rep. 483, where the facts were very similar, except that the road was a steam railroad, and that the plaintiff got off on the left, or wrong, side of the train, the court said, "It is difficult to see why, after the speed was slackened, the name of the station was called out and the train stopped, unless it was intended that the passengers for that station should alight. The passenger who should draw this conclusion cannot be considered as forming an opinion which no reasonable man could entertain. The evidence does not inform us why the name was called out, and why the train was stopped, unless this was the purpose, nor does it show why, after a momentary pause, it afterwards slowly proceeded. If the discovery of the approaching train caused any change of purpose on the part of the conductor, it would have been reasonable to communicate this change to passengers whose safety might be affected by it. If any reason had been made known to the plaintiff for the stopping of the train and the announcement of the name of the station, we would have had more light on the nature and character of his act. But without some aid of this kind, we are unable to say that the inference of negligence on his part is certain and uncontrovertible, and consequently we cannot declare it as a question of law." Here, we are now informed from the evidence that the car was stopped because of the wagon in front of it, and that it moved on after the wagon had started up; but we are not informed why the direction to transfer was given when it was, and no communication of any kind was given to passengers to countermand or delay the transfer which had been directed. We find no material difference between that case and the present, and we cannot, therefore, declare the plaintiff negligent in law. The reasoning of *Maugans' Case* and *Anderson's Case* is supported by the leading case of *Bridges v. North London Railway Company*, in the House of Lords, 7 Eng. & Ir. Appeals, 213, in which a number of elaborate and instructive concurring opinions were delivered by the lords and justices, but it is unnecessary to protract this opinion by any citation from them.

The form of the plaintiff's fifth prayer is in accord with the principles laid down in *Armstrong's Case*, 92 Md. 564, 48 Atl. 1047, 54 L. R. A. 424, and we think there was testimony tending to place the defendant's agent in a situation affording him an opportunity to discover the plaintiff's peril by the exercise of reasonable care, in time to avert it. The conductor had announced the transfer, and if, after this announcement, the car stopped before it was safe to attempt to transfer, his attention should have been attracted thereby, and he should have suspended the collection of fares, in which he was engaged on the forward part of the foot-board on the same side, and should have warned passengers to keep their seats till further direction was given. The plaintiff's son-in-law had gotten off before her. Other passengers saw him get off, and saw her attempting it, and called to the conductor in time for him to see her falling, and we can perceive no reason why he could not have seen her in time to check her attempt, if his attention had been given where, under the existing circumstances, it was needed. The duties of a conductor upon rapid transit cars are numerous and exacting, and it should be said to their credit that they are generally discharged with commendable care and skill, but the safety of the public demands that carriers be held to the rule requiring them to exercise the highest degree of care and diligence practicable under the circumstances.

We think the whole law of the case was fully and fairly put before the jury by the prayers granted by the learned judge, in whose rulings we can discover no error.

Judgment affirmed, with costs above and below.

(97 Md. 429)

QUEEN CITY GLASS CO. v. PITTSBURG CLAY POT CO.

(Court of Appeals of Maryland. June 30, 1903.)

SALES—IMPLIED WARRANTY—BREACH—DAMAGES—RECOUPMENT.

1. A maker of clay pots used in the manufacture of glass, and made by a secret process, sold a certain number of them in an unburnt condition to a manufacturer, with the full knowledge that he intended to anneal such pots, and then use them in the manufacture of glass to melt and hold the materials used in the making of glass. Some of the pots became useless while they were being annealed, and others broke after they had been in use only a short time. *Held*, that there was an implied warranty of the pots, which covered their use in the glass furnace as well as the annealing process.

2. In an action by the seller to recover the price of the pots the purchaser was entitled to recoup the damages sustained on account of the breach of this implied warranty.

Appeal from Circuit Court, Allegany County; Ferdinand Williams, Judge.

Action by the Pittsburg Clay Pot Company against the Queen City Glass Company.

Judgment for plaintiff, and defendant appeals. Reversed.

Argued before McSHERRY, C.J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Benjamin A. Richmond and D. Lindley Sloan, for appellant. J. W. Scott Cochran, for appellee.

McSHERRY, C. J. This suit was brought by the Pittsburg Clay Pot Company, a body corporate, against the Queen City Glass Company, also a corporation, to recover the price of 17 clay pots sold by the former to the latter. The declaration contains the usual money counts. A plea denying the right of the Pittsburg Company to sue in the courts of this state because of its failure to comply with the provisions of chapter 270, p. 811, of the Acts of Assembly of 1898, was put in, which later on appears to have been demurred to, whereupon, under leave obtained, amended pleas of never promised, never indebted, and payment were filed. The case then went to trial before a jury, and resulted in a verdict for the plaintiff, the Pittsburg Company, upon which verdict a judgment was entered, and from that judgment this appeal was taken. There is but one bill of exceptions in the case, and that brings up for review the rulings on the prayers for instructions to the jury.

The clay pot company is engaged in the manufacture of clay pots for use in glass factories. The Queen City Glass Company carries on the business of making glass bottles. In the prosecution of that business clay pots about five feet high, four feet wide, with walls four inches thick, are used to melt and hold the materials of which glass is composed. The clay pots, when shipped from the establishment where they are made, are unburnt. When needed for use by the glass factory, they are placed in what is called a "pot arch," and subjected to an intense heat, reaching 2,000 degrees, and are kept there for several days. This process is called "annealing." When annealed, the pots are quickly transferred from the pot arch to the glass furnace, where they are filled with the materials out of which glass is made, and those materials are brought by the heat to a molten state, so that the glass blowers may fashion and shape the glass into bottles. In the process of annealing, some 8 or 9 of the 17 pots, for the price of which this suit was brought, cracked, broke, warped, bulged, or melted down and flattened out in the pot arch, and thus were rendered useless; whilst 4 or 5 of them, which had stood the annealing, cracked and broke in the glass furnace after two or three fillings, and the remainder lasted a much shorter time than such pots should be serviceable. It was shown in evidence that when the pots broke in the glass furnace the molten glass which they contained was spilled and wasted, caus-

ing a loss of \$200, and the molten material ran down into the eye of the furnace, cut the grate bars, and damaged the furnace to such an extent as to necessitate the expenditure of \$150 for repairs. It was further shown that the employes of the glass company were skillful and competent, and that they had used care in annealing the pots. It was proven that the pots were made of clay brought from Germany, Missouri, Kentucky, Pennsylvania, and other places; and that other ingredients were used in mixing the clay according to a secret formula known to the Pittsburg Company. In the nature of the case, therefore, it was impossible for the purchaser to discover any defects in the pots before they were placed in the annealing furnace, because no inspection could reveal any imperfections in their make-up or in the composition of the material of which they were constructed. The evidence further showed that, inasmuch as nothing could be discovered by inspection about the quality of the pots, or as to their fitness for the use for which they were intended, the glass company was compelled to trust to and rely upon the manufacture and the manufacturer for their quality and fitness; and that the Pittsburg Company knew exactly to what use the glass company intended to apply them, and what treatment in heating them would be necessary to put them in condition for use in the glass furnace. On the account rendered, and upon which the suit is founded, there is a credit of 5 per cent. allowed as a discount "in lieu of guaranty"; but this entry was explained by one of the witnesses to mean "merely a deduction for guaranty against breakage in transit, and not in satisfaction of any breakage of the pots in the pot arch or furnaces." At the conclusion of the evidence the plaintiff presented one prayer and the defendant three for instructions to the jury. The plaintiff's prayer was granted, but those of the defendant were rejected, and in their stead the trial court gave two instructions of its own. Those are the rulings of which error is predicated.

The prayer granted at the instance of the plaintiff, the appellee in this court, proceeded upon the theory that, if there was an express or implied warranty on the part of the vendor, it was a warranty that the "pots were reasonably fit for the purpose of being heated in" the "retort or annealing furnace to be prepared for use in the melting of glass." The defendant's first prayer, after setting forth hypothetically the facts substantially as we have narrated them, concluded with the legal proposition, deducible therefrom, that "said pots, when sold to the defendant, were sold upon an implied warranty on the part of the plaintiff that they were fit and serviceable for"—first, annealing or heating in the retorts, and, secondly, for heating and for retaining molten glass in the usual way of the manufacture of glass articles in the defendant's works. The dif-

ference between the two prayers lies in this: By the plaintiff's the warranty extended no further than the annealing of the pots, and did not cover their use in the glass furnace; whilst by the defendant's first prayer the warranty included both of the uses for which the pots were intended and were furnished, viz., annealing and capacity or ability to hold the molten glass. Upon these two prayers two questions arise, and they are: First. Was there a warranty? Secondly. If there was, what is its scope and extent?

1. There is no pretense that there was an express warranty. Does an implied warranty arise by operation of law out of the circumstances of the case? We need not go farther than the Maryland Reports to find an answer to that question. In *Rice v. Forsyth*, 41 Md. 403, this court adopted and approved the proposition laid down in *Jones v. Just*, L. R. 3 Q. B. 197, as follows: "Where a manufacturer contracts to supply an article which he manufactures to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment, and not upon his own." See *Osgood v. Lewis*, 2 Har. & G. 524, 18 Am. Dec. 317; 1 *Parsons on Cont.* 468; *Johnston v. Cope*, 3 Har. & J. 89, 5 Am. Dec. 423; *Hyatt v. Boyle*, 5 Gill & J. 110, 25 Am. Dec. 276; *Gunther and Rodewald v. Atwell*, 19 Md. 157; *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28. We think it is quite clear that the proposition just quoted is applicable. The evidence already referred to, if credited by the jury, demonstrates that the purchaser was compelled to rely on the skill and judgment of the manufacturer. The pots were formed of several species of clay. The clays were mixed according to a secret formula, and they were made into form and shape by hand, the process involving the addition of successive layers of the material. It was impossible for the purchaser to know, by an inspection or otherwise, whether the various component elements had all been used, or, if used, whether they had been used in proper proportions, or whether they had been skillfully manipulated, or whether the formula had been observed. Actual use of the pots was the sole method by which a defect could be discovered. They were manufactured for a special purpose, which was known to the vendor, and the vendee was bound to trust to the manufacturer, and to rely on his judgment. There could not well be a condition of circumstances more obviously within the doctrine of implied warranty.

2. What is the scope and extent of the implied warranty? The instruction given at the instance of the Pittsburgh Company limited the warranty to the annealing process, whilst the rejected first prayer of the glass com-

pany extended the warranty to the use of the clay pots in the glass furnace. If there was a warranty at all, upon what principle can it be said that it has been fulfilled or complied with if the thing warranted to be fit for a designated use disintegrates or breaks down either before it has been put to that use or in the very act of being used for the purpose for which it was designed? The clay pots were purchased to be used in the manufacture of glass bottles. Their ultimate use was, therefore, in the glass furnace. The annealing process was merely preliminary to their final use. Without being annealed, they were of no value to the purchaser. After being properly annealed, they were in a condition to be used in the glass furnace, provided they were free from inherent and hidden defects; and if, when thus used, they cracked, and permitted the molten glass to escape, they obviously were unfit for the purpose to which they were to be applied, and for which they had been manufactured and had been bought. It cannot be said that they were bought merely to be annealed, because both vendor and vendee knew perfectly well their real use was to hold in a fused state, and at a high temperature, the materials composing the glass. An implied warranty, arising as this one did, to be a warranty at all, must be coextensive with the use to which the thing warranted is intended to be put; and the use to which the clay pots were designed to be put, as previously stated, was the melting of glass in the glass furnace, and not the mere annealing of the pots; and this both buyer and seller fully understood. Many cases have been referred to on the brief of the appellant to illustrate this view, but it is not deemed necessary to do more than name them, or rather some of them, without quoting from them. *Cochran v. Jones*, 85 Ga. 678, 11 S. E. 811; *Shaw v. Smith*, 45 Kan. 334, 25 Pac. 886, 11 L. R. A. 681; *Omaha Coal, C. & L. Co. v. Fay*, 37 Neb. 68, 55 N. W. 211; and the copious notes to *McQuaid v. Rose et al.*, 22 L. R. A. 187. According to the conclusion just stated, there was error in granting the appellee's instruction and in rejecting the appellant's first prayer. The appellant's second prayer includes but part of the ground covered by the first. The granting of the first would render the second unnecessary. The appellant's third prayer relates to recoupment. Upon the assumption that the warranty extended to the clay pots in the glass furnace after they had been annealed in the retorts, the purchaser, the glass company, was entitled to recoup against the vendor's claim the amount of damages sustained by the vendee in consequence of a breach of the warranty. *Crook, Horner & Co. v. B. & O. R. R. Co.*, 80 Md. 338, 30 Atl. 701; *Harman v. Bannon*, 71 Md. 424, 18 Atl. 862. The third prayer should, therefore, have been granted.

The instructions given by the court in lieu

of the defendant's first and second prayers were at variance with the first of those two prayers, and, for the reasons which have induced us to hold that the defendant's first prayer should have been granted, the instructions given by the court ought not to have been given. Because of the errors indicated—that is to say, because of the granting of the plaintiff's prayer, the rejection of the defendant's first and third prayers, and the granting of the court's two instructions—the judgment must be reversed, and a new trial will be awarded.

Judgment reversed, with costs above and below, and new trial awarded.

(97 Md. 573)

ROGERS v. ROGERS et al.

(Court of Appeals of Maryland. July 1, 1903.)

TRUSTS—EXECUTION BY SURVIVING WIFE—CANCELLATION—GROUNDS—FIDUCIARY RELATIONS—POWER OF REVOCATION—TESTAMENTARY DISPOSITION.

1. A husband expressed a desire in his will that his wife, on collecting the insurance on his life, deliver it to his trustee to be invested, the interest to be paid to her for life, and the principal after her death to go to their children, in the same manner as he had disposed of his estate. On reading the will at her husband's request, she expressed satisfaction with it. After his death she delivered the proceeds of the policies to the trustee, executing a declaration reciting the provision of the will, and ratifying, confirming, and accepting all its conditions. She knew the policies, as stated in the will, were for her exclusive benefit. The declaration was voluntarily executed, and she afterwards expressed herself as being glad she had set aside the funds in conformity with her husband's wish. The husband's only desire was to preserve the funds for her benefit. After a lapse of 14 years, on the trustee's refusal to advance to her a portion of the principal, she became dissatisfied, and instituted proceedings to cancel and annul the declaration. *Held* insufficient to warrant annulment, on the theory that a fiduciary relation existed between the parties, and that equity would raise a presumption against the validity of the transaction.

2. The complainant having executed the declaration of trust with the deliberate purpose of conforming to her husband's wish, the absence of a power of revocation in the instrument was of no consequence.

3. The absence of a power to make a testamentary disposition could not avail to invalidate the declaration, as the will secured the property to complainant's heirs after her death.

Appeal from Circuit Court of Baltimore City; Geo. M. Sharp, Judge.

Bill by Elizabeth C. Rogers against Anna Virginia Rogers and others to cancel and annul a declaration of trust. From a decree in favor of defendants, complainant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Thomas Hughes, for appellant. George Whitelock and Edward L. Koontz, for appellee.

PEARCE, J. Philip Rogers died in 1889, leaving a will dated May 16, 1888, in which

he directed his executor, Alonzo Lilly, Jr., his partner in the firm of Lilly, Rogers & Co., to convert his entire estate into cash, and, after the payment of all charges and debts, to pay over the residue in trust to the Safe Deposit & Trust Company of Baltimore, to be by it invested in sound interest-bearing securities, the interest thereon to be paid to his wife, Elizabeth C. Rogers, in equal quarter-yearly installments during her life, and the said securities to be equally divided, after her death, among their children, with a provision that, if there should then be any child or children of a deceased parent, they should take, in equal proportions, the deceased parent's share.

The third item of the will lies at the foundation of this case, and is as follows:

"Inasmuch as my life has been largely assured, to wit, to the amount of at least \$29,500, in various life assurance companies of this country, for the exclusive benefit after my death of my beloved wife, Elizabeth C. Rogers, provided she survive me, and inasmuch as I have paid comparatively large sums of money to keep the policies thus assuring my life alive, I desire that my said beloved wife shall, as soon as she shall have collected, after my death, the amounts due to her under said policies, hand over the same as they are respectively collected to the said Safe Deposit & Trust Company of Baltimore in trust, that the said company may invest the same and dispose of the interest and principal of such investment as is particularly set forth in the second clause of this will."

Between the 17th day of January, 1889, and the 21st day of February, 1889, Elizabeth C. Rogers collected from five separate insurance companies the proceeds of five policies of insurance payable to her upon the life of her said husband, amounting to the sum of \$29,459.53, and, as each policy was paid to her, she paid over the whole amount thereof, less \$1,000 reserved from one of said policies for family expenses, to said trust company, and on the 24th day of January, 1889, executed and delivered to said trust company the following declaration of trust:

"I, Elizabeth C. Rogers, widow of Philip Rogers, deceased, having delivered and paid over to the Safe Deposit & Trust Company of Baltimore the sum of seven thousand dollars, received by me from the National Life Insurance Company of Vermont, as the proceeds of a policy of insurance upon the life of my late husband, do hereby declare that said sum has been handed over for the purpose of conforming to the desire expressed by my husband in his will, dated May 16, 1888, and left for probate in the orphans' court for Baltimore city, and do declare that it is my purpose to deliver over to said company all further sums, excepting \$1,000 to be reserved by me for family expenses, that may come into my hands from all other life insurance policies, in order that the same may

be invested by said company for the trust purposes and upon the conditions and terms set forth in said will, and thus become a part of said trust estate, and do hereby agree to ratify, confirm, and accept all the conditions of said will.

"Witness my hand and seal this 24th day of January, 1889.

"Elizabeth C. Rogers. [Seal.]

"Test: Geo. McCaffray."

This was acknowledged, same day, before Geo. McCaffray, J. P.

On April 18, 1889, the trust company sent Mrs. Rogers a statement showing in detail the amounts received from her and the investments thereof. On three occasions since then, advances (amounting in all to \$450) have been made from the principal to Mrs. Rogers, at the request of her children, to relieve her necessities; but the residue of the fund remains intact, invested as shown in said statement, and the net income, less a commission of 5 per cent. thereon, has ever since been regularly paid to Mrs. Rogers. In October, 1902, Mrs. Rogers applied to the trust company for an advance of \$2,000 from the principal, to be loaned to her son, Thornton Rogers, for use in his business as a printer and bookbinder; and, this being declined by the trust company, on the 22d of October, 1902, she executed and tendered to the trust company a deed renouncing all interest in the trust created under her husband's estate (which had proved to be only \$5.50) and also under the terms of her own declaration of trust, for the purpose of accelerating the vesting of the remainders created by the will and the declaration of trust; and, the company declining to accede to the termination of the trust in that way, on the 7th of November, 1902, she filed the bill in this case against the trust company and against her own four children, and the four infant children of her two sons, praying that her declaration of trust "be canceled and annulled, and that the so-called trust funds held thereunder may be assigned to her as her individual property."

The bill alleges that at the time of the execution of her husband's will he read the same to her, and reiterated to her his wish, expressed therein, in reference to her policies of insurance; that at the time of his death she was 53 years of age, wholly unacquainted with business affairs, and accustomed to rely upon and be controlled by her husband in all things; that, not understanding or knowing that she was at liberty to ignore his wishes thus expressed, she paid the proceeds of said policies to the trust company, and executed to it the declaration of trust upon the request of its president, Mr. Newcomer, but that she never read it, or heard it read, and that it was never in her possession, and that she signed it as a matter of course; that the payment of the proceeds of the policies and the execution of the declaration of trust were not her free, voluntary, unbiased, and un-

constrained acts; that she did not know, and was not told by any one, that there was anything else she could do, or that she was at liberty to treat the proceeds of said policies as her own, and that, if she had known this, she would not have paid the money, nor executed the declaration of trust; that said trust company occupied a fiduciary relation toward her by reason of its designation as trustee of her husband's estate; that no explanation was made to her by any officer of said company of the nature of that paper, nor of her rights in the proceeds of said policies; and that she had no idea she was disposing of her own property in executing the declaration of trust. It further alleges that the trust company was then, and now is, engaged in administering trusts for profits, and that the said Newcomer, as president of said company, was influenced to procure said declaration of trust, in order to secure the control and use of the proceeds of said policies, and that the railroad bonds in which said proceeds were invested were purchased at a high premium from a business firm of which Newcomer was a partner, and that he was also president of one of these railroads. It further alleged that the declaration of trust contained no power of revocation on her part, no power to devise the fund, and no restriction upon her power to alienate her life estate, but reduced her to the position of an annuitant upon her own estate; that only within the last 30 days she had learned, from her nephew and counsel, Herbert A. Smith, that these funds were absolutely hers, and that she was at liberty to ignore and terminate the trust; and that she then applied to the company to consent to its termination, and, upon its refusal, filed this bill.

The Safe Deposit & Trust Company answered fully, denying all the charges of fraud, misrepresentation, and suppression in procuring the declaration of trust, and averring that it was executed by the plaintiff with full knowledge of the nature and extent of her interest under the policies of insurance, and of the fact that she was at liberty to conform to, or ignore, her husband's wishes in reference thereto, as she should determine, and that she did in fact disregard his wishes in part, in reserving from said trust \$1,000 derived from said policies; that said company never occupied any fiduciary relation to the said Philip Rogers in his lifetime, nor to his estate, until November 1, 1890, and then only as to the sum of \$5.50, being the net amount received from said estate after payment of debts, and that it never occupied any fiduciary or confidential relation, either as trustee or agent for the plaintiff, until after and by virtue of the execution of said declaration of trust, and that the railroad bonds in which the funds were invested were purchased in good faith, at their full market value, and were then worth from 10 to 15 per cent. more than when purchased; that

after the death of her husband his executor brought her to the company's office and introduced her to its vice president, Mr. Marshall, who introduced her to its president, Mr. Newcomer, since deceased, to whom she stated her purpose to carry out the wishes and request of her husband as expressed in his will, and voluntarily and deliberately executed the declaration of trust, prepared at her request, and with full and explicit knowledge of its contents, purpose, and effect; and that the trust thus created was irrevocable by reason of the contingent interests thereby created, either by the plaintiff's renunciation of her life interest under said trust, or by any decree of court.

The plaintiff's four children answered, consenting to the decree prayed; and the infant children of her two sons answered by their guardian, submitting their rights to the protection of the court. A large amount of testimony was taken, and after full hearing the bill was dismissed, and from that decree this appeal is taken.

There is no allegation in the bill of any mental incapacity on the plaintiff's part; but three of her children, who were then aged, respectively, 20, 18, and 12 years, testified that when the declaration of trust was executed she was incapable of executing a valid deed or contract; their opinion being based entirely upon the fact that she was inexperienced in business and greatly distressed by her husband's death. Dr. Sellman, who was the family physician, during Mr. Rogers' life and ever since, testifies that she was then just as capable of transacting business as she ever has been, and that in his judgment she was perfectly competent to execute a valid deed or contract; and Mr. Lilly, the executor, who had known her many years, and Mr. West, who had been with Mr. Rogers in his business since 1872, unhesitatingly say she was perfectly competent for that purpose. We may therefore safely dismiss this question without further comment, except to remark that the testimony of all the children confirms that of Mrs. Rogers, that her husband's disposition was a very lovely one, that he was always kind and considerate of her, granting her wishes in every way in his power, and, in the language of Thornton Rogers, "never seeking to coerce her, but treating her in all respects as his equal."

The plaintiff's own testimony cannot be read without producing the conviction that she is a woman of strong mind and great caution, and it is due to her to add that a regard for candor and truth is apparent in all she says. Upon her examination in chief, she stated that, when her husband executed his will, he gave it to her to read, and, after she had read it, repeated his wish that she should deliver the proceeds of her insurance policies to the trust company as requested in the will, and asked if she was satisfied with the will, and that she said she was, but she would like to continue to carry on the drug

business; but he said: "Let the Rogers girls be a warning to you." These were his brother's children, who tried to carry on their father's business and lost everything. She said she supposed her husband had entire control over these policies; that his request was his will, and she had to abide by it; that the declaration of trust was given to her to read, and she signed it as a matter of course, without any explanation from any one of her rights in the matter; that she was never told, and never knew, until a short time before filing this bill, that she could have ignored her husband's wishes in this regard; and that, if she succeeded in this suit, she intended to let her son Thornton have \$2,000, and to make a will so that her own children should have the interest on the whole fund for life, and the principal go to their children on their death. On cross-examination she said she read the will only once in her husband's lifetime, when he showed it to her, but after his death read it a number of times; that during his last illness she told him again she would like to carry on the drug business, and he replied, "No! No! Let the Rogers girls be a warning to you;" that she went with Mr. Lilly to the office of the trust company, and the declaration of trust was executed there, but she could not remember who was present, or whether she went more than once before its execution, or anything that was said about its execution; that they just gave it to her to sign, and she thought she had to sign it; that she had no recollection of making any proofs of loss, though she knew several policies, amounting to \$29,500, were payable to her; and that she was quite sure she had received no money or checks for any of these policies, and had paid no money and indorsed no checks to the trust company. She said she did not know when or by whom the declaration of trust was suggested or prepared, but she admitted it was handed her to read, and she supposed she read it, since, as far as she knew, she had never signed any paper without reading it; that she knew these policies were, as stated in the will, for her "exclusive benefit," and that this meant "entirely and absolutely" for her, so that after his death they were hers; that she understood a request was not an imperative command, and that no one told her she had no control over the policies, but that she "thought that was the thing for her to do"; that Mr. Newcomer died about April, 1901, and that she never raised any question during his life as to the validity of the trust; that she could not say who showed the will to Mr. Marshall or Mr. Newcomer, and that she could not recollect any conversation on the subject with either; that she does not charge that either of these gentlemen in any way misled her, or made any representation to induce her to execute the paper; that she did not charge Mr. Lilly, or any one, with misleading her or influencing her in the matter, but that, if she had known she could

have controlled the money, she would have acted differently; that she could not remember telling Mr. Marshall that she had always been glad she had complied with her husband's request in reference to these policies, and never wished the investments disturbed, and was quite sure she did not do so; that she could not recollect that Mr. Newcomer told her it was optional with her to make the trust; that she could not explain how it was that \$1,000 was reserved from the operation of the trust, but that she did not suggest it, and that when these proceedings were authorized she left everything to her counsel, Mr. Hughes; and that she executed the renunciation of her life interest under the trust in favor of her children, because she supposed that was the right way to go about the matter, and that she did it freely and voluntarily for that reason, and because her children requested her to do it.

It thus appears that it was only after the lapse of 14 years from the death of her husband, after the death of Mr. Newcomer, with whom alone the transaction was conducted, and after the failure of her son to obtain from the trust company the advance he sought, that she expressed any dissatisfaction and was induced to take these proceedings. It is also to be observed that she has forgotten almost everything which the testimony shows occurred at that time, such as the making of the proofs of loss by her, the receipt of checks payable to her order for the proceeds of her policies, their indorsement by her to the trust company, and her subsequent declaration to Mr. Marshall that she was well satisfied with what had been done and under no circumstances wished her investments disturbed. Mr. Lilly testified that the policies payable to Mrs. Rogers were kept at her house and were never in his possession; that he collected only the policies payable to him and to the estate, and that he had no connection with the proofs of loss under her policies, nor with the payment or transfer of their proceeds to the trust company; that he went with her to the trust company's office on her first visit, introduced her to Mr. Marshall, and stated the purpose of her visit, but did not see Mr. Newcomer, and had no knowledge of the execution of the declaration of trust, or of what was said at that time; that Mrs. Rogers asked no questions of him as to her right to control these policies, and was thinking only of one thing, the security for her investments and complying with the terms of the will. Mr. Marshall testified that Mr. Lilly introduced Mrs. Rogers, and handed him a copy of the will, stating that Mr. Rogers' estate would be practically nothing; that after reading the will he introduced Mrs. Rogers to Mr. Newcomer, and communicated to him the information received from Mr. Lilly; that he could not recall any details of the interview between Mr. Newcomer and Mrs. Rogers, but the

result was that Mr. Newcomer prepared a draft of a declaration of trust to be executed by Mrs. Rogers, a copy of which remained in Mr. Newcomer's portfolio several days before it was executed; that the only compensation received by the trust company was a commission of 5 per cent. upon the income; and that when Mrs. Rogers, in 1894, asked for the small advances then made, she said she never wanted the bonds disturbed, and had always been satisfied and glad that she had set aside these funds to conform to her husband's wish.

With this outline of the testimony, which we have felt to be necessary to a proper understanding of the case, we may consider the legal principles to be applied. The position of plaintiff's counsel is that the doctrine of fiduciary relations "extends to dealings between husband and wife," and that in all transactions between persons occupying such relation "equity raises a presumption against their validity which can only be overcome, if at all, by clear evidence of good faith, of full knowledge, and of independent consent and action," as laid down in *Pomeroy's Equity*, §§ 956, 957, 963; and he cites in support of this position the case of *Livingston v. Hall*, 73 Md. 397, 21 Atl. 49, in which the court said that "a gratuitous conveyance by a wife, of her property to her husband will be held void, unless it affirmatively appears, from the attending circumstances or otherwise, that it was her voluntary act, free from any undue influence exercised by her husband." Conceding this statement of the law to be correct, it cannot have the controlling effect assumed by plaintiff's counsel; for, whatever influence Philip Rogers may have possessed over his wife, it is certain, from her own testimony, that he did not seek to exert it unduly during his life. He never mentioned the subject of this trust to her, until he handed her his will for her examination, and he couched the reference therein to her own policies of insurance in the language of request, and laid stress upon the fact that these policies, as she already knew, were for her "exclusive benefit." It must be observed that he exacted no promise from her to comply with his request, and that his question whether she was satisfied with the will, and her answer that she was, would have been equally appropriate, if no request as to her policies had been made, and that, logically, the inquiry as to her satisfaction must refer rather to what he had done, than to what he had requested her to do. But, conceding, as we must, that this request was embodied in the will in order to give it a moral force which it might not otherwise have, the case is not brought within the principles above invoked, because here there was no "dealing between husband and wife," no "transaction" between persons, one of whom occupied a fiduciary relation to the other, and which "transaction" could be made the sub-

ject of rescission by the courts. The only influence which could be exerted over her by her husband's request, when she was called on to act in the matter, was the silent, powerful, and sacred influence which the last request of a wise and devoted husband, made in the truest interest of herself and their children, ought to exert over an equally devoted wife.

Referring to the case of *Huguenin v. Basely*, 14 Ves. 273, so often quoted in cases of this character, there was nothing withheld from Mrs. Rogers by her husband which he was bound to communicate to her. She has testified she knew these policies were absolutely hers, and the will so declares. She knew that the effect of creating this trust would be to substitute a life estate for her absolute estate, and she knew that her husband's motive in advising and requesting as he did was to guard her against misfortune and to preserve to her, throughout her life, the fund for the accumulation of which he had toiled so long, and in doing which he had reduced his own estate to practical insolvency. He never again referred to the request made in his will. In his last illness, however, she did, again expressing her wish to continue the drug business, and his only reply, not in the language of command, or of authority, but of affectionate expostulation, was, "No! No! Let the Rogers girls be a warning to you." No trust was executed during his life, and she had nearly a year for reflection upon his request, undisturbed by any importunity or solicitation upon his part, before he died. He left his request to repose during the remainder of his life, and after his death, upon the foundation upon which alone it was originally rested, her own confidence in the wisdom of his judgment and the disinterestedness of his motives in making the request. Can there, then, be any doubt as to how her intention to comply with this request, was produced? Can it be attributed to anything else than her own fixed purpose, with full knowledge and understanding of the nature, effect, and consequences of the act, to adopt his advice and fulfill his request? He secured no benefit or advantage through the declaration of trust, other than the assurance, if knowledge of earthly things can penetrate the veil of death, that thereby she would be secured against her own inexperience, against her own possible improvidence, or the importunity of her children in the future, while they would be equally protected in the ultimate enjoyment of that which, though legally hers in the fullest sense, came exclusively from his exertions, and partook of all the essential qualities of a patrimonial estate.

Nor can we find that the trust company bore any fiduciary relation to her until after the execution of the declaration of trust. It had not even accepted the trust created by the will as to the testator's own estate, until No-

vember 1, 1890, nearly two years after the execution of her declaration, when the \$5.50 which constituted the whole estate was turned over to it. Mr. Lilly had advised Mr. Marshall, in Mrs. Rogers' presence, that her husband's estate would be practically nothing. She came voluntarily to the company, bringing a copy of the will, for the express purpose of fulfilling its request. The will declared these policies to be exclusively for her benefit, and there could be no obligation resting upon the company to attempt explanation of a fact which was patent upon the face of the will, and which it must be presumed was as plain and clear to Mrs. Rogers' intelligence as to that of the officers of the company. It secured no advantage under the declaration of trust, which does not even provide for any commissions, leaving these to be regulated by custom or by order of court. But, if it had conferred a right to a fixed commission, this would not have altered the case, since it was held in *Brown v. Mercantile Trust Co.*, 87 Md. 392, 40 Atl. 256, that the law regards reasonable commissions as compensation for services rendered, and not as a benefit granted by the deed. It is true that, whenever any one proposes to divest himself of rights and constitute a trustee, whose duty it may become to enforce a trust thus created, full opportunity should be given for consideration before taking such irrevocable step. Here there was no undue haste; for, though the declaration of trust was prepared by Mr. Newcomer at the first interview with Mrs. Rogers, Mr. Marshall's uncontradicted evidence is that it was not executed until several days later. Under these circumstances, then, can it be said that this declaration of trust is *prima facie* void, and that the burden is on the trustee to establish to the full satisfaction of the court that it was the free, voluntary, unbiased act of the grantor? We think not. In *Williams v. Williams*, 63 Md. 405, Judge Miller, with the concurrence of Judge Robinson, said: "It would seem to be clear that there must be some gift or conveyance, or some bargain, purchase, or other business transaction, by means of which the party holding the position of influence acquires property, or obtains some pecuniary benefit or advantage, in order to bring this equitable rule into operation. It cannot, in reason, be applicable where the deed simply settles the estate and property of the grantor upon himself for life, and after his death transmits it to his own heirs at law. If a party, capable of disposing of his property, chooses, for the purpose of protecting it from his own improvidence, or for any other reason, thus to settle it, why should a court of equity look with suspicion upon a transaction simply because he has made his father or his solicitor the trustee in the deed of settlement?"

For the purposes of the case before us we might have omitted the last line of the passage we have reproduced, which goes farther

than is necessary in this case, where, as we have shown, no fiduciary relation existed between the settlor and the trustee; but we have preferred to quote the passage in full. With regard to it, we may repeat here what was said in *Brown v. Mercantile Trust Co.*, supra, in reference to a passage from the same opinion: "This was part of a dissenting opinion, it is true, but there is nothing in the opinion of the court in conflict with it, and the utterance of so able and experienced a judge, concurred in, as it was, by the late Chief Judge Robinson, is undoubtedly entitled to great consideration." We find nothing in the opinion of the court in that case in conflict with the passage we have cited, though the court refused to apply the view of the law there expressed to the case before them, on the ground that the deed in that case provided that in certain contingencies the whole estate should go to the trustee, who was the grantor's father; and in referring to this Judge Bryan said: "It would be in vain to argue that there was no benefit conferred on the father by the deed." With this expression of the court, and with its conclusion upon the whole case, we are in full accord, and have referred to the opinion of Judge Miller only as applicable to the facts of the present case.

We do not regard the absence of a power of revocation or of testamentary disposition as requiring any consideration in this case. As has been said: "There is a class of voluntary settlements to which powers of revocation are appropriate, and another class to which they are not, and it is fairly well settled that each case depends, in this regard, upon its own facts." We think this case falls within the latter class. If Mrs. Rogers understood her rights in the matter, and executed the declaration of trust with the deliberate purpose of conforming to her husband's request, it would have been as clearly out of place, although for different reasons, to have inserted a power of revocation, as this court said it would have been in *Brown v. Mercantile Trust Co.*, supra, where his purpose was to protect himself from his own improvidence. Nor can the absence of a power to make testamentary disposition constitute any valid objection, since the deed transmits the property after her death to her heirs at law, and thus leaves its devolution where the law would have carried it if no trust had been created and she had died intestate. In *Whitridge v. Whitridge*, 76 Md. 83, 24 Atl. 645, the court said: "It is highly improvident for a young woman, just 21, and about to be married, to divest herself by deed, forever and irrevocably, of all title to and control over her property, without the slightest reference to or provision for any of the contingencies which might arise in the future in the new relation of life upon the threshold of which she stands. It is equally improvident in one so circumstanced to surrender by such a conveyance all testamentary power over the bulk

of her estate, save the right to appoint among persons of a designated and selected class, to tie it up beyond recall, and to abandon all participation in its investment." But what would be unwise and improvident in such a case is far otherwise in a woman of 53, unaccustomed to business, deprived by death of the daily counsel and aid of her husband, possessed only of a moderate competence provided by his frugality and toil, and with infant children to be reared and educated. In such case, every consideration of prudence and sound judgment would dictate the adoption of some plan by which her little store might be guarded against the misfortunes which lie in wait for inexperience, and might be preserved intact for her and her children. She stood, not upon the threshold of a new life, but over the ashes that lay cold and gray upon the hearthstone of the sundered family, and no wiser or more provident course could have been pursued than that pointed out by the affectionate solicitude of her husband.

The law applicable to cases of this character has been so fully and ably considered in the long line of cases in Maryland, and notably in the recent cases of *Williams v. Williams*, 63 Md. 371, *Whitridge v. Whitridge*, 76 Md. 54, 24 Atl. 645, and *Brown v. Mercantile Trust Co.*, 87 Md. 377, 40 Atl. 256, that there can be no excuse for protracting this opinion by any further discussion. If the testimony in this case satisfied us that Mrs. Rogers did not know that she had absolute control over these policies, and believed that she had no power to refuse to execute the declaration of trust, and would not have done so but for such belief, we should feel constrained to declare the deed a nullity, however disastrous the consequences to her. But we cannot reconcile her statement to that effect with the pervading evidence of her general intelligence, quick perception, and marked caution in dealing with legal papers during her long examination as a witness; with her apparent satisfaction with her action throughout 14 years, and with her declaration to Mr. Marshall of this satisfaction. We are not to be understood as questioning her sincerity, for throughout that trying ordeal her desire to state only the truth was made apparent. But she has been subjected to the most powerful of all influences to maternal affection, the importunity of children, who, having grown to manhood, are now experiencing the responsibilities that altered meager incomes and the exigencies of business competition, and have become weary of waiting for the distribution which would relieve present necessities, and enable them to enlarge their sphere of operations. Mrs. Rogers' infirmity of memory is shown by her complete forgetfulness of all the circumstances attending the collection and transfer of the proceeds of these policies, as established by other evidence, and of the circumstances attending the execution of the declaration of trust; and this forgetfulness leads us irresistibly to conclude that she has also forgotten, what she

indeed practically admits in one breath, while in the next she denies it, that she knew these policies upon her husband's death belonged absolutely to her. In this case, as in many others, the wish is father to the thought, and under pressure from loved ones generates belief. Protection against one's self is sometimes more needed than against others, and, when this is shown to be the case, it is our duty to extend it, if we can lawfully do so.

For the reasons we have given, the decree of the circuit court will be affirmed.

Decree affirmed, with costs to the appellee.

(97 Md. 539)

JOESTING v. MAYOR, ETC., OF BALTIMORE.

(Court of Appeals of Maryland. July 1, 1903.)

TAXATION—LEVY—STATUTORY COMMUTATION—VIOLATION—REMEDY—APPEAL TO CITY COURT—EQUITY JURISDICTION—CONSTITUTIONAL LAW—VIOLATION OF CONTRACTS—CONTRACT BETWEEN STATE AND CITY.

1. Acts 1888, p. 113, c. 98, providing for annexing to a city certain territory, and that the county rate of taxes should continue in force within such territory until 1900, and should not be increased after 1900 upon landed property until streets should be opened, and there should be at least six dwellings or storehouses on each block of ground so formed, did not constitute a contract between the state and the city; and thus Acts 1902, p. 199, c. 130, defining the terms used in the act of 1888, and in effect continuing in force the county rate of taxes on the annexed territory until it should become urban property, within the meaning of the act of 1902, is not unconstitutional, as impairing the obligation of a contract.

2. The assent to annexation of a majority of the voters in the annexed district as a condition on which the act should become operative did not make the act a contract.

3. The contract, if any, would be one between the people in the annexed district and the state, and one to which the city would not be a party, and of an impairment of which it could not complain.

4. Acts 1898, p. 336, c. 123, § 170, providing that persons aggrieved by assessments made by the appeal tax court of a certain city, because of failure to abate or reduce an assessment, may by petition appeal to the city court to review the assessment, covers only illegal or erroneous assessments, and affords no remedy in the courts for illegal levies made by the mayor and council, with which the appeal tax court has nothing to do.

5. Although Acts 1898, p. 336, c. 123, § 170, provides for appeal from the appeal tax court to the city court in cases of erroneous valuation of property by the former tribunal, yet for erroneous classification of property for taxation no remedy is given by that section.

6. There being no statutory remedy, one whose property is subject only to the county rate of tax, under Acts 1902, p. 199, c. 130, defining the terms used in Acts 1888, p. 113, c. 98, providing that certain territory annexed to a city should be subject only to the then current rate of county taxation until specified conditions should be fulfilled, may obtain relief in equity by injunction from an illegal levy and collection of the current rate of city taxes on his property.

Appeal from Circuit Court No. 2 of Baltimore City; John J. Dobler, Judge.

Bill for an injunction to restrain levy of unlawful taxes by Henry Joesting against the

mayor and city council of Baltimore. From a decree dismissing the bill, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, and SOHNMUCKER, JJ.

Isidor Rayner and Isaac Lobe Straus, for appellant. Olin Bryan and Charles W. Field, for appellee.

McSHERRY, C. J. There are two questions in this case. The first is this: Is the act of assembly of 1902 (chapter 130, p. 199) constitutional? And the second is this: Has a court of equity jurisdiction to restrain the levying of taxes which, if levied, would be unlawful? These two questions will be disposed of in the order in which they have just been stated.

First. By an act passed at the January session of 1888, and known as chapter 98, p. 113, provision was made for annexing to the city of Baltimore part of the territory then within the limits of Baltimore county. By that act the voters residing in the districts intended to be annexed to the city were given an opportunity to decide by ballot whether those districts should be brought within the city's limits. The majority of the voters in two of the districts cast their votes in favor of annexation. In the other the majority was against annexation. By section 19 of the act of 1888 (Acts 1888, p. 127, c. 98) it is enacted in substance that until after the year 1900 the property situated in the annexed districts should remain assessed at the valuation fixed by the Baltimore county authorities, and that the owners of that property should only be charged at the rate of 60 cents on the \$100, that being the Baltimore county rate which was current when the act of 1888 went into effect. The same section further provided that from and after the year 1900 "the property, real and personal, in the said territory so annexed, shall be liable to taxation and assessment therefor, in the same manner and form as similar property within the present limits of the said city may be liable: provided, however, that after the year 1900, the present county rate of taxation shall not be increased for city purposes on any landed property within the said territory, until avenues, streets or alleys shall have been opened and constructed through the same, nor until there shall be upon every block of ground so to be formed, at least six dwellings or storehouses ready for occupation."

The validity of this statute was assailed on various grounds, but in the case of *Daly v. Morgan*, 69 Md. 460, 16 Atl. 287, 1 L. R. A. 757, it was fully and finally upheld. In the year 1900 the appeal tax court of the city of Baltimore proceeded to revalue the property in the annexed districts, or the "belt," as those districts have been called, and the city levied on the owners for the year 1900 the then current city tax rate, instead of the

60-cent rate contemplated by the statute. That proceeding provoked litigation. Sundry property holders filed bills in equity seeking by injunction to restrain the enforcement of those levies, and the cases were disposed of by this court in 1901. *Sindall v. City of Baltimore*, 93 Md. 535, 49 Atl. 645. At the next session of the General Assembly, an act was passed that defined the terms used in the original act of 1888 (chapter 98, p. 113), and that is the statute which is now attacked as unconstitutional and void. By this last-mentioned act "landed property" was defined to mean "real estate, whether in fee simple or leasehold, and whether improved or unimproved. 'Until avenues, streets, or alleys shall have been opened and constructed' shall be construed to mean until avenues, streets, or alleys shall have been opened, graded, curbed, or otherwise improved from curb to curb, by pavement, macadam, gravel, or other substantial material; the words 'avenues,' 'streets,' and 'alleys' being herein used interchangeably. 'Block of ground' shall be construed to mean an area of ground not exceeding 200,000 superficial square feet, formed and bounded on all sides by intersecting avenues, streets, or alleys, opened, graded, curbed, and otherwise improved from curb to curb, by pavement, macadam, gravel, or other substantial material as above." Acts 1902, p. 190, c. 130. The mayor and city council, treating the act of 1902 as invalid, proceeded to levy against the appellant, and others living in the belt and similarly situated, the current city rate for 1903, whereupon the pending bill was filed to restrain the levy and collection of that tax. The effect of the act of 1902 is to retain the 60 cent rate in the belt until the landed property there situated becomes urban property, within the meaning of the terms employed in that act. The sole ground upon which its validity is questioned is this: that it impairs the obligation of the contract supposed to be involved in the act of 1888. If, however, the act of 1888 is not a contract, the contention of the city must fail, and a like result must follow, even upon the assumption that the act of 1888 constitutes a contract, if the city was not a party to that contract.

We have no difficulty in holding that the act of 1888 neither evidences nor contains the constituents of a contract. The purpose of the act was to enlarge the municipal limits of the city of Baltimore with the consent of a majority of the voters residing within the territory proposed to be annexed. In carrying into effect that purpose provision was made, amongst other details, with respect to the rate of taxation to be levied on the inhabitants brought within the city; but that provision was merely the exercise by the General Assembly of its undoubted authority over the subject of taxation. As was said in *Daly v. Morgan*, *supra*, the act of 1888 created separate taxing districts, and fixed within their outlines a definite

rate for a prescribed period of years. It therefore conferred upon the city of Baltimore a power to tax individuals who, prior to its passage, had not been within the taxing jurisdiction of the mayor and city council. But the grant of that power to the municipality was not the grant of private property, nor the creation of a vested right; much less was it a contract. *Williamson v. New Jersey*, 130 U. S. 189, 9 Sup. Ct. 453, 32 L. Ed. 915; *New Orleans v. New Orleans Waterworks*, 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943, and cases cited in the court's opinion. The power to tax conferred by the state upon one of its own municipalities is, in its last analysis, the mere transfer by the state to its own creature of authority to exercise part of the state's attributes of sovereignty, to be used solely for the public good. When exerted in this way, it is the power of the state that acts through the agency of the municipality. *M. C. C. v. State*, etc., 15 Md. 376, 74 Am. Dec. 572. It is a governmental function, which the state may grant or withhold, and which, when it has been given, may be withdrawn, so far, at least, as the municipality itself is concerned.

Laying out of view the rights of third parties, and dealing with the question solely as one between the municipality and the state which created it, it would be singular and anomalous if the grant by the state to the municipality of a power to tax were beyond the subsequent control of the sovereign, although the very existence of the creature could be terminated at any moment by the same authority that formed it. If the life or duration of the municipality depends on the will and the pleasure of the state (as it does), and therefore is in no sense founded on contract, it is difficult to understand how an attribute of the sovereign, exercised through its own agent, can, as between the sovereign and the agent alone, be treated as a contract, protected by the organic law against impairment, modification, or total repeal. It must be borne in mind that this controversy is between the individual and the municipality, and that the municipality is insisting that the state, by the act of 1902, has impaired the obligation of a contract between the state and the city; whilst the individual is complaining because the city refuses to obey the enactment of the state. The authority given to the city to tax the inhabitants in the belt was a governmental power that was conferred, and, like every other similar power conferred upon a municipality, was subject to the control of the General Assembly. The Maryland cases fully sustain this proposition. *State, use Wash. Co., v. B. O. R. R. Co.*, 12 Gill & J. 437, and other cases referred to in *Thompson's Md. Citations*, 580-590. The fact that the majority of the voters in two of the districts voted in favor of annexation does not convert the act of 1888 into a contract. The assent of the

voters was made the condition upon which the act was to become operative, but that assent in no way modified or changed the character or the qualities of the statute, for the reason that it did not deprive the Legislature of its undoubted control over the municipality, and consequently did not interfere with the authority of the General Assembly to repeal or to amend the original enactment. *Burgess v. Pue*, 2 Gill, 19; *Fell v. State*, 42 Md. 85, 20 Am. Rep. 83; *Jones v. State*, 67 Md. 256, 10 Atl. 216; *Hamilton v. Carroll*, 82 Md. 326, 33 Atl. 648.

There is another no less serious difficulty in the path of the city's contention. If it be conceded, for the sake of the argument, that the act of 1888 was a contract, which is within the protection of that provision of the federal Constitution which forbids the several states from enacting any law that impairs the obligation of a contract, the city of Baltimore is in no position to invoke the aid of the prohibition, because the city is in no sense a party to the contract. If there be a contract at all, it is between the state and the taxpayers, and not between the state and the city. The state made certain provisions in the act of 1888, and the taxpayers accepted them when they voted to annex the belt to the city. If those provisions could be construed to constitute a contract, the city was not a party thereto. It had no participation in their adoption or acceptance, and was a stranger to them. Now, it is well settled that a person who is not a party to a contract cannot complain that it has been invaded or impaired by state legislation, if the parties to it are satisfied with the disposition which has been made of it; for whether it has been so impaired or not is a matter with which a stranger to the contract has no concern. *Phinney v. Shepard*, etc., *Hospital*, 88 Md. 639, 42 Atl. 58; *Id.*, 177 U. S. 170, 20 Sup. Ct. 573, 44 L. Ed. 720; *Williams v. Eggleston*, 170 U. S. 309, 18 Sup. Ct. 617, 42 L. Ed. 1047. So much for the first of the two questions presented on this record.

Secondly. Has a court of equity jurisdiction to restrain the levy and collection of a tax attempted to be levied and collected illegally? To this interrogatory there can be but one answer, and that must be in the affirmative (*Holland v. M. C. C.*, 11 Md. 197, 69 Am. Dec. 195; *Gill's Case*, 31 Md. 395), unless there is some local legislation affording another adequate remedy. Remedy there must be in some form, for so serious a wrong could not be permitted to go unredressed. Reliance is placed by the mayor and city council on section 170 of the city charter (Acts 1898, p. 336, c. 123). That section provides in part as follows: "Any person or persons, or corporation assessed for real or personal property in the city of Baltimore and claiming to be aggrieved because of any assessment made by the said court, or because of its failure to reduce or abate any existing

assessment, may by petition appeal to the Baltimore city court, to review the assessment. * * * The petition in such appeal, other than the petition of the city, shall set forth that the assessment is illegal, specifying the grounds of the alleged illegality, or is erroneous by reason of overvaluation, or is unequal in that the assessment has not been made at a higher proportion of valuation than other real or personal property on the same tax roll, by the same officers, and that the petitioner is, or will be, injured by such illegality, unequal or erroneous assessment. * * * The person or the city appealing to the said Baltimore city court shall have a trial before the court without the intervention of a jury, and the court sitting without a jury shall ascertain or decide on the proper assessment, and shall not reject or set aside the record of the proceedings of the said judges of the said appeal tax court for any defect or omission in either form or substance, but shall amend or supply all such defects and omissions, and assess, increase or reduce the amount of the assessment, and alter, modify and correct the records of proceedings in all or any of its parts, as the said Baltimore city court shall deem just and proper, and shall cause the proceedings and decisions on said appeals to be entered in the book containing the record of proceedings of the said Baltimore city court, certified by the clerk under the seal of the Baltimore city court, and the book to be transmitted to the judges of the said appeal tax court, which shall be final and conclusive in every respect, unless an appeal be taken to the Court of Appeals."

It is insisted that under this provision the appellant could, by a timely appeal to the Baltimore city court, have obtained full and complete relief, and therefore that equity was without jurisdiction to aid him. We cannot accept that view. It will be observed that the above-cited section of the charter provides only for appeals from erroneous or illegal assessments, whereas the relief sought in the pending proceeding is against an unauthorized levy. Assessments are made by the appeal tax court. Levies are made by ordinances of the mayor and city council. Assessments relate to valuations; levies consist in the fixing and the imposition of the rate of taxation. With the one the legislative branch of the city government has no connection; with the second the tax department has nothing to do. From no action of the legislative branch is a direct appeal to the courts provided. But it is argued that the appeal tax court must classify the property which is included in the basis of taxation, and that from such classification an appeal will lie to the city court, because classification is, if not valuation itself, an essential element of valuation, inasmuch as by classification the rate which particular property will bear is practically determined. This theory, however, is not tenable. Classi-

fication has no relation to valuation, even in those instances where a limited and fixed rate is prescribed for some species of property, such as bonds, etc.; but it concerns primarily the rate of the levy. The assignment of a particular piece of property to a certain class or category is a totally different thing from its valuation for the purposes of taxation. As respects the last-named duty, there can be no doubt of the power of the appeal tax court; and there can be no question that section 170 of the charter gives to a party aggrieved an adequate remedy by appeal to the city court. But with regard to the first function—classification—there is nothing said in the section and there is no appeal provided.

In the recent case of *M. & C. C. v. Poole & Sons Co.*, 54 Atl. 683, this court, speaking by Judge Pearce, said: "When, therefore, the appeal tax court may be informed, or have reason to believe, that any property within the territory annexed under the act of 1888 has been brought within those conditions of the annexation act which will warrant the imposition of the regular city rate of taxation, they should give reasonable notice to the owner of their purpose to impose this rate, fixing a time and place when he can be heard in relation to the matter. We have not been advised, and have not discovered, any specific provision of law prescribing how, and by what authority, property in the annexed territory, which has been brought within the conditions of the act of 1888 warranting the imposition of the city rate of taxation, is to be put into that category upon the books of the appeal tax court; but it would seem, in the absence of such specific provision, that the court should have power to make such classification. The correctness of such classification, however, is a question of fact, dependent upon proof as to the opening of avenues, streets, and alleys through the property, and the erection of the prescribed number of houses upon a block, as provided in the annexation act; and, if no tribunal has been provided for the determination of that question, it follows that relief against such erroneous classification can be had only through the restraining power of a court of equity. And the exercise of that power, in cases involving the question of the rate of taxation under the annexation act, was sustained in *Sindall's Case*, 93 Md. 526, 49 Atl. 645, *Goebel's Case*, 93 Md. 749, 49 Atl. 649, and *Kuenzel's Case*, 93 Md. 750, 49 Atl. 649, where the injunction was denied only because the amount involved was not sufficient to give a court of equity jurisdiction."

In the absence, then, of any statutory provision applicable to the precise situation here presented, the ordinary jurisdiction of equity to restrain by injunction the enforcement of an ultra vires act must be upheld, or the injured individual would be without redress. The bill of complaint describes the property owned by the appellant with particularity,

and gives in full detail the physical conditions surrounding it, and thus distinctly classifies the property for the purposes of the city levy. This classification clearly brings the property within the terms of the act of 1902 and renders its owner liable only to the county rate of 60 cents. The demurrer admits the accuracy of the classification, and it follows that the full city rate is not applicable, because of the provision of the act of 1902. We are fully satisfied that a court of equity has plenary power to interfere by injunction under the averments of the bill filed in this case. From what has been said it will be seen that we concur in the conclusion reached by the learned judge below, in so far forth as he held the act of 1888 not to constitute a contract, but that we are constrained to differ from the view he took to the effect that equity was powerless to intervene in such a case as this record presents. The bill of complaint was dismissed in circuit court No. 2 for the want of jurisdiction. In this action we are of opinion there was error. Because of that error, the decree will be reversed, and the cause will be remanded for further proceedings.

Decree reversed, with costs, and cause remanded.

(97 Md. 711)

DOYLE v. WHITRIDGE.

(Court of Appeals of Maryland. July 2, 1908.)

EXECUTORS—AUCTION SALE—MISDESCRIPTION
IN ADVERTISEMENT—MISREPRESENTATIONS BY AUCTIONEER.

1. The misdescription, in the advertisement of an auction sale by an executor of a ground rent, that it is on the "Calverton Stockyards," is material, releasing the purchaser, though innocently made, and though it is correctly described by courses and distances and as bounded on certain streets, and reference is made to a plat in the possession of the auctioneer, where the sale is made a distance from the premises.

2. Misrepresentation by the auctioneer, at an auction sale by an executor of a ground rent, that a certain responsible person was the tenant, though innocently made, the leasehold having been sold without the landlord's knowledge, releases the purchaser.

Appeal from Orphans' Court of Baltimore City; Myer J. Block and Wm. J. O'Brien, Judges.

James Doyle, purchaser at an auction sale by John A. Whitridge, executor, petitioned to be released from his purchase, which was refused, and he appeals. Reversed.

Argued before McSHERRY, O. J., and FOWLER, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Robert W. Beach and Charles Morris Howard, for appellant. James M. Ambler and Randolph Barton, Jr., for appellee.

PAGE, J. This is an appeal from an order of the orphans' court of Baltimore

† 2. See *Executors and Administrators*, vol. 22, Cent. Dig. § 1577.

City overruling an exception to the sale of a ground rent made at public auction by the appellee, as executor. The grounds of the exception are, first, a misdescription of the property in the advertisement, and, second, misleading and untrue statements made by the auctioneer at the time of the sale.

The published advertisement described the ground rent as follows: "\$250 on the Calverton Stockyards. The lot has a front of 344 feet on West Fayette street near Calverton road, with an irregular depth of 155 feet to a 20-foot alley, on which it runs 444 ft. 7 in." It is not contended, nor is there any proof in the record, that the particular description was not correct as stated; and it also appears there was a correct plat of the lot in the possession of the auctioneer, at the time of the sale, for the examination of all who for any reason were interested in the sale. The alleged misdescription is that it was stated in the advertisement that the "ground rent" was "on the Calverton Stockyards," whereas in point of fact the ground never belonged to the Calverton Stockyards. The alleged misrepresentations were made by the auctioneer at the sale before the caveator had bid upon the property, and were to the effect that the property was improved by a one-story brick building occupied by Gray & Judic, a prominent firm of cattle dealers, "who were then owners of the leasehold interest, and who paid the rent and had been paying it for a long time"; whereas, in fact, Gray & Judic had removed from the premises more than a year previous, and had sold the leasehold interest which they had owned in said property, and had conveyed it by a deed dated 10th June, 1902, to a certain Emma Reid, "whose whereabouts and address the purchaser has been unable to ascertain, and whom he believes to be an irresponsible person." The petitioner alleges that these misstatements misled him and induced him to buy, and now justify him in refusing to be bound by his offer therefor. The orphans' court dismissed the petition, and from its order the petitioner has appealed.

The rule applicable to sales made by a trustee is well settled in this state. Before ratification of sales in equity all objections to it are open for consideration, and the sale will be set aside if it does not appear to be in all respects fair and proper. *Tomlinson v. McKaig*, 5 Gill, 256. "Any misdescription of the estate, or of the nature or extent of the property, is a material and substantial point, so far affecting the subject-matter of the contract as that it may be reasonably supposed that but for such misdescriptions the contract would not have been made, at once avoids the contract and releases the purchaser, if he so elect." *Rayner v. Wilson*, 48 Md. 444; *Keating v. Price*, 58 Md. 536. It is immaterial whether such misrepresentations were innocently made or not, if they are so material and sub-

stantial that they reasonably may be supposed to have influenced the purchaser. *Gunby v. Sluter*, 44 Md. 247, 248. The petitioner complains that the advertisement states that the ground rent was "on the Calverton Stockyards," whereby the impression was created upon him that "he was purchasing a ground rent on the Calverton Stockyards, or at least upon certain property covered by these stockyards." This statement, the appellee contends, could not have misled him as to the actual location of the property, because of the fact that the advertisement contains a careful and accurate description of the lot by metes and bounds. It is stated therein to front on West Fayette street 344 feet, and thence by courses and distances, bounding on certain designated roads, to the place of beginning; and, further, the prospective purchaser is referred to a "plat and full description of the lot at the office of the auctioneer." If he had been upon the lot, it would have been in his power to determine with precision the exact location, whether the statement was made or not (that it was "on the Calverton Stockyards"). But it must be borne in mind that the sale was being made at the Real Estate Exchange Sales Rooms, far distant from the site; and the petitioner relied on, and was forced to rely on, the representations there made. He was there told by the advertisement that the rent was on the Calverton Stockyards, and he could well have supposed that by this it was meant that it was located within the bounds of what was then or at one time had been the stockyards. The description by metes and bounds would have been of much service if he had undertaken to locate the lot; but he accepted the statement that the rent was on the Calverton Stockyards; that was clear, and gave him not only his impressions as to the location, but also helped him to form his estimate of its value. In point of fact, the rent was not on the stockyards, or on ground once or ever occupied for the purposes of the stockyards. The statement was untrue. It seems to have been made innocently by the appellee and his agents, who were themselves misled by the fact that some persons spoke of the whole region thereabout as "The Stockyards"; but the effect of the statement upon the petitioner, who believed in its accuracy, was the same as if the misrepresentation had been made with the intention of deceiving.

The second ground of objection is that at the sale the auctioneer stated that the lot was owned and occupied by Gray & Judic, who were still paying the rent and had paid it for a long time. It was not incorrect that Gray & Judic had been paying the rent, but the appellee insists that he then believed they were still doing so. There is some conflict in the proof as to what the auctioneer actually did state, but it may be assumed from the proof that it was stated that Gray & Judic paid the rent and had paid it for

a long time; whereas in fact, at that time, these persons had sold and transferred the lot, and no longer were the lessees of the property. It may be correct to say that the value of a ground rent depends principally upon other considerations than the character of the tenant, yet it cannot be said that that is immaterial. The character of the tenant has much to do with the desirability of the property. If the owner of the leasehold be a person of known integrity and business ability, there are many persons who would be attracted thereby to become purchasers. The very fact of the ownership of such a person would be regarded as being to some extent an assurance of its value. It was not true in fact that Gray & Judic owned the leasehold; they had sold out without the fact being known to the landlord; but the petitioner was misled by the statement, and induced thereby to become a purchaser.

Without prolonging this opinion, it is sufficient to say that in our opinion, under these circumstances, he should not be compelled to take the property.

Order reversed, and cause remanded.

(97 Md. 493)

MEDAIRY et al. v. McALLISTER.

(Court of Appeals of Maryland. June 30, 1903.)

TRESPASS—CARRYING AWAY GOODS OF ANOTHER—DECLARATION—SUFFICIENCY—EVIDENCE—ADMISSIBILITY—DEFENSE—ADVICE OF COUNSEL—PUNITIVE DAMAGES—EXCEPTIONS—WAIVER—PARTY ENTITLED TO RAISE QUESTIONS.

1. Where, under leave to amend, defendant files a new plea bearing the same number as the original one filed, the latter is considered as withdrawn, and its sufficiency is not reviewable on appeal.

2. Defendant, sued for the forcible seizure and carrying away of plaintiff's property, cannot prevent a recovery by showing that he acted under the advice of counsel.

3. In view of the fact that oleomargarine may under some conditions be lawfully possessed and sold, the declaration in an action for the forcible seizure and carrying away of oleomargarine is not defective for failing to negative the facts making the possession thereof by plaintiff unlawful.

4. The allegation of a declaration that defendant "unlawfully entered the plaintiff's place of business, . . . and forcibly took and carried away plaintiff's goods," etc., does not allege a trespass *quare clausum fregit*, but merely shows that the ground of the action was the carrying away of plaintiff's goods.

5. Exceptions by a defendant to the rulings of the court on prayers offered by him at the close of plaintiff's testimony are waived by his proceeding with his testimony.

6. In an action for the forcible seizure of oleomargarine belonging to plaintiff, evidence as to the orders given police officers with respect to plaintiff's place of business, and looking to the prosecution of violators of the oleomargarine law, and as to plaintiff having been convicted of violating that law, was properly excluded.

7. Where, in an action of tort against several defendants, the court, at the close of plaintiff's testimony, granted the prayer directing a verdict in favor of three of the defendants after

striking from the prayer the name of one of them, the question of the sufficiency of the evidence as to this one could only be raised, at the close of all the testimony in the case, by offering a prayer for the direction of a verdict as to him alone.

8. In an action for the forcible seizure of oleomargarine belonging to plaintiff, the evidence showed that a defendant went with a city detective to plaintiff's place of business, and tried to buy a package of oleomargarine, but was refused. This defendant then asked his codefendant for instructions, who stated that if the goods could not be bought he was justified in taking a package. The former defendant then forcibly took the goods, but before doing so saw the codefendant at his place of business, and after the seizure the goods were taken there. The codefendant was a member of an association organized to prosecute offenders of the oleomargarine law, and contributed to the salary of the other defendant employed by the association. *Held* sufficient to make the codefendant liable.

9. Where defendants, under the protection of a detective, forcibly seized and carried away goods belonging to plaintiff, and located at his place of business, after being warned not to do so, on the false theory that plaintiff was guilty of a criminal offense because of having the goods in his possession, punitive damages could be awarded, though defendants were engaged in an effort to punish violators of the law.

10. Where three defendants in an action in tort requested the court to rule that plaintiff's evidence was insufficient to warrant the jury in finding against them, and the court granted it as to two but refused it as to one, the latter could not question the correctness of the ruling as to the others by asserting that there was evidence against them.

Appeal from Court of Common Pleas; Albert Ritchie, Judge.

Action by Charles E. McAllister against S. B. Medairy, J. K. Bosee, C. G. Wanner, and the Wholesale & Retail Butter Dealers' Protective Association of Baltimore City. There was a verdict in favor of Bosee and the butter association, and a judgment in favor of plaintiff against the remaining defendants, who appeal. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, and SCHMUCKER, JJ.

James Hewes, George Whitelock, and Edward L. Koontz, for appellants. Gans & Haman, W. Calvin Chesnut, and Stuart S. Janney, for appellee.

BOYD, J. This suit was instituted by the appellee against S. B. Medairy, J. K. Bosee, C. G. Wanner, and the Wholesale & Retail Butter Dealers' Protective Association of Baltimore City for entering the plaintiff's place of business and forcibly taking and carrying away a tub of oleomargarine.

The defendants filed the general issue plea, and a second plea, which was demurred to, and the demurrer was sustained. It was defective, but if it was not it could not be reviewed by us, as the defendants filed an amended second plea. When, under leave to amend, a new plea, bearing the same number as the original one, is filed, the first will be considered as withdrawn. *Lake v. Thomas*, 84 Md. 608, 36 Atl. 437. The amended second plea alleged that the defendants had con-

sulted counsel learned in the law, had laid before him all the material facts within their knowledge of and concerning the plaintiff's business, and concealed nothing material, and they were advised by the said counsel to take the package of oleomargarine, to be used in a subsequent prosecution of the plaintiff, and they acted under his advice, believing the same to be sound and without malice. A demurrer to that plea was also sustained, and there can be no doubt that it was demurrable. We are not aware of any authority that would excuse a defendant for the seizure of another's goods because his counsel advised him to do so. The plea was offered as a bar to recovery, and therefore it is unnecessary to consider how far such facts as it alleges could be introduced for the purpose of denying malice.

But it is contended that the declaration was defective, and the demurrer to the plea presents for determination its validity. In the first place, it is said that it fails to show that the oleomargarine was imported from without the state, and that it was not a deleterious product. Without deeming it necessary to determine whether the plaintiff would be entitled to recover in an action of this kind, if no oleomargarine could be lawfully sold, it is sufficient to say that the narr. does not disclose any fact that made its possession unlawful. It was alleged to be in the original package, and, for aught that appears in the declaration, may have been of the character that was expressly authorized to be sold by article 27, § 88, Code Pub. Gen. Laws, as amended by Acts 1900, p. 792, c. 496. If it was not, but was shipped from another state, in the original package, the case of *McAllister v. State*, 94 Md. 290, 50 Atl. 1046, protected it, and there is no presumption that it was held in violation of the law. We held in *Wagner v. Upshur*, 95 Md. 519, 52 Atl. 509, that the plaintiff could recover, in an action of replevin, a gambling instrument which could be put to a legitimate use, and that such instrument could not be summarily seized by the police, under its power to prevent crime, until it had been determined in a criminal proceeding that the article was held or used for an illegal purpose by the person from whose possession it was taken. When then oleomargarine may under some conditions be lawfully possessed and sold, a declaration which does not disclose any unlawful use of it certainly cannot be defective because it does not negative such facts as make its possession unlawful.

It is also contended that the declaration is defective because it alleges in one count a trespass *quare clausum fregit*, a trespass *de bonis asportatis*, and injury to the plaintiff's business. The allegation is that the defendants "unlawfully entered the plaintiff's place of business, * * * and forcibly took and carried away the plaintiff's goods," etc. That can hardly be said to be an action of trespass *quare clausum fregit*, in which the gist of the action is the injury to the possession; for

the declaration shows that the ground of action was the asportation of the goods, and does not allege that the defendants broke and entered, etc. But, if it be conceded that it does embrace the two, it would by no means be an unusual practice in this state. Take, for example, the case of *Barton Coal Company v. Cox*, 39 Md. 1, 17 Am. Rep. 525, in which the court said: "The declaration was filed in the names of the coplaintiffs, containing three counts, which, as far as the distinctive forms of actions can be recognized in our present system of pleading, may be designated as trespass *quare clausum fregit et de bonis asportatis* combined. The first count is a general one, charging that the defendant broke and entered the locus in quo, and mined, dug, excavated, and carried away large quantities of coal." The second and third counts set out the trespasses with greater minuteness, but, in substance, made the same allegations as in the first. That is the form adopted in this state in such actions, as will be seen in *Franklin Coal Company v. McMillan*, 49 Md. 549, 33 Am. Rep. 280, and *Blaen Avon Coal Company v. McCulloh*, 59 Md. 403, 43 Am. Rep. 560. The allegation as to the injury of the plaintiff's business was only intended to enhance the damages. Under our system of pleading, the declaration was sufficient.

The first exception was to the refusal of the court to permit the defendants to ask the plaintiff for whom he sold butter, but, as its relevancy does not appear, we will not discuss it, especially as the court subsequently instructed the jury that there was no evidence of damage to the plaintiff's business.

The second bill of exceptions presents the ruling on two prayers offered by the defendants at the close of the plaintiff's testimony, but, as the defendants then proceeded with their testimony, the exceptions to those rulings were waived. In order that later proceedings may be understood, it is proper, however, to add that the court then instructed the jury that the plaintiff had not offered sufficient legal evidence against Mr. Bosee and the Butter Dealers' Association to warrant the jury in finding against them, and a verdict was accordingly rendered in their favor at that time.

The third exception contains an offer to prove, by a member of the police force in Baltimore, what his orders were with respect to the plaintiff, and his having oleomargarine in his possession in November, 1900. The court properly sustained an objection to that.

The fourth presents the ruling of the court on an offer to show by the secretary of the board of police commissioners, and a copy of the order of the marshal of police, that the police captains of the city were directed, upon the faith of an opinion of the counsel of the board, "to take certain action looking to the arrest of alleged violators of the oleomargarine law." An objection to that was properly sustained, as was also the one in the offer in the

fifth bill of exceptions that the plaintiff was convicted in 1890 for the violation of the oleomargarine laws.

At the conclusion of the whole testimony, the plaintiff offered three prayers, which were granted, and the defendants offered ten, all of which were rejected excepting the fifth. Those offered at the conclusion of the plaintiff's testimony were apparently renewed, although the first is marked, "Offered at close of plaintiff's case." That prayer asked the court to instruct the jury that the plaintiff had not offered legally sufficient evidence to warrant the jury in finding against Medairy, Bosee, and the butter association, and their verdict must be for said defendants. That was granted by the court at the end of plaintiff's case, after striking out the name of Mr. Medairy, and at the conclusion of all the testimony the same prayer was apparently offered, and the same modification made, and it was then again granted as modified. In order to properly raise the question of the legal sufficiency of the evidence against Medairy, there ought to have been a prayer offered as to him alone, the other two defendants named in the prayer having already had a verdict entered in their favor, and the court would therefore have been justified in then rejecting this prayer as offered. But as the sixth bill of exceptions says it was granted with the modification, and an exception was taken to the striking out of Mr. Medairy's name, we will treat it as thus disposed of at the end of the case.

There can be no doubt about the sufficiency of the evidence against Mr. Wanner, and therefore the second and third prayers of the defendants were properly rejected, as they sought to withdraw the case from the jury. By the plaintiff's first prayer, the court instructed the jury "that it being the undisputed evidence in this case that the defendant Charles G. Wanner did on or about the 22d day of November, 1900, take and carry off from the possession of the plaintiff the goods mentioned in the declaration, their verdict must be for the plaintiff as against said Wanner. And if the jury find that the said Wanner, in taking and carrying off said goods, was acting as the agent or by the authority or instructions of the defendant S. B. Medairy, then the verdict of the jury must be for the plaintiff as against both of said defendants." There was no special exception to this prayer, to the effect that there was no legally sufficient evidence of those facts as to Medairy, but, assuming that the defendants' first prayer presented that question, we will now consider it. Three of the plaintiff's and one of the defendants' witnesses testified that when Wanner took the oleomargarine he said he did so by the direction of Medairy. That of itself would not be sufficient to establish that fact, as Medairy could not be held liable by such statement of Wanner, made out of his presence. But there was ample testimony to

justify the court in submitting to the jury the question of Medairy's liability. Wanner went with the city detective to the plaintiff's place of business, and tried to buy a package of the oleomargarine, but was refused. He and the detective talked the matter over, and the latter advised him to telephone to Medairy, which he did. He testified: "I asked Mr. Medairy what instructions they had received from the counsel, and Mr. Medairy stated the counsel had received from the police board the right to go ahead, where they refused to sell, and take a package as evidence." After speaking of McAllister's refusal to sell, the counsel for plaintiff asked the witness, "Then you went off for further instructions?" to which he replied, "I went off and telephoned to Mr. Medairy." The counsel said, "I want you to answer that question 'Yes' or 'No.' Did you or not go off for further instruction about the matter?" And he answered, "Yes, sir; of course I did." The testimony shows that Wanner and the detective had been at Medairy's place of business, where they had seen him, before the package was taken, and after it was seized they took it to the office of Medairy's firm, and he then examined it. The jury was not only justified in drawing an inference from the testimony that Wanner acted under the authority or instructions of Medairy, but it is difficult to see how any other conclusion could have been reached by them. Medairy was a member of the butter association, which was, according to his own testimony, organized to promote the interests of the people in the butter trade, and, with the assistance of the police authorities, to prosecute actual or alleged offenders of the law. He contributed to Wanner's salary, who was employed by the association, and he had been active in many of the prosecutions for alleged violations of the oleomargarine laws. When the question arose as to the powers of Wanner to seize a package, he telephoned Medairy, who, to use his own language, said: "I stated to him that my understanding was that wherever he found yellow oleomargarine he was to make the effort to buy a package, and if he failed in his efforts to purchase a package he was justified in taking a package as evidence; that that was my understanding." Wanner then immediately returned to plaintiff's place of business, seized the package, and took it to the office of Medairy's firm, and there is other evidence in the record tending to show that Medairy was advising Wanner in the matter. If any authorities be necessary to show that Medairy and Wanner could be sued together, many of them will be found in 26 Am. & Eng. Ency. of Law (1st Ed.) 575, 580. See, also, *Blaen Avon Coal Company v. McCulloh*, 59 Md. 403, 43 Am. Rep. 560. The first prayer of plaintiff was therefore properly granted, and that of defendants was properly modified by striking out Medairy's name.

The plaintiff's second prayer authorized the

jury to award punitive damages, if they found that the "taking was done willfully, wantonly, against the protest of plaintiff, and with full knowledge on the part of the defendants that the said goods were the property of the plaintiff." There are numerous decisions of this court on the subject of punitive damages, but it will not be necessary to refer to many of them. In *Moore v. Schultz*, 31 Md. 418, which was an action of trespass *de bonis asportatis*, it was said that ordinarily in suits of this character the plaintiff is entitled to recover the value of the goods taken, if they be not returned, with interest to the time of the trial, if there be no circumstances of aggravation; "but if the trespass be committed in a wanton and aggravated manner, indicating malice, or a disregard of the rights of others, and the circumstances of the case afford no justification, in addition to the measure of compensation just stated, the jury will be allowed to make reparation, not only for the loss of property, but for outraged feeling and reputation; and this may be carried to the extent of setting a public example to deter others who may be alike evilly disposed." It is urged on behalf of the appellants that they were engaged in an effort to punish violators of the law, and that the appellee was prominent in that class, in reference to the statute against the sale of oleomargarine; but however much private citizens are to be commended for their assistance in suppressing crime, there are some things in this case that made it imperative on the trial court to grant this prayer. If the appellee was in fact violating the law at the time of the alleged trespass, it might readily have been established without resorting to such means as were adopted. Samples of the oleomargarine could probably have been procured by purchase, if Wanner had acted more discreetly. It was not surprising that McAllister refused to sell to him, if he knew, as he apparently did, that his object was to institute proceedings against him; but certainly some one might have bought the oleomargarine, as the appellee was apparently getting it for sale. But, whether that be so or not, criminal prosecutions are usually more fairly conducted by the legally constituted authorities than by those who have personal or business reasons for carrying them on. If those dealing in butter had just ground to believe that the appellee and others were violating the law, they had the right to report them to the law officers, and as long as they kept within proper bounds could with propriety assist those officers; but it is difficult to imagine a greater indignity upon a merchant than to have some one enter his store and forcibly carry off his goods without authority, and especially when it is done for the benefit of some competitor or competitors in his business. Wanner was duly warned, but not only persisted in taking the package, but did so under the protection of a detective whom

he took with him for that purpose, and upon the theory that the appellee was guilty of a criminal offense in having it in his possession, which was afterwards determined by this court not to be the case. Such conduct is well calculated to cause a breach of the peace, and, under the circumstances, it would be a very insufficient compensation to simply award, as damages, the value of the goods taken. When the facts justify the trial court in submitting the question of allowing punitive damages to a jury, it can, on motion for a new trial, afford protection against excessive verdicts; but, if the circumstances be such as may entitle a plaintiff to such damages, it is the duty of the court to submit that question to the jury. For such damages in actions of this character, see, also, *Schindel v. Schindel*, 12 Md. 108; *Young v. Mertens*, 27 Md. 114; *Strasburger v. Barber*, 38 Md. 103; 1 *Poe*, § 240. There was no error in granting this prayer, and in rejecting the defendants' fourth, which sought to limit the recovery to actual expenses.

The plaintiff's third prayer simply announced the law as determined by this court in *McAllister v. State*, supra. The sixth of the defendants' was properly rejected, because it sought to take the case from the jury. The seventh and eighth, to say the least, would have been misleading. From what we have already said, it is evident that the ninth and tenth were properly rejected.

The only remaining question to be considered is whether the appellants can complain because the court granted the prayer exonerating Bosee and the Butter Dealers' Association, but declined to grant it as to Medairy. The theory of that objection is that if Medairy was liable the other two defendants were, and could have been required to bear their share of the verdict if they had not been acquitted. But without going into the question of contribution between joint tortfeasors, or of the right of the plaintiff to sue one or more of a number of them, or to dismiss the suit as to some of them, we are not aware of any practice in this state which would justify a reversal of the judgment on this ground. If it would, then if the prayer had been granted as offered, including Medairy, and judgment had been rendered against Wanner, he could have had it reversed because the others were discharged. The same counsel represented all the defendants, and if he was not willing to have the two discharged unless all three were he could have asked leave to withdraw the prayer when he found that Medairy's name would be stricken out. But how can the question be reviewed here to the prejudice of the appellee? He did not offer the prayer, and had no control over it. The three defendants, including Medairy, asked the court to say that the plaintiff had not offered sufficient legal evidence to warrant the jury in finding against them; and when the court so instructed them as to Bosee and the Butter

Dealers' Association can Medairy now question what he thus asked the court to instruct the jury? He has no right to complain that the court agreed with him in that respect, and, being a party to that prayer, cannot question it by now saying there was evidence against those parties. If the appellants' contention be correct, it would prevent one attorney from appearing for a number of defendants in an action of tort. If there was not sufficient evidence against Bouse and the association, they were entitled to have a verdict entered in their favor, yet the attorney representing them could not under that theory ask for that verdict because it would prejudice the other defendants. So, without discussing the question as to whether there was sufficient evidence against those two defendants, we think it is clear that the appellants cannot complain of that ruling of court on this ground, and we have already considered it with reference to the legal sufficiency of the evidence against Medairy.

Judgment affirmed, the appellants to pay the costs.

(65 N. J. E. 91)

MARTIN v. McFALL.

(Court of Chancery of New Jersey. July 27, 1903.)

LABOR UNIONS—BOYCOTT.

1. Attempts by members of a labor union to compel an employer to accede to the demands of the union as to the mode of doing his business by persuading or inducing others not to deal with him is unlawful, and will be enjoined.

Suit by Martin against McFall for injunction. Heard on motion to dissolve injunction. Denied.

B. W. Ellicott, for complainant. J. A. Beecher, for defendant.

PITNEY, V. C. As this case is set for final hearing in the near future, I deem it unwise to express any final or definite opinion on the questions argued on the order to show cause so far as relates to the facts in this case. Some matters, however, seem to be quite well settled: First. That all sorts of laborers may lawfully combine and form what are known as "labor unions," for their mutual benefit, and that they may use all lawful means to promote their own interests, being careful in so doing not to infringe on the rights of others. Second. One lawful means to that end is the refusal to work on the terms offered by the employer. Third. An unlawful means is to hinder or prevent others from working for an employer on such terms as they shall see fit. Fourth. One means of such hindering and preventing is in various ways to render it either difficult or uncomfortable for such willing workmen so to work. This is unlawful. Fifth. Another unlawful means in common use to hinder or prevent willing employes in work-

ing and to compel employers to accede to terms which they would not otherwise adopt, is the boycott in its various forms. This, in whatever form it assumes, is unlawful.

Applying these principles to the present case, it is unlawful for the defendant to attempt to induce or compel complainant to adopt a particular mode of doing his business by persuading or inducing other persons not to deal with him. It is unlawful by such means to punish him for refusing to accede, in respect to the conduct of his business, to the demands of the union. McFall denies that he has done, or intends doing, anything of the kind. The affidavits on the subject are contradictory, and, in view of the well-known fact that the boycott, such as that against which the bill is aimed, is one of the most usual, and in fact almost the only, means by which the defendants can enforce their demands, I cannot say that complainant is in no danger of being injured. Besides, if McFall and his agents, etc., do not intend to do the things forbidden by the restraining order, then the order will do them no harm. It does not operate to hinder or delay any work or business enterprise, nor, according to my present view, does it infringe upon the liberty of the individual.

The restraint will be continued until final argument; costs to abide the event of the suit.

(65 N. J. E. 1)

GRAND LODGE, A. O. U. W., v. GADDIS et al.

(Court of Chancery of New Jersey. July 14, 1903.)

BENEFICIAL SOCIETIES—BILL OF INTERPLEADER—PLEA.

1. To a bill by a beneficial society to enjoin threatened actions and to have a decree of interpleader, a plea presents no defense which alleges that complainant's constitution provides for a board of arbitration to first pass on conflicting claims, it not alleging that either of defendants has demanded an adjudication of it.

Bill by the Grand Lodge, Ancient Order of United Workmen of New Jersey, against Mary A. Gaddis and others. Heard on plea of said defendant Gaddis. Plea overruled.

Walter A. Barrows, for complainant. Henry J. Melosh, for defendant Mary A. Gaddis.

MAGIE, Ch. The complainant's bill seeks a decree of interpleader. It sets forth that it is a fraternal benefit society, located and doing business in this state under the provisions of the act entitled "An act regulating fraternal and beneficiary societies, orders or associations," approved March 11, 1893 (P. L. 1893, p. 232); that on November 25, 1881, one James Dickson was duly admitted to its membership, and continued therein until his death on December 28, 1902. It charges that, pursuant to its laws, James Dickson, on his admission, designated as his beneficiaries to receive out of the beneficiary fund "\$2,000, to

¶ 1. See Injunction, vol. 27, Cent. Dig. § 174.

Annie Dickson, in trust for children bearing relationship of wife and children"; that a beneficiary certificate was issued by complainant to said James Dickson in favor of said beneficiaries; that about December 3, 1898, James Dickson, asserting that the certificate issued to him had been lost, made application, in a form prescribed by complainant's laws, for another certificate to be issued in duplicate of that lost; that complainant issued to him another certificate, intending it to be a duplicate, but the officer who issued it inserted therein as beneficiary the name "Mary Agnes Dickson, bearing the relationship of daughter," and such certificate was delivered to James Dickson, and remained in his possession until his death; that the mistake therein was not discovered until after his death; and that, while the laws of complainant permit the member to change his beneficiary, no application for such a change was made by James Dickson, but that his only application was for a duplicate certificate of that which had been lost. It further charges that at the death of James Dickson he left, him surviving, his widow, Annie Dickson, and six children, one of whom is Mary Agnes Dickson, who is the defendant, now called Mary A. Gaddis; that Mary A. Gaddis claims from the complainant the payment of \$2,000 under the second certificate above mentioned, and threatens to bring an action at law against complainant for it; and that the widow and the other children also claim from the complainant the \$2,000 under the provisions of the first certificate, and they threaten to bring an action at law against complainant therefor. The complainant acknowledges its liability for the payment of said sum, and expresses its willingness to pay the same to the person or persons lawfully entitled thereto, and offers to pay the same into court. The complainant asks an injunction restraining the respective defendants from proceeding against it in actions at law.

To this bill, no defense has been interposed by any defendant except Mary A. Gaddis. As to all the other defendants a decree pro confesso could now be taken, and they may be considered as submitting to the jurisdiction of this court. The defendant Mary A. Gaddis has interposed a plea to the jurisdiction of this court, and thereby asserts that by the constitution and laws of the complainant there is a board of arbitration to hear and determine all controverted questions as to distribution and disbursement of the beneficiary fund of the complainant, in which board is vested jurisdiction to hear and determine all controversies as to complainant's liability on claims for benefits, and as to who are the beneficiaries, when conflicting claims are set up; that by the express terms of the laws in this respect the rights of all parties to such controversies shall be determined in the first instance in that tribunal, without recourse to the courts of law; and that, before this court can obtain jurisdiction in the case presented

by the bill, complainant must comply with the provisions of its own laws, and procure adjudication from its own tribunal. The plea was filed May 11, 1903. The complainant did not reply or take issue upon it. On notice of defendant's counsel, argument on the plea was brought on without objection from the complainant's counsel. It is settled law in this state that the members of beneficiary associations may agree to submit their grievances, in the first instance, to an internal tribunal of their society, and that, having so agreed, they cannot, against the protest of said society, maintain a civil action against it until the condition precedent of submission to such tribunal has been, in legal contemplation, complied with. *Ocean Castle v. Smith*, 58 N. J. Law, 545, 33 Atl. 849; *Smith v. Ocean Castle*, 59 N. J. Law, 198, 35 Atl. 917; *Roxbury Lodge v. Hocking*, 60 N. J. Law, 439, 38 Atl. 693, 64 Am. St. Rep. 596; *Societa v. Cenni*, 62 N. J. Law, 652, 42 Atl. 743. A plea is a special answer, showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed, or barred. The question is whether the facts set up in this plea bar this court from taking cognizance of the case made by the bill. Without determining whether an association of this sort may not waive the provision for an adjudication in the court constituted by its laws, or whether it may not seek an injunction against threatened actions at law, I have reached the conclusion that the plea is otherwise defective. It asserts the existence of a tribunal having jurisdiction over conflicting claims to this fund, made by the pleader on one side and the other defendants on the other side. It fails to assert that either she or the other defendants have demanded an adjudication from that tribunal, or have initiated any contest upon which the tribunal could act. In the case of such conflicting claims, such an adjudication must be sought by the claimants, and the tribunal is without power to initiate a proceeding, or bring in the contending parties by its own motion. Under these circumstances the complainant, having the money in hand, and being ready to pay it, may well resort to the only tribunal which can protect it from threatened actions at law, and may, in that mode, require the contending parties to submit their respective claims to judicial arbitration.

The plea must, therefore, be overruled.

BOARD OF HOME MISSIONS et al. v. DAVIS.

(Court of Chancery of New Jersey. July 14, 1903.)

MORTGAGES—ANSWER—MOTION TO STRIKE—
SUFFICIENCY—DENIAL—BAR—CROSS-
BILL—DEFENSES.

1. Where a motion to strike out an answer is denied because of a defective statement of the objections, such denial was of the same effect as an order overruling exceptions to the answer, and was therefore a bar to a second motion to strike.

2. Where, in a suit to foreclose a mortgage, the answer alleged failure of consideration because the conveyance of the mortgaged premises which constituted the consideration for the mortgage had never been delivered to defendant, and by way of cross-bill for cancellation that the mortgage was induced by fraud, an order sustaining a motion to strike out the alleged cross-bill did not affect the defense of failure of consideration, though the facts alleged therein were insufficiently stated.

Suit by the Board of Home Missions and others against William Davis. Motions to strike defendant's answer and for reference. Motions denied.

George M. Shipman, for the motions. Martin Wyckoff, opposed.

MAGIE, Ch. On behalf of complainants two motions are made, which require separate consideration.

The first motion is for an order striking out the answer of defendants. It is made under the provisions of rule 213. Such a motion takes the place of exceptions to the answer. *Hanneman v. Richter*, 63 N. J. Eq. 755, 53 Atl. 177. A previous motion of identical character was made and denied. A denial of such a motion is the exact equivalent of an order overruling exceptions. Exceptions to an answer must specify the grounds of objection. A motion which takes the place of exceptions is subject to the same rule. A defective statement of the grounds of objection might, perhaps, be amended on application. If no amendment is made, and the exceptions are overruled, no further exceptions can be interposed. A like rule must apply to a motion taking the place of exceptions. The previous motion was denied because of defective statement of objections. As exceptions could not now be interposed, a new motion of the same kind cannot be made. This motion must be denied, with costs.

The second motion is for a reference to a master under rule 29. The bill seeks the foreclosure of a mortgage, and complainants' claim is that the answer of defendant does not appear to set up any defense, or to present any question except such as may be properly referred to a master, and therefore, under the rule cited, a reference may be made. The pleading filed by defendant consisted of the answer not under consideration, and what was claimed to be a cross-bill, whereby defendant stated that he reiterated the facts set forth in the answer as to the manner and circumstances under which he was induced to execute the mortgage in question, and thereon prayed a decree for the surrender of the bond and mortgage to him for cancellation. Complainants previously moved to strike out the cross-bill under rule 213. This motion took the place of a demurrer, and required me to determine whether, upon the facts stated, defendant had disclosed an equity entitling him to the relief sought—of surrender and cancellation.

My examination led me to the conclusion that a demurrer to the cross-bill would have been sustained, and the motion in place of the demurrer was therefore granted, and the cross-bill was struck out. Complainants now claim that such action requires me to now hold that the answer of defendant presents no defense. But this is an unwarrantable deduction, arising from a misconception of the defendant's position as disclosed by his pleading. The bill charged that the bond secured by the mortgage sought to be foreclosed was given for the purchase money of a conveyance of the mortgaged premises from complainants to defendant, and that the mortgage was executed by defendant, and contained an express averment that it was given for such purchase money. The answer of defendant admitted his execution and delivery of the bond and the mortgage having such an averment therein, but was plainly intended to set up two equitable defenses, viz.: (1) The total failure of consideration for the bond and mortgage, because the conveyance of the mortgaged premises from complainants to defendant was never delivered to defendant; and (2) because defendant was induced to execute and deliver the bond and mortgage by the fraud of complainants. The first of these was a pure defense against the claim of the bill; the second required to be asserted in and supported by a cross-bill. *O'Brien v. Hulfish*, 22 N. J. Eq. 471; *Hile v. Davison*, 20 N. J. Eq. 228; *White v. Stretch*, 22 N. J. Eq. 76; *Kuhnen v. Parker*, 56 N. J. Eq. 286, 38 Atl. 641. The latter of these positions was the only one requiring consideration upon the motion to strike out the cross-bill. Without going over the allegations in the pleading, it is sufficient to state that, if all of them were proved as alleged, no fraud on the part of complainants would be shown. In that conclusion, the defense of failure of consideration was not involved. The answer, in attempting to state that defense, is not felicitously expressed. Perhaps it might have been excepted to on the ground of insufficiency. But if such an exception had been made and allowed, defendant would have had the opportunity to file another answer setting up the facts with more certainty. But there is in the answer a plain assertion that the conveyance, to secure the purchase money for which the mortgage was concededly given, was never delivered to the defendant. Upon this motion, I do not think I ought to treat the answer as not presenting a defense, even if I find that it could have been excepted to as insufficiently stated. Where such an objection was not interposed when defendant could have cured the defect, if there was any, it ought not to be considered to induce a course of action which might deprive defendant of the defense he intended to present.

For these reasons, this motion will also be denied with costs.

(85 N. J. E. 11)

PENNINGTON et al. v. METROPOLITAN
MUSEUM OF ART et al.(Court of Chancery of New Jersey. July 14,
1903.)WILLS—TRUSTS—JURISDICTION IN EQUITY—
CHANGE OF SCHEME—PAYMENT OF
TAXES—CONSTRUCTION.

1. By the will of Jacob S. Rogers, deceased, testator created a trust fund, consisting of both real and personal estate, and provided that the income therefrom should be applied (1) to the payment of all taxes and assessments and other impositions upon the trust fund; (2) to pay to each of two infants \$500 annually as long as he shall live; (3) to use and apply the remainder in improvements upon the real estate in the trust; and (4) any balance of the income not so used was to go to the Metropolitan Museum of Art in the city of New York. The trustees were empowered to lease the real estate in the trust for terms not exceeding 15 years. Upon the death of the longest liver of the two infants, it is provided that the whole trust fund shall go to the Metropolitan Museum.

2. The Metropolitan Museum, having applied to the trustees of the fund for immediate possession of the real estate in the trust, undertaking to thereafter relieve the trustees from the payment of any taxes, assessments, or impositions thereon, the trustees filed their bill for instructions and directions respecting their conduct in the management of the trust.

3. By the proofs, it appears that the present income of the whole fund is insufficient to discharge the annual taxes now imposed on the real estate in the fund, and that there is no reason to anticipate that the income will hereafter become sufficient to pay the taxes, assessments, and other impositions thereon. *Held:*

(1) That if testator did not anticipate and provide for the case of the income being exhausted in the payment of the impositions upon the real estate, and if, by a change of the scheme for the management of the trust, the benefit intended for the infant beneficiaries and the residuary beneficiary may be carried out with the consent of the latter, this court has power to direct and instruct the trustees to so change the scheme of the trust as to effectuate the testator's intention.

(2) That the power to direct such change of scheme is grounded on the necessity of such a change to effectuate testator's intention, which, under the present circumstances, cannot be carried out.

(3) That the court will not refrain from exercising its power in that regard because two of the beneficiaries are infants, or because objections are made in behalf of one of the infants, if it is convinced that such change is for the benefit of the infants, and their interests can be effectually secured to them.

4. The trust in question was created, and its scheme of management prescribed, by the first codicil of testator's will, the terms of which justify the inference that testator contemplated that the income from the trust would suffice to pay the taxes, assessments, and other impositions, and also the annual sums to the infant beneficiaries. By a subsequent codicil testator provided that, if at any time the income should not be sufficient to discharge the taxes and assessments, the deficiency should be paid by the residuary beneficiary out of the income from other property bequeathed to it by the will. *Held:*

That, by the true construction of this provision, the testator therein provided for the case of assessments for municipal improvements imposed casually and from time to time, and which at times might, when added to the annual taxes, exhaust the income of the fund, and did not have in contemplation or provide for the case

of annual taxes exhausting the income and constantly depriving the infant beneficiaries of the benefit intended for them.

(Syllabus by the Court.)

Bill by William Pennington and others, executors of Jacob S. Rogers, against the Metropolitan Museum of Art and others, for relief respecting the trust arising under the will and codicil of Jacob S. Rogers, and for instructions to the trustees. Referred to the master.

The following extracts from said will and codicils show the trust in question:

Will of Jacob S. Rogers.

" * * * Sixteenth. All the rest, residue and remainder of my estate real and personal of every nature and kind and wherever situate, I give, devise and bequeath to my brother Columbus B. Rogers, and my friend Asahel S. Levy, my executors hereinafter named and appointed. To have and to hold unto them, their successors and assigns forever, with full power to receive the rents, issues, and profits thereof, In Trust nevertheless to sell and convey and convert the said real and personal estate into money, or available securities, and I order and direct them to sell, convey and convert the same into money or available securities, as soon as it can be done, having in view the best interest of the estate, and thereupon, without delay, to pay over the proceeds thereof, and the rents, income, issues and profits thereof to The Metropolitan Museum of Art in the City of New York, a corporation constituted and created by chapter 197 [page 491] of the Laws of 1870 of the state of New York, for the use and purpose of forming an Endowment Fund for the said Museum, or of adding to and enlarging the Endowment Fund of said corporation, if such a fund now exists, or shall be in existence at the time of my death; the income only of the fund hereby created, or intended so to be, to be used for the purchase of rare and desirable art objects, and in the purchase of books for the library of said Museum, and for such purposes exclusively, the principal of said fund is not to be used, diminished or impaired for any purpose whatever. * * *

First Codicil.

" * * * Second. I except and exclude from the rest, residue and remainder of my real and personal estate given and devised by my said will and testament all my real estate in the city of New York and in the state of New Jersey, and also all of the stock of the Paterson and Hudson River Railroad Company and of the Patterson and Ramapo Railroad Company which I may own or be entitled to at the time of my death. And I give, devise and bequeath the same to Asahel S. Levy and Jenkins Van Schaick, both of in the city of New York, for and during the lives of Thomas B. Bradford, and of Theodore B. Rogers, Jr., grandsons of my deceased

brother Theodore Rogers, and for and during the life of the longest liver of said Thomas B. Bradford and Theodore B. Rogers, Jr., In Trust nevertheless to collect and receive the rents, income, issues, dividends, interest and profits thereof and to apply and pay the same as follows:

"1st. To the payment of all taxes, assessments, insurances, alterations, repairs, and other charges which may be or come against said real and personal estate, or which may be necessary for the proper care and preservation thereof.

"2nd. To apply to the use of each of the said persons above named viz. Thomas B. Bradford and Theodore B. Rogers Jr. five hundred dollars annually so long as he may live.

"3rd. The remainder of said rent and income if any, shall be used and applied to the improvement and permanent benefit of the real estate given and devised in trust by this codicil.

"4th. If there shall still remain a balance of said rent and income, I give and bequeath the same to The Metropolitan Museum of Art in the City of New York, for the purpose of forming or increasing an Endowment Fund of said Corporation, as I have in said will and testament provided.

"My executors and trustees shall have and I hereby give them power to lease and let the said real estate for terms of not more than 15 years at any one letting or leasing, and for such rents and upon such terms, covenants, agreements and conditions as to them may seem just and proper. * * *

"Fourth. Upon the death of the longest liver of said two named persons, viz. Thomas B. Bradford and Theodore B. Rogers, Jr. I order and direct the said Trustees to sell and convert into money all of said real estate devised in trust in this codicil, and I give and bequeath the proceeds arising from said sale and conversion, and the two above mentioned railroad stocks, together with any accumulations of the income from said properties, to the Metropolitan Museum of Art in the City of New York, in my said will and testament mentioned, for the same uses and purposes and subject to the same conditions and limitations which are contained in the sixteenth and seventeenth clauses of my said will and testament, and as are therein prescribed and applied to the gift, devise and bequest of the rest, residue and remainder of my real and personal estate, and the provisions I have made in the event of the failure or invalidity of the devise and bequest of said rest, residue and remainder or any part thereof, and the disposition to be made of the same, shall apply to and include my said real estate and the two stocks above mentioned and hereby excluded from and taken out of said rest, residue and remainder and hereby intended to be devised and bequeathed.

"If however, at the time this instrument

shall go into effect, the said Metropolitan Museum of Art in the City of New York, shall be authorized to take the land in question by devise, a sale of said real estate shall not be necessary, but the same shall upon the expiration of the trust term hereby created, vest in possession in said Corporation to which in that event I give and devise the same, and it shall not be necessary to sell and convert the remainder of the rest, residue and remainder of my real estate into money as provided in my said will if at the time of my death the said Metropolitan Museum of Art shall be authorized to take it by devise, and in that event I give and devise the same to that corporation absolutely. * * *

Second Codicil.

"* * * Third. If at any time it shall happen that the income from the real and personal estate given and devised in trust by the second clause or paragraph of the said first codicil to my said last will and testament shall be insufficient to pay and discharge the taxes and assessments which are or may be levied and imposed upon said real and personal estate, such deficiency shall be made up and paid and supplied out of the income of the estate, real and personal, given, devised and bequeathed to the Metropolitan Museum of Art by my said last will and testament, or out of the income from the fund which may arise from the sale and conversion of said real and personal estate ordered and directed by said last will and Testament. * * *

Fourth Codicil.

"* * * As Thomas B. Bradford mentioned in a former codicil as one of the parties during whose life a certain Trust is to last has since died; I hereby nominate and appoint to take his place in all things William Du Pont, grandson of my deceased brother Theodore Rogers. And I hereby declare William Pennington, Theodore B. Rogers and Judge John S. Barkalow are the executors and trustees of and under my said last will and testament and the codicils thereto. * * *

John R. Beam and John W. Griggs, for complainants. George Holmes, Robert De Forest, and Robert Thorne, for defendant Metropolitan Museum of Art. Alan H. Strong, for defendants William Du Pont, Jr., and William Du Pont, his guardian ad litem.

MAGIE, Ch. Complainants are the executors of Jacob S. Rogers, deceased, and hold, as trustees, the personal and real property withdrawn and excluded from the residuary disposition made by the sixteenth clause of the will of the testator, and created a trust fund by the provisions of the second clause of the first codicil to said will. Their bill seeks specific relief respecting the disposition and management of the trust fund, and it contains a prayer for general relief. The defendants are the Metropolitan Museum

of Art, a corporation of the city of New York, Theodore B. Rogers, Jr., William Du Pont, Jr., and William Du Pont, guardian of William Du Pont, Jr. The Metropolitan Museum of Art has filed an answer admitting the charges of the bill, and joins in one of the prayers for specific relief contained therein. An answer to the bill by the defendant Theodore B. Rogers, Jr., who is an infant, has been filed by Theodore B. Rogers, his guardian, submitting to the direction of the court, and praying for protection of the infant's interest. An answer has also been filed by William Du Pont, Jr., who is an infant, by William Du Pont, his guardian ad litem, and by said William Du Pont, as general guardian of said infant. By that answer no contest is presented in respect to the facts charged in the bill, but it is submitted thereby that no such specific relief as is prayed for in the bill can be decreed, except on consent of said infant, which consent is thereby expressly refused. The cause has been brought to hearing upon the bill, answers and proofs.

The proofs establish the following facts: The stocks of the Paterson & Hudson River Railroad Company, and of the Paterson & Ramapo Railroad Company, which are included in the trust fund in question, are producing an annual income of \$13,676. The real estate in the city of New York included in the trust is, in part, unimproved, producing no income; the remaining part is a lot, with a building which has been unoccupied for several years past, and which needs considerable repairs to enable a rental to be obtained for it. The taxes imposed on that property for the year 1902 were \$6,021.49. In the opinion of a witness, the two tracts are worth \$362,000. The real estate in the state of New Jersey in the trust, among other things, includes land in the city of Paterson, viz., a considerable tract of unimproved land, and the late residence of the testator. All the real estate in the city of Paterson was assessed for taxes, for the year 1902, at a valuation of \$412,790.40. One of the executors testified that he and his co-executors consider this valuation to be excessive, and have appealed therefrom to the state board of taxation. The witness, however, admits that the lands in that city have a valuation of over \$200,000. The annual taxes imposed on that property at the valuation of the taxing office for the year 1902 were \$10,310.76. There are, besides, large assessments upon that property, imposed for street improvements (to an amount not disclosed by the proofs), which have not been paid. The same witness expresses an opinion that the whole Paterson real estate cannot be made to yield an annual income of more than \$600. There is also included, in the trust in question, some land situated at and in the vicinity of Pompton, N. J. The same witness expresses the opinion that that property cannot be made to produce

more than \$400 a year. What annual taxes are imposed therein is not disclosed by the proofs.

From the facts established by the proofs, the following inferences may be fairly drawn: (1) That the present income of the trust is now insufficient to discharge the annual taxes imposed upon the property, and directed to be first paid out of the income by the first subdivision of the second clause of the first codicil; (2) that there is no reasonable probability that in the future the fund will produce sufficient income to discharge such annual impositions, because there will be no income to apply to improvements under the third subdivision of the second clause of the codicil, and therefore no increase produced from the fund; and because the limitation of the power to rent the property to 15-year terms will prevent the unimproved land being let upon building leases, which might increase the income.

It results that at present the fund can produce nothing to satisfy the annual payments directed to be made to the two infants, and there is no reasonable likelihood that it will do so for the future. The deficiency required to be met by the Metropolitan Museum of Art under the third clause of the second codicil now exists, and is likely to continue to exist and to be increased by the increase of taxation, and especially by assessments for municipal improvements in Paterson. If the trustees could be relieved from the burdens arising from the requirement to pay the impositions on the real estate included in the trust, the income from the stocks included therein would not only suffice to pay the annual legacies to the infants, but would leave a large surplus.

The contention made by the guardian ad litem of the infant Du Pont, one of the beneficiaries under the trust, ought to be first considered. That contention is that, notwithstanding the trustees are unable, in the present condition of the trust fund, to make any payment under the annual legacy to that infant, and that the fund is so limited by the terms of the trust that there is no reasonable probability—indeed, no possibility—that any such payment can be made hereafter, yet none of the relief sought by this bill can be granted without the consent of that infant. As the infant is not sui juris, he is, of course, incapable of giving a consent upon which the action of the court in making a decree under this bill could be supported. The guardian ad litem has no power either to give or to withhold such a consent. But a court of equity is not hampered in the administration of relief, in a proper case, by the inability of an infant to give consent to its action. Thus, where an infant, if adult, would be bound to make an election, the court may defer the question of election until he becomes of age, if it can be done without prejudice to the rights of other parties, but will ordinarily make in-

quity whether it is to the infant's interest to elect, and what election should be made, and will thereon make an election in the infant's behalf. Pom. Eq. Jur. § 509; *Streatfield v. Streatfield*, 1 White & Tudor, L. Q. Eq. 225, and notes.

If, in the case before us, consent is necessary, and can be given by the court in the infant's behalf, it would seem to be inequitable to stay the hand of the court until this infant becomes of age, because the long delay will not only injure the infant objecting, but the other infant beneficiary who submits himself to the judgment of the court, and would also operate injuriously upon the residuary beneficiary. Upon the pleadings and proofs, I deem it my duty to determine (1) whether this court is possessed of power to grant the specific relief prayed for, or any part of it, or any germane relief under the prayer of the bill; and (2) whether, if the court possess such power, it should refrain from exercising it because of the infancy of two of the beneficiaries under this trust.

Before addressing myself to these inquiries, it is proper to state that the interests of the infant beneficiaries are not correctly called "annuities." An annuity arises upon the grant of a yearly sum, with the payment of which the grantor has charged himself, and would have been liable at the common law to a writ of annuity. Co. Litt. 144, E. Here is no bequest of an annual sum, under which the executors might be required to set aside a fund sufficient to raise such sum. The infants' interests are created and fixed by the terms of the trust. They are not entitled to a fixed annual sum at all events, but only to an annual sum if the income of the fund in each year permits. Therefore, if in any year the income does not suffice to pay the whole or any part of the annual sum, the trustees are without power to make up the deficiency out of the subsequent income. Nor can there be the least pretense that the annual sums are charged upon the principal of the trust fund. *Baker v. Baker*, 6 H. L. C. 615; *Wharton v. Masterson*, L. R. App. Cas. [1895] 186. Continued deficiency of income to pay the annual sums will therefore result in a total loss to the infants of the benefit which testator intended them to receive. If the interests of the infants under this trust were strictly annuities, the case would fall within the line of English cases in which the Court of Chancery has required the annuity to be secured, and, after security given, has disposed of the residue. Thus, in *Slanning v. Style*, 3 P. Wms. 334, upon a will bequeathing an annuity to testator's wife, and charging it upon the personal estate, Lord Talbot decreed the executors to bring into court sufficient of the bonds and securities of the estate to answer the annuity. In *re Parry*, L. R. 42 Chan. Div. 570, North, J., upon a will bequeathing annuities, and then bequeathing the residue of testator's property after payment of the annuities, held that while the

annuitants would not be entitled to have the estate converted, and a sum sufficient to answer the annuities invested, they were entitled to have the annuities sufficiently secured; and he decreed that such security should be given by a first mortgage on certain real estate of the testator, which was part of the residue, and, when so secured, that the rest of the income of the estate should be divided among the residuary legatees. A like doctrine has been applied in a well-considered case in New Hampshire. *Healy v. Tappan*, 45 N. H. 243, 86 Am. Dec. 159. With respect to annuities so secured, the Court of Chancery has, when the income has proved to be insufficient to satisfy the annual payment, required the deficiency to be made up from the subsequent income, or even from the principal. *May v. Bennett*, 1 Russell, 370; *Boyd v. Buckle*, 10 Simons, 595; *Booth v. Colton*, Law Rep. 5 Chan. App. 684; *Baker v. Baker*, *ubi sup.* But the case under consideration is distinguished from those cases, because, as before stated, the infants are not annuitants. Their interest is confined to a share of the income to be paid annually, if the income extends so far. If the income does not suffice for any annual payment, the deficiency does not fall upon any subsequent income or the principal of the fund. The residuary legatee is therefore in no respect concerned in that deficiency. It cannot be required to give security that the income shall be sufficient, and is under no liability if the income never becomes sufficient. The solution of the problem presented in this case must be found in the application of other principles.

Complainants are trustees of a fund of great value. They exhibit and prove a situation in which the fund does not now serve the evident purpose of its creator, in respect, at least, to his infant beneficiaries. They show that there is no reasonable probability that the situation will improve in the future. It is not too much to say that, in view of the possible and probable increase of municipal impositions by way of taxes and assessments, there is no reasonable expectation of an improved situation. Under such circumstances, they apply to this court for directions as to their duty. They invoke the action of the court under its well-settled jurisdiction to construe wills and trusts, and to aid executors and trustees by instructions and directions, where necessary and proper. The trustees bring this matter to the attention of the court upon the demand of the residuary legatee, the ultimate beneficiary of testator's bounty under the trust. If complainants yield to this demand, it is evident they will themselves be liable to a charge of a breach of trust. For it is impossible to deny that the course of action requested by the defendant the Metropolitan Museum of Art is not in accord with the apparent intent of the testator expressed in the language set out in the prefatory statement. That language

clearly indicates that testator's intent was that the whole fund, real and personal, should be kept intact in the trust as long as the longest liver of the two infants should survive. What this defendant seeks is that, notwithstanding this intent, the real estate may now, at once, be released from the trust and given to it in immediate possession. As it must be conceded that the defendant has, under the terms of the trust, a present vested interest in the whole fund, this course will only accelerate the purpose intended, and put the residuary beneficiary in a possession to which it must ultimately come. But it must also be conceded that this course will alter the scheme of the trust as devised by the testator.

It is not easy to determine what motive actuated the testator to include in this trust both real and personal property which must have been of great value at the time he executed the will and codicil, and which is now worth over half a million dollars, and also to include therein real estate which is unimproved and in a condition which, under the terms of the trust, precludes the possibility of improvement and of any income therefrom. It is clear that his sole purpose could not have been to secure the annual payment of the comparatively paltry sums given to the two infants. His purpose must have had a broader scope. In my judgment, he contemplated that the income from the personal estate, and such of the real estate as produced income, would always be sufficient to satisfy the primary charges imposed thereon by the first subdivision of the second clause of the first codicil, and the annual sums to the two infants directed to be paid by the second subdivision of the same codicil, and that his motive may be inferred to have been to keep the unimproved and nonincome producing real estate in the trust until its termination, when the ultimate beneficiary would receive it, with the benefit of what has been called the "unearned increment."

The residuary beneficiary supports its demand upon the trustees upon the doctrine of a line of cases in the English Court of Chancery. That doctrine is that, when an interest under a will is vested in one who is or becomes *sui juris*, the court will, upon his demand, put him in immediate possession thereof, notwithstanding the testator postponed his possession to a later period, if it clearly appears that no other person is interested in the property which will be affected thereby. This doctrine seems firmly established in those courts, the leading case of *Saunders v. Vautier*, Or. & Ph. 243, in which it was first enunciated, having been repeatedly followed and approved. *Gosling v. Gosling*, 1 *Johnson*, 285; *Re Colson Will*, Kay, 133; *Coventry v. Coventry*, 2 Dr. & Sm. 47; *Josselyn v. Josselyn*, 9 Sim. 963; *Rocke v. Rocke*, 9 Bevan, 66; *Re Jacobs Will*, 29 Bevan, 402; *Wharton v. Masterson*, *ubi sup.*

If the relief sought for in this case depended upon the application of the doctrine of those cases, I should find serious difficulty in granting it. The infant beneficiaries have an interest in the trust fund during their joint lives, and the survivor of them has such an interest as long as he shall survive. If, under the circumstances disclosed, the interest of the infant beneficiaries may be ignored, the doctrine seems to me, at present, to be in opposition to the rule requiring courts to carry out and effectuate the expressed will of the testator. The doctrine was frankly and forcibly stated by Vice Chancellor Page Wood in *Gosling v. Gosling*, *ubi sup.*, thus: that the Court of Chancery does not hesitate to strike out of a will any direction that a beneficiary shall not enjoy an interest thereunder until a later period, when the beneficiary has a vested interest, and has become *sui juris*, and demands immediate possession. This, it seems to me, is substituting the will of the beneficiary for the will of the testator. It cannot, however, be open to doubt that a court of equity, in dealing with trusts, has a right to break in upon and thwart the expressed will of the creator of the trust in some cases. A notable example of such a case is, when the trustee, to whom the creator of the trust has expressly given power of management and control, becomes incompetent, or is misconducting himself, to the peril of the trust and those interested therein, this court has never hesitated to remove such a trustee, and to substitute its own appointee. The reason for such action is evidently necessity, and its purpose is to carry out the expressed intention of the creator of the trust, which intention is imperilled if his appointment of a trustee cannot be revoked for good reasons, and a trustee substituted by the decree of the court. If trustees disclose a situation of their trust in which a slavish adherence to the terms of the trust will operate to wholly prevent the benefits intended by its creator, and they seek instructions and directions as to their duty, I think that instruction and directions for a course of conduct which, though differing from that prescribed by the terms of the trust, will actually carry out the intent of the creator, may well be grounded upon and sustained by the necessity of the case. The benefits intended for the beneficiaries are the main subjects of consideration. The modes in which those benefits may be attained are incidental, and necessity may require a change of mode to produce the intended effect. The power of the court may well be exercised in a case of evident necessity. How far it may extend on other grounds need not be considered.

It is not improper to add that I should find extreme difficulty in applying even the doctrine of necessity to a case where the creator of the trust has plainly disclosed an intent to limit the benefit he intended, by an adherence to a course of conduct expressly

mapped out in the management of the trust. In the present case, if we assume that the testator contemplated a situation such as now confronts the trustees, and made express provision for it, how could it be maintained that any necessity existed requiring the court to direct the trustees to take another course of conduct, on the mere ground that it would be more beneficial than that course which the testator prescribed? I have examined carefully all the cases cited in argument, or which have been discovered by me, on the subject of the power of a court of equity to deal with trusts under circumstances such as are presented in this case. I have found none more satisfactory in reasoning and conclusions than those decided in the state of Illinois. In a well-considered case, arising upon a trust created by deed, the court held (the opinion being delivered by Caton, C. J.) that in an emergency which had not been considered by the creator of the trust, and which, if anticipated, would have been provided for, a court of equity might take the place of the creator of the trust, and do what he would have done. This power was placed upon the ground of a necessity to carry out the intent of the trust, when, by unforeseen circumstances, it was not answering the purpose of its creation. *Curtiss v. Brown*, 29 Ill. 201. Afterward, the same court held that the power of a court of equity to break in upon the terms of a trust, or to change the terms and conditions imposed by its creator, exists only in extreme cases, as, when not to exercise the power, the property held in trust may be lost or wholly fail to answer the purposes of the trust. *Voris v. Sloan*, 68 Ill. 588. The same court, with more questionable propriety, upheld the jurisdiction of a court of equity to sell lands in which a life tenant or remainderman had respective interests, and to invest the proceeds, when it was made to appear that, unless a court of equity interfered, the property would be lost to both the life tenant and the remainderman, although no trust was involved in that case. *Gavin v. Curtin*, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776. Later the court, while admitting the power of a court of equity to interfere with a trust when the preservation of the subject-matter of the trust, or other like necessity, required interference, limited the power to such cases of necessity, and refused to direct a change of trust property merely to increase income, or to subserve the interest of persons entitled to the income. *Johns v. Johns*, 172 Ill. 472, 50 N. E. 337.

Recurring to the will and its codicils, for the purpose of determining what was the intent of the testator in respect to this trust and its management, it is plainly apparent that his purpose was to benefit two classes of persons, viz., (1) the two infant beneficiaries, who were each to receive \$500 in each year, if the income of the fund should be sufficient therefor; and (2) the Metropoli-

tan Museum of Art, to which the whole fund is to go at the death of the survivor of the two infants. Looking at the provisions of the will and the first codicil, they entirely justify the inference that the testator contemplated and expected that the income from the fund would suffice, not only to discharge the payments required by the first subdivision of the second clause of that codicil, but also to pay the annual sums to the infant beneficiaries under the second subdivision thereof, and that there might be a remainder to be applied by the trustees to the improvement of the property under the third subdivision thereof, and even a balance to be paid to the Metropolitan Museum of Art under the fourth subdivision thereof. Considering the great value of the real and personal property which the testator impressed with this trust, there is another plain inference to be drawn, as before suggested, viz., that testator's intent was that the ultimate beneficiary should receive the whole fund at the death of the surviving infant, with such enhanced value as it might then have.

But there are provisions contained in the third clause of the second codicil which have a bearing upon what was in the contemplation of the testator when he made the final scheme for this trust, and which have given me much difficulty. By that clause it is provided that if at any time the income of the trust fund should be insufficient to "discharge taxes and assessments" upon the real and personal estate in the fund, the deficiency shall be paid out of the income receivable by the Metropolitan Museum under the other provisions of testator's will. Do the provisions of this third codicil justify and require the inference that the testator contemplated that at some future time the income from the trust fund would become constantly insufficient to discharge the annual taxes, and that he intended that in such event the Metropolitan Museum should thereafter pay the deficiency for the life of the surviving beneficiary? It will be perceived that if such intent must be inferred, it produces an alteration of the scheme of the trust previously prescribed. That scheme contemplated and provided for yearly benefits to the infant beneficiaries. The suggested alteration would, when the income proved constantly insufficient to pay the annual taxes, wholly deprive them of any benefit. The original provision provided for possible benefits to the Metropolitan Museum out of the income. The alteration, when the annual taxes constantly exceed the income, would impose a burden on that beneficiary, to continue for an indefinite period, during which it would have no use of the trust fund, or any part of it. An alteration so completely destructive of the whole scheme of the trust ought not to be adopted upon a construction of the second codicil, unless that construction is necessary. If the language of the third clause is reasonably capable of a construction which

will be in conformity with the previous scheme, I think it should be adopted. It is difficult to conceive that the testator, if he intended so radical a change in the scheme of the trust, would not have expressed it in some more explicit language. If he had said that the ultimate beneficiary should make up the deficiency in the taxes and assessments, imposed on the trust fund, whenever the income of the fund should thereafter become insufficient therefor, such an intent might, perhaps, be found. But, in providing for the making up of such deficiency, he used the words "at any time," which may refer to a single time or single times, and do not suggest the idea of constant and continued deficiency, and, in my judgment, give a clue to the meaning of the testator. Taxes, as is well known, are imposed upon valuations not often changed, although, when changed, usually increased. But assessments are imposed by reason of benefits conferred by municipal improvements, which are not constant, but casual. Now, there is included in this trust a large tract of unimproved real estate in the growing city of Paterson. It must have been in the contemplation of testator that municipal improvements would be made which would occasion assessments to be imposed from time to time upon that property, which assessments, when added to the ordinary yearly taxes, would exhaust the income of the fund. In my judgment, the intent of the testator, discoverable from this clause, when applied to the subject-matter of the trust, was to provide for such casual and intermittent impositions, and that it did not extend to or contemplate the situation with which the trustees are confronted, when the income is insufficient to discharge the ordinary annual taxes, and there is no reasonable ground to suppose it will ever become sufficient for that purpose.

Having reached the conclusion, upon the proofs, that the trustees cannot, under the present circumstances, or any circumstances that can be anticipated, so manage the trust fund as to carry out the plain intentions of the testator, and being of opinion that the circumstances were not within the contemplation of testator, or the subject of any direction in the scheme of the trust as devised by him, I am led to the further conclusion that a case of necessity is presented, requiring the intervention of this court and directions for a change in the management of the trust fund, if by such change the manifest intention of the testator can be practically carried into effect. Nor do I think this court should refrain from intervening in the management of the trust fund because two of the beneficiaries are infants. Under the situation in which the trust is, it is obvious that

the provision made for their benefit will be wholly unavailable to them. If, by the intervention of this court and a direction for a change in the management of the trust, the benefit intended for them may be made available and indubitably secured to them, an additional reason for the intervention of the court is disclosed. I entertain no doubt of my power to determine whether such a change would be for their benefit, and, finding it to be for their benefit, to direct such a change.

The trust fund under consideration is so large that it cannot be difficult to formulate some scheme for its management which, with the assent and concurrence of the residuary beneficiary, the Metropolitan Museum, will practically carry out testator's intentions. But I do not think the matter is so presented that I can now determine what is a proper or judicious scheme. The Metropolitan Museum, by its answer, offers that, if it is permitted to come at once into possession of the real estate included in the fund, freed from the trust, it will accept the same, and relieve the trust fund from any liability for the taxes and assessments, etc., imposed and to be imposed thereon, which now burden and exhaust the income. This would leave in the trust the railroad stocks, now producing an income many times exceeding the annual sums payable to the infant beneficiaries. So long as the dividends from those stocks are paid, the infants' interests will be protected. On being reminded at the argument that railroad stocks are not securities in which trust funds may be properly invested, the counsel for the Metropolitan Museum offered to give additional security, to be approved by this court, for the complete and adequate protection of the income therefrom, so as to perpetually assure its sufficiency to pay the annual sums due the infants during their respective lives. Such a security ought, of course, to be of a kind which trust funds may be invested in. Some suggestion was made that security might be given upon some part of the real estate of which the Metropolitan Museum seeks the present possession. But if this suggestion be pursued, it is obvious that the material for the formulation of a proper scheme is not before me. The question would involve the consideration of what real estate should be thus mortgaged, and the right of the Metropolitan Museum to execute such a mortgage.

Under these circumstances, I think the cause should be referred to a master to consider and report a scheme for the management of the trust fund upon the lines of the above opinion, so that, upon the coming in and approval of his report, a decree may be made in conformity thereto.

(N. J. L. 113)

WALLACE, MULLER & CO., Limited, v.
LEBER et al.(Court of Errors and Appeals of New Jersey.
June 22, 1908.)INDEMNITY—ACTION ON CONTRACT—EVIDENCE
—DEPOSITION.

1. Defendants, by a contract in writing, agreed to indemnify the plaintiffs with respect to the duty upon 4,000 bags of sugar bought that day by the plaintiffs from Messrs. Bunge & Co., through the mediation of the defendants.

Held, that when sued on their contract the defendants were entitled to exhibit, at the trial, the contract of sale between Messrs. Bunge & Co. and the plaintiffs, of even date therewith, for the sale of 4,000 bags of sugar, made through their mediation, in so far as such contract described or tended to identify the subject-matter of their indemnification; but that they were not entitled to treat the other provisions of such contract of sale as conditions precedent to their contract of indemnity.

2. A deposition taken under section 45 of an act concerning evidence (P. L. 1900, p. 375), and returned and filed with the court in which the action is pending, or with the clerk thereof, is, so long as it remains a file of such court, to be treated as testimony delivered in the cause, which either party may read to the jury.

3. *Held*, also, that, if a deposition contained no competent proof favorable to the party who seeks to read it to the jury, he is not injured by the denial of his abstract right in this respect.

Dixon, J., dissenting.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Wallace, Muller & Co., Limited, against Edward F. Leber and Louis Meyer. Judgment for plaintiff, and defendants bring error. Affirmed.

The writ of error in this case brings up for review the judgment entered in the Supreme Court in favor of the plaintiffs in the sum of \$3,435.15, upon a verdict of a jury rendered at a trial at the Hudson circuit, before Mr. Justice Collins.

The action was brought to recover damages for the alleged breach of two contracts, reading respectively as follows:

"Wallace, Muller & Co., Limited.

"New York, Sept. 19th, 1897.

"Messrs. Wallace, Muller & Co. Ltd. 48 Pearl St., City—Dear Sirs: In accordance with our agreement, we hereby guarantee to you that the duty on the 4,000 bags of Dutch Sugar, bought to-day from Messrs. W. Bunge & Co. Rotterdam, through our mediation, shall not exceed \$1.95 per 100 lbs. Any excess in duty which you may be called upon by the Government to pay will be promptly refunded by us to you without any objections whatsoever.

"Yours very truly, Leber & Meyer."

"Wallace, Muller & Co., Limited.

"New York, Sept. 24th, 1897.

"Messrs. Wallace, Muller & Co. Ltd. 48 Pearl St., City—Dear Sirs: In accordance with our agreement, we hereby guarantee to you that the duty on the 4,000 bags of Dutch

Sugar, bought to-day of Messrs. W. Bunge & Co. Rotterdam, through our mediation, shall not exceed \$1.95 per 100 lbs. Any excess in duty which you may be called upon by the Government to pay will be promptly refunded to you by us, without any objections whatsoever.

"Yours very truly, Leber & Meyer."

The contracts of sale were as follows:

"Edward F. Weber. Louis Meyer.

"Leber & Meyer,

"Importers, Exporters and Commission Merchants,

"3, 5 & 7 William St., and 8 South William St.

"Cable Address: Telephone, 937 Broad.

"Leber, New York.

"A B C Code.

"New York, Sept. 18th, 1897.

"Sold for account of Messrs. Bunge & Co., Rotterdam, to Messrs. Wallace, Muller & Co. Ltd., Two thousand (2,000) double 100 pound bags Dutch Granulated Sugar, W. S. R. at 12.6 G. S. (Twelve Shillings and Sixpence) per 112 pounds net, cost and freight New York, shipment per steamer from Holland on or about October 6th, 1897, two thousand (2,000) bags as above at 12.7½ (Twelve Shillings Seven and One-half Pence) per 112 pounds net, cost and freight New York, shipment per steamer from Holland on or about October 23rd, 1897.

"Terms of payment:—Buyers agree to open 90 days date Letter of Credit in favor of Messrs. W. Bunge & Co. Rotterdam, on London Bankers and to cover Marine Insurance. Sellers are to have the option of drawing 90 days or 60 days, allowing buyers in latter case ¼ per cent. on Invoice.

"Leber & Meyer, Agents.

"Accepted.

"Wallace, Muller & Co., Limited.

"Documents to consist of Bills of Lading, Consular Certificate and Certificate signed by the Mayor of the city where the Refinery is situated, attested by U. S. Consul, as per attached form. Leber & Meyer."

"Wallace, Muller & Co., Limited.

"W. L. W.

"(Name of Country.)

"(Name of place where certificate is issued.)

"(Date)

"This is to certify that the Sugar specified in the annexed invoice is the product of (name of country); that no indirect bounty has been received thereon in excess of the tax collected upon the best or cane from which it was produced, and that no direct bounty has been, or shall be, paid thereon.

"(Signature of the officer authorized by the Government of — to issue such certificate.)

"I, —, Consul of the United States at —, hereby certify that the above signature is that of the officer authorized by the — Government to issue the same.

"(Seal)

"(Date)

"United States Consul."

* 2. See Depositions, vol. 18, Cant. Dig. §§ 237, 238, 276.

"Edward F. Leber. Louis Meyer.

"Leber & Meyer.

"Importers, Exporters and Commission Merchants,

"3, 5, & 7 William St. and 3 South William St.

"Cable Address: Telephone, 937 Broad.

"Leber, New York.

"A B C Code.

"New York, Sept. 24th, 1897.

"Sold for account of Messrs. W. Bunge & Co., Rotterdam to Messrs. Wallace, Muller & Co. Ltd., New York City, Two thousand (2,000) double 100 pound bags of Dutch Granulated Sugar W. S. R. shipment first week of November, and Two Thousand (2,000) double 100 pound bags Dutch Granulated Sugar, W. S. R. shipment second week of November from Holland, by steamer to Baltimore, at 12.7½ (Twelve Shillings and Seven and One-half Pence) per 112 pounds net, cost and freight Baltimore.

"Terms:—Buyers agree to open Letter of Credit with their London Bankers, in favor of Messrs. W. Bunge & Co., for this purchase 90 days' or 60 days' date less 1.4 (One-quarter) per cent, at sellers' option, and to cover Marine Insurance inclusive of lighter risks.

"Bankers' acceptance to be given in exchange for Bills of Lading, Consular Invoice and Certificate from Refiners, attested by the Mayor of the city where the refinery is located, showing the country of Origin of this Sugar and that no export bounty is received on the exportation of this Sugar, and this certificate to be sworn to before the United States Consul.

"X refined. Leber & Meyer, Agents.

"XX steamer.

"Accepted.

"Wallace, Muller & Co., Limited.

"W. L. Wallace, Ts."

With regard to the contract of sale of September 18th there was a dispute upon the trial as to when the italicized portion of this contract was executed, the defendants contending that it was executed simultaneously with the previous portions of the contract, and with the contract of indemnity upon which suit was brought, dated September 18, 1897, while the plaintiffs claimed that it was executed some days subsequently thereto.

Under the ruling of the learned trial justice in his charge to the jury this is unimportant, inasmuch as he ruled that the italicized portion became a part of the contract.

A provision substantially similar to that of the italicized portion of the contract of sale of September 18, 1897, is found in the body of the contract of sale of September 24, 1897.

Certain sugar arrived in the United States, and Wallace, Muller & Co. were called upon by the United States government to pay or

deposit a certain amount of money pending the determination by the government as to whether any countervailing duty was leviable upon such sugar. Thereafter the United States government determined that countervailing duty was due, inasmuch as the Dutch government paid export bounty, and determined the amount of such countervailing duty. The entries were thereupon liquidated, and a portion of the money deposited by Wallace, Muller & Co. was retained by the government.

Messrs. Leber & Meyer were called upon to refund this to Wallace, Muller & Co., and they declined, whereupon this action was brought.

The two main defenses set up and relied upon by Messrs. Leber & Meyer were:

First. That the document specified in the italicized portion of the contract of the 18th of September, and in the body of the contract of the 24th of September, did not accompany the shipments, and that this relieved Messrs. Leber & Meyer from their contract of indemnity, it being their contention that it was the duty of Wallace, Muller & Co.'s bankers not to accept the drafts drawn upon them when they found that the documents accompanying the bill of lading did not conform to the contract requirements.

Second. That the sugar which was accepted by Wallace, Muller & Co., and upon which they paid countervailing duty was not "Dutch Granulated Sugar, W. S. R." G. S.

As to the first point, the learned trial justice charged the jury that the facts were as claimed by the defendants, but that, as a matter of law, this did not relieve them from their contract of indemnity.

As to the second point, the learned trial justice submitted the question to the jury whether the sugar upon which the duty was paid was "Dutch Granulated Sugar, W. S. R." G. S. within the meaning of the contract, upon which question the jury found in favor of the plaintiffs.

The defendants thereupon brought this writ of error, assigning as error certain portions of the charge of the learned trial justice, his refusal to charge certain requests submitted by the defendants, and the exclusion of material testimony upon the one question submitted to the jury, as well as the denial of the motion to nonsuit the plaintiff.

In a previous action between these parties upon a contract of indemnity in all respects similar to the contracts upon which the present suit is brought, Mr. Justice Lippincott, before whom the cause was tried, a jury being waived, found as a fact that the memorandum requiring the certificates was not a part of the contract of sale, hence the first point now raised by the plaintiffs in error was not passed upon by this court in its opinion affirming the judgment then before it (Wallace, Muller & Co. v. Leber & Meyer, 65 N. J. Law, 195, 47 Atl. 430).

Coult & Howell and Herbert R. Limburger, for plaintiffs in error. Albridge C. Smith, for defendant in error.

GARRISON, J. (after stating the facts). 1. The contract of the defendants, Leber & Meyer, by which they agreed to indemnify the plaintiffs against any duty upon 4,000 bags of Dutch sugar in excess of \$1.95 per 100 pounds, was an independent undertaking upon their part, made in their individual capacity, and not as agents for Bunge & Co., the vendors of the sugar. The fact that, as vendors' agents, they had brought about the sale of the sugar, did not have the effect of reading into their contract of indemnity with the plaintiff any provision of the contract of sale made between Bunge & Co. and the plaintiffs, save as, by apt reference thereto, certain provisions of the earlier contract were legally incorporated in the later one. This is not a mere rule of evidence governing the admission of testimony. It is a matter of substantive law, touching the effect of written contracts, and, as such, presents normally, and in the absence of equivocal language, a court question.

The question in the present case was whether the defendants' contract with the plaintiffs was an absolute agreement of indemnity, or whether it was a qualified undertaking conditioned upon the performance by Bunge & Co. and the plaintiffs of a provision in their contract of sale by which certain certificates from the refiners of the sugar were to be furnished by Bunge & Co. in exchange for acceptance of their bills by the plaintiffs' bankers.

The language of the defendants' contract is free from ambiguity. It is brief, and in these words: "New York, September 18th, 1897. Messrs. Wallace, Muller & Company, Ltd., 48 Pearl Street, City—Dear Sirs: In accordance with our agreement we hereby guarantee to you that the duty on 4,000 bags of Dutch Sugar bought to-day from Messrs. W. Bunge & Co., Rotterdam, through our mediation, shall not exceed \$1.95 per 100 lbs. Any excess in duty which you may be called upon by the Government to pay will be promptly refunded by us to you without any objections whatsoever. Yours very truly, Leber & Meyer." This, on its face, is an absolute undertaking, subject only, as all contracts are, to the identification of its subject-matter, to which end the contract of sale is sufficiently indicated to authorize reference to be made to it for the purpose of ascertaining what sugar the plaintiffs had that day bought of Messrs. Bunge & Co., Rotterdam, through the mediation of the defendants. To that extent the language of the contract of sale is to be read into the contract of indemnity. The defendants, however, insist that by such reference the entire contract of sale, with all of its incidents and accompanying provisions, became legally embodied in their contract of indemnity as conditions

precedent, failure to perform any one of which by Bunge & Co. or the plaintiffs would absolve the defendants from their bargain with the latter; or, if this be not so, that at least a latent ambiguity was established that opened the case to proofs as to the intention of the parties and the meaning of their contract with the consequent submission of the entire question to the jury.

The learned trial justice ruled against each of these contentions, holding, in effect, that there was no ambiguity in the defendants' contract, and that the requirement as to certificates contained in the contract of sale did not enter into the defendants' undertaking. This ruling of the learned justice was clearly right. The contract of sale covered three general subjects: (1) The sale by Bunge & Co. of 4,000 bags of sugar described as "Dutch Granulated Sugar, W. S. R.," which, it is admitted, meant "Western Sugar Refinery." The specification of prices and dates of shipment from Holland then followed. (2) A stipulation by the vendees as to the terms of payment by them, and as to marine underwriting to be effected by them. (3) A statement that certain documents, among which were the certificates from the refinery, were to be given to plaintiffs' bankers in exchange for their acceptance of the vendors' drafts upon them.

Of these several provisions it will be observed that the only one bearing upon the identification of the subject of the defendants' indemnity was that contained in the first clause, which set forth the date of the sale, the mediation of the defendants, the number of bags, to wit, 4,000, the name and description of the sugar itself, to wit, "Dutch Granulated Sugar, W. S. R.," together with the prices and dates of shipment. All of these matters of description, as has already been said, are deemed to be incorporated in the defendants' contract of indemnity by the simple reference to its subject-matter as "4,000 bags of Dutch sugar bought to-day of Messrs. Bunge & Co., Rotterdam, through our mediation." This fully complies with the call of the reference, and exhausts its capabilities.

The other treaties between Messrs. Bunge & Co. and the plaintiffs, inserted in their contract of sale, but not conducive to the establishment of the identity of the subject of the defendants' indemnification, are not within the scope of the reference contained in the latter contract, and cannot, by any rule of law, be imported into it, either to enlarge or to restrict its operation or effect. All of the testimony, therefore, that was offered as to tariff regulations at different periods, and as to the intention of the defendants that their agreement to indemnify should be inoperative under certain contingencies, was simply nugatory in view of the ruling of the trial court upon the lines just indicated and approved. The question of the meaning and effect of the defendants'

contract was properly withheld from the jury, and was properly decided by the trial court, the ineffective testimony that was admitted going for nothing.

No error was committed by the trial court in dealing with this branch of the case.

2. The question whether the sugar upon which the plaintiffs paid duty was that sold by Bunge & Co. to them and referred to in the defendants' contract with the plaintiffs was properly left to the jury. This was the main ground upon which the motion to nonsuit was rested, it being contended then and before this court that Dutch sugar was sugar that was both grown and refined in Holland, that there was no evidence that the sugar received from Bunge & Co. had been refined in Holland, or that it was the product of the Western Sugar Refinery. Upon each of these propositions there was testimony that raised an issue of fact. This rendered the submission of the case to the jury upon these points the only proper judicial course.

That the defendants' contract was not without consideration has already been decided in the earlier case referred to and reported in 65 N. J. Law, 195, 47 Atl. 430. The failure of Bunge & Co. to present the required certificates in exchange for the acceptance of its drafts has already been considered in this opinion. There was, therefore, no error in the refusal of the trial court to nonsuit the plaintiffs.

3. Under a further assignment of error, based upon a proper bill of exceptions, the defendants submit that the trial court erred in refusing to permit them to read to the jury as the testimony of a witness examined in the cause the deposition of Charles H. Waller that had been taken by the plaintiffs, but had not been offered by them on the trial. Upon the abstract proposition upon which this contention is based I concur in the views advanced by counsel for the defendants. The deposition had been taken upon notice given by the plaintiffs under section 45 of an act concerning evidence (P. L. 1900, p. 375). Section 51 of that act provides as follows: "51. The examination of any witness, by commission or deposition taken, returned and filed, as provided for in this act, shall be as competent evidence in the cause in which it shall be taken as if such witness had been examined in open court, on the hearing or trial thereof, * * *

and if the testimony be taken under the forty-fifth section of this act, proof being made that notice of the taking thereof was given as therein prescribed." I think that the fair meaning of this language, and the practicable rule to be deduced from it, is that the testimony so given is to be taken as testimony given in the cause, and not merely as information obtainable by a party in aid of his line of action or defense, as is the case with interrogatories proposed under the 341st section of the practice act (Gen. St. p. 2592),

wherein it is expressly provided that "the answers shall be evidence in the action if offered as such by the party proposing the interrogatories, but not otherwise." One practical difficulty that would result from the contrary view is of itself almost conclusive, viz., that if the party to whom notice of taking depositions had been given could not rely upon his right to use the testimony so adduced, he would in all cases be obliged to retake the same proofs—a result so onerous, and in most cases so needless, that it cannot well be deemed to have been within the legislative intent. A further practical difficulty in such contrary rule would be that documentary evidence, exhibited before the officer taking a deposition, and annexed by him and returned with the deposition so taken, under section 49, could not be produced upon the retaking of the deposition which such contrary rule would render necessary. Finally, the requirement that such deposition, when taken, shall be forwarded or delivered to the judge of the court in which the action is pending, or be filed with the clerk thereof, is a significant indication that thenceforward such testimony is to be regarded as part of the files of the court, subject, so long as it so remains, to judicial rulings as to its competence, but not to the mere will of either of the parties as to its production. The practice of removing depositions from the files before trial, which has been the subject of adjudication in other jurisdictions, need not now be considered.

The contention of the defendants in the above respects is in the main supported by the cases decided elsewhere, although the matter must, in its nature, be largely one of special statutory construction. *Stewart v. Hood*, 10 Ala. 600; *Arsonia v. Cooper*, 66 Conn. 184, 33 Atl. 905; *Rucker v. Reid*, 36 Kan. 468, 13 Pac. 741; *Adams v. Russell*, 85 Ill. 284; *Pelamoures v. Clark*, 9 Iowa, 1; *Hale v. Gibbs*, 43 Iowa, 380; *Bank v. Rhutasel*, 67 Iowa, 316, 25 N. W. 261; *Little v. Edwards*, 69 Md. 499, 16 Atl. 134; *Converse v. Meyer*, 14 Neb. 190, 15 N. W. 340; *Polleys v. Insurance Co.*, 14 Me. 141; *Greene v. Chickering*, 10 Mo. 109; *McClintock v. Curd*, 32 Mo. 411; *Weber v. Kinsland*, 21 N. Y. Super. Ct. (8 Bosw.) 415; *Jordan v. Jordan*, 3 Thomp. & C. 269; *O'Connor v. Am. Iron Met. Co.*, 56 Pa. 234; *Bank v. McSpedon*, 15 Wis. 629.

There are a few decided cases that hold the contrary view either upon the language of special rules or statutes or upon general grounds that do not commend themselves in their practical aspect.

The result of my examination is that the trial court acted upon an erroneous view of the general right of the defendants to use the deposition in question. Notwithstanding, however, the errancy in judicial reasoning, the defendants were in no wise injured, for the reason that the deposition itself contained no competent testimony bearing upon any

matter of defense open to them. The direct testimony of the witness who was examined was strictly corroborative of the plaintiffs' contention as to the trade significance of the term "Dutch granulated sugar." The expressions of the witness upon cross-examination, which was what the defendants desired to exhibit to the jury, were not in contradiction, or even modification, of his testimony in chief upon this point, but were at best non-expert opinions as to the persuasive force that might be accorded to the defendants' contention that certain changes in the tariff law would impart to the trade-name in question a significance that it did not previously possess. This was the matter of argument, not of testimony. The refusal of the court, therefore, to permit the reading of the deposition, while placed upon an untenable ground, did not deprive the defendant of any legal evidence to which he was rightfully entitled.

4. A further point argued for the defendants was that the trial court erred in its refusal to charge the jury that, if they believed "that by the term 'Dutch granulated sugar' the parties to the contract intended different things, and that, if their intentions in this regard were both reasonable and justifiable under all the circumstances, their verdict must be for the defendants."

In the absence of equivocal language, which is the case here, the meaning of a written contract is for the court, whose treatment of the contract in issue has already been disposed of with approval.

5. The defendants also contend that the court should have charged to the jury the following request: "From the failure of plaintiffs to call Mr. Neumark as a witness, you are entitled to infer that, if called as a witness, his testimony would not have been favorable to the plaintiffs."

This request was properly ignored.

6. The court properly refused to charge the following request: "If you believe that the plaintiff would have made the contract of purchase of the 18th and 24th of September even without the agreements of guaranty upon which this suit is brought, your verdict must be for the defendants."

Further errors are assigned upon the refusal to charge other requests and to the charge as delivered, which raise, however, no pertinent questions of law that are not covered by the assignments that have already been considered.

Finding in the conduct of the trial below no error prejudicial to the defendants, my conclusion is that the judgment in favor of the plaintiffs should be affirmed.

DIXON, J. (dissenting). The opinion of the court in this case concedes that the agreements of September 18 and 24, 1897, between the plaintiffs and defendants, on which the suit was brought, were made in consequence of and with regard to the contracts of like

date between the plaintiffs and Bunge & Co., and that in ascertaining the obligation of the defendants some reference must be made to those contracts. The opinion, however, confines the purpose of this reference to the identification of the subject-matter of the defendants' agreements, while I would deem it more reasonable to declare the purpose to be the ascertainment of every clause in those contracts which was material to the obligation of the defendants; for each of the Bunge contracts is an entirety, and I perceive no ground on which it can be held that these parties had respect to some portions of those contracts, and not to all parts material to their own bargains. But, let it be assumed that the reference is limited to the identification of the subject-matter, what is that subject-matter? The opinion rests on the idea that it is the sugar bought by the plaintiffs from Bunge & Co. But that is an error. The subject-matter of the defendants' agreements is the duty to be paid on the importation of sugar. This is the principal thing, to which the sugar bought is only an incident. Hence, according to the conceded purpose of the reference, we must search the Bunge contracts for every feature by which that matter may be identified. Thus it might readily be supposed that the duty bargained for would depend upon the country from which the sugar should be shipped, the nationality of the bottom in which it should be carried, the port at which it should be landed, and the time of its arrival. On all these points the defendants' agreements are silent, but on three of them—the country, the port, and the time of arrival, so far as it would be determined by the time of shipment and means of transportation—the Bunge contracts are explicit; and it happens that the fourth point—the nationality of the bottom—is unimportant. But can it be that, if the duty of shipments from Holland were less than that on shipments from Belgium, the duty on imports to New York and Baltimore were less than that on imports to Halifax, and the duty on arrivals in the year 1897, were less than that to be imposed on arrivals in 1898, the plaintiffs could have accepted sugar shipped in Belgium for Halifax by sailing vessel in December, 1897, instead of sugar shipped in Holland for New York and Baltimore by steamer in October and November, 1897, and still have held the defendants to an indemnity against the duty thus chargeable? Such a conclusion would seem to me utterly irrational. But on what ground could it be excluded, if our reference to the Bunge contracts must be confined to the identification of the sugar sold? The true principle is that by the defendants' agreements we are referred to the Bunge contracts as entireties for everything therein which is material to the defendants' obligation, or, if we must adopt the limited form of statement, material to the duty which formed the subject-matter of that obligation.

Among the clauses thus material is that re-

quiring certificates, in one case attested by the mayor of the place where the sugar was refined, in the other case sworn to by the refiners, that no expert bounty was receivable on the sugar delivered. The materiality of this clause arose from the fact that, if any export bounty had been received on sugar imported to this country, our government increased the normal duty of \$1.95 per 100 pounds by the amount of that bounty, and thus the bounty became the measure of the defendants' responsibility. As a precaution against the delivery and acceptance, under the Bunge contracts, of sugar on which such bounty had been received, those contracts provided for the payment of the price only on production of such certificates. In my judgment, the defendants are entitled to the benefit of that provision, and the plaintiffs had no right to waive it, and still insist on indemnity from the defendants. Although the certificates would not absolutely preclude the levy of a countervailing duty by our government, yet they would render it highly probable that the sugar imported was not subject to such a duty, and therefore that it would not be exacted. The duty for which the plaintiffs now demand indemnity is not the duty that would have been levied, in all probability, if the stipulation of the Bunge contracts on that subject had been performed, and therefore is not, I think, the duty to which the defendants' agreements referred.

(97 Md. 404)

HACKETT v. WEBSTER et al.

(Court of Appeals of Maryland. June 30, 1903.)

EJECTMENT—ADVERSE POSSESSION—COLOR OF TITLE—CONSTRUCTIVE POSSESSION—PLATS OR LOCATIONS—KNOWLEDGE OF OWNER—QUESTIONS FOR JURY—EVIDENCE—PRAYER.

1. In ejectment, where defendants set up adverse possession, a witness testified that he rented a portion of the lands from defendants' ancestor at an agreed rental, moved on the lands, and remained there four years, paying rent therefor. He was then asked to state whether or not he remained in possession of the lands as tenant during the entire period, and answered, over plaintiff's objection, that he had. *Held* evidently intended simply to ascertain whether he continued to do what he had already spoken of during such period, and plaintiff was not prejudiced by the form of the question.

2. The witness further testified that he rented a "two-horse till" of the lands; that the balance, a one-horse till, was rented to another tenant; that the lands consisted of "about 80 to 90 acres of arable land, the balance, some 30 acres, being timber land"; that, by universal neighborhood custom, firewood went with a rented farm, and that, though nothing was said about timber land at the time of renting, he went indiscriminately over the woodland, while a tenant, and cut cordwood for the use of his family and fencing; that he knew nothing about the other tenant's lease; that he saw him hauling corn to defendants' ancestor, which he supposed to be rent; and that on leaving the lands rented by him one of defendants moved on the same. There were no plats or locations to point out the part of the lands claimed to

have been occupied by the tenant. *Held*, his testimony was inadmissible.

3. When one enters on land without color of title, his possession cannot be extended by construction.

4. In ejectment, defendants set up adverse possession by themselves and their ancestor, subsequent to a deed from him to plaintiff's deceased wife. It was not pretended that the ancestor had any paper title after making the deed. *Held*, that his possession through a tenant could not be extended beyond what the latter actually occupied.

5. Where adverse possession is attempted to be established by proof of possession of different parts of the land in controversy by different tenants, plats and locations can alone furnish the jury any certain evidence on which they can form a verdict as to what was actually occupied.

6. In order that the statute may operate on the rights of the true owner, where adverse possession is pleaded, the possession must not only be adverse, exclusive, and continuous, but must be of such character as may give the owner some knowledge or means of knowledge that the possession is adverse.

7. Where adverse possession by defendants and their ancestor was attempted to be established by proof of possession of different parts of the land in controversy by different tenants, and there were no plats or locations showing just what land was actually occupied, deeds for a portion of the tract made by the ancestor were inadmissible to prove such adverse claim.

8. In ejectment, a prayer merely relying on the failure of defendant to prove adverse possession to entitle plaintiff to recover was erroneous.

9. In ejectment, where it was essential to the right of plaintiff to recover to prove that his wife died intestate, his life estate depending on the fact, the record, while not disclosing any contradiction of his testimony on that subject, did not show that the fact was admitted. *Held* a question for the jury.

10. In ejectment, where plaintiff claimed a life estate in the land by virtue of a deed to his deceased wife from the ancestor of defendants, who set up adverse possession, and the agreed statement of facts admitted the execution of the deed, evidence that the ancestor stated such fact to a witness could not alone entitle plaintiff to recover.

Appeal from Circuit Court, Dorchester County; Henry Lloyd, Judge.

Action by Thomas B. Hackett against George W. Webster and others. Judgment for defendants, and plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Goldsborough & Fletcher, for appellant. Clement Sullivane, for appellees.

BOYD, J. The appellant instituted an action of ejectment against the appellees for a tract of land in Dorchester county, called "Jones' Venture," containing 125 acres, more or less. The record contains an admission of facts, amongst others, that Mathan Dail Howeth was seised and possessed of a fee-simple estate in the lands described in the declaration, on the 13th day of October, 1877, and that on that day he conveyed them to his daughter, Annie S. Howeth, by a deed

¶ 3. See Adverse Possession, vol. 1, Cent. Dig. § 642.

duly recorded, for a recited consideration of \$2,000, the receipt of which is acknowledged. Annie S. Howeth was married to the plaintiff on the 24th of November, 1880, and died on the 17th of March, 1886, leaving her husband and a daughter, Jessie S. Hackett, surviving her. Mrs. Webster, one of the appellees, was a daughter of Mr. Howeth, and the appellees contend that, notwithstanding his deed, Mr. Howeth and his heirs held the property by adversary possession for over 20 years. The first seven bills of exception relate to the admissibility of testimony, and the eighth embraces the rulings on the prayers, 11 of which were offered by the plaintiff and 2 by the defendants. The court granted those offered by the defendants, and the ninth offered by the plaintiff, the others of the plaintiff being rejected as offered, but the third, fourth, fifth, and seventh were granted as modified by the court.

1. The first exception was to the ruling of the court in permitting a question to be asked of one Zora Marine. He had testified that in the fall of 1878 he rented "a two-horse till of said lands" from Mr. Howeth "at the rental of two-fifths," and he moved upon the lands so rented on the day before Christmas, 1878, and remained there for four years, cultivating them and paying rent therefor to said Howeth. After making some other statements not material to this exception, he was asked, "Please state whether or not you remained in possession of the lands rented by you, as tenant of the said Mathan Dail Howeth, during the entire period of four years spoken of by you." That was objected to but the objection was overruled, and he answered he had. It was said in *Thistle v. Frostburg Coal Company*, 10 Md. 129, that "possession is a question of law to be determined by the court upon the facts of the case, and, where this is the point at issue in the suit, the mere statement of a witness that he took possession of the land, without stating the acts by which he did so, is not admissible evidence"; but this witness did state his acts, and the question was evidently intended to simply ascertain from him whether he continued to do what he had already spoken of during the whole period of four years, and was not intended to prove that what he did amounted to possession under the law. Under the circumstances, we do not see how the plaintiff could have been prejudiced by the form of the question.

2. It will not be necessary to discuss separately all of the exceptions presented by the record, and, as one of the most important questions is presented by the second, third, and fourth bills of exception and the special exceptions to the defendants' prayers, we will consider them together. The defendants rely entirely on the alleged adverse possession of Mr. Howeth and his heirs. After Mr. Howeth conveyed the property in controversy to his daughter, they lived on it until

December 24, 1878, when they moved to another place a short distance away, where they lived together until the 24th of November, 1880, when she married the plaintiff. The day Howeth and his daughter left this property Marine moved on some part of it under his rental of the "two-horse till" spoken of. He also testified "that in the neighborhood of said lands it is a universal custom that firewood goes with a rented farm, and that the balance of the lands mentioned in the declaration, a one-horse till, was rented to a colored man, Nathan Jackson." On his cross-examination he stated that the lands consisted of "about 80 to 90 acres of arable land, and that the balance, some 30 acres, is timber land; that in renting from Mr. Howeth nothing was said about the timber land; that while he was a tenant on said lands he went indiscriminately over the woodland and cut cordwood for the use of his family, and also to get fencing for the farm; that he knew nothing about Jackson's lease, or from whom he rented, but simply knows that he saw him hauling corn to the said Howeth, which he supposed to be rent; and that, when he left the lands rented by him, the defendant George W. Webster moved upon the same." Marine's testimony had been admitted, subject to exception, and the plaintiff moved to exclude such parts of it as tended to prove adverse possession on the part of Howeth, through his tenant Marine, of any part of the lands mentioned in the declaration, on the ground that there were no plats or locations to point out the part of the lands in dispute claimed to have been adversely possessed by Howeth, through Marine, but the court overruled the motion, and that ruling is presented by the second bill of exceptions. It will be observed that the only description of the part rented by Marine is "a two-horse till of said lands," and his testimony shows that "a one-horse till" was rented to Jackson. There is nothing in the record to explain those terms, but, assuming that they have a well-known meaning in that community, it is manifest that the description of the precise portions of the lands rented by those tenants is wholly indefinite. The witness was even uncertain as to the amount of arable land in the tract—said it consists "of about 80 to 90 acres"—and it is difficult to imagine a more indefinite description of a tract of land sought to be held by adverse possession by one who did not occupy it himself, but by successive tenants, than Marine gave. When one enters upon land without color of title, his possession cannot be extended by construction, as is done in favor of one who has entered under color of title. It is not pretended that Howeth had any paper title after he made the deed to his daughter, and, if it be conceded that Marine's possession was his possession, it could not be extended beyond what he actually occupied or used. The fact that he occasionally went upon the timber lands

and took from it cordwood and timber for fencing, did not give Howeth any foundation for a claim beyond what he had rented to Marine, and he did not rent the timber lands to him. Adopting the most favorable theory for the appellees that can be claimed from the testimony, this tract of land was divided into three parts—the “two-horse till,” “the one-horse till,” and the timber lands. The appellees could not establish such adverse possession by Howeth and his heirs as is necessary to defeat the paper title without proving that it was exclusive and continuous for 20 years. Marine only occupied the “two-horse till” for four years, and, in order that the jury could determine whether his successor was in possession of the same land, it was of the utmost importance that they be informed with certainty as to the precise lands so occupied by them respectively. Under such circumstances as this record discloses, the proper way, under our practice, to give them that information, is to take defense on warrant and have plats and such locations as are necessary to make it certain what was actually so occupied or used, unless the necessity for that is avoided by agreement, as of course it can be.

It was said in *Clement v. Ruckle*, 9 Gill, 326, that, “where a defendant claims but part of the lands in controversy, his proper defense is upon warrant; the lands claimed by him must be located, so as to ascertain for what land the plaintiff is to get judgment against the casual ejector, and what is to be settled by the jury.” It is true these defendants claim all the lands in controversy, but they do so by attempting to establish possession through at least two different channels in addition to the timber lands. It was possible for them to prove adverse holdings of a part of the tract sued for, and to fail in their proof as to the balance. Indeed, we think there has been an utter failure to establish such use of the timber lands as the law requires to prove adverse possession, especially under the circumstances of this case, where Howeth had conveyed the land to his daughter and they lived together for several years. If the jury was satisfied that Howeth and his heirs did hold adversely as to part, but not as to the rest, then the plaintiff was entitled to recover the part not so held. Yet how could they render a verdict for that which the plaintiff was entitled to, without proper descriptions of the several parts? In *Newman v. Young*, 30 Md. 417, it was said: “Under the law and practice in this state, when parties set up adverse claims to lands under different titles, the only mode of pointing out to the jury the land actually embraced within the lines and boundaries described in patents, deeds, or other title papers, is by plats and locations; by that means alone could there be furnished to the jury any certain evidence upon which they could form a verdict.” And in a case like this, where the adverse possession is attempted to be

established by proof of possession of different parts of the land in controversy by different tenants, plats and locations can alone furnish the jury “any certain evidence upon which they could form a verdict.” The proof offered of payment of taxes, etc., was not sufficient to establish possession of the whole tract. It was impossible to remedy the failure of Marine to show what part of the tract he had been in possession of, by any subsequent testimony, as it is not pretended there were any plats, and the motion to exclude his evidence reflecting upon the question ought to have been granted.

What we have said is equally applicable, if not more so, to the testimony contained in the third bill of exceptions. It referred to “the one-horse till” occupied by Nathan Jackson. The evidence is very indefinite as to the length of time he remained there, and it was not attempted to show the precise land he occupied. As it was attempted to show that at least three other persons cultivated the lands, previously occupied by Jackson, before the defendant Webster took possession of it, the necessity for clear and definite proof as to the land actually occupied by these different parties, as well as the time each occupied it, seems to us to be manifest.

The motion to exclude the testimony of Webster, as stated in the fourth bill of exceptions, should also have prevailed. It may be said that there is some evidence tending to show that Webster was in possession of the whole tract, after he took possession of both of what may be designated the “Marine” and “Jackson” tracts. If it be conceded that his possession then included the timber lands (which is at least doubtful as disclosed by the record) and all of the arable land, he did not have such possession long enough to avail the defendants in the only defense made by them. He only moved on to the “Marine tract” in 1882, and testified that Jackson lived on the part occupied by him “at least five or six years” after he (Webster) moved on the “Marine tract.” Three other tenants are said to have cultivated that, each for a year, before Webster took it, so even if we ignore the agreement dated December 31, 1898, by which the appellees agreed to pay the rent for 1898 to the party in whom the title may be determined to be, it is clear that Webster did not claim to be in possession of the whole tract sued for long enough to establish adverse possession through him alone. If he had been, then it might not have been necessary to have plats and locations made, for we do not mean to say that possession of an entire parcel or tract of land can never be shown without plats and locations; but when, as in this case, there is an attempt to establish possession of the whole by showing that one set of tenants occupied one part and another set another part, then it is necessary to prove with certainty the parts so respectively held.

We are not unmindful of section 77, etc., of article 75 of Code Pub. Gen. Laws. The act of 1852 and subsequent acts were passed to prevent warrants of resurvey from being unnecessarily issued, as they had been not only expensive but at times oppressive, and calculated to do great injustice to plaintiffs in ejectment and other cases. But when defendants undertake to defend against the owner of the record title, without claim of right other than what they have by adverse possession, they cannot do so by showing that one set of tenants occupied one undefined part of the tract in controversy, and another set of tenants held another part equally undefined and uncertain, and as the evidence in these three bills of exception was altogether indefinite, and not sufficient to enable the jury to reach a proper conclusion as to what parts of the tract were so held by the tenants, it ought to have been excluded.

Each of the two prayers of the defendants was specially excepted to, amongst other reasons, "because said prayer assumed that the acts of user and possession, given in evidence, extended over all the land in dispute," and "because there was no legally sufficient evidence to show adversary possession on the part of the defendants or either of them, and those under whom they claim, of the whole land in dispute, in the manner and for the period required by law." From what we have already said it is apparent that, in our opinion, the testimony did not justify the claim that the whole tract sued for was so held by Howeth, through his tenants, as to amount to adverse possession. Yet the first prayer speaks of the property as "said farm," thereby assuming that the evidence offered related to the entire tract, and it concludes against the right of the plaintiff to recover. There is no legally sufficient evidence to show adversary possession of all the lands in dispute. It is not pretended that either Marine, Jackson, or any of the tenants, at least prior to Webster, rented the timber land. The most that the testimony shows is that Marine rented the "two-horse till" and Jackson the "one-horse till," and that both had the privilege (from Howeth) of getting cordwood and timber for fencing. There is no evidence whatever to show that Annie S. Howeth knew that either of them was using the timber. The first prayer is defective in other respects, one of which we will mention. It left to the jury to find that Howeth rented out said farm from the year 1878 to the date of his death, in 1897, and, after referring to the payment of taxes, etc., says, "Then said acts were hostile in their character, if his said claim was made and said acts done to the knowledge of said Annie S. Howeth." It is admitted that she died on the 17th of November, 1886, and it was therefore impossible for her to have knowledge of those acts from 1878 to 1897, and the prayer did not leave to the jury to find whether the plaintiff knew that Howeth had assert-

ed or was asserting claim to the property after he became entitled to a life estate. The deed to Annie S. Howeth was only made nine years prior to her death. So, without referring to other grounds of special exceptions to this prayer, those we have mentioned ought to have been sustained. The second prayer was also objectionable for the reasons set forth in those two special exceptions.

3. The fifth, sixth, and seventh exceptions present the rulings of the court on objections by the plaintiff to the admissibility of three deeds made by Howeth for portions of this tract. The first was dated March 30, 1878, the next August 9, 1890, and the other January 7, 1892. They were offered as part of the testimony of the defense, to show that Howeth was asserting a claim to the property. In order that the statute may operate upon the rights of the true owner, the possession must not only be adverse, exclusive, and continuous, but must be of such character as may give the owner some knowledge, or means of knowledge, that the possession is adverse to his title. As these deeds were doubtless offered for that purpose, they might have been admissible if there had been plats and they had been located, but, for the reasons stated above, it was not proper to admit them in the absence of such plats and locations. Of course, they would not of themselves be sufficient to establish an adverse claim for the whole property, but they could be used as evidence tending to establish the fact, if they could be located. How the one of 1892 could be located it is difficult to see, as there is no proper description of the property attempted to be conveyed.

4. The first and second prayers offered by the plaintiff were to the effect that there was no legally sufficient evidence of adversary possession in the defendants or those under whom they claim, and the verdict must be for the plaintiff. The first was clearly erroneous, as it merely relied on the failure of the defendants to prove adversary possession to entitle the plaintiff to recover; but the second referred to the pleadings and to the agreed statement of facts, which admitted the title was in Annie S. Howeth on the 13th of October, 1877, and the appellant claims that the admitted facts entitled the plaintiff to recover, if there was no legally sufficient evidence of adverse possession. But it would be a dangerous precedent to grant a prayer such as this in an ejectment case. It was essential to the right of the plaintiff to recover to prove that his wife died intestate, as his life estate depended on that fact, and, although we do not see any contradiction of his testimony on that subject, the record does not show that it is admitted, and it was for the jury to pass upon. Both prayers were therefore defective, inasmuch as they asked the court to instruct the jury to render a verdict for the plaintiff. There being no sufficient evidence to show what particular parts of the land sued for were held by Howeth,

through his tenants, there was no legally sufficient evidence of adverse possession; but as the court erroneously permitted evidence of possession of parts of the tract, and the case was tried on the theory that such evidence was admissible, we would not be justified in reversing the judgment, without awarding a new trial, as suggested by the appellant, if the prayers were not defective. But in addition to that, we cannot assume that by the use of plats and locations the appellees cannot produce sufficient evidence.

5. The appellant has no reason to complain of the court's action on the third, fourth, fifth, and seventh prayers. As offered they were clearly erroneous, and as modified by the court they gave the appellant all he could ask from the evidence mentioned in them. The seventh, as amended, concluded with the right of the plaintiff to recover upon the jury finding the facts stated in it, without leaving it to the jury to determine whether Annie S. Hackett died intestate. The sixth was properly rejected. It asks the court to say that if the jury believe that Howeth said to T. C. Reid, in or about the year 1890, that he had given a deed for the land in dispute to his daughter, or words to that effect, then their verdict must be for the plaintiff. If he did say so, he only said what the agreed statement of facts admitted, and his simply stating that conceded fact to a witness could not entitle the plaintiff to recover. What we have said about the first and second prayers will relieve us of the necessity of saying anything about the eighth, further than it was properly rejected. Nor is it necessary to discuss the tenth or eleventh.

For errors in overruling the motion to strike out the evidence in the second, third, and fourth bills of exception, and in granting the defendants' first and second prayers, the judgment must be reversed.

Judgment reversed and new trial awarded, the appellees to pay the costs.

(77 Md. 415)

NICHOLSON v. SNYDER.

(Court of Appeals of Maryland. June 30, 1903.)

ACTION ON NOTE—FORGERY—AFFIDAVIT OF DEFENSE—SUFFICIENCY—EVIDENCE—RECORD IN JUDICIAL PROCEEDINGS—ADMISSIONS—CONCLUSIVENESS—EXPLANATION—ESTOPPEL—NOTARY'S CERTIFICATE—IMPEACHMENT.

1. Under the practice act (New Charter of Baltimore, § 313 [Laws 1898, p. 393, c. 123]) requiring affidavits of forgery to state that "affiant knows that such signature was not written by or by the authority of the person whose signature it purports to be," an affidavit that defendant "knows her alleged signatures upon the notes filed with the declaration in this case were not written by her, or by her authority," was sufficient denial of the authenticity of all the signatures.

2. A record in bankruptcy, containing an admission of indebtedness on a note, is admissible in evidence in a subsequent suit on the note between the parties to the bankruptcy proceedings.

3. A notary cannot impeach his official certificate attached to an answer in a bankruptcy proceeding.

4. Where a record in bankruptcy proceedings between the parties to an action is introduced in evidence to prove an admission in an answer made therein, the party against whom the evidence is introduced may deny the making of the answer and the facts evidenced thereby.

5. Admissions made by defendant in a former bankruptcy proceeding between herself and plaintiff, which was dismissed at plaintiff's instance, were not conclusive though made under oath, and, there being no element of estoppel present, could be explained by any competent evidence.

6. Where there was no evidence that plaintiff had done or omitted to do anything which he otherwise would have done or omitted to do, nor any suggestion of any possible prejudice resulting to him from an admission made by defendant in bankruptcy proceedings instituted against her by plaintiff, but, on the contrary, plaintiff was informed by defendant's pleading in such proceedings that she claimed that her alleged signature to a note was a forgery, and he prayed leave to dismiss such proceeding because defendant could prove her solvency, there was no estoppel on defendant to explain, in a subsequent suit on the note, her alleged admissions of liability in the bankruptcy proceedings.

Appeal from Superior Court of Baltimore City; Charles E. Phelps, Judge.

Action by J. Henry Snyder against Laura V. Nicholson. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Bernard Carter and T. Wallis Blackstone, for appellant. Frank Gosnell, for appellee.

PEARCE, J. This suit was brought to recover the amount of three promissory notes payable to the order of J. Henry Snyder, of Charles, made and signed by James A. Nicholson, and purporting to be signed by Laura V. Nicholson, his wife, but, James A. Nicholson having died before suit was brought, the appellant was the sole defendant. These notes were as follows: One for \$2,000, dated August 27, 1899, at 4 months; one for \$2,000, dated November 28, 1899, at 2 months; and one for \$400, dated November 13, 1899, at 4 months. The declaration contained the common counts, and a special count on each of the notes, and the plaintiff annexed thereto the affidavit required when proceeding under section 313 of the new charter of the city of Baltimore, known as the "Practice Act" (Laws 1898, p. 393, c. 123). The defendant pleaded the general issue pleas, and annexed thereto an affidavit denying that her alleged signatures to said notes were written by her or by her authority, as required by section 312 when such signatures are denied. Upon the trial, a verdict for \$5,189.79, the full amount of these notes, was rendered for the plaintiff, and the defendant has appealed from the judgment entered thereon.

The plaintiff contended that section 108, art. 75, Code Pub. Gen. Laws, regulates the defense, and that under it the denial of defendants could only be made in the plea it-

self, and that the defense of forgery was therefore not in the case, but the court ruled that the denial could be made in the affidavit, as provided by section 312 of the new charter. Since that ruling was made, its correctness has been established by two recent decisions in this court, one in *Farmers' & Mechanics' Bank v. Hunter* (decided, April 1, 1903) 54 Atl. 650, under the local law of Carroll county, and one in *Horner v. Plumley* (decided April 22, 1903) 54 Atl. 971, under section 313 of the new charter, the latter being substantially the same as the local law of Carroll county. It is unnecessary, therefore, to dwell upon that question.

It was contended, however, by the plaintiff that the defendant's affidavit did not conform to the requirements of section 313, and this objection will be first considered. That section provides that the affidavit shall state that the affiant "knows that such signature was not written by, or by the authority of, the person whose signature it purports to be"; the defendant's affidavit being that "she knows her alleged signatures upon the notes filed with the declaration in this case were not written by her or by her authority"; the argument of the plaintiff being that it should have said that "none of her alleged signatures upon said notes were written by her or by her authority." We do not think this criticism can be allowed to prevail, though it might have been more prudent to exclude the possibility of criticism by using some such language as it suggests. We think, however, the language used constitutes a sufficiently clear denial of the authenticity of all the signatures, and is, in legal contemplation, a denial of the signature of each. If there could otherwise be any serious question upon this point, it is removed by the reference in the affidavit to the notes as being those "filed with the declaration in this case," thereby emphasizing that the denial embraces all the notes sued on, and consequently every one of them; and we are not required to strain the construction of a statute, or the meaning of the language of this affidavit, for the purpose of depriving a party of so meritorious a defense as forgery.

During the progress of the trial eight exceptions were taken to rulings upon the evidence, and one to the rulings on the prayers. The first exception was taken to the admission in evidence of the record of a proceeding in bankruptcy, instituted in the United States District Court by the present plaintiff against the present defendant and her husband, upon the first of the promissory notes herein mentioned, which proceeding was, after the death of the husband, dismissed without prejudice, upon petition of the plaintiff, because he had ascertained to his satisfaction that Mrs. Nicholson was not in fact insolvent. This record was offered with the special purpose of contradicting, by Mrs. Nicholson's answer in that proceeding, her plea and affidavit in this case. The eighth

exception was taken to the refusal of the court to allow the notary public, before whom the defendant's answer in the bankruptcy proceeding purported to be sworn to, to impeach his official certificate. Both these exceptions were abandoned by the defendant at the argument in this court, and we think correctly.

Among the proceedings in bankruptcy which were admitted in evidence was a paper purporting to be an answer by Mr. and Mrs. Nicholson to the petition of this plaintiff, which expressly admitted "the indebtedness of \$2,000 alleged in the petition," but denied the insolvency of Mrs. Nicholson. This paper was signed by Mr. Nicholson, and by John W. H. Fry, his counsel, who signed as "attorney for respondents," but it did not purport to be signed by Mrs. Nicholson. After the plaintiff closed his case, the defendant called a Mr. Schaeffer as a witness, and offered to prove by him the following facts: That he went with Mr. Nicholson, at his request, about February 2, 1900, that being the date of the alleged answer, to Fry's office; that Fry prepared the alleged answer, then and there, in their presence; that the notary, William H. Jones, was sent for, and certified the affidavit attached to the answer; that Fry then said it was very important it should be immediately filed in the United States court, and that he had only a moment to get over to court, as it was then nearly 4 o'clock; that Mrs. Nicholson was not present and did not sign the answer then, and that, so far as he knew, there was no communication between Mrs. Nicholson and Mr. Fry and the notary on that day; but the court refused to allow this offer, and this constitutes the second exception. Mrs. Nicholson was then sworn as a witness, and was asked, after referring to the answer, "Had you any knowledge of the preparation and filing of that answer?" which was also refused, and it constitutes the third exception. She was then asked, "Did you authorize Mr. Fry, or any one, to prepare that answer for you?" which was refused, and this constitutes the fourth exception. She was next asked, "Did you swear to that answer?" which was also refused, and this constitutes the fifth exception. She was next asked, "Look at the note dated August 27, 1899, for \$2,000, payable to the order of J. Henry Snyder, of Charles, and state whether you ever signed it, or authorized any one to put your signature to it?" which was also refused, and this constitutes the sixth exception. Lastly, she was asked, "Have you ever, since the date of that note, ratified it, or adopted it, or promised to pay it?" which was also refused, and this constitutes the seventh exception. These rulings are all manifestly based upon the theory that the alleged answer in the bankruptcy proceedings was a conclusive admission of indebtedness upon that note, and that, as the evidence offered contradicted that answer, it was not admissible. These

rulings, therefore, must either stand or fall together. The plaintiff then offered three prayers, all of which were granted, and the defendant offered five, all of which were refused, except the second, which dealt only with the two notes not involved in the bankruptcy proceedings, as to which the jury were instructed that if they believed they were never signed by Mrs. Nicholson, nor authorized nor ratified by her, and that she never promised to pay them, then the plaintiff could not recover thereon.

For the purposes of this case it will only be necessary to consider the first prayer of the plaintiff and the first prayer of the defendant. By the plaintiff's first prayer, the jury was instructed that the defendant was estopped from denying her liability upon the note of August 27, 1899, and that, as no evidence had been offered of payment of any part of this note, the verdict must be for the plaintiff for the amount of that note with interest. The defendant's first prayer, which was refused, asked that the jury be instructed that if they believed Mrs. Nicholson did not sign that note, nor authorize any one to sign it for her, that she never ratified the signing, never assumed any liability for the note, and never promised to pay it, then the plaintiff could not recover thereon. It will thus be seen that all the exceptions and the two prayers above mentioned involve substantially the same question, and may all be considered together.

It is settled law that a record in a chancery suit between the same parties, and relating to the same subject of inquiry, is admissible in evidence in a subsequent suit between the same parties for the purpose of proving antecedent admissions of either party relative to rights again involved in controversy (*Mobberly v. Mobberly*, 60 Md. 378), and this is equally true of a record in a bankruptcy court. This rule rests upon principles sound in themselves, and as satisfactory to the lay as to the legal mind, for consistency in essential and fundamental matters is universally regarded as one of the surest indications of truth and accuracy, as inconsistency is of doubtful veracity or infirmity of memory. When one is called on in law to assert or defend a right, he is not likely to make any admission destructive of, or prejudicial to, his right, unless compelled by his regard for truth; and therefore it is eminently proper that any such admission, whether made in the pleadings or in the evidence, should be regarded as of high probative force. But the whole value of such evidence depends upon whether the admission was in fact made as it purports by the record to have been made, for, if not in fact made, the refusal to inquire into this fact results in the substitution of falsehood for truth. If Mrs. Nicholson did not make, or authorize this answer to be made for her, it ought not to have gone to the jury as her undisputed admission of her indebtedness upon the note in question; and, if she did not

swear to it, it ought not to have gone to them as her confessedly sworn admission. It was *prima facie* proof of such admission, and as such was properly admitted in evidence, but we can perceive no sound or just principle upon which she could be precluded from rebutting this *prima facie* case. It is very clear that the notary was properly not allowed to impeach his certificate, as held in *Central Bank of Frederick v. Copeland*, 18 Md. 305, 81 Am. Dec. 597, *Matthews v. Dare*, 20 Md. 271, and *Highberger v. Stiffler*, 21 Md. 351, 83 Am. Dec. 593; but these cases just as clearly recognize that the testimony of Schaeffer and of Mrs. Nicholson, excluded in the 2d, 3d, 4th, and 5th bills of exception, should have been admitted, for in the *Copeland Case*, approved in the two later cases, the court said "that the statements contained in the certificate [to the execution of the mortgage by Mrs. Copeland], under the circumstances and as between the parties in the case, were open to contradiction by proper and competent proof, cannot be doubted." If this cannot be done in the present case, then, as was said by counsel at the argument, "a lawyer and a notary, by conspiring together to file a sworn answer on behalf of a defendant, could forever preclude such defendant from showing that he had no part or lot in the making or filing of such answer." And here it may be noted, as illustrating the wrong of excluding such evidence, that this record discloses an agreement of counsel that the notary, if present, would testify, subject to exception, that Mrs. Nicholson was not present when her husband swore to the answer, and never swore to it herself; and it also discloses the fact that Mr. Fry, the attorney, was not sworn as he might have been, to prove, if he could truthfully do so, that Mrs. Nicholson did authorize and swear to the answer. It is true that the testimony of the notary, as offered, was properly excluded for the reasons stated; but, treating it as if expunged from the record, we may ask why the notary was not called, as he might have been, to prove that his certificate possessed in fact the conclusiveness sought to be given it in law by the plaintiff.

It follows also from what we have said that the testimony of Mrs. Nicholson, which was excluded in the sixth and seventh exceptions, should have been admitted, and that the court erred in striking out all the testimony admitted subject to exception, tending to show she was not liable on the note of August 27, 1899; for, if the answer was not hers, there was no reason why she could not testify she had never signed nor ratified the note, and no reason why any evidence tending to show she was not liable therefor should be stricken out.

If, however, the alleged answer were in fact her answer, and even if it were made under oath, we are of opinion that its statements would not be legally conclusive against her, and that she would be entitled to ex-

plain them by any competent evidence in her possession; provided, of course, that the principle of estoppel did not preclude it, as we shall later show it does not do in this case. This is the law as stated in 1 Greenleaf's Evidence, § 210; 2 Taylor on Evidence, § 857; and 2 Wharton on Evidence, § 833. In *Perry v. Simpson*, 40 Conn. 317, it was said: "Admissions made in a former trial may be admitted, but the circumstances surrounding the admissions relied on, the purposes for which they were made, etc., may be shown." This language is especially apposite to the present case, in view of the condition of Mr. Nicholson's health at the time, and the painful situation in which Mrs. Nicholson was placed thereby, as disclosed by the record in the bankruptcy case. In *Ohlton v. Scruggs*, 73 Tenn. 318, the court said: "One who has made solemn admissions under oath in the course of judicial proceedings will not be permitted to deny them, without first showing that they were made inconsiderately, or without full knowledge of the facts;" and in *Hamilton v. Zimmerman*, 5 Sneed, 39: "In either case, whether in pais, or in judicial proceedings, if it satisfactorily appear that the party made admissions inconsiderately, or without full knowledge of the facts, it is proper that the court should relieve him from the consequences of his error." In *Blanks v. Klein*, 53 Fed. 436, 3 C. C. A. 583, it was said: "Judicial admissions and pleadings of a party in another suit than the one under consideration are open to explanation or rebuttal, or it may be shown they were made by mistake;" and the following passage from Wharton on Evidence, § 833, was cited and approved: "The qualities of an estoppel which are imputable to a party's pleas, so far as concerns the particular case in which they are pleaded, are not imputable to such pleas when offered collaterally." In *Elliot v. Hayden*, 104 Mass. 180, an admission made in a bill in equity sworn to by the plaintiff was held "competent, but not conclusive," against him. In *Combs v. Hodge*, 21 How. 397, 16 L. Ed. 115, where the petition and answer were signed by counsel, and not by the parties, it was held they could not be resorted to for admissions of the respective parties. In that case, it should be observed that the plaintiff in the former suit was not the same as in the latter, but the court cited, in support of the law announced, the case of *Bolleau v. Rutllin*, 2 Exch. 665, in which Baron Parke said that "pleadings in equity, as well as at common law, are not to be treated as positive allegations of the truth of the facts therein, but only as statements of the case of the party, to be admitted or denied by the opposite side, and, if denied, to be proved, and ultimately submitted for judicial decision. The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are conclusive evidence between them. * * * But the statements

of a party in a declaration or plea, though for the purposes of the cause he is bound by those that are material, ought not, it should seem, to be treated as confessions of the truth of the facts stated." In the case before us, nothing was actually decided in the former suit, that being dismissed by the plaintiff upon his own admission of inability to prosecute it to a successful termination, and it follows from the authorities we have cited that the answer in the bankruptcy proceeding, even if shown to be her answer, could not be held conclusive against her.

It only remains to inquire whether, upon any principle of good faith and fair dealing, Mrs. Nicholson could be estopped by her answer, even if it had been filed with her knowledge and consent. In the leading case of *Alexander v. Walter*, 8 Gill, 251, the court adopted the definition of an estoppel in pais given in *Dezell v. Odell*, 3 Hill, 215, 38 Am. Dec. 628, in these words: "We have the clear case of an admission by the defendant, intended to influence the conduct of a man with whom he was dealing, and actually leading him into a line of conduct which must be prejudicial to his interests, unless the defendant be cut off from the power of retraction. This is the very definition of an estoppel in pais. For the prevention of fraud, the law holds the admission to be conclusive." And in the same case the court cited the following language from *Welland Canal Company v. Hathaway*, 8 Wend. 483, 22 Am. Dec. 51: "As a general rule, a party will be precluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter." And similar language was also cited from *Hearne v. Rogers*, 9 Barn. & Cress. 577. In *Homer v. Grosholz and Coquentin*, 38 Md. 525, this court said: "To constitute such an estoppel, there must be acts or admissions intended or designed to influence the conduct of another; the acts or admissions must come to the knowledge of the party; his conduct must be influenced by them; and a denial of them must operate to the injury of the party whose conduct is influenced by them. The Court of Appeals in the case of *Alexander v. Walter*, supra, adopt the rule laid down in the *Welland Canal Company's Case*, and applied it to the case before them, and it must be regarded as the law of this state."

It is settled at common law that an estoppel in pais need not be pleaded, and may be given in evidence under the general issue (8 Enc. Plead. & Prac. 6); and it is so held in this state. *Alexander v. Walter*, supra. But the rule as to what must be proved to constitute an estoppel is the same as to what must be alleged to constitute a good plea of estoppel, and this rule is that every fact supporting an estoppel in pais must be clearly made out by the party relying on it. 8 Enc. Plead. & Prac. 10, and *Sharon v. Min-*

nock, 6 Nev. 377, where it was held that if a plea does not allege that the party relying on the estoppel was induced to act differently from what he otherwise would, and that he was prejudiced thereby, the plea will be bad. There is no evidence whatever that the plaintiff in this case has done or omitted to do anything which he would otherwise have done or omitted to do, nor any suggestion of any possible prejudice resulting to him, from the admission made in the alleged answer of Mrs. Nicholson. He was informed by her petition filed in those proceedings July 18, 1900, that she claimed her signature was a forgery, and he prayed leave to dismiss his petition, April 12, 1901, solely because he admitted that she would be able to prove her solvency as she alleged. If we could discover in this case the essential requisites of an estoppel in pais, we should not hesitate to give effect to it, but we cannot discover them.

Judgment reversed, with costs to appellant above and below, and new trial awarded.

(97 Md. 725)

RIDGELY v. WILMER et al.

(Court of Appeals of Maryland. July 1, 1903.)

APPEALABLE DECREE—NECESSARY PARTIES
—DISMISSAL OF BILL—PLEADINGS—
NOTES FILED WITH BILL.

1. A decree dismissing a bill to cancel judgments and enjoin enforcement thereof, though "without prejudice" to file a new bill with proper parties, adjudicates rights, and so is so far final as to allow of appeal, it having the effect of dissolving the preliminary injunction.

2. Gen. Equity Rule 35 (Code Pub. Gen. Laws, art. 16, § 163) provides that, when a defendant suggests that the bill is defective for want of parties, plaintiff may have the case set down for argument on that objection only; and, if he shall not have it set down, but proceed to a hearing, notwithstanding the objection, if defendant's objection shall be allowed he shall not be entitled as of course to amend his bill by adding parties, but the court may, if it be thought fit, dismiss the bill. If, however, the cause be set down on the objection, and it be allowed, plaintiff may amend on paying the costs. *Held*, that discretion to dismiss is given only for absence of a necessary party plaintiff; and whether the person is a necessary party is open to review.

3. Notes having been filed with the bill as parts of and explanatory of its averments, must be taken to be as they appear, notwithstanding averments of the bill contradictory of their legal effect as they so appear.

4. Though a bill asks relief for complainant and another not a party, yet the averments showing complainant entitled to relief independent of the other, the bill is not objectionable on the ground of want of a necessary party, though the relief cannot be allowed such other, he not being a party.

Appeal from Circuit Court No. 2 of Baltimore City; John J. Dobler, Judge.

Suit by Franklin W. Ridgely against Edwin W. Wilmer and another. Bill dismissed, and plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

John L. G. Lee, for appellant. D. Eldridge Monroe, for appellees.

PAGE, J. The bill of complaint of the appellant sets forth: That three judgments were entered by a justice of the peace, Luchesi, one of the defendants, in favor of the appellee Wilmer, and three judgments against James A. Galloway. That these judgments were obtained on the following facts: Ridgely, on the 19th of December, 1900, borrowed from Wilmer \$30, and gave him his note for \$33. In February, 1901, he borrowed \$10, and gave his note, indorsed by Galloway, for \$11; and on December 27, 1900, borrowed \$10, and gave his note, indorsed by Galloway, for \$11. Copies of the notes filed in the record show, however, that the notes were given to Galloway. It also appears that both Ridgely and Galloway agreed that on default of payment at maturity of the principal and interest judgment by confession might be entered in favor of the holder of the notes, to include 10 per centum for expense of collection, \$10 as an appearance fee for attorney and costs of suit; and they also waived appeal, supersedeas, bankruptcy, injunction, summons, and appearance in any court or before any justice of the peace having jurisdiction. The bill further alleges that the judgments against the appellant, amounting in the aggregate to \$93.39, and against Galloway, aggregating \$94.14, were entered by the justice of the peace without any summons or appearance; that at the time the judgments were rendered Ridgely had already paid Wilmer \$58, or \$8 more than in fact the latter had received; and for that reason Ridgely had refused to make more payments. It is charged that the notes were usurious, and the judgments fraudulently obtained, and to enforce the latter would cause great and irreparable loss and damage. The complainant claims to be entitled to have the notes and judgments canceled, and prays that the appellees may be restrained by injunction from enforcing them. Galloway is not joined in the bill. The usual order for a preliminary injunction was issued, and both the appellees answered. Wilmer denied the alleged fraud, and averred that he bought the notes; and by the seventh paragraph of his answer sets up that the complainant has a full remedy at law, and, further, that the "plaintiff has failed to make proper parties, because James Galloway is a proper party, and that the person who signed the bill was not at that time an attorney of the court." The appellant joined issue. On the 24th day of September, 1902, leave was granted to take testimony, but the record fails to show that any was taken. On the 2d day of April, 1903, the appellees moved, in writing, to dismiss the bill, because "the plaintiff has failed to comply with the provisions and requirements of the thirty-fifth general rule of pleading, in reference to the objection for want of parties." On the 2d day of April, 1903, after a hearing

and the agreement of counsel, the court dismissed the bill, "without prejudice to the plaintiff to file a new bill with the proper parties"; and from this decree the appeal has been taken.

A motion was made to dismiss the appeal, and of the two grounds assigned the first was, because the decree, being "without prejudice to the plaintiff," does not adjudicate any right of the parties, and is not, therefore, so far final as to authorize the appellants to prosecute an appeal. Whatever might be the force of this consideration as ordinarily applied, in this case it cannot apply, because of the fact that this particular decree had the effect of dissolving the injunction (*Wagoner v. Wagoner*, 77 Md. 189, 28 Atl. 284), and from such an order appeal lies. *Johnson Co. v. Henderson*, 83 Md. 126, 34 Atl. 835.

The second ground for the motion was that the dismissal of the bill was a matter within the discretion of the court, under the thirty-fifth general equity rule (section 163, art. 16, Code Pub. Gen. Laws), and therefore not reviewable. That rule provides that, when a defendant in his answer suggests that the bill is defective for want of parties, the plaintiff may have the case set down for argument on that objection only; and, if he shall not set it down, but proceed to a hearing notwithstanding the objection, if the defendant's objection be allowed he shall not be entitled as of course to an order for liberty to amend his bill by adding parties, but the court may, "if it be thought fit, dismiss the bill." If, however, the cause be set down on the objection, and it be allowed, the "plaintiff shall have the liberty to amend on paying the costs of the amendment." The record does not show that the cause was set down for a hearing on the objection of want of party plaintiff; but it appears that on the 2d of April, 1903, the defendant prayed the court to dismiss the bill because of the failure of the plaintiff to comply with the provisions of the thirty-fifth rule "in reference to objections for want of parties," and that on the same day the decree dismissing the bill was passed. The court, therefore, when it passed its decree, acted upon the motion of the defendant to dismiss the bill, and dismissed it because it thought fit to do so on failure of the plaintiff to set it down for a hearing. It must, therefore, have been held by the court that Galloway was a necessary party, without whom no proper decree could have been authorized, under the allegations of the bill, since without such an adjudication, even upon a final hearing it could not have exercised its discretion under this rule. By the terms of the rule the want of a proper party plaintiff is a fact that must be found, and whether Galloway is a necessary party is a matter open to our review. It is clear that the object of the bill is to restrain Wilmer from collecting the judgments from Ridgely. The judgments were based upon certain instruments made by Ridgely to the order of Galloway. They

have never been indorsed by him, and from all that appears in the bill or exhibits Galloway is not in any manner responsible for the payment of the money to Wilmer, and there is nothing on the face of the bill or notes to show that Wilmer is in fact the legal or bona fide holder of the notes. He calls himself "holder and plaintiff" in the order to Lucchesi to extend the judgments; but he could not become a bona fide holder except by the indorsement of Galloway, and there is no such indorsement or assignment to him. It is true that the bill makes some averments that seem to be contradictory of the legal effect of the notes as they appear in the record, but, having been filed with the bill as parts of and explanatory of its averments, they must be taken to be as in fact they appear. Furthermore, the plaintiff avers that to enforce the payments of the judgments will cause him great damage, and that the "complainant" has no remedy at law, etc. It is, therefore, clear that the complainant was seeking a remedy only for himself; and he was not bound to seek a remedy for and on behalf of Galloway. The fact that Ridgely asks that the injunction may include Wilmer's claim against him does not prevent the court from granting him such relief as his case may require, or from granting such parts of the relief as may be legal and proper under the allegations of the bill.

So far as the record shows, therefore, Galloway has no interest in the questions litigated, or sought to be litigated, between the complainant and defendants. That, in substance, is, only, shall Wilmer be permitted to collect the judgments from Ridgely, or out of his property, and not from Galloway? The bill makes no common ground between Galloway and Ridgely. If Wilmer should attempt to collect out of Galloway, it would be the latter's privilege and business to proceed on his own behalf. "No one need be a party plaintiff in whom there exists no interest. *Kerr v. Watts*, 6 Wheat. 559, 5 L. Ed. 328; *Wright v. Santa Clara M. Ass'n*, 12 Md. 443. The relief asked by Ridgely is for an injunction restraining the defendants from enforcing the judgments against himself and against Galloway, and for general relief. It need not be said that the relief asked for in behalf of Galloway could not be allowed, he not being a party; but that fact alone will not, as we have said, preclude the complainant from obtaining such relief as he may be entitled to within the scope and object of the bill which he has asked for himself. *Fenby v. Johnson*, 21 Md. 106; 18 Enc. & Prac. 795, and authorities there cited. Inappropriate allegations in the bill will not defeat the right to relief, if the bill makes a case justifying the relief granted, when there is a special or general prayer. *Sloan v. Safe Deposit Trust Co.*, 73 Md. 239, 20 Atl. 922; *Dunnock v. Dunnock*, 3 Md. Ch. 140. If it be conceded that Galloway was not a necessary party, can it be successfully maintained that in dismissing the bill

the court acted within the limits of any discretion it may have had under the statute? It is there provided, in substance, that, if the cause be not set down for hearing "for want of parties," and the objection be allowed, the "plaintiff shall have liberty to amend on paying costs of the amendment; but if the plaintiff, notwithstanding the suggestion of the defendant in his answer that the bill is defective for want of parties, shall not set down the cause for a hearing on that objection only, but shall "therewith proceed to a hearing," and the objection be allowed, he shall not be entitled to amend "as of course," but the court or judge may, "if it be thought fit," dismiss the bill. It then appears that the power of the court, as conferred by the act, is dependent for its exercise upon a judicial finding upon the terms and condition of the statute that the bill is defective for want of parties. That must be found by the court before the court has power to exercise its alleged discretion in respect to the dismissal of the bill. If it should undertake to dismiss the bill solely under the rule for want of parties before there had been a determination that new party plaintiffs were necessary, manifestly it would exceed its authority. The discretion to which we have alluded can be exercised only on a final hearing. It seems to be no less clear that, if it should erroneously decide that a new party was necessary, and should then dismiss the bill, its order of dismissal would also be in error, not because it had exercised its discretion wrongly or unwisely, but because the occasion for its exercise had not arisen. In *Bell v. Jones*, 10 Md. 330, it was said "that an act of the court which is within the limits of their exclusive discretion is final; but nevertheless, if it appears to be partly within and partly beyond the scope of their authority, it may be appealed from and reversed. *Cecil, Adm'r v. Negro Rose*, 14 Md. 68; *Kinnear & Willis v. Lee & Reynolds*, 28 Md. 489, 490. Inasmuch as we have found that Galloway was not a necessary party to enable the appellant to obtain the relief he asks for himself, the decree dismissing the bill must be reversed.

Decree reversed, and cause remanded, etc.

(25 R. I. 202)

BOSWORTH v. UNION R. CO.

(Supreme Court of Rhode Island. May 13, 1903.)

CARRIERS—APPROACHING PLACE OF DANGER—CARE REQUIRED.

1. In approaching any place of danger—as in attempting to run its cars through a mob—it is the duty of a common carrier to use the utmost care to protect its passengers from injury.

Action by Benjamin B. Bosworth against the Union Railroad Company. Demurrer to declaration overruled.

Argued before STINESS, C. J., and TIL-
LINGHAST and DUBOIS, JJ.

John W. Hogan and Henry B. Tiepke, for plaintiff. David S. Baker, for defendant.

DUBOIS, J. This is an action of trespass on the case for negligence. In the second count of his declaration the plaintiff alleges that it was the duty of the defendant to exercise the utmost vigilance and care in guarding and protecting him, as and while a passenger, against violence and risk of injury; and that the defendant was negligent in not exercising proper and adequate care and vigilance in guarding and protecting him, while he was its passenger, against mob violence, and in attempting to run its car through a mob without warning the plaintiff of the dangers to which he was being exposed thereby, in consequence of which he sustained the injury complained of. The defendant demurs to such statement of its duty. We have heretofore, in *Boss v. Prov. & Wor. R. R. Co.*, 15 R. I. 149, 1 Atl. 9, thus stated the law: "In regard to the degree of care which the law imposes upon common carriers of passengers. It is settled by a long and uninterrupted line of adjudication that they are bound to exercise the utmost care and skill which prudent men would use under similar circumstances; and they are liable for injuries resulting from even the slightest negligence on the part of themselves or their servants;" and later, in *Elliott v. Newport St. Ry. Co.*, 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208, as follows: "Common carriers of passengers are required to do all that human care, vigilance, and foresight reasonably can, in view of the character and mode of conveyance adopted, to prevent accident to passengers." The defendant, though not denying the foregoing to be the general rule applicable to common carriers of passengers, claims that it particularly applies to its running appliances, for the reason that defects therein are likely to occasion accidents resulting in great injury and loss of life to passengers; and also calls our attention to another rule, relating to its approaches to trains, concerning which it is bound to use only ordinary care. We recognize the distinction in the law between the degree of care to be used in its stationary and in its locomotive appliances. The more stringent rule is established for the protection of passengers while in transit. During their passage they are to be guarded not only against accidents resulting from defects in the running appliances, but also from dangers arising out of the recklessness or carelessness of the servants of the common carrier. With the best appliances it would be possible for a careless or reckless servant to propel a car into danger; as, for instance, into an open draw on a bridge, into a blazing station, or into a drove of infuriated cattle. In approaching any place of danger it is the duty of the common carrier of passengers and its servants to exercise the utmost care, caution, vigilance, and skill which prudent men would use under like circumstances. Whether the servants and agents of the defendant did exercise that degree of care and skill at the time and place alleged by the

plaintiff is a question of fact, which must be determined by a jury.

Demurrer overruled, and case remanded to the common pleas division for further proceedings.

(25 R. I. 209)

MURRAY v. PAWTUXET VALLEY ST. RY. CO.

(Supreme Court of Rhode Island. May 28, 1903.)

CARRIERS — INJURIES TO PASSENGER — ABSENCE OF NEGLIGENCE — EVIDENCE — SUFFICIENCY.

1. In an action against a street railway for injuries to a passenger caused by the breaking of an appliance underneath the car, where defendant's evidence showed, not only that it purchased the appliance from a reputable dealer, but also that it had made daily inspection of the same by an expert employed for that purpose, and plaintiff offered no evidence in rebuttal, relying wholly on the doctrine of *res ipsa loquitur*, a verdict for defendant was supported.

Action by Alice G. Murray against the Pawtuxet Valley Street Railway Company. Verdict for defendant. Heard on plaintiff's petition for new trial, and petition denied.

Argued before STINESS, C. J., and DOUGLAS, and DUBOIS, JJ.

Page & Page, for plaintiff. Walter B. Vincent, for defendant.

DUBOIS, J. The plaintiff, while a passenger in one of the defendant's electric cars, was thrown from her seat and injured by its sudden stop through accident. It appears that the motor underneath the floor of the car was attached thereto by two bearings upon an axle which held its principal weight, while a bolt or pin on its front end passed through a hole in the center of a wrought-iron suspension bar placed edgewise in front of the motor from side to side of the truck, and steadied it and supported the remainder of its weight. This bar, a part of the car truck, was about four feet long, five-eighths of an inch thick, and was five inches wide, excepting that in the middle about the hole the width had there been increased to preserve its strength. The accident was due to the breaking of this suspension bar. The break occurred in the center, from the hole downward, allowing the pin to drop out and the forward end of the motor to fall upon the ground, causing the car to stop suddenly.

The burden of proving that the plaintiff was in the exercise of due care at the time of the accident was maintained by evidence that she was quietly sitting in the car at the time. In such a position she could not have contributed anything to cause the breaking of the suspension bar beneath the floor under her. The burden of proving that the accident was due to the negligence of the defendant was sustained by the presumption of negligence arising out of a consideration of the cause of the accident itself. The

mere fact that the bar broke and let the motor fall is inferentially evidence of negligence on the part of the defendant. "*Res ipsa loquitur*" is the maxim applicable to cases where the cause of injuries to passengers arises from the breaking down of apparatus wholly under the control of the common carrier. "It is a presumption raised by the law on grounds of public policy, which makes out a *prima facie* case against the carrier unless it is rebutted to the satisfaction of the jury." Thompson on Negligence, § 2773. The plaintiff having thus presented a *prima facie* case, the burden was cast upon the defendant to rebut the presumption to the satisfaction of the jury.

The defendant offered evidence to the effect that the car truck, of which the suspension bar formed a part, was manufactured by the Franklin Foundry Company, of Providence, a reputable concern in that line of business, under the Munier patent; that it was purchased directly from the Franklin Foundry Company, and came all ready to place under the car; that the truck was a new one, and had never been in use upon any other car; that the cars of the defendant company were inspected to discover defects every day when in use; that this car in which the plaintiff sustained injury was placed over a pit and inspected by an expert of 10 years' experience on the afternoon before the accident, and was found to be in good order; all the bars, nuts, and bolts were tested with hammer and wrench, and everything was found to be sound; that the car was not run after the inspection until the morning of the accident, when it was subjected to a slight inspection by the motorman who ran it; that after it had been run about 18 miles, and about 150 feet beyond a sharp curve which the car had rounded, the suspension bar broke; that the break was clean and fresh, and did not even show a flaw, and that the cause of the breaking was in no way apparent; that the speed of the car at the time of the accident was six or eight miles an hour. In the opinion of the foreman of the defendant's repair shop, the suspension bar was broken either by the weight of the motor upon it, or the jar of the motor—the rise and drop of it. No evidence in rebuttal was introduced by the plaintiff, and the case was submitted to the jury, who found for the defendant, and the plaintiff petitioned for a new trial upon the ground that the verdict was against the evidence and the weight thereof.

The defendant having satisfied the jury by evidence, not only that it purchased the broken appliance from a reputable maker and dealer in such commodities, but had made daily inspections of the same by an expert employed for that purpose, without any attempt upon the part of the plaintiff to meet it with evidence tending to show that the bar was unlike or inferior to other bars in use for like purposes, or that it was too thin,

too narrow, or too weak, and without offering evidence tending to throw discredit upon the kind of inspection that was made, or upon the competency of the inspector, the jury was justified in arriving at a verdict for the defendant. "It is the general rule that, where unimpeached witnesses testify distinctly and positively to facts which are uncontradicted, their testimony suffices to overcome a mere presumption." *Robinson v. N. Y. Central R. R. Co.* (C. C.) 9 Fed. 877.

Petition for a new trial denied, and case remanded to the common pleas division with direction to enter judgment for the defendant.

(25 R. I. 208)

RICH v. TREU.

(Supreme Court of Rhode Island. May 20, 1903.)

TRUSTEE PROCESS — EXEMPTION — NECESSARIES — SERVICES OF ATTORNEY.

1. Services of an attorney are necessities, within Pub. Laws 1900-01, c. 841, § 1, amending Gen. Laws c. 255, § 5, cl. 12, as amended by Pub. Laws 1900-01, c. 751, so as to provide that there shall be exempt from trustee process wages not exceeding \$10, except when the cause of action is for necessities furnished defendant.

Assumpsit by William G. Rich against William D. Treu. The ruling of the district court was adverse to defendant, and he brings exceptions. Exceptions overruled.

Argued before STINESS, C. J., and TIL-
LINGHAST and DOUGLAS, JJ.

Wm. G. Rich, pro se. Wm. C. Bliss, for defendant.

PER CURIAM. In *Crafts v. Carr*, 24 R. I. 397, 53 Atl. 275, we decided that the services rendered by the plaintiff as an attorney at law in a civil case were legal necessities for the minor defendant, and that such minor was liable therefor. There are no words of limitation used in chapter 841, p. 217, § 1, Pub. Laws 1900-01, restricting the necessities therein mentioned to articles of food, clothing, or shelter, or to other articles of a similar nature.

The court is of opinion that the garnishee was properly charged, and that the exceptions must be dismissed, and the case remanded to the district court of the Twelfth Judicial District.

(97 Me. 564)

BROWN v. EDWARDS et al.

(Supreme Judicial Court of Maine. June 30, 1903.)

NEW TRIAL—APPEAL—REVIEW—WARRANTY—SALE—HORSE—WHISTLER.

1. When it is obvious that the jury reached their conclusion by inferences not sustained by facts proved, a new trial will be granted.

2. In a case where the evidence consists principally of testimony which is neither discredited nor conflicting, and the cross-examination of the witnesses indicates no distrust of

their truthfulness, the law court has the same opportunity as the jury to weigh the evidence.

3. In such a case, on a general motion for a new trial, the questions in dispute will be examined by the law court by a review of the evidence from the point of view of the parties.

4. The disease of whistling in a horse sold with a warranty was not known to the parties, or any of their witnesses, until nearly two months after the sale, although nearly all of them were experienced horsemen, and the usual tests were applied.

Within a few days after the symptoms were first recognized, the disease resulted fatally.

Held, that a theory that the disease existed in the horse in question, in a primary stage, at the date of the sale and warranty, is not well founded.

(Official.)

On Motion from Supreme Judicial Court, Penobscot County.

Action by George W. Brown against Jonas Edwards and others. Verdict for plaintiff. Motion for new trial granted.

Assumpsit, brought after rescission, for an alleged breach of warranty in the sale of a horse. Plaintiff's declaration was as follows:

"In a plea of the case, for that whereas the said defendants on the 24th day of January, A. D. 1901, at said Auburn, offered to sell to the plaintiff a certain brown horse of the said defendants, and thereupon then and there, in consideration that the plaintiff, at the special request of the said defendants, would buy of the said defendants the said brown horse at a large price or sum, to wit, one hundred dollars, to be paid by the plaintiff to the said defendants upon request, the said defendants promised the plaintiff that the said brown horse was sound; and the plaintiff in fact saith that he confided in the said promises of the defendants, and then and there, at the special request of said defendants, did buy of the said defendants the said brown horse at and for the price of one hundred dollars, and did then and there pay to the said defendants the sum of one hundred dollars, yet the said defendants did not regard their promise aforesaid, but craftily and subtly deceived the plaintiff in this: that the said brown horse at the time of making the promise aforesaid was not sound, but, on the contrary thereof, was unsound, and was afflicted with a certain malady or disease called 'whistling' or 'wind broken,' and was of no value whatever; and the plaintiff alleges that, as soon as he ascertained that said horse was unsound and afflicted with disease as aforesaid, he returned him to the said defendants on the 30th day of March, A. D. 1901, and has requested the said defendants to pay back to him the said sum of one hundred dollars thus paid them as aforesaid, whereby and by reason of which the said defendants became liable to the plaintiff and promised to pay him said sum of one hundred dollars.

"Yet, though often requested, said defendants have not paid said sum nor any part

thereof, but neglect and refuse so to do, to the damage of said plaintiff (as he says) the sum of two hundred dollars."

The plea was the general issue. The verdict was for plaintiff.

Argued before EMERY, WHITEHOUSE, STROUT, SAVAGE, PEABODY, and SPEAR, JJ.

P. H. Gillin and T. B. Towle, for plaintiff.
Tascus Atwood, F. J. Martin, and H. M. Cook, for defendants.

PEABODY, J. Assumpsit to recover the price paid for a horse sold and delivered to the plaintiff after rescission of the sale for breach of warranty. The case is brought before this court on motion of the defendants to set aside the verdict of the jury because against law, evidence, and the weight of evidence. The evidence consists principally of the testimony of witnesses not discredited or conflicting. From facts not in dispute the jury, by their verdict, must have found that the defendants warranted the horse sound except as to quarter cracks in the forward feet, and that it was at the time of the sale unsound by being affected with a disease called "whistling." The warranty, we think, is proved; but the breach of warranty is a question which must be decided by a review of the evidence from the point of view of the parties.

It appears that the horse in question was purchased for the defendants, just previous to the sale to the plaintiff, by an experienced buyer, who applied the usual tests to determine its soundness, and discovered no evidence of whistling; and the defendants, making use of similar tests, and parties who used the horse in hauling coal, failed to notice such defect. After the sale to the plaintiff, the horse, being noticeable in its general appearance, was for weeks under the casual observation of experienced horsemen, and to them it appeared in good condition. Afterward it was sold by the plaintiff to a man by the name of Smith, who was familiar with horses, and his examination failed to disclose unsoundness in respect to the horse's breathing until he was driving it home, a distance of 12 miles. The whistling became so manifest that in about a week he returned the horse, and the price which he had paid was refunded. The plaintiff thereupon, finding that the horse was unsound, shipped it back to the defendants by rail, with notice to them of his reason for rescinding the sale. The horse, when removed from the car, was found to be sick, and upon the advice of a veterinary surgeon it was chloroformed. The sale was made January 24, and the rescission March 30, 1901. It appears by the evidence that the disease was not

known to the parties or any of their witnesses during a period of nearly two months, and that within a few days after its symptoms were recognized it resulted fatally.

The theory of the plaintiff is that the disease existed at the time of the sale and warranty in its primary stage, induced either by acute laryngitis or by paralysis caused by working in an ill-fitting collar, and that it had not become sufficiently developed to attract the attention of himself or those about his stables until after the sale to Smith; and he relies upon the testimony of the experts to show that, if the horse was not driven fast or loaded heavily, no person could tell whether he was a whistler or not; and he claims that the condition of the weather was such that there had been no opportunity or occasion to use the horse in a way to develop symptoms of the disease.

The theory of the defendants is that the disease was contracted, while in the possession either of the plaintiff or Smith, from exposure in severe weather or from contagion; and they rely upon the fact that the horse was taken from a close stable and actually used in hauling snow, and subsequently driven a considerable distance to Smith's home, and upon the further fact that when the horse was returned to them it bore evidence of having taken a sudden cold or of being affected by some other malady in an acute form, inconsistent with the plaintiff's theory of the gradual development of the disease.

The parties were large dealers, who must have had special knowledge in reference to conditions affecting the soundness of horses, and their acts do not indicate bad faith on the part of either, but that in fact neither of them knew that the horse was unsound, except the obvious defects in its feet, until it had been returned by Smith to the plaintiff. The cross-examination of the witnesses does not indicate distrust of their truthfulness. This court had the same opportunity as the jury to weigh the evidence, and it is obvious that they must have reached their conclusions by inferences not sustained by facts proved. Nearly two months after the horse was warranted sound the disease which constituted the alleged breach of warranty was first discovered. It is possible that it might not have been so far developed as to be observed under the existing circumstances, but it seems improbable that it could have existed at the date of the warranty, when we consider the tests made by the purchasing agent, the three days of heavy work in hauling coal, and the good general condition indicated by the appetite and appearance of the horse until a few days before its death. *Beach on Contracts*, § 281.

Motion sustained. New trial granted.

(97 Me. 548)

COWETT v. AMERICAN WOOLEN CO.

(Supreme Judicial Court of Maine. June 16, 1903.)

MASTER AND SERVANT—NEGLIGENCE—MACHINERY—RISKS ASSUMED.

1. The master is bound to provide and maintain machinery which is reasonably safe in view of the uses that are to be made of it, and the work that is to be performed upon it and around it. He is responsible for any defect in the machinery which was or ought to have been known to him, and was unknown to the servant.

2. He is not bound to anticipate and guard against every possible danger, but only such as can be foreseen by the exercise of reasonable care.

3. In this case the plaintiff's own testimony shows that he did not receive the injury in the manner he thinks he did; but, if it be admitted that he is correct in his theory as to the manner in which the injury was sustained, such an accident or injury was a possibility so remote, a thing so unlikely to happen, that it could not be foreseen or anticipated by the defendant by the exercise of reasonable care.

(Official.)

On Motion from Supreme Judicial Court, Somerset County.

Action by Walter Cowett, pro ami, against the American Woolen Company. Verdict for plaintiff. Motion for new trial sustained.

Case for negligence.

This was an action brought by Walter Cowett against the American Woolen Company for an accident resulting in the loss of the fourth finger of his left hand while in the employ of said company in its mill at Skowhegan, January 12, 1901.

The plaintiff alleged in his writ, first, that the defendant adopted and maintained an unsafe, unsuitable, improper, and dangerous carding machine, with its cogwheels and rollers improperly and insecurely guarded and protected; second, that he was not given proper warning or instructions as to the dangerous character of the machine; and that, being about 16 years old, he did not know or appreciate the danger.

The case was tried at the March term of the court, and a verdict for the plaintiff was rendered for \$1,034.88. The defendant filed a motion to set the verdict aside, which motion was filed in due season, in the usual form.

Argued before WISWELL, C. J., and STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

Forrest Goodwin, for plaintiff. E. F. Danforth and S. W. Gould, for defendant.

POWERS, J. This is an action on the case for negligence, and comes before the court on motion to set aside the verdict, which was for the plaintiff.

At the time of the injury the plaintiff was employed in the cardroom of the defendant's mill, and it was a part of his duty to feed and clean the cards. He undertook to clean the waste out of the cogwheels at the end

of the rollers while the machinery was running. To pick the wool from the cogs, he was obliged to use his left hand in the narrow space between the wheels and the rollers, employing his thumb and forefinger for that purpose. This brought his little finger very near to the rollers, and while so employed it was caught between the large cylinder and one of the smaller strippers on top of the cylinder, drawing in and partially crushing the hand. He was sixteen years of age, and had worked in the cardroom for two years and a half. The cogwheels, cylinders, and strippers were all in plain sight, and his testimony shows that he knew and appreciated the danger of getting his hand between the cylinder and roller, and as to this he must be held to have assumed the risk. The plaintiff's claim, however, is that there was another and a hidden danger, of which he did not know, and could not have known in the exercise of reasonable care and diligence, and which was the real cause of the injury he received. In the collar on the shaft of and at the end of the stripper, near to the plaintiff's hand, there was a small set screw with an oval head, in which was a slot with sharp edges. The head of this screw was about one-quarter of an inch broad, and projected about one-sixteenth of an inch from the rapidly revolving collar. The plaintiff claims that the head of this screw hit his hand, surprising him, and causing him, by a sudden and involuntary movement, to draw his hand into the machinery, where it was caught and injured. It is claimed that it was the master's duty to place a guard over the head of the screw, or to warn the plaintiff of its existence, which was not ordinarily perceptible, and of which he had no knowledge.

The plaintiff's theory as to the manner in which the injury happened is not supported by his own evidence. He says something hit his finger, and that whatever hit it was away from the roller, and on the other side. The screw in the collar of the roller or stripper might possibly be said to be away from it, but it could hardly be said to be upon the other side of it. He states positively that he does not know what hit his finger, but we think his testimony shows what it was in fact. He says, "Something struck my finger, and I went to draw my hand out and it began to draw in."

"Q. How long was it from the time this something hit your hand before your hand went into the collar?

"A. It went in right off. The minute I went to draw my hand out, it began to draw in."

At the time the plaintiff was standing with his side to the machinery, facing the same way as the cards, and using his thumb and forefinger to pick the wool from the cogs. This would bring his little finger very near to that part of the machinery in which it was caught. His testimony shows that

there was not a hitting of the finger, a drawing away of the hand, and then a catching of the finger. The contact and the catching were simultaneous, and at the same point; and it is impossible to resist the conclusion that the only object which hit his finger was that part of the machinery in which it caught. The space was a narrow one; on the one side the cogs, and on the other the rollers. He says the wool which he was picking out was packed tight into the cogs. To extricate it must have required the use of some strength, and a slight sudden and unexpected giving away of the wool would have a tendency to carry his hand away from him and into the rollers. If the finger had been hit by the screw head, causing a sudden and involuntary starting on the plaintiff's part, it would seem that the natural and instinctive movement would have been to have drawn his hand toward him, and away from the point of contact, rather than away from him and by the screw head. We are of the opinion that the jury failed to appreciate the force of the plaintiff's testimony, and that the verdict is clearly erroneous.

Even if the plaintiff's theory in regard to the manner in which the injury was received had been sustained by the evidence, there is another objection which is fatal to his recovery. It was not the duty of the defendant to provide absolutely safe machinery. The law imposes no such burden upon the master. He is not an insurer. It is his duty to provide and maintain machinery which is reasonably safe in view of the uses that are to be made of it, and the work that is to be performed upon it and around it. He is responsible for any injury arising through any defect in the machinery which was or ought to have been known to him and was unknown to the servant. He is not required to anticipate and guard against every possible danger, but only such as are likely to occur. The degree of care should rise with the danger; but, assuming as true the plaintiff's position, that it was within the contemplation of the parties that he should clean the machine while running, we do not think the defendant ought to have known that such an injury was likely to occur. That the oval head of the set screw, projecting one-sixteenth of an inch from the revolving collar near the plaintiff's hand, by coming in contact with his finger would cause him injury, or cause him to make any such involuntary movement as would be the occasion of such an accident or injury as that complained of in the present case, was a possibility so remote, a thing so unlikely to happen, that it could not be foreseen or anticipated by the defendant by the exercise of reasonable care. Such being the fact, neither his failure to place a guard over the head of the screw nor his omission to warn the plaintiff of the danger constitute negli-

gence on his part. The facts of the case do not justify a finding that the defendant was negligent, and, allowing to the verdict of the jury all the weight to which it is entitled, the court is of the opinion that it is clearly wrong, and that justice requires it to be set aside.

Motion sustained. Verdict set aside. New trial granted.

(97 Me. 559)

STATE v. WEBB'S RIVER IMP. CO.

(Supreme Judicial Court of Maine. June 30, 1903.)

INDICTMENT—NUISANCE—DAMS—FLOODING
HIGHWAY—CRIMINAL PLEADING—CORPORATION CHARTER—EVIDENCE—PUBLIC ACT.

1. Since the passage of Rev. St. 1883, c. 1, § 6, par. 26, acts of incorporation are public acts, and bound to be noticed by the courts as part of the law of the land.

2. In criminal pleading it is not ordinarily necessary to make negative averments, unless the clause defining the crime contains exceptions.

3. An act of incorporation, which modifies a general statute declaring the obstruction or incumbering of a highway to constitute a nuisance, is equivalent to an exception reserved in the clause of the statute which defines the crime.

4. An indictment for a nuisance by overflowing a highway against a corporation whose charter authorizes the maintenance of dams, etc., at the outlet of a pond, should contain a negative averment to the effect that the dam complained of is not erected and maintained in accordance with the charter.

5. If the dam complained of is erected by the respondent in accordance with its charter, and so maintained, no indictment for nuisance will lie, even though individuals or the public have been injured.

See State v. Godfrey, 24 Me. 232, 41 Am. Dec. 382.

(Official.)

Exceptions from Supreme Judicial Court, Franklin County.

The Webb's River Improvement Company was indicted for nuisance under Rev. St. 1883, c. 17, § 5. The demurrer to the indictment was overruled, and defendant excepted. Exception sustained.

Respondent was charged with raising the water in Webb's pond, in the town of Weld, in Franklin county, by means of a dam, to such a height that the highway around the head of said pond was overflowed, obstructed, and rendered impassable.

The indictment was as follows:

State of Maine.

"Franklin, ss.

"At the Supreme Judicial Court, begun and holden at Farmington, within and for the County of Franklin, on the first Tuesday of February in the year of our Lord one thousand nine hundred and two, the jurors for the State aforesaid, upon their oaths present that there is and for a long time, to wit,

¶ 1. See Evidence, vol. 20, Cent. Dig. § 40.

for the space of eighty years last past, has been a public road and common highway, situated, lying and being in the Town of Weld in the County of Franklin aforesaid, leading from Webb Post-Office around the westerly side of Webb's Pond to Carthage in said County, of great length, to wit, of the length of ten miles, and of great breadth, to wit, of the breadth of four rods, over and upon which the citizens of the State aforesaid have been accustomed to pass and repass freely and at their pleasure with their horses, teams, carts and carriages.

"And the jurors aforesaid further present that the Webb's River Improvement Company, a corporation existing under and by force of the law of this State, duly organized and doing business, and having an office in Lewiston, Androscoggin County, Maine, on the fifteenth day of March in the year of our Lord one thousand nine hundred, erected and has since maintained to the day of the finding of this indictment dams at the outlet of said Webb's Pond in said Franklin County.

"Whereby and by reason of said dams the water in said pond has been raised to a great height and has overflowed, obstructed and encumbered said highway around the head of said Webb's Pond, and rendered the same impassable, so that the citizens of the State aforesaid over and upon said highway with their horses, teams, carts and carriages, at and during the time aforesaid since said dams were erected, could not nor yet can, pass and repass with safety and convenience, to the great damage and common nuisance of all the citizens of said State over and upon said highway, passing and repassing as aforesaid, against the peace of the State and contrary to the form of the Statute in such case made and provided.

"A true bill.

"A. V. Hinds, Foreman.

"H. S. Wing, Attorney for the State."

The respondent, having obtained leave to plead over, filed a general demurrer to the indictment. The presiding justice overruled the demurrer, and the respondent alleged exceptions.

Sections 3 and 4 of respondent's charter are as follows:

"Sec. 3. Said corporation is hereby authorized to construct and maintain dams and side dams, piers, abutments, booms, side booms and sluices at the outlet of said pond and in said river, and to blast, excavate and deepen said outlet and the channel of said river, remove any obstructions therein and make any and all other improvements thereon which will facilitate the transportation of logs, wood and other lumber down said stream into the Androscoggin river; to hold and occupy by lease or purchase, and to enter upon and take such land and materials as may be necessary to make its said improvements, and to flow such land, so far as

it may be necessary to accomplish its object. Provided, said corporation shall not enter upon and take for the purpose aforesaid any mill site otherwise than by lease or purchase, and said corporation shall pay to the owners of said land and material so taken, such sums as the parties may agree upon, or if they cannot agree, such damages as may be adjudged by the county commissioners of the county in which said land and materials are taken, in the same manner and under the same conditions and liabilities as are provided in the case of damage by the laying out of public highways, and for lands flowed by said corporation the owners shall be entitled to the same remedies as are now provided by law in cases of flowing lands by the erection of dams for mills.

"Sec. 4. Any dam erected or maintained by said corporation at the outlet of the pond under the authority of this act, shall be of such height as not in ordinary seasons to flow the water in the pond above ordinary high-water mark, and the authority to hold said water shall be limited solely to the purpose of floating logs, wood and lumber out of said pond and down said river during the spring driving season. It shall be the duty of said corporation to use reasonable diligence in running said logs, wood and lumber down the river, completing the same by June fifteenth, and thereupon to so manage the dam that the water in the pond and the flow in the river shall continue in its natural state as near as may be, until another driving season begins."

The contentions of counsel on both sides concerned the question as to whether the indictment should allege that the dam was not erected in pursuance of authority of statute, or whether the privilege conferred by its charter should be pleaded by the respondent.

Argued before WISWELL, C. J., and EMERY, STROUT, POWERS, and PEABODY, JJ.

H. S. Wing, Co. Atty., for the State. W. H. White and S. M. Carter, for respondent.

PEABODY, J. This is an indictment against the Webb's River Improvement Company, a corporation doing business in Lewiston, in the county of Androscoggin and state of Maine, for nuisance, in which it is alleged that the respondent corporation maintained certain dams at the outlet of Webb's pond, in Franklin county, in said state, by which the water of the pond was raised so as to overflow, obstruct, and encumber the highway around the head of the pond, rendering it impassable.

By Rev. St. 1883, c. 17, § 5, "the obstructing or encumbering by fences, buildings, or otherwise, highways, private ways, streets, alleys, commons, common landing places, or burying grounds, are nuisances within the limitations and exceptions hereafter mentioned."

The respondent demurred to the indictment

as insufficient in law. The demurrer was overruled by the presiding justice, and the cause is brought before the law court on exceptions.

It appears that the Webb's River Improvement Company was incorporated by an act of the Legislature (chapter 84, Private & Special Laws of 1891) referred to and made part of the bill of exceptions. Its charter gave the corporation the right to maintain dams and other structures at the outlet of this pond, and it is claimed by the respondent that the indictment alleges nothing which it has done not authorized by the act of incorporation.

The charge constitutes an indictable offense, to which corporations, as well as individuals, are amenable, and, unless privileged by the special act of incorporation, the respondent would be chargeable with the offense defined in the section and chapter of the Revised Statutes quoted. The test of its rights and privileges is the statute conferring them.

The alleged insufficiency of the indictment is that it fails to show that the dam was not erected and maintained in accordance with the rights and privileges granting it.

It is an elementary rule of pleading that every material fact essential to the commission of a criminal offense must be distinctly alleged in the indictment. *Williams v. The People*, 101 Ill. 385; *State v. Paul*, 69 Me. 215; *State v. Chapman*, 68 Me. 477; *State v. Bushey*, 84 Me. 459, 24 Atl. 940.

Ordinarily, it is not necessary to make negative averments, unless the clause defining the crime contains exceptions. *Bishop, New Criminal Procedure*, par. 631.

While the statute quoted has, in its terms, no exception or limitation exempting the respondent from its effect, the law creating the corporation gave it authority to do what the indictment alleges it has done. The act of the Legislature was a public act, and the courts are bound to notice its provisions as part of the law of the land. *Rev. St. 1883, c. 1, § 6, par. 26*.

So that, as to the respondent, the act of incorporation modified the statute which declares such obstructions nuisances as fully as if it had been incorporated therein. The corporation, if it has erected and maintained the dam in accordance with its charter, is protected against indictment for nuisance, even though individuals or the public have been injured. *Crittenden v. Wilson*, 5 Cow. 165, 15 Am. Dec. 462; *Commonwealth v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386.

If the acts of the respondent described in the indictment are only such as it might legally do, no law has been violated, and no offense is charged in the indictment. *State v. Godfrey*, 24 Me. 232, 41 Am. Dec. 382; *State v. Turnbull*, 78 Me. 892, 6 Atl. 1.

The indictment is therefore insufficient in not alleging that the respondent corporation

exceeded its charter rights and privileges. This case is substantially identical with *State v. Godfrey*, supra.

Exceptions sustained. Demurrer sustained.

(55 N. J. B. 60)

SUPREME COUNCIL CATHOLIC BENEV. LEGION v. MURPHY et al.

(Court of Chancery of New Jersey. July 24, 1903.)

BENEFICIAL ASSOCIATIONS—CHANGE OF BENEFICIARIES—EQUITIES—INTERPLEADER.

1. One insured in a beneficial association in favor of his wife, who had possession of the certificate, told her, after it had lapsed and he had ceased to have any income or property, if she would get it reinstated and continue the payments, she should have the benefit of the certificate. This she did, also supporting him, though he was able to support himself but for his habit of drinking. At this time the by-laws of the association allowed a change of beneficiary only on surrender of the certificate. Afterwards, under a by-law thereafter passed, allowing such change without such surrender in case the certificate is beyond the member's control, he attempted to make a change in favor of a sister, who had made some slight gratuitous gifts to him of spending money. *Held*, on an interpleader by the association, which paid the money into court, that the wife's equity was so strong that it could not be overcome, even if the designation of a new beneficiary was made by him of his free will, and was carried out with the technicalities necessary to make the new certificate effective.

2. Under a by-law of a beneficial association allowing change of beneficiary only on surrender of the certificate, except that where the certificate is lost or beyond the member's control he may have a change, on a request accompanied by an affidavit setting forth the facts of the loss or how the certificate is beyond his control, where the member voluntarily gave the certificate to his wife, the beneficiary, and made no demand on her for it, his affidavit prepared by his sister, when his mind was weakened by liquor, stating that the certificate was beyond his control, that his wife had obtained possession of it and refused to deliver it to him, though requested to do so, and that he had not for a long time been living with her, when he had been continuously living with her, receiving support from her for five or six years, is insufficient to support a new certificate designating the sister as beneficiary.

3. Where a beneficial association pays the insurance into court, and interpleads the persons claiming it, the court may award it on equitable principles, and in accordance with the real wishes of decedent, without regard to technical defenses which the association might have had to either of them.

Interpleader by the Supreme Council Catholic Benevolent Legion against Kate Murphy and Mary J. Bauer. Final hearing on issue made up between the defendants.

This is a suit of interpleader. The contest is over a sum of \$1,000 deposited in the court by the complainant as part—one-half—of the money due under a certificate called a "benefit certificate" issued by the complainant to John J. Murphy, the husband of the defendant Kate Murphy, and the brother of the defendant Mrs. Bauer.

The certificate is dated March 9, 1888, and

is issued to John J. Murphy as a member of Paulus Hook Council, No. 183, of the Catholic Benevolent Legion at Jersey City. This Paulus Hook Council is a council subordinate to the complainant. The domicile of the complainant is Brooklyn, in the state of New York. The important part of the certificate is as follows: "These conditions being complied with, the Supreme Council Catholic Benevolent Legion hereby agrees to pay out of its benefit fund to Kate Murphy—wife—a sum of money not exceeding two thousand dollars according to the provisions of law governing said fund upon the death of said member in good standing, provided he shall not have substituted another beneficiary or reduced the amount of said benefit under the rules governing disability benefits." This certificate bears the seal of the supreme council, complainant, and a lithographed signature of John D. Carroll, the supreme secretary, and John C. McGuire, the supreme president. It also has the actual signature of John J. Murphy, following the words "Witnessed and delivered in our presence," and the seal of the Paulus Hook Council, and the actual signature of Peter Byrne, president, and H. T. J. Moran, secretary, of the Paulus Hook Council.

As throwing light on this mode of attesting the certificate issued by the complainant, is section 3 of chapter 2 of the laws of the legion: "A member in good standing may at any time surrender his benefit certificate to the secretary of his council for change of beneficiary, and have a new one issued payable to such legal beneficiary or beneficiaries as he may direct, as provided in the foregoing section, upon the payment of a certificate fee of fifty cents. The right to receive the benefit will vest in the new beneficiary or beneficiaries named in this application as soon as indorsed over his signature on the benefit certificate, duly attested by two witnesses, one of whom must be a member of the Legion."

This certificate, which was numbered 15-359, was, as soon as received by the member handed by him to his wife, the defendant Kate Murphy, the beneficiary therein named, and retained in her possession (with the exception of one or two months in the summer of 1901) until the death of her husband, which occurred on the 9th of March, 1902. With the certificate was handed to Murphy a pass book or books in which were entered the charges for assessments and dues both in the supreme council and in the local council, and his payments were credited thereon as made. Murphy kept his payments up until some time in the year 1897, when he fell in arrear. Indeed, some of the last payments were made by a friend. The policy thereby became lapsed, whereupon he handed the passbooks to his wife, and asked her to repay the amount advanced by his friend, and said that if the complainant would reinstate

him she should continue the payments, and that she should have the benefit of the certificate. His wife accepted the passbooks, repaid his friend the amount advanced by him; the complainant waived the lapse, accepted payments from her, and she kept up such payments until the death of her husband, March 9, 1902. She also during that period supported him, without any aid from him. They never had any children.

On February 11, 1902, Murphy, being quite sick from the combined effects of tuberculosis and the excessive use of alcoholic stimulants, and temporarily stopping at the house of his sister Mrs. Bauer, who lived with another sister, Mrs. Brock, and her mother, Mrs. Murphy, made an affidavit wherein he identified himself as the person named in the certificate above mentioned, and stated that the policy of insurance or certificate in question was beyond his control, and had been since the month of September, 1901; that he was not then, nor for a long time had been, living with his wife; that his wife had obtained control of the insurance policy, and had refused to deliver the same to him, although requested so to do. This affidavit was essentially untrue. He had been continuously, up to within 10 days previous to that time, living with his wife, and had been for 5 or 6 years supported by her. The so-called "policy" had been in his possession for a few weeks during the previous summer of 1901, but had been voluntarily returned by him to his wife, and he had made no demand on her for it. The affidavit was made for the purpose of complying with the terms of a new rule or by-law adopted by the complainant in the summer of 1901. Previous to that by-law of 1901, a new beneficiary could not be named except by the surrender of the previous certificate and the issuing of a new one. That by-law was an addition to section 3 above quoted, and is in these words: "In case a benefit certificate is lost or beyond a member's control, the member may, by a written request, witnessed as required by this section, and stating in writing that all claims under the former benefit certificate are surrendered, and requesting that a new certificate be issued to him payable to the same or a new beneficiary or beneficiaries, in accordance with the laws of the Legion, and accompanied by an affidavit setting forth the facts of the loss of the former certificate, or how such certificate is beyond the member's control, which affidavit shall be in form satisfactory to the Supreme Secretary and accompanied by a fee of fifty cents. Thereupon the Supreme Secretary shall issue to such member a new certificate payable to the beneficiaries as requested. * * *

On the 12th of February he executed, in the presence of his counsel, Mr. Melosh, and of John F. Murphy, secretary of the Paulus Hook Council of the C. B. L., a paper as follows:

"To the officers and members of Paulus Hook Council No. 183, Catholic Benevolent Legion of Jersey City, N. J.

"I hereby surrender all claims and demands which I may have against Paulus Hook Council No. 183 Catholic Benevolent Legion, or against the Supreme Council of the Catholic Benevolent Legion, which I, or my beneficiaries may have against them under and by virtue of the terms and provisions of Benefit Certificate No. 15359; and I request that a new certificate be issued to me, in lieu of the certificate before mentioned, payable upon my death to my wife Kate Murphy one half, to wit, the sum of one thousand dollars, to my sister Mary A. Bauer the remaining one half or one thousand dollars.

"John Murphy.

"Dated February 12th, A. D. 1902.

"Witness:

"Henry J. Melosh.

"John F. Murphy."

Acting upon the strength of this paper and the affidavit above mentioned, the complainant issued a new certificate bearing the same number, 15,359, to John J. Murphy, and in the course of three or four days it came in due course of business into the hands of John F. Murphy, the secretary of the Paulus Hook Council, but it never passed out of his hands, and it was never sealed with the seal of the Paulus Hook Council, nor delivered to John J. Murphy and accepted by him, or witnessed by the president and secretary of said council. That new certificate bore the seal of the supreme council and the lithographed signature of the president and supreme secretary, and by its terms the agreement was to pay to Kate Murphy, wife, and Mary A. Bauer, sister, \$2,000, one-half to each.

The next day, February 13th, John J. Murphy was removed to his own home by his wife, and the same afternoon made two other affidavits, and executed another paper which, if it had been executed in the presence of the proper officer of the local council and approved by the complainant, would have been effectual, according to its rules, to reinvest the wife with the title to the whole fund. This was never done. These papers were as follows:

"State of New Jersey, County of Hudson—ss.: John J. Murphy being by me duly sworn on his oath doth depose and say that he has a certain benefit certificate in the Catholic Benevolent Legion issued to him payable to his wife; that on or about February 12th, 1902, his sister Mary Bauer obtained from him while he was under the influence of some drink or drug and under threat some papers which he has been informed and believes to be an application for the change of beneficiary from his said wife Kate to his sister Mrs. Mary Bauer; that it is his request and he hereby demands that said papers which he signed be returned to his said wife or himself; that he does not

desire that the beneficiary be changed to any other person; that his said wife is entitled to have the said monies due under said certificate and that it is his request that they return whatever papers he signed.

"John Murphy.

"Sworn and subscribed before me this 13 day of February, 1902.

"F. V. Many,

"Master in Chancery of New Jersey."

"State of New Jersey, County of Hudson—ss.: John J. Murphy being by me duly sworn upon his oath doth depose and say, that on or about twelfth day of February nineteen hundred and two he signed an application on some paper purporting to be an application to the Catholic Benevolent Legion for the change of beneficiary in a certain policy of insurance issued to me and payable to my wife, Kate Murphy; that said application and affidavit was obtained from me while under the influence of some drink or drug and under threat and fear of my sister, Mrs. Mary Bauer; that he believes said Mary Bauer is now in possession of said papers or a new policy issued to her and that she refused to give them to him; that it is his desire that said policy as originally issued to him payable to his wife, Kate, shall not be changed to any other person and he hereby requests that if a new policy has been issued to any other person that a new certificate be issued to him payable to his said wife Kate Murphy.

John J. Murphy.

"Sworn and subscribed to before me this 13 day of February A. D. 1902.

"Francis V. Many,

"Master in Chancery of New Jersey."

"Jersey City, N. J., February 13, 02.

"To the Officers and Members of Paulus Hook, No. 183, Council, C. B. L.

"Comrades: I hereby surrender my benefit certificate No. 15359 to be forwarded to the Supreme Council C. B. L. with the request that a new one be issued changing my beneficiary to Kate Murphy.

"John J. Murphy.

"Witness present: F. V. Many."

On the 15th of February he executed a testamentary writing as follows:

"In the name of God, Amen. I, John J. Murphy, being of sound and disposing mind, do make, publish and declare this to be my last will and testament.

"First, I give, devise and bequeath to my wife, Kate Murphy, all my property of whatever kind and description; I also give to my said wife, Kate Murphy, whatever interest I may have in a certain policy or certificate for Two Thousand dollars issued to me by the Catholic Benevolent Legion; my wife having paid all the premiums and assessments under the said policy for at least six years, and I having given the said policy or certificate to her with the understanding that if she would pay the said premiums, the said policy or certificate in the said Catholic Benevolent Legion would be hers absolutely,

the said premiums having been paid by her out of her own monies, it is my intention that if I now have any interest therein that such interest be vested in her; it is my intention and request that she should have the said two thousand dollars under said policy.

"Second, I hereby appoint my said wife, Kate Murphy, executrix of this last will and testament and direct that no bond be required of her as such executrix.

"In witness whereof I have hereunto set my hand and seal this 15th day of February, A. D. 1902.

"Signed, sealed, published and declared by the said testator to be his last Will and Testament in the presence of us who at his request and in his presence and in the presence of each other have hereunto signed our names as subscribing witnesses.

"John Murphy.

"Geo. W. Rurode, 1 Exchange Pl., Jersey City.

"Martin Rielly, 14 Sussex Pl., Jersey City.

"William Cornell, Jr., 14 Sussex Pl., Jersey City.

"Mamie Wright, 14 Sussex Place."

A mass of evidence was given as to the condition and habits of the deceased during the last six or seven years of his life, and longer, and also as to his mental condition between the 1st of February and the time of his death. The evidence on behalf of his wife tended to show that he was and had been for many years a steady drinker of intoxicants, and had indulged to such an extent that, at the last, if he was not supplied with a certain amount of stimulants, he was liable to fall into delirium tremens, and was in fact very weak in mind and easily influenced and persuaded; that he died of alcoholic neuritis, or wearing out of the nervous system, as the result of long continued overstimulation, accompanied by tuberculosis. On the part of the sister the evidence tended to prove that he was of sound mind, but afflicted with tuberculosis, which caused his death. The evidence clearly established the fact that from the day of the visit to the house of his mother and sisters, February 2, 1902, until his death, on the 9th of March, he was, quite properly, kept constantly under the influence of stimulants, and that while at his sister's the attending physician prescribed, and there was administered to him, doses of an opiate. The evidence also shows that neither of the papers signed by him were prepared from personal direction taken from him, with a single exception. The evidence shows that his sister Mrs. Bauer employed Mr. Melosh to prepare the papers changing the certificate in her favor, and that he prepared the affidavit verified before him from her instruction. The same is true with regard to the affidavits taken by Mr. Many. Those were prepared by Mrs. Murphy's counsel, Mr. Rurode, from statements made to him by Mrs. Murphy. The single exception is that the latter part of the new

surrender and designation executed February 12th in the presence of the secretary of the local legion, wherein he specifies that his wife, Kate Murphy, was to have one-half, viz., the sum of \$1,000, and his sister Mary A. Bauer the remaining \$1,000, was written in by his bedside. The evidence of Mr. Melosh is that he was willing and desirous to give the whole to his sister, but that he (Melosh) reasoned with him upon the inequity of such disposition, and induced him to divide it between his wife and sister.

Peter Backes, for complainant. M. W. Van Winkle, for defendant Murphy. L. G. Morten, for defendant Bauer.

PITNEY, V. C. (after stating the facts). There are two aspects of the law applicable to this case: One which holds that the rules of the complainant society regulating the making of new designations of beneficiaries applies and controls the rights of the parties although the society has paid the money into court, thereby, as held in many adjudged cases, waiving all defenses which it might have made to a claim preferred by any particular party based on a failure to comply with those rules. The other aspect is that the rules and regulations just mentioned are made wholly for the benefit of the association, to protect it against uncertain claims, and to enable it to pay the money with safety to a particular individual, and that they have no force and effect, as between divers adverse claimants, except to aid in ascertaining intention. The former rule seems to have been adopted and acted upon by Vice Chancellor Grey in the very recent case of Grand Lodge v. Gandy, 63 N. J. Eq. 692, 53 Atl. 142. The latter rule was applied by the Supreme Court of Pennsylvania in the quite recent case of Pennsylvania Railroad v. Wolfe, 52 Atl. 247, and of Schomaker v. Schwebel, 204 Pa. 470, 54 Atl. 337. Without at this time considering the merits of the rules in question and the extent of their application, I think it quite safe to affirm that no rule, however reasonable in itself, or thoroughly imbedded in the contract, or useful in general application, can stand in the way or stay the effect of the operation of the fundamental principles of equity.

I will first consider the case as if the last designation made by the deceased on February 13th, and that made in his will in favor of his wife, were ineffectual, and consider the strength of the wife's position independent of that designation, and independent of her contention that her husband was so far incompetent, and so completely under the influence of his mother and sisters, when on February 12th he executed the designation in favor of his sister, as to render that instrument invalid and ineffectual to warrant the issuing of the new certificate. At the time in 1897 that the deceased delivered the pass-books to his wife, with a request that she

should revive the policy and keep it alive, with the promise that she should continue to be the beneficiary therein named, he had stopped business and had no income, and had become incapable, by reason of his habits and disposition, to earn a living either for himself or his wife; and she took up the burden of furnishing that living, both for herself and her husband, and, by very hard labor in keeping a boarding house for young men, supported him from that time on, until his death, in decency and comfort. She also with her own money, earned with her own hands, paid the monthly dues and assessments to the complainant, and the quarterly and other dues due to the Paulus Hook Council. When she commenced such payments he was still a comparatively young man, with a prospect, but for his drinking habit, of living many years, and of that prospect of life she took the chances. She might be obliged to continue payments and his support for many years. The fact that he died so soon, whereby her payments aggregated a comparatively small sum, and the fact that she was obliged to support him but for only a few years, does not detract from the merit of her position. The same principle applies that would apply if her payments and support had commenced many years earlier and had continued many years longer. At the time she commenced payments and the support of her husband, as the by-laws of the society then stood, the actual possession of certificate, or "policy," as it was called, was, on the present hypothesis, an absolute protection against any change in the beneficiary. This was admitted by counsel for Mrs. Bauer. Without the production and surrender of the certificate itself, the husband could not exercise the only absolute right he had in the certificate, viz., the power to change the beneficiary.

In this situation the question arises: Was it competent for the complainant society to so change its rules and by-laws as to affect the wife's right, and enable the husband, as against her, to change the beneficiary? I think there can be but one answer to this question. The transaction referred to between the husband and wife, when acted upon as it was by the wife, amounted to an irrevocable waiver by him in her favor of his right to exercise the power of change of designation. It operated in equity as a release of such power to her. Her right became vested by reason of her payments and the support which she furnished him, and it was not competent for the complainant, by a change of rules, to enable her husband to divest them, or, rather, it was not competent for the husband to take advantage of such change of rules for that purpose. It seems to me that citation of authority in support of this position is unnecessary. It has been held that not only is the Legislature incapable of destroying vested rights by subsequent legislation, but the people in their supreme

power may not do it even by change in the Constitution. It is a familiar rule, well settled in this state, that the reservation by the Legislature of the right to alter and amend charters of incorporated companies must be confined to altering that part of the charter which consists of the legislative grant to the corporation, and cannot be extended to altering that part of the charter which constitutes the contract between the stockholders. In this case if the wife, by the continued possession of the certificate under claim of right, with the consent of her husband, and the continued payment of the monthly and quarterly dues thereon, and by her continued support of her husband in anticipation of receiving the benefit of the certificate, acquired an equity in the fund created thereby, no act of her husband, based on any new rule adopted by the complainant association, or anybody in any other manner, can deprive her of that right. I am of the opinion, therefore, that, if the case stopped just here, the wife, in the absence of any countervailing equity on the part of the sister, would be entitled to the fund.

But the question arises whether the new certificate, filled up and issued in blank by the supreme council, and sent down to the local council for delivery, but never delivered, to the deceased, ever became binding on complainant, and superseded the original certificate, so that the complainant could have been successfully sued thereon by the beneficiaries therein named. It seems to be a part of the general scheme of these councils, which has not been repealed by the new by-law of 1901, that the new certificate does not become binding until certain formalities have been complied with by the assured and the officers of the local council. That is, the assured must accept the policy, and the local council must affix thereto its seal, and the acceptance by the assured must be witnessed by the president and secretary of the local council. This was never done with the new certificate here. It may be admitted, however, that if the assured did everything in his power to make the change, and it was not fully carried out, either by reason of want of time on the part of the supreme council and the local council, or by refusal on their part so to do, the right of the new beneficiary could not be affected thereby, but he or she would be entitled to the money. I have so held in an unreported case, and there are reported cases in other jurisdictions to the same effect.

This brings us to the consideration of the circumstances preceding and attending the execution of the various papers above set forth, and the influences which prevented the consummation of the formalities required on the face of the new certificate. The parties were married in 1886, and always lived in Jersey City. At that time deceased was about 28 years old, and his wife was apparently of a corresponding age. As far as

appears he had no pecuniary means, but she had saved a considerable sum of money, \$1,000, she swears, from her earnings in a publishing house. This she gave to him, and set him up in the business of a drinking saloon. He conducted this drinking saloon and supported his wife in the ordinary way until about 1896, when he was obliged by the decline of his business to sell it, and he from that time became substantially unable to support either himself or his wife. She shortly afterwards, with the assistance of her niece, a Miss Wright, established a boarding house, and carried it on until his death, laboring with her own hands, and having only the assistance of her niece, and the help, occasionally, of a washerwoman. Thereby she was enabled to support herself and her husband in comfort. Her boarders consisted entirely of young men. Those of them who appeared on the stand seemed to be of a decent and respectable sort. Her husband had acquired the drink habit, and also a taste to play the gentleman, and lounge about hotels and drinking saloons. From that time until he died the only work he did was to serve as a bartender and assistant in a restaurant for a few months, and also one term as a jurymen. No part of the proceeds of such service, so far as appears, ever came to the hands of his wife. At the time of his stopping business he was possessed of some valuable jewelry, watch, chain, etc., and, I infer, a good stock of clothing. He managed to keep up a gentlemanly and tidy appearance in the matter of clothes, and was fond of frequenting drinking saloons. The drink habit increased upon him, and he often came home at night drunk, and always more or less under the influence of liquor. His wife swears that he received over \$100, over and above his debts, from the sale of his drinking saloon, and gave it to her. Shortly afterwards he reclaimed it, and stayed away from home at a hotel for two or three weeks until it was all spent, and, as he told her, most of it was gambled away. Naturally, his principal difficulty was to keep up his appearance in the matter of clothing, and have a little money in his pocket to do his part in the matter of drinks among his boon companions. His wife furnished him with very little money directly, and in this she was entirely justified. But she did give him a good home, good food and good attention, and she furnished him with all his underclothing, and did his washing, but abstained from furnishing him with outer clothing, because, as she swears, she knew he had his jewelry, of considerable value, and was selling it from time to time, and she thought he might as well buy his outer clothing with that as to spend it, as she knew he would, for drink. Perhaps, though she does not so say, she thought that the desire to wear good clothes might induce him to work to earn them. The only thing like unkindness which, according to the proofs, she ever exhibited toward him, was in remon-

strating with him for his idle, drunken habits, and the proof is that occasionally she did so remonstrate with him, and that he flew in a passion and used loud and harsh language toward her. But the proof also satisfies me that in the main, and especially toward the last, they manifested toward each other the ordinary affection of husband and wife, and that she was uniformly kind and attentive to him in all his wants. He was for the last two or three years at least a frequent visitor at the home of his mother and two married sisters, who lived together. The character of his visits there, and their extent, have, I think, been much exaggerated by them in their evidence. Mrs. Bauer contends that she habitually gave him money for his expenses of trolley riding, barbers' fees, and clothing. I think the amount said to have been given has been exaggerated. I have no doubt his sisters did from time to time give him money in small sums, and I have as little doubt that he spent the greater portion of it in drinking saloons. Mrs. Bauer claims to have furnished him money to cover the expenses of two summer outings. Against this evidence on his sister's part is convincing evidence that on one of these occasions he received a sufficient contribution in money from the Society of Elks, of which he was a member, and on the other he sold an article of jewelry and realized sufficient funds from it.

It appears from the evidence of Mr. Melosh, and also the evidence of Mr. Weile, president of the Paulus Hook Council, that, some two years or more before his death, deceased spoke to each of them separately about changing the name of the beneficiary in his certificate, and was informed by each that it would be necessary, in order to accomplish that result, to produce the original certificate. The reason that he gave Mr. Melosh for the proposed change was that his wife had treated him harshly, and that was the reason for the change that he gave to his sister and Melosh on February 11 and 12, 1902, as they swear. This ground was unfounded in fact.

It is a part of Mrs. Bauer's case that this change of beneficiary had been in his mind a long time, and that it was not, as alleged by the wife, the result of undue influence exerted by his mother and sisters upon him at a moment when his intellect and will were enfeebled by disease. But we have the remarkable fact, clearly established in the case, that in the month of June or July, 1901, long after the consultations with Mr. Melosh and Mr. Weile just mentioned, he abstracted from his wife's bureau drawer, without her knowledge, the certificate of membership, and delivered it to his sisters, Mrs. Brock and Mrs. Bauer, and they had it in their possession for a considerable length of time; that his wife discovered the absence of the document and requested him to return it to her, and that he voluntarily returned it to her a month or

two later. Thus it appears that he had ample time and opportunity, several months before he became so entirely besotted, to make the contemplated change, and not only abstained from so doing, but voluntarily restored the certificate to his wife, and so, as he believed, put it beyond his power to make any change in it. The truth is that it was not until the very last that he lost all his self-respect. He was fully conscious of his delinquencies, and of what he owed to his wife, and in his better moments he fully appreciated it. At other times, when his desire to enjoy himself with companions of the same taste and to play the gentleman around town was strong and his will was weak, he was annoyed by his wife's scolding him for his idleness and drunkenness, and doubtless also for her refusal to furnish him with money to spend to gratify his appetite, and to furnish him with the outside clothing of a gentleman, so that he could appear to good advantage on the street.

In the meantime the drink habit increased upon him; he was out almost every night until late, came home generally intoxicated, and in the morning was unable to eat any breakfast, and felt miserable until he had a drink of spirits. Several of the men boarders swore that he would beg them of a morning to go out and bring him in a small quantity of whisky to steady his nerves. Finally, in the morning of the 1st day of February, 1902, he was taken, I am entirely satisfied, with an incipient attack of delirium tremens. He was observed in that condition in his room by one of the boarders. The attention of Miss Wright, the niece, was called to it, and when Mrs. Murphy came in from her morning marketing she gave him her attention, and he begged for spirits. Then, as she swears, for the first time in her life, she sent out and bought a half pint of spirits, and gave it to him in small doses mixed with milk. The result was that toward night his system had become stimulated and strengthened, so that he was probably as near as ever during that period, himself. And he then dressed himself and started to go out, as he said, to see the boys and spend the evening. His wife begged of him not to go, but he insisted on going. She at that time was suffering from an attack of gout, and was only able at times to move about at all, and then with difficulty. He did not return the next day, which was Sunday, but, as it afterwards appeared, slept all night in some sort of a saloon, and the next day tried to go to a hospital. That desire to go to a hospital continued for several days, and I think showed that he had some good sense left. He found his way to his mother's house on Sunday, the 2d of February, and was immediately put to bed, and, as before remarked, he was continually sustained by stimulants, principally milk punch, from that time until he died.

While at his mother's house he was at-

tended by a Dr. Petrie, who, in addition to the prescription of stimulants in limited quantities at stated times, prescribed as before stated, an opiate, which was also given him. His wife was confined to the house with rheumatism for three or four days after he left, and was ignorant of his whereabouts. As soon as she was able she made a search and found him, and visited him as often as her health and household duties permitted.

On Friday or Saturday, February 7th or 8th, about a week after the deceased came to his mother's house, Mrs. Bauer, with her counsel, Mr. Morten, called upon Mr. John F. Murphy, secretary of the Paulus Hook Council, and stated to him that her brother, the deceased, wished to change the beneficiary named in the certificate, and asked him how it could be done. Mr. John F. Murphy said that it would be necessary for them to produce and surrender the original certificate. This they said it was impossible for them to do, because it was not in the possession of the deceased; but Mr. John F. Murphy was unable to suggest any mode of avoiding the difficulty. This circumstance is important, because it shows that the existence of the new by-law, dispensing under certain circumstances with the production of the original certificate, was unknown to the secretary of the local council, a man who was undoubtedly the principal executive officer, and of all others would be most likely to know and be familiar with all the by-laws of the association. The only way to account for his advice in that behalf, except on the score of his ignorance of the new by-law, was that he knew the circumstances of John J. Murphy, and the fact that his wife was paying his monthly dues and assessments and supporting him, and he desired to throw obstacles in the way of any change. Upon receiving this information from the secretary, Mr. Morten inquired if they could not go to some higher officer for suggestions, and Mr. Murphy referred them to Mr. Carroll, the secretary of the supreme council. It does not positively appear, except by inference, that they did go to see Mr. Carroll. Be that as it may, Mr. Melosh did learn of the by-law, and did prepare an affidavit as above set forth. He seems to have acted in the matter in concert with Mr. Morten.

Secretary Murphy, being informed of the illness of the deceased, made a friendly visit to him on Sunday afternoon, February 9th. The sick man made no mention of the certificate of membership, nor any desire to change the beneficiary therein named. This I think is also important, and suggests that possibly up to that time the matter had not been mentioned to him by his sister. In the meantime Secretary Murphy deemed it his duty to inform, and did inform, the wife, of what was contemplated by his sister in the way of changing the beneficiary. I think

this information reached the wife on or about the 11th of February. On that day Mr. Melosh prepared the affidavit above set forth, and also a new designation of beneficiary, and intended to make, and thought he had made, an appointment with Mr. John F. Murphy to meet him at the house of the mother in the evening of that day, the 11th, to witness the signature of the deceased, it being conceded that the new designation must be witnessed by the secretary or one of the officers of the local council. Mr. Melosh went to the mother's house that evening, but Mr. John F. Murphy was prevented from attending. Mr. Melosh took the affidavit of the deceased as above set forth, and the next day Mrs. Bauer called on the secretary, at his house, to insist upon his coming that afternoon to witness the designation. It so happened that Mrs. John J. Murphy had just called at that house to learn the situation of affairs, and she heard what passed between the secretary and Mrs. Bauer, and the making of the appointment for that afternoon. She did not go to her husband's bedside to interfere with the operations of her sister-in-law, but did consult with her counsel, Mr. Rurode, and in his presence, by telephonic communication with Dr. Petrie, learned that her husband was well enough to be moved. On the afternoon of the 12th, Mr. Melosh and Mr. John F. Murphy, the secretary, met at the house of Mrs. Bauer, and there the new designation was signed, and the affidavit and the two papers handed to Mr. Murphy, who, as I have already said, sent it to the supreme council, with the result that they returned the new certificate in the course of three or four days. On the evening of the 12th the wife visited her husband, intending to have him removed to her house that night; but objection was made by Mrs. Bauer, and some sharp words passed, and the husband suggested that she should come in the morning, with a heated carriage and a policeman, and take him home. There is no doubt that he was perfectly willing to go home with his wife, and he did go home the next morning. He was in the same nervous condition that he had been for many days, and she was obliged to give him at stated intervals a stimulant of milk punch, and in that way he was sustained during the day and evening. In the afternoon Mr. Rurode prepared, on the instruction of the wife, and without seeing the husband, the three papers above set forth, and sent his clerk, Mr. Many, a master of this court, to Mrs. Murphy's boarding house in York street, and they were there signed and verified by Mr. Murphy. While Mr. Many was procuring those papers to be signed, Mr. Rurode was holding communication by telephone with Mr. John F. Murphy, the secretary, at his place of business in the Sugar House in Jersey City, and urged him to go with him and witness the papers in question. Mr. Murphy, the secretary, finally, about 5 o'clock,

came to Mr. Rurode's office, and the papers had just been brought in by Mr. Many, signed by the deceased. They were shown to and looked at by Mr. Murphy, and he was requested by Mr. Rurode to go around to Mrs. Murphy's house and witness the papers, but he declined—declared that he had been censured for what he had already done, or, as he expressed it, "got himself in a hole," and that he would witness no more papers by the deceased, unless in the presence and with the consent of the principal men in the local council. In pursuance of that determination, Secretary Murphy himself prepared a paper proper to be signed by the deceased in order to counteract what he had done the night before, and procured Mr. Welle, the president of the local council, and Mr. Holmes, holding some high position therein, both being highly respectable gentlemen, to go with him that evening, February 13th, to the home of the deceased, and they there saw the deceased in the presence of his wife. The most intelligent and reliable account of the interview is given by Mr. Welle. He was called as the witness of Mrs. Bauer, and swears: "Q. Did you see Mr. John J. Murphy that night? A. I saw him. Q. Did you have any conversation with him? A. I did. Q. Was Mrs. Murphy present? A. Mrs. Murphy was in the room. Q. What was that conversation—I don't mean the second night, I mean the first night? A. Yes, sir. I asked Mr. Murphy in the first place whether he knew us that were present there, meaning myself, Mr. John F. Murphy, the gentleman who preceded me, and Mr. Holmes. He said he did. I then asked him whether he knew for what purpose we were there, and he said he did. He had reconsidered the document that he had executed the day before, and wanted to change that. Q. (By the Court). Did he say that? A. He did say it; yes, sir. He says, 'I must have been hypnotized, I must have been crazy, to execute such a document, because I had intended to give all to my wife,' and Mr. Murphy, Mr. Holmes, and myself went there for that purpose to witness his signature in case he should execute such a paper, and while we were speaking about it I told Mr. Murphy, 'Anything that you do in this matter must be of your own free acting will,' and he said he knew that. While we were speaking a lady came in, who I afterwards learned was Mrs. Bauer, and Mr. Murphy then said he didn't want to say any more that night; he said, 'Come back to-morrow night and I will do it then;' so we left the house, Mr. Holmes, Mr. Murphy, and myself, and came back the next night."

Later on, Mr. Welle stated that before Mrs. Bauer came in he had told the deceased that Mr. John F. Murphy had papers ready for him to sign. The same party visited the house the next night, the 14th, and found there both Mrs. Bauer and her sister, Mrs. Brock, and their brother, Patrick Murphy,

surrounding the bed in the room with the deceased, while Mr. Melosh, counsel for Mrs. Bauer, was in the hall. Mr. Welle's account of the second interview is that not one word was said by him to the deceased or by the deceased to him about the signature to any papers, and the witness judged from the manner of the deceased and the presence of his two sisters and brother, whose incoming had stopped the proceedings of the night before, that deceased would do nothing in the way of signing papers, and he and the party left, and no further attempt was made by any member of the council to procure the signature to any paper by the deceased.

When this evidence was produced, the court was not aware that the second set of papers had been signed by the deceased on the afternoon of February 13th, and inquired why the new certificate of membership which was sent from the supreme council on or after the 13th had not been delivered to the deceased and his signature of the acceptance procured, the seal of the local council, and the signature of the president and local secretary, attached thereto; and the court animadverted freely upon what seemed to be a neglect upon the part of the local council to do a plain duty. The reason given by Mr. Welle was that deceased had declared his desire to leave his first certificate in force, and had refused to sign any more papers, and that they thought it was useless to go to him and complete a new certificate.

It is plain that both Mr. Welle and Mr. Murphy considered that the new certificate was of no value under the by-laws of the association until the formalities just mentioned had been complied with. And looking back and reviewing the evidence, I have no doubt that both persons, and especially Mr. Murphy, the secretary, felt that the original designation of February 12th, witnessed by him, had been signed by the deceased under such circumstances and influences as rendered its validity questionable, to say the least, and therefore they were unwilling to take the responsibility of giving official approval to the new certificate by setting thereto the seal of the local council and their official signature.

The next day, February 15th, the will was signed, and it is worth while to observe that all the signatures to all of these papers are mere scrawls. The signature to the original certificate made in 1888 showed that Mr. Murphy was a man who wrote a tolerably good hand, and is in marked contrast with these later signatures; but, of all these later signatures, that to the will is decidedly the best, showing the greatest control over his muscles. The lack of control over his muscles is attributed by Dr. Loomis to the effect of the disease—neuritis. However, my conclusion of the whole case is that Mr. John F. Murphy was right in saying, as he did, that Mr. John J. Murphy was in such a con-

dition during the period here in question that he would sign any paper for anybody, and I am entirely satisfied that he never would have signed the designation in favor of Mrs. Bauer in the presence of his wife, just as he declined to sign the paper restoring his wife to her full rights in the presence of Mrs. Bauer.

It is argued by counsel that it was generally understood by the parties at and near his bedside on the night of February 14th that he had made up his mind to let the matter stand as it was. Granting that to be so, the question remains, how did he understand the matter to stand? He had the previous afternoon signed papers which he may well have supposed, and probably did suppose, restored his wife to her former position. And it is by no means clear that he did not at the moment believe that as matters then stood his wife would be entitled to the whole fund. In fact, there is evidence that he said about that time that his wife had the original certificate, and for that reason they could not prevent her from getting all the money.

With regard to the condition of his mind, this is to be said: He had been stimulated by alcohol so long and so seriously that unless that stimulation was continued up to a certain degree he would fall immediately into delirium, and if he was stimulated so as to pass that point he would become positively drunk; so that in order to be at all rational it was necessary for him to be stimulated with care to a certain degree. Now, we cannot be sure that he was at any particular time during this period stimulated up to that particular degree which would render him, approximately at least, of sound mind. I say approximately, because I doubt if at any time during this period he was of truly sound mind. He was undoubtedly in a condition which rendered him easily influenced by those around him. Under these circumstances, I am not satisfied that any of the papers which he executed on that occasion have any validity whatever. I am entirely satisfied that those he executed on the 13th have quite as much validity as those he executed on the 12th of February. I am entirely satisfied that, so far as he was capable of regretting anything, he regretted his attempt to deprive his wife of the full benefit of the certificate, and that he was to a degree conscious of his obligations to her and of her equitable rights.

I have not enlarged upon the falsity of the affidavit of February 11th. Much may be said in favor of the position that the procurement of that affidavit, known as it must have been to Mrs. Bauer to be false in some essential respects, was a fraud practiced not only on the deceased but upon the complainant society, and through that society upon the beneficiary named in the first certificate. It is fairly inferable from the action of Mr. Welle and Mr. John F. Murphy that they were inclined to so treat it. The rule that

the action of the supreme council, either in acceding to the request of the member to issue a new certificate, or refusing so to do, is final and conclusive on the rights of the parties, as apparently held by Vice Chancellor Grey in *Grand Lodge v. Gandy*, supra, is founded on the idea that such action is based on an affidavit stating the truth, made intelligently and freely by a sane man who fully appreciated the act and was not subjected to undue influence, and does not sanctify a certificate issued under the circumstances here present, and cannot give the new beneficiary any right of action against the association, or affect the rights of the beneficiary named in the old certificate.

It is said that the deceased declared to his sister and Mr. Melosh that he had not lived at home in three years, and that his wife had thrown him out of doors. There is no foundation whatever in fact for the last assertion as to his being thrown out doors, and the assertion that he had not lived with his wife for three or four years has just this much, and no more, of truth in it: He had for about three years ceased to sleep in the same bed with his wife, and had been furnished with a comfortable bed in an adjoining room, all at his own request, because he was conscious of the truth, viz., that he was an unfit bedfellow for any person, man or woman.

It was further urged that the moneys paid by Mrs. Murphy for dues and assessments on the certificate should be treated as mere loans, and she should be allowed a lien upon the fund for that much advanced. The complete answer to that is that the money was not paid as a loan, but paid by her as beneficiary in order to keep the policy alive, and with the understanding that she was to have the final benefit. Moreover, I think the circumstances, taken altogether, justify the conclusion that the support which she furnished her husband during the five or six years that she did support him should also be considered as so furnished on the strength of the policy. She was under no obligation to support him, and would have been justified in morals and law in casting him off and refusing him a home.

Then, again, it is said that the moneys which his sister furnished him from time to time also creates an equity in her favor. I am unable to adopt that view. The contributions were made voluntarily by the sister as gratuity to her brother, without any reliance upon receiving anything from the benefit certificate.

My conclusion then is, first, that the wife's equity is so strong that it could not be overcome even though the new designation was made by her husband deliberately, when in the full control of his faculties and uninfluenced by his sister, and even though it had been carried out with all the technicality necessary to make the new certificate effective. And, in the second place, I am of

opinion that the affidavit and new designation upon which the sister relies were, under the circumstances, insufficient to support the new certificate, even if that had been fully and completely issued by the supreme council. But I am also of the opinion that under the circumstances the supreme council did not intend to make a complete execution and delivery of such new certificate until it had been passed upon by the local council, and that the local council deliberately abstained from giving full effect to that new certificate, for the reason that they were not satisfied that it was based upon the deliberate action of a sane man.

Referring again to the case of the *Grand Lodge v. Gandy*, decided by Vice Chancellor Grey, relied upon by counsel for Mrs. Bauer, I find that the learned Vice Chancellor was there dealing with a case in which there was a complete absence of any equity based on pecuniary consideration on the part of either claimant. The children to whom he awarded the money were the natural objects of his bounty and of his duty, while the claim of Miss Gandy was without the least fact to sustain it in a court of equity. She was a mere employé for a wage in his service, so that the decision is strictly in accord with what may be termed the natural equity of the case. The learned Vice Chancellor put his decision on two grounds: First, the fact that the designation in favor of Miss Gandy was not completed in technical accord with the rules of the association; and, second, that Miss Gandy was not one of the persons who, according to the constitution of the society, were capable of taking a benefit. This last reason was ample in itself, without relying on the first reason, which, although not in accord with the great weight of authority, as I find it upon the examination of a large number of cases where the money has been paid into court, yet would bind me if it were precisely in point. The conclusion at which I have arrived is sustained by what I think is sound reason, as well as authority.

The case of *Pennsylvania Railroad v. Wolfe*, above cited (reported in 52 Atl. 247), was, as here, a case of interpleader. The decedent was possessed of a benefit certificate, in which his sister was named as beneficiary. Afterward he married, and agreed with his wife before marriage that he would make her the beneficiary in place of his sister. This he never did, and died, leaving his sister named as the beneficiary. Claims being made by both the widow and the sister, the custodian of the fund paid the money into court, and it was there adjudged to the widow. The language of the learned judge on page 248 is significant: "Nominally, at the husband's death, Alice R. Young was entitled to the fund. In this view of the facts, what effect has the antenuptial contract, or what effect ought it to have, in

equity, upon a disposition of the fund? Concede, as argued by appellant's counsel, that a member of the association has only the power of appointment of a beneficiary, subject to the approval of the relief association; still, as between him and his appointee, equity will take cognizance of facts entering into the transaction, so that, as between them, flagrant wrong shall not be done. We say as between the member and his appointee, for the law is settled that, if the association insists on its legal rights under its rules, equity will not interfere between it and its members. But the relief association wholly withdraws from this contest. It pays the money into court, and, in effect, says: 'Wage your war between yourselves. I will have nothing to do with it.' So that all the authorities cited on either side as to the rights of the complainant against the association are wholly outside this case. We then have the sister nominally the payee in the certificate. The member, under the rules, had the right at any time to name another in her stead. She was a mere volunteer, having given no consideration, and, it must be presumed, had full knowledge that her brother could at any time strike out her name and substitute that of another, as he did when he struck out his first wife's name and substituted hers. He promised to substitute that of his second wife when she married him. She did marry him. He did not substitute, formally, her name. We have no reason to doubt this omission was from neglect, not because of willful wrong. But the moment the marriage contract was complete, the wife had an equitable claim to the certificate, or to the benefit it represented. It was not that sort of a mutual contract which could be very conveniently performed by each party at the same time. Marriage, the condition, must almost necessarily follow after the promise, and she had no right to substitution until after marriage. But when she married him, she had a vested right in the benefit, a right not dependent on his will or whim, but one no longer in his power, as between him and her, to confer or withhold. She could not take back the consideration she gave. He could not give it back to her. He could only formally transfer to her that which by the consummation of the contract was hers. He ought, in form, the day of the marriage, or immediately after, to have done that. Equity will now treat that as done which ought to have been done. To illustrate the application of the principle, suppose the intended wife had made the promise, and the intended husband then had, regularly, under the rules of the association, appointed her the beneficiary, and then she had refused to marry him, and before he had time to create a new appointee he died; would equity, assuming the association did not interfere, have permitted her to receive the fruits of her fraud? There is no more

reason why she should suffer the penalty of his neglect."

In *Leaf v. Leaf*, 92 Ky. 166, 17 S. W. 354, 854, twice argued, the beneficiary named in the certificate issued to the husband was his present wife. Later, the husband and wife were separated by an absolute divorce, and the certificate was given by the husband to the wife as her property, and she paid the assessments thereon for two years or more after the divorce. "By making an affidavit that the certificate was not in his possession the member changed the designation, and obtained a new certificate payable to his sons by a former marriage. The money being paid into court, it was held that the first beneficiary, the divorced wife, should take the fund, although, if the society had paid the money to the second beneficiary, such payment would have been upheld. The court said: 'The wife has intercepted the fund before it reaches the children who are named as the beneficiaries, and her equity is so great that no chancellor should withhold a judgment in her favor.'"

I think that the wife in the present case comes within the principle upon which the courts acted in those cases, although they are in some respects stronger cases.

Another case much in point is *Swift v. Railway Conductors' Association*, 96 Ill. 309. In that case the rules of the association directed that the money to arise from the insurance might be disposed of by will, and, if not so disposed of, should belong to and be paid to the widow, or, in case the insured had no widow, then to his legal heirs and representatives. In 1875 he made a will, and therein bequeathed to his two daughters the proceeds of the insurance, and appointed a man named White as executor, and afterwards delivered to White the will and the certificate of membership in the association. In 1877, being in California, he signed an informal paper stating that the certificate should be for the benefit of his wife. This paper was inclosed in a letter to his wife, wherein he asked her to pay the assessments, saying he would refund them to her, and also saying that the certificate was hers if she wished to keep it paid up. Thereafter she paid the assessments (only \$38) and kept the policy alive. The wife was held entitled to the proceeds of the policy, under the doctrine of equitable assignment for a valuable consideration.

Grand Lodge v. Child, 70 Mich. 163, 38 N. W. 1. One Child, living in Michigan, and having a wife and son living in England, instituted proceedings for divorce from his wife, and at the same time entered into an agreement of marriage with Miss Drur. Pending the engagement, he took out a benefit certificate in her favor for \$2,000. S saw and knew of the certificate, not have it in her possession. Finding that Child had a wife living and the engagement with him, and

married O'Connor. Subsequently Child lost his certificate, and attempted to procure another in favor of his child, but the association refused to issue a new certificate because he did not produce the first one. Mrs. O'Connor (formerly Miss Drury) and the son of the deceased each claimed the money. The court, in awarding the money to the son, used the following language: "We do not deem it our duty upon this record to consider the liability of the complainant upon the certificate. Both defendants claim it, and the complainant concedes and offers the money to the person entitled; and, thus admitting the right of one defendant or the other to the money, we are asked in equity and good conscience to determine which one of the two is entitled to the fund. * * * Equity will consider that done which ought to have been done. For the purpose of determining the rights between these defendants, the proceeding is governed by equitable principles. The fund is held in trust by the order for the person to whom it belongs; and it is true in this, as in every other case, equity follows the law, so far as the law goes in securing the rights of the parties, and no further; and, when the law stops short of securing this object, equity continues the remedy until complete justice is done. In other words, equity is the perfection of the law, and is always open to those who have just rights to enforce where the law is inadequate. Any other conclusion would show our system of jurisprudence not only a failure, but a delusion and a snare. Justice alone can be considered in a court of chancery, and technicalities can never be tolerated except to obtain and not to destroy it, and the greater equity should always be allowed to prevail. There can be, it seems to me, no doubt in this case where it lies."

Splawn v. Chew (1883) 60 Tex. 532. The third headnote is as follows: "Where a section in the by-laws of such association reads, 'Applicants shall enter upon their application the name or names of the members of their family dependent upon them, to whom they desire their benefit paid, and the same shall be entered in the benefit certificate (issued instead of a policy) by the supreme secretary, subject to such future disposition among their dependents as they themselves direct,' such section vests the control of the certificate, so far as the selection of its beneficiaries is concerned, in the member insured. A clause or by-law of an insurance or other corporation, pointing out a way in which the right to dispose of the insurance money may be exercised, or relating to some other rights, merely directory in its character, and whose object is to protect the corporation, cannot be taken advantage of by outside parties claiming the insurance or other right under the charter of such corporation. Such provisions are for the protection of the company alone, and can only be used by it." This was a contest between the father and moth-

er, who were named as beneficiaries in a certificate of a deceased member of the American Legion of Honor, on the one part, and his executors, in behalf of his widow and two children, on the other part. The beneficiaries named in the original certificate were the father and the mother. Subsequently the member married and had two children, and a short time before his death made a will bequeathing the proceeds of the certificate to his two infant children, the interest on it for the support of his wife during her widowhood. The money was paid into court by the association, so that the affair assumed the position of an interpleader. The by-law with regard to a change of beneficiary was in these words: "Members may at any time, when in good standing, surrender their certificate, and have a new one issued, payable to such beneficiary or beneficiaries dependent upon them as they may direct, upon payment of a certificate fee of fifty cents." That was the only provision for a change of beneficiary, and it was contended that the disposition by will did not meet that requisition, and hence the money was still due to the father and mother. The court, on page 536, inquired thus: "But is this the only way in which such change can be effected? The right to make the change is given by a different section of the by-laws, and exists in the insured as long as he remains a member of the order. A method by which he may accomplish it to the satisfaction of the order is pointed out in the section last recited, but we do not consider this as exclusive of all other ways of effecting the same object. The design of this section is to protect the interests of the corporation. The company are entitled to know who are the parties entitled to the benefit money, and this is an effectual and certain means of giving that information. But, like all such provisions in the by-laws of private corporations, it may be waived at the option of the corporation, being for its benefit alone. This has been held with reference to such provisions when prescribed in mandatory terms. If they can be waived in such cases, much stronger would seem to be the reason why this can be done when the course to be pursued is directed, as in this instance, in permissive language alone." Near the bottom of page 537 the court says: "This suit is not between the claimant of this money and the corporation by whom it is to be paid, and the latter does not object to the manner in which the change of beneficiaries was made. * * * Upon principle, however, and the rules which govern in the analogous cases to which we have alluded, we think, as between the parties to this suit the change of beneficiaries was fully effected by the will of E. J. Chew, and the right to the insurance money was vested in the parties named therein, the children of the deceased, and the judgment of the court below should have been in favor of the appellants."

Titworth v. Titworth (Kan. Sup.; Jan. 5, 1889) 20 Pac. 214. This, again, was in effect a suit of interpleader. The money was paid into court by the association—the A. O. U. W. The constitution of that association provided as follows: "Any member holding a beneficial certificate, desiring at any time to make a new direction as to its payment, may do so by authorizing such change in writing on the back of his certificate in the form prescribed, attested by the recorder, with the seal of the lodge attached; and by the payment to the grand lodge of the sum of fifty cents; but no change of direction shall be followed or have any binding force or effect until said change shall have been reported to the grand recorder, the old certificate, if practicable, filed with him, and a new beneficiary certificate issued thereon, and said new certificate shall be numbered the same as the old certificate; provided, however, should it be impracticable for the recorder to witness the change desired by the brother, attestation may be made by a notary public or an officer of a court of record, seal to be attached in attest." The change was attempted to be made in this case by a letter written and signed by the member on a sick-bed, changing the beneficiary from his divorced wife to his mother and brother, and the same amanuensis made the proper changes on the back of the certificate, and sent them to the lodge, who issued a new certificate. The contention was that that change was ineffectual, but the court (page 214) says: "In the determination of the question arising in this case it must be borne in mind that the A. O. U. W. association is no longer a party, and is not taking any part in the litigation. It has paid the money into court, and has been released from all obligation respecting it. This payment, however, is an admission on its part that the benefit certificate was actually issued, and hence all contention as to whether its rules and regulations respecting these matters had been complied with is out of the case and is entirely disposed of."

Manning v. A. O. U. W. (Ky.; Oct. 6, 1887) 5 S. W. 385, 9 Am. St. Rep. 270, is substantially to the same effect as *Titworth v. Titworth*.

Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620, is an instructive case upon the question of the right of a member of a beneficiary association to defeat the right of the beneficiary named therein by pledging the certificate as security for a debt. Such right was upheld in that case.

The foregoing are a few of the cases cited by Mr. Bacon in support of the text as found in the second edition of his treatise on Benefit Societies, etc., volume 1, §§ 305-311, inclusive. They sustain the principle, asserted by him, that when a society pays the money into court it thereby waives all mere technical defenses which it might set up against either claimant, and leaves the court free to

award the fund upon equitable principles. For this position we have some support, at least, in the decision of our own Court of Appeals in the case of *Meyers v. Schumann*, 54 N. J. Eq. 414, 34 Atl. 1066. Further, the authorities above cited show that the mode provided for making a change of beneficiaries is not in all cases exclusive of other modes, except in a suit against the society, so that where the society pays the money into court it leaves the court at liberty to determine the destiny of the fund according to the real wishes of the decedent. The application of these principles gives the fund to the wife.

In coming to this conclusion I have not had occasion to consider another point made by the wife, viz., that, according to the original certificate of incorporation, Mrs. Bauer is not competent to take. The language of that constitution is that the benefit fund shall be paid to the family or dependents of the member, as he shall have directed. It is argued that Mrs. Bauer was not a member either of his family or dependent upon him.

I will advise a decree that the fund be paid to Mrs. Murphy, and that she recover against Mrs. Bauer her costs of this suit, including, of course, the costs and counsel fee, if any, paid out of the fund to the complainant. The complainant is undoubtedly entitled to costs and counsel fee, if it has not already received it.

(97 Me. 547)

TREMBLAY v. AETNA LIFE INS. CO.

(Supreme Judicial Court of Maine. June 26, 1903.)

FOREIGN JUDGMENT—RES JUDICATA—JURISDICTION—SERVICE—PARTIES—DEFAULT—LIFE INSURANCE—ASSIGNMENT OF POLICY—ASSENT OF COMPANY—BENEFICIARY—VESTED INTEREST.

1. A foreign judgment is merely *prima facie* evidence of what it purports to decide.

2. The doctrine of *res judicata* extends only to those facts which must necessarily be made to appear as a basis of the judgment, and without a showing of which the judgment could not have been rendered.

3. It is necessary, before a court can render a valid judgment, that it shall first acquire jurisdiction over the parties, the subject-matter of the suit, and the process.

4. A writ, declaration, summons, publication, default, and judgment against the heirs of J. O. T., defendants, giving no name or names, would not give the courts of this state jurisdiction to render a valid judgment in personam, nor, upon their face, would they furnish a basis for a judgment in rem.

5. In a case where judgment is rendered on default, without personal notice to the defendant, the false allegation by plaintiff of a fact so material that, without its existence, his pleading fails to set out a cause of action, operates as a fraud, and is well calculated to deceive the court.

6. The acts and recitals of a court acting without jurisdiction cannot conclusively bind the defendant, nor can such acts and recitals serve as conclusive evidence of facts which would give the court jurisdiction.

¶ 1. See Judgment, vol. 30, Cent. Dig. § 1531.

7. An assignment of a life insurance policy, executed in compliance with the terms of the policy by the assured and the only beneficiary, divests both of them of, and vests the assignee with, the entire legal interest in the policy.

8. A letter from an insurance company, acknowledging the receipt of such an assignment of a life policy issued by it, in which letter the company states that it will place the assignment "on file for such attention as it may deserve when such policy becomes a claim," is a sufficient indication of the company's assent to the assignment.

9. The mere statement or recital in such an assignment that it is subject to a claim, if there be in fact no claim, would be surplusage, and would not affect the assignment of the entire sum.

10. A foreign judgment based upon an invalid assignment of a life insurance policy can have no binding force upon the courts of this state, either by way of estoppel or under the doctrine of *res judicata*.

(Official.)

Report from Supreme Judicial Court, Androscoggin County.

Action by Patrick F. Tremblay against the Aetna Life Insurance Company on a policy of life insurance. Case reported, and judgment for plaintiff.

Plaintiff claimed under an assignment executed both by the assured and his wife, who was the beneficiary named in the policy.

One J. B. Cloutier, claiming the fund under color of a prior assignment executed in fact by the husband alone, had brought suit in the superior court of the province and district of Quebec, and recovered judgment for the insurance money, which had been previously deposited with the provincial treasurer in accordance with the Revised Statutes of the province of Quebec. This judgment the insurance company interposed as a defense to this action of debt commenced in this court below in Androscoggin county.

Argued before WISWELL, C. J., and STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

H. W. Oakes, J. A. Pulsifer, and F. E. Ludden, for plaintiff. R. W. Crockett, for defendant.

SPEAR, J. This is an action of debt to recover the amount alleged to be due upon a life insurance policy. On August 13, 1885, the Aetna Life Insurance Company of Hartford, Conn., issued a policy through its Canadian branch on the life of Jean O. Tremblay, of the province of Quebec, in the sum of \$2,000, payable at his death to his wife, Arthemise D. Tremblay, or, in event of her death before his, to his executors, administrators, or assigns. On November 24, 1891, this policy was assigned by Jean O. Tremblay, without the joinder of his wife, to J. B. Cloutier, of Quebec, as collateral security. On January 14, 1901, Jean O. Tremblay and Arthemise D. Tremblay executed two other assignments of the same policy to their son, Patrick F. Tremblay, of Lewiston, Me., the plaintiff in this case. A duplicate of but one of these assignments was forwarded to the

company. This assignment was made upon the company's blank form, and is as follows:

"For value received, we hereby transfer, assign and turn over unto Patrick F. Tremblay, attorney at law and notary public of Lewiston, Maine, as collateral, all our right, title and interest in policy of life insurance 149,296, issued by the Aetna Life Insurance Company of Hartford, Connecticut, and all benefit and advantage to be derived therefrom to the extent of such interest as he may have when said policy becomes a claim, subject to J. B. Cloutier's claim.

"Dated at Quebec this 14th day of January, 1901."

This assignment was duly executed and forwarded to the company, and its receipt acknowledged in a letter, as follows:

"Aetna Life Insurance Company.

"Hartford, Conn., January 19, 1901.

"P. F. Tremblay, Esq., 256 Lisbon St., Lewiston, Me.

"Dear Sir: We have your favor of the 16th inst. enclosing an assignment of policy No. 149,296 on the life of Jean O. Tremblay, executed by said insured and Arth. D. Tremblay, in favor of yourself, under date of January 14, 1901, subject to the claim of J. B. Cloutier, which we place on file for such attention as it may deserve when such policy becomes a claim. Yours truly, J. L. English."

The assignment was executed by both the assured and the only beneficiary, and consequently divested both of them of, and vested the assignee with, the entire legal interest in the policy, the exception to Cloutier being an equitable interest only, to which allusion will be made later.

J. O. Tremblay died January 21, 1901. At his death there was due on the policy \$1,959.49. Proofs of death were filed, accompanied by the affidavits of both J. B. Cloutier and P. F. Tremblay as assignees, and of Arthemise D. Tremblay as beneficiary. P. F. Tremblay, in his affidavit, claims "all but what is excepted by assignment between \$500 and \$1,000." Arthemise D. Tremblay, in her affidavit, states that the policy was assigned to Cloutier as above stated, and that the assignment is still in force; and also that a further assignment was made to her son January 14, 1901. Cloutier, in his affidavit, claimed the full amount due upon the policy. This dispute having arisen between the claimants, the company, in accordance with the Revised Statutes of the Province of Quebec, deposited the money due in the office of the provincial treasurer, which exonerated the company from the payment of costs in any litigation which might arise upon the policy. All the claimants were properly notified of the deposit. On April 22, 1901, J. B. Cloutier commenced proceedings, to secure the money thus deposited, in the Superior Court at Quebec, against the heirs of J. O. Tremblay, defendants, and Dame Arthemise Du-mais et al., mise en cause. The defendants

and the Ætina Life Insurance Company, Arthemise Dumais Tremblay, widow, and Patrick F. Tremblay, these latter two of Lewiston, Me., U. S. A., mise en cause, the said Patrick F. Tremblay, furthermore, one of the defendants aforesaid, mise en cause, were condemned to appear at court on a day certain, and service upon all these parties was made by publication. On the 8th day of June, no appearance having been made by any of the defendants or by Arthemise Dumais Tremblay or Patrick F. Tremblay, the court upon an ex parte hearing rendered judgment for the plaintiff, which was that it "maintains the present action, consequently adjudges and condemns the defendants to pay to the plaintiff the sum of \$2,118.39, with interest from the 23d day of April last, and costs." It does not appear that any steps were taken to have administration upon the estate of Jean O. Tremblay and no administrator was mentioned in this suit, as the judgment shows. The plaintiff, notwithstanding the judgment rendered by the court at Quebec, has brought an action against the Ætina Life Insurance Company in the Supreme Judicial Court for Androscoggin county, as assignee of the policy. To this action, the defendant interposes the following defenses:

(1) The suit is brought in the name of the assignee, the assignment not having been assented to by the insurance company.

(2) The assignment is of a part of an entire sum.

(3) The matter is res judicata, and the plaintiff is bound by the record in the Canadian suit.

(4) The evidence shows that the claim of J. B. Cloutier exceeds the amount due under the policy.

The plaintiff in reply controverts all of the above defenses, and, in addition, asserts that, even if the Canadian judgment was in other respects valid, the claim of J. B. Cloutier, as presented in the Canadian suit, upon which the judgment was issued, was to a large extent clearly a fraudulent one.

The first matter of defense interposed is to the right of the plaintiff to maintain his action, on the ground that, being assignee of the policy, and the assent of the company being required to make the assignment valid, the plaintiff had not, at the date of his action, secured such assent. Such objection cannot prevail. The letter of the company, acknowledging the receipt of the assignment, was a sufficient indication of their assent. The assignment was upon a printed blank prepared and furnished by the company. The assignors, by their assignment, conveyed to the assignee "to the extent of such interest as they may have when said policy becomes a claim." The acknowledgment of the receipt of the assignment was "for such attention as it may deserve when said policy becomes a claim." The language of acknowledgment is as broad as the language of the assignment. The assignment became a claim upon the death of

Jean O. Tremblay. What did the company mean when they wrote the assignee that they had placed the assignment on file? That it was an act of dissent? What, when they said that, upon its becoming a claim, they would give it such attention as it deserved? That it was invalid, and hence entitled to no attention? Did they intend to convey to the plaintiff the idea that his assignment, after they had written him this letter, was invalid? If they did, they were very unfortunate in their form of expression, for it must necessarily have operated as a complete deception upon his mind. If it was their intention to decline to accept the assignment, they could easily have made their purpose clear. It cannot be possible that they so intended. It would be a contradiction of terms to hold that they did. On the other hand, construing the phraseology of their letter "according to the common meaning of the language," and no violence will be done in evolving the conclusion that placing the assignment on file, and agreeing, when the occasion arose, to give it due consideration, operated as an express acceptance. Nothing seems to be wanting to clothe their conduct with the idea of consent. We think the language used by the defendant company in acknowledging the receipt of the assignment was not only sufficient in its terms, but intended by the company to convey their consent to the assignment. But consent is held to effectuate a new contract with the assignee.

Grant v. Elliot and Kittery Mutual Fire Insurance Company, 75 Me. 196, is a case in which the widow of the owner succeeded to the title of the premises insured under his will. Later she conveyed all her right, title, and interest in the premises to Mark A. Libby, and on the same day, by written assignment, made over to said Libby the policy of insurance issued to Hiram R. Roberts, her husband, in his lifetime, and the directors of the company indorsed their consent to the assignments. Still later, Mark A. Libby conveyed the premises to the plaintiff, and on the same day assigned the same policy to him, and the directors of the defendant company indorsed thereon their consent to this second assignment. The court (page 204, 75 Me.) say: "The defendants were paid for insuring a given sum to Hiram R. Roberts for a fixed term, and their contract was to pay to his assigns. By consenting to the assignment made by his executrix and devisee to her grantee, Libby, they agreed that Libby might be substituted, and that the policy should represent to him just what it had to the party originally insured. The same thing was done when Libby conveyed the property and assigned the policy to the plaintiff. No element of a valid and binding contract between the plaintiff and defendant seems to be wanting." Donnell v. Donnell, 86 Me. 518, 30 Atl. 67, is a case in which Kingsbury Donnell owned certain real estate, with buildings thereon, upon which he procured two policies

of insurance. Later he conveyed his real estate to his sons, and on the same day assigned to them the insurance policies. The court say (page 522, 86 Me., page 68, 30 Atl.): "The conveyance would have rendered the contracts of insurance with Kingsbury Donnell null and void if the companies had not consented to the assignment of the policies. The effect of this transaction was to make a new and original contract of indemnity with the assignees, who were not indebted to the plaintiff, and had no contract relations with him." "The assent of the company to the assignment was a renewal of the original contract to the assignee, with all its force, effect, and liabilities, as well as its conditions and limitations." *Biddeford Savings Bank v. Dwelling-House Insurance Company*, 81 Me. 571, 18 Atl. 290. The same doctrine obtains in Massachusetts. "The policies are in terms payable to the assured and his assigns. The assignments to the plaintiff, assented to by the insurers, transferred to him the legal title in the policies and the right to sue thereon." *Burroughs v. State Mutual Life Assurance Company*, 97 Mass. 360. "But we are of opinion that the assignments of the policy, with the express consent of the defendants, enable the assignees to sue on it in their own name; that such consent to the assignments operates as a promise to pay the loss to them." *Kingsley v. New England Mutual Fire Insurance Company*, 8 Cush. 400.

The second matter of defense is that the assignment is a part of an entire sum. This defense is based upon the clause in the assignment, "subject to J. B. Cloutier's claim." There is no question but the assignment, if not modified by this clause, conveyed the entire legal interest in the policy to Tremblay, the assignee. Unless the clause attaches to the assignment a legal modification, it can have no effect. The mere statement that it was subject to a claim, if in fact there was no claim, would be surplusage. This leads us to the consideration and determination of the validity in law of Cloutier's alleged assignment. The policy in question was made payable to Arthemise Dumais Tremblay, wife of the assured. It is well settled in this state that this policy, being payable to her, became a vested right. *Small v. Jose*, 86 Me. 124, 29 Atl. 976. Neither the company, the husband, nor a creditor could deprive her of it without her consent. *National Life Insurance Company v. Haley*, 73 Me. 268, 272, 4 Atl. 415, 57 Am. Rep. 807. Applying these principles to the assignment of Cloutier, and it becomes evident that it was entirely inoperative to vest in him any legal interest, as the beneficiary did not join in the assignment. But the defendant claims that the assignment, though not signed by the wife, is of such an equitable character as to vest in him an interest that will be protected and enforced by a court at law; but *Palmer v. Merrill*, 6 Cush. 282, 286, 52 Am. Dec. 782, holds that, "in order to constitute such an

assignment, two things must concur," the second of which is, "the transfer shall be of the whole and entire debt or obligation in which the chose in action consists, and as far as practicable place the assignee in the condition of the assignor to receive the full debt due, and to give a good and valid discharge to the party liable." The record clearly shows that Mrs. Tremblay did not assign to Cloutier her "whole and entire" interest in the policy. It may be, however, that, although she did not join in the assignment, she had by her acts conveyed to Cloutier an equitable interest, which the assignee holds in trust for his benefit, and which may be enforced by proceedings in equity. *Unity Mutual Life Assurance Association v. Dugan*, 118 Mass. 219; *Burroughs v. State Mutual Life Assurance Company*, 97 Mass. 359; *National Life Insurance Company v. Haley*, 73 Me. 268, 4 Atl. 415, 57 Am. Rep. 807; *Duffy v. Metropolitan Life Ins. Co.*, 94 Me. 418, 47 Atl. 905. Cloutier, therefore, had no interest, by virtue of his alleged assignment, which he could enforce in law; hence the phrase, "subject to J. B. Cloutier's claim," did not affect the capacity of the assignment to effect a transfer of the entire legal interest in the policy to P. F. Tremblay.

The third defense offered is that the whole matter is *res judicata*. "It has been repeatedly adjudged that foreign judgments are prima facie evidence merely of the right and matter which they purport to decide." *McKim v. Odom*, 12 Me. 94. This doctrine has been repeated by our courts from the time it was above promulgated to the opinion of *Tourigny v. Houle*, 88 Me. 406, 34 Atl. 158. Upon foreign judgments "the merits, as well as the jurisdiction of the courts which rendered them, may be inquired into." *Middlesex Bank v. Butman*, 29 Me. 23. This opens to inquiry the validity of the Quebec judgment. The record of the case, showing the proceedings and judgment in the court at Quebec, discloses, upon inspection, that the plaintiff's complaint, corresponding to our declaration, was based entirely upon the evidence, and the assumed validity, of Cloutier's assignment; the judgment followed, the complaint, hence was necessarily based upon the assignment. But we have already determined that the assignment claimed by Cloutier was invalid in law; therefore the judgment based upon the assignment was also invalid, there being no proof of facts upon which it was founded, and "a verdict and judgment are conclusive by way of estoppel only as to facts, without the existence and proof or admission of which they could not have been rendered." *Hill v. Morse*, 61 Me. 543.

Upon another ground the proceedings, if not tainted with intentional fraud, operated as such upon the honesty of the judgment. The complaint, item 14, sets out that "the plaintiff [Cloutier] is regular assignee of the aforesaid policy, assignment being made to him by the late J. O. Tremblay and his wife.

the said *mise en cause*." Without this allegation, Cloutier set out no cause of action whatever. But the statement is not true. The assignment was not executed by the wife. It was signed by J. O. Tremblay only. It was therefore not made by the wife, as alleged in the complaint or declaration. The allegation operated as a fraud upon the court, and was well calculated, especially in a case decided *ex parte*, without personal notice and upon default, to deceive it. Nor was the assignment filed with or assented to by the insurance company. The law invoked to defeat the validity of Tremblay's assignment, for want of consent, applies with force with respect to the validity of Cloutier's assignment. The case shows that it was neither signed by the wife nor consented to by the company, as required by the policy to make it a valid assignment. "In all judgments by default, whatever may be their competency or regularity, every proceeding, indeed, from the writ and indorsements thereon down to the judgment itself, inclusive, is part of the record, and is open to examination." *Penobscot R. R. Company v. Weeks*, 52 Me. 460. "And the records of all courts are liable to be impeached if it can be done by inspection alone." *Id.* 459. The judgment was upon default, but it is well settled that a default does not admit allegations, in the complaint, of fraud extrinsic to the cause of action." 5 *American Encl. of Law*, 466. "The acts and recitals of a court not having acquired a jurisdiction cannot be conclusively binding on him, nor can acts and recitals be conclusive evidence of facts which would give them jurisdiction." *Carleton v. Bickford*, 13 Gray, 591, 596, 74 Am. Dec. 632. No more can a false statement in the declaration give jurisdiction.

Therefore the plaintiff, in the case at bar, did not admit by default, even if proper service had been made upon him, the untrue allegation set out in the declaration of Cloutier's writ. Nor did the proof presented to the court at Quebec sustain the allegation. It was evident, upon inspection of the proof offered, that Cloutier's alleged assignment was not executed by Tremblay's wife, and that her agreement to transfer a part of her interest in the policy, as collateral security, was not, in law, even an equitable assignment of her right. Hence, there being no legal proof of the allegation, set out in the declaration, that the assignment was made by the wife, the Quebec judgment was not founded upon the evidence of any legal claim, and was therefore void.

"And if the judgment is wrongfully obtained by a fraud between the parties for the purpose of defeating the title of a third party, the latter may plead the matter in avoidance of a judgment. If the judgment has not been obtained by collusion with the debtor, or with any fraudulent design, yet if it was unlawfully recovered to the injury of a third person, who cannot reverse it

from error in being a party thereto, he can avoid it in the same manner." *Caswell v. Caswell*, 28 Me. 287. "If, upon these facts, the judgment appears to be fraudulent against the creditors, any creditor on whom it is a fraud may give them in evidence." *Pierce v. Jackson*, 6 Mass. 244. Apply these principles to the proceedings before the court at Quebec, and we think the judgment there rendered, even upon the ground of fraud, is not entitled to be considered *res judicata* against the right of the plaintiff to have his case determined on its merits.

There is still another reason why the proceedings at Quebec are not *res judicata*. "No court can rightfully render judgment in a cause until it has acquired complete jurisdiction over the parties, the subject-matter of the suit, and the process." *Penobscot R. R. Company v. Weeks*, 52 Me. 458. "But the records of all courts are liable to be impeached, if it can be done by inspection alone; and if such inspection discloses want of jurisdiction over the person of the defendant, the judgment will be void against him for that purpose." *Id.* p. 459. "If the record negative the jurisdiction, or if it had not been extended, and the original papers do so, then the supposed judgment is void." *Tourigny v. Houle*, 88 Me. 408, 34 Atl. 159. "Where it appears by the record itself that there was no appearance, and no notice which he was bound to attend to, the judgment against him is a dead letter beyond the territory in which it was pronounced." *Middlesex Bank v. Butman*, 29 Me. 25. Under these decisions, the plaintiff in the present case is not bound by the proceedings in Quebec. No legal service of the writ was made upon him. He was a resident of a foreign country, and the plaintiff knew his residence, and alleged it in his writ to be in Lewiston, Me., U. S. A. Service of the writ was by publication. The writ, declaration, summons, publication, default, and judgment were against the heirs of Jean O. Tremblay, defendants, giving no name or names. Such a writ and such a service would not give our courts jurisdiction upon which a valid judgment could be rendered in personam.

Nor would the proceedings upon their face furnish a basis for a judgment in rem, even if we assume that the statutes of the province, or the *lex rei sitæ*, are the same as our own. By our statutes a judgment in rem can be entered only against the property of the debtor, certain liens excepted. *Pluredé v. Lévesque*, 89 Me. 172, 36 Atl. 110. P. F. Tremblay was not the debtor; therefore no valid judgment in rem could be entered against the insurance money, in the hands of the provincial treasurer, of which he held a legal title. The Quebec court, therefore, had no jurisdiction over the plaintiff, Tremblay, in personam or in rem, and could not render a binding judgment. The Revised Statutes of the Province of Quebec, applying to this case and made a part of the exhibits, are

as follows: "Art. 1198. Whenever any person desires to pay any sum of money which is demanded of him by contending claimants, he may deposit the money he so desires to pay in the office of the provincial treasurer. Art. 1199. In the case mentioned in the preceding article, the treasurer shall pay over the amount deposited to the claimant, who shall produce and file an authentic copy of a competent judgment entitling him to the money, saving the right of the depositor, if the deposit receipt has not been registered, and if the money has not been paid into court as a tender, to withdraw his deposit, before the same shall have been demanded by the claimant." There is no evidence in this case that the receipt was registered, or that the money had been paid into court as a tender. The company, therefore, had full power and ample opportunity, being a party to the proceedings, even after the judgment was rendered, to fully protect itself against any doubt of the legality of the Quebec proceedings by withdrawing its deposit from the treasury. Although having a full knowledge of all the transactions of Cloutier and P. F. Tremblay with respect to their claimed assignments, and of the conditions imposed by themselves in order to make an assignment valid, together with a presumed knowledge of the law, yet they stood by and allowed the proceedings of Cloutier to be consummated, without the slightest intervention. It would not be a great strain upon the imagination, under the circumstances in this case, to read between the lines of these proceedings the subtle good will of the company contributing to the result attained. They can neither legally nor morally complain of the fall of the Quebec judgment. The case was reported with the stipulation, "if the law court is of opinion that the action is maintainable, it shall render such judgment as the rights of the parties require." The action is maintainable. In accordance with the stipulation:

Judgment for the plaintiff for \$1,959.49 and costs, and interest from April 21, 1901, 90 days after the death of the insured.

(97 Me. 585)

FURBER v. FOGLER.

(Supreme Judicial Court of Maine. June 30, 1903.)

SALES—STOCK—CONSIDERATION—MERE INADEQUACY—FRAUD—RELEASE—ACCORD AND SATISFACTION—DECLARATIONS OF PARTY—VERDICT—NEW TRIAL—EQUITABLE INFLUENCES ON JURY.

1. In the absence of inquiry, the omission to mention an indebtedness of a corporation, a transfer of whose stock is the consideration for a promissory note, would not justify a jury in finding fraudulent concealment of facts in a suit on the note.

2. In a suit on a promissory note given for the purchase price of stock in a corporation, the defense of fraud is not made out when the defendant's own version of the transaction fails to show such fraudulent representations as to

the value of the property as would render the notes invalid.

3. A distinction is to be observed between want or failure of consideration, which is a defense pro tanto to an action between the parties, and inadequacy of consideration, which does not, in law, constitute a defense.

4. In the absence of fraud a party will not be allowed to interpose, as a defense to an action for the purchase price, the fact that the property was not pecuniarily worth what he supposed it to be.

5. When the consideration for a promissory note consists of the payee's agreement to transfer to the maker certain stock in a corporation, the agreement is no less valid because the value of the stock becomes depreciated by subsequent events.

6. Such a depreciation no more gives the defendant a right to avoid his obligation to pay the stipulated price than an enhanced value would avail the plaintiff as an excuse for the nonfulfillment of his agreement.

7. A purchaser of stock, who paid \$300 down, and gave his note for the balance, offered to lose the \$300 already paid, and be released from further liability. There was no evidence of any verbal or written acceptance or of any release, and the notes were not surrendered.

Held, that a declaration by the payee that the maker "was out of the mill business, and that he was \$300 ahead by the transaction," is not sufficient ground on which to sustain a verdict based upon the defense of a release.

8. Where it appears that the jury must have been moved by seemingly equitable influences, instead of weighing the evidence under the rules of law given them, their verdict will be set aside.

(Official.)

Action by Chester E. Furber against Lyman S. Fogler. Verdict for defendant. Plaintiff moves for new trial. Motion sustained.

Assumpsit brought to recover the amount due on two promissory notes given by the defendant to the plaintiff in part payment for the transfer to him of plaintiff's holdings in the capital stock of the Gate City Lumber Company of Port Angeles, on Puget Sound, in the state of Washington.

A witness whose deposition was taken on behalf of defendant testified in answer to one of the direct interrogatories as follows:

"(8) Did Mr. Furber, prior to making of said mortgage, tell you that he had got \$300, which Mr. Fogler had paid in cash, and that Mr. Fogler was out of it, and that the transaction between himself and Mr. Fogler was ended?"

"To interrogatory 8, he answers: 'Mr. Furber, in the presence of myself and C. A. Cushing, my father, said that he had got \$300 from Mr. Fogler, and that Mr. Fogler was out of the mill business, and that he was just \$300 ahead by the transaction.'"

Argued before WISWELL, C. J., and STROUT, SAVAGE, POWERS, PEABODY, and SPEAR, JJ.

S. J. & L. L. Walton and A. A. Beaton, for plaintiff. C. E. & A. S. Littlefield and A. K. Butler, for defendant.

¶ 3: See Bills and Notes, vol. 2, Cent. Dig. §§ 126, 1267, 1274.

PEABODY, J. This is an action of assumpsit to recover upon two promissory notes, dated June 2, 1900, respectively for \$300 18 days after date, and \$500 6 months and 18 days after date, given by the defendant to the plaintiff as part of the purchase price—\$1,200—of one-sixth part of the total number of shares of the entire capital stock of the Gate City Lumber Company of Port Angeles, in the state of Washington, which the plaintiff, being an owner of one-third interest in the corporation, agreed in writing to assign and transfer to the defendant; and, as no certificates of the capital stock had, at the date of the notes and agreement, been printed or issued by the company, the plaintiff in said writing further agreed upon the printing and issue of the certificates to assign and deliver them to the defendant, and cause the transfer to be entered upon the books of the corporation.

The plea was the general issue, with a brief statement of special matters of defense:

(1) That the defendant was induced by false and fraudulent representations of the plaintiff to give the notes.

(2) That there was no consideration for the notes, or if there was, it has wholly failed.

(3) That he has been released by the plaintiff.

The verdict of the jury was for the defendant, and the case comes to the law court on the plaintiff's motion that the verdict be set aside.

At the date of the transaction between the parties a sawmill was owned by the Gate City Lumber Company, a corporation, whose entire stock was held by the plaintiff and two other persons in equal proportions, but no certificates of stock had been issued.

The location of the mill was on Puget Sound, at Port Angeles, in the state of Washington, a town of 11,000 inhabitants. On the same site there had previously been a mill, which was destroyed by fire. The surrounding country was well timbered, and a railroad to the mill had been chartered, and the work upon it had been commenced.

The defendant had bought stock in the railroad, and had come to the place under guaranty of employment in the enterprise. While waiting he boarded at the house of the plaintiff, and spent a part of his leisure around the mill. There was an indebtedness of the corporation of about \$1,000, and subsequently a mortgage was placed upon the mill plant by the three original owners of the capital stock, without notice to the defendant. Neither in this matter nor in other business was he ever recognized by the managers of the company as having any interest in the mill, although he had knowledge that a mortgage was contemplated for the purpose of raising money to purchase a planer, and this he favored, as he believed the machine would add to the profits of the business.

Soon after the defendant's purchase, the railroad, through failure to place its bonds,

was abandoned. The opportunities for successful mill operations were thereby lessened, the prospective value of the property was greatly diminished, and it was finally taken under foreclosure of the mortgage.

There is some conflict of testimony as to the representations of the plaintiff in regard to the capacity of the mill, but even the defendant's version falls short of such fraudulent representations affecting the value of the property of the corporation as would render the notes invalid. The defendant was on the ground, and had opportunity to observe all the conditions affecting the value of the property, and must have relied mainly upon his own judgment. The omission of the plaintiff to mention the indebtedness of the corporation, in the absence of any inquiry by the defendant, would not justify the jury in finding fraudulent concealment of facts.

It is claimed by the defendant that his theory of a discharge gave the jury the right to decide in his favor, not only on the ground of substantial justice, but by the rules of law.

It appears that the defendant paid \$300 of the purchase price when the memorandum of agreement was signed and the notes in suit were given; and he testifies that he made a proposition to the plaintiff by which he offered to lose the sum paid, provided the company would release him from the terms of the memorandum. This is denied by the plaintiff, though he subsequently recognizes the fact that "Fogler was out of the mill business, and that he was just \$300 ahead by the transaction." But there is no evidence that such a proposition was acted upon by the plaintiff either by verbal or written acceptance or any release of the defendant from his obligation under the memorandum. There was no surrender of the notes, or any consideration for the alleged discharge. There was, consequently, no release of the defendant in accord and satisfaction within the meaning of the law, and no statutory discharge of the demand. And upon this ground the jury were not justified in their verdict. *Deering v. Moore*, 86 Me. 181, 29 Atl. 988, 41 Am. St. Rep. 534; *Burgess v. Denison Paper Manufacturing Company*, 79 Me. 266, 9 Atl. 726; Rev. St. c. 82, § 45.

The evidence bearing upon the consideration of the notes consists of facts which are not in controversy. A distinction is to be observed between want or failure of consideration, which is a defense or defense pro tanto to an action between the parties (*Edwards v. Pyle*, 23 Ill. 354; *Maxfield v. Jones*, 76 Me. 135; *Shoe and Leather National Bank v. Wood*, 142 Mass. 568, 8 N. E. 753; *Savage v. Whitaker*, 15 Me. 26), and inadequacy of consideration, which does not, in law, constitute a defense (*Norton on Notes & Bills* [3d Ed.] 277; *Worth v. Case*, 42 N. Y. 362; *Earl v. Peck*, 64 N. Y. 596; *Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693).

The consideration of the notes in suit consisted of the plaintiff's agreement to transfer and assign to the defendant one-sixth of the capital stock of a corporation, and to assign to him certificates of this amount when printed and issued by the corporation. It was a valuable consideration in the sense of the law. *Currie v. Misa*, 10 L. R. Exch. 153. It was, at the inception of the notes, a valid agreement, and is not less valid because the value of the subject-matter has become depreciated by subsequent circumstances. This depreciation gives the defendant no greater right to avoid his obligation to pay the stipulated price for the property than an enhanced value would avail the plaintiff as an excuse for the nonfulfillment of his agreement. In the absence of fraud, a party will not be allowed to interpose as a defense the fact that the property was not peculiarly worth what he supposed it to be. "The courts do not sit to make contracts, but only to enforce those the parties have already made."

Our conclusion is that the jury must have been influenced by what they deemed equitable considerations, and erred in weighing the evidence given them under rules of law, Motion sustained.

(97 Me. 568)

DAVIS v. STARRETT.

(Supreme Judicial Court of Maine. June 30, 1903.)

SLANDER—WORDS ACTIONABLE PER SE—PRIVILEGED COMMUNICATION—MALICE—EVIDENCE—REPETITION OF SLANDER—PROBABLE CONSEQUENCE—SPECIAL DAMAGES—BOYCOTT—PLEADING—EXCESSIVE DAMAGES.

1. To say of one that he is the "greatest rum-seller in town," taking the words in their natural and ordinary signification, either imports a criminal charge *ex vi termini*, or is susceptible of that construction, and, as imputing a criminal charge, is actionable *per se*.

2. An action for slander may be sustainable upon proof of facts from which malice may be implied, which is called "malice in law." But the plaintiff may also show malice in fact—that is, actual malice; a desire and intention to injure.

3. To show actual malice it is competent for the plaintiff to prove that the defendant has repeated the slander charged, or has used the same or similar words upon other occasions.

4. The materiality of evidence of other statements than the one sued for depends not upon whether they are privileged or not, but upon whether or not they have a tendency to show actual malice in the utterance of the slander in suit.

5. Another statement, otherwise privileged, may therefore be admissible to show actual malice in making the statement sued for.

6. The plaintiff alleged special damages, in that he "had been greatly injured in his business as a trader by persons boycotting his store," on account of the slander charged.

Held, that the word "boycott" in such connection does not necessarily imply a combination to injure, and that it was open to the plaintiff to show refusal to trade on the part of old customers, on account of defendant's slander; and that, with or without combination.

7. While one who utters a slander is not responsible, either as on a distinct cause of action, or by way of aggravation of damages for the original slander, for its voluntary and unjustifiable repetition without his authority or request, by others over whom he has no control, it is nevertheless true that the slanderer is responsible for the natural and necessary consequences of his act; and it may well be held that the repetition of a slander is a natural consequence of the original publication, and may be regarded as fairly within the contemplation of the original slanderer, and a consequence for which he is responsible.

Held, that the jury in this case were justified in returning a verdict for the plaintiff; but taking into account all the elements of damage which were open to the plaintiff, for loss of reputation; mental suffering, loss of business, and even punitive damages, the court is further of the opinion that the verdict is unwarrantably large.

(Official.)

Exceptions from Supreme Judicial Court, Knox County.

Action by Orren Davis against Avery Starrett. Verdict for plaintiff. Exceptions and motion for new trial by defendant. Exceptions overruled, and motion granted on conditions.

Action on the case for slander uttered by defendant concerning plaintiff.

The declaration contained two counts—the first in the common form, in which it was alleged that the plaintiff said of the defendant, "Orren Davis is the greatest rumseller in Warren, Maine."

The second count alleged a boycott of plaintiff's store as the result of the slanderous reports concerning him, circulated by the plaintiff, and was as follows:

"Also for that the said plaintiff is a good, true, and honest citizen of this state, and from his birth hath hitherto always behaved and governed himself as such, and during that time hath been held and esteemed and respected to be of good name, character, and reputation as well, among a great number of his fellow citizens, as among all his neighbors and acquaintances, and during all that time has never been guilty of committing any crime such as selling intoxicating liquor, or any such hurtful or disgraceful crime; and whereas the said defendant, well knowing the premises aforesaid, but contriving and maliciously intending to hurt, injure, degrade, and disgrace the plaintiff in his aforesaid good name, reputation, and character, to subject him to the pains and penalties of the laws of the state, provided against those who sell intoxicating liquors, did on the 15th day of September, A. D. 1901, at Warren, in the county of Knox, and on divers other days and times since the said 15th day of September, and on the day of the purchase of this writ, in the presence and hearing of divers good citizens of this state, of and concerning the plaintiff did falsely and maliciously speak and utter in substance the following false, scandalous, and defamatory words of and concerning the

¶ 8. See *Libel and Slander*, vol. 32, Cent. Dig. § 286.

plaintiff: 'Orren Davis (meaning the plaintiff) is a rumseller (meaning that the same plaintiff was engaged in the selling of intoxicating liquor in this state contrary to law)'—by speaking and publishing of which said several false, malicious, and scandalous and defamatory words, and of the false and malicious charge, the plaintiff has been greatly injured and prejudiced in his own good name and character and reputation aforesaid, and his business as a trader, by persons boycotting his store on account of the slanderous reports spoken and published by the defendant aforesaid, greatly injured, and he has been rendered liable to be prosecuted for the crime of selling intoxicating liquors in the state contrary to law, and has suffered and undergone great pain and distress and trouble both of body and mind, and likewise greatly injured and prejudiced.

"To the damage of the said plaintiff (as he says) the sum of three thousand dollars."

Defendant moved for a statement of particulars, and the motion was allowed. The plaintiff complied with the order by filing the following specifications:

"The plaintiff will undertake to prove that the defendant, Avery Starrett, on or about the 16th day of August, 1901, said in substance to C. H. Webster, at Warren, in said county of Knox, 'Orren Davis is a rumseller'; also, the said Avery Starrett at Warren, September 10, 1901, in the presence of divers citizens, among whom was one Newel Eugley, made the following statement: That 'Orren Davis (meaning the plaintiff) is the biggest rumseller in town,' and that he (Starrett) 'could back it up.'"

"And the plaintiff expects to prove further, by Dexter B. Hahn, that in September, 1901, Avery Starrett said that 'Orren Davis is a rumseller'; and that at the same time he said to Joseph W. Hahn and Augustus Hahn that 'Orren Davis is a rumseller'; also, that the said Avery Starrett said in the presence of divers other witnesses, whose names are at the present time unknown to the plaintiff, in Warren aforesaid and at the time aforesaid, 'Orren Davis is a rumseller.'"

The plea was the general issue with the following brief statement:

"And for brief statement of special matter of his defense the defendant, not confessing the utterance of any of the alleged slanderous words charged in the plaintiff's declaration, says:

"(1) That he will prove the essential truth of whatever words the plaintiff shall prove that he has spoken of and concerning the plaintiff.

"(2) That if it shall appear that the defendant spoke the alleged slanderous words of and concerning the plaintiff set out in the plaintiff's declaration, it will also appear that such words, if they would otherwise have been slanderous, were spoken under such circumstances as made them a privileged communication, and without malice to

the plaintiff, and that therefore they were not slanderous."

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, SAVAGE, and SPEAR, JJ.

L. M. Staples, for plaintiff. L. F. Starrett, for defendant.

SAVAGE, J. Action for slander in which the plaintiff recovered a verdict for \$1,500. In one count of the writ it is alleged that the plaintiff said of the defendant, "Orren Davis is the greatest rumseller in Warren, Maine," and in another that he said, "Orren Davis is a rumseller." Special damages are averred.

Exceptions.

1. The plaintiff offered the testimony of one Joseph Hahn to prove that the defendant said that the plaintiff was the "worst" or the "greatest" rumseller in Warren. Hahn also testified that the statement was made to himself, and that no one else was present. The defendant claimed and testified that he did not make this statement to Hahn, but that he did say to one Webster, in the presence of Joseph Hahn, that he considered the defendant the worst rumseller in the town of Warren. The defendant further testified that he made no such statement about the defendant to Hahn at all, or in his presence or hearing, at any other time than the occasion of the conversation with Webster. Hence he claims that the conversation testified to by Hahn must be the same one he admits having had with Webster, but varying in details.

The defendant claims that the communication to Webster was privileged by the occasion and circumstances under which it was uttered. His version is as follows: "In the field we [defendant and Webster] were together at work, and he asked me to bring up a package for him from Mr. Davis previously. I brought it up and gave it to him, and he told me it was an application for membership in the order of Odd Fellows in the village. * * * I asked him if he was going to send in his name or his application by Orren Davis, and he said he was, and I told him I should rather send it in by any other member that I knew of in the order other than by him. He asked me why, and I said, 'Because he doesn't have a good reputation;' and, further, he asked me what I meant by that, and I said that I considered him the worst rumseller in the town of Warren. * * * Joseph Hahn was at work there in the field." Webster testified that Hahn was not over a rod away.

The presiding justice ruled that the communication to Webster was not privileged, and the defendant excepted.

We think, as claimed by the learned counsel for the defendant, that it is made fairly certain, by reference to the plaintiff's specifications and the instructions of the court,

that neither the conversation with Joseph Hahn nor that with Webster, whether they were the same conversation or not, was the slander for which the plaintiff recovered damages, and thereupon it is suggested that the question whether the communication to Webster was privileged or not was immaterial, because not relating to the slander which was the basis of the action.

It does not seem to us that the question whether the communication to Webster was technically privileged or not is material to any issue presented by the case. In slander, as is well settled, while an action may be sustainable upon proof of facts from which malice may be implied, which is called "malice in law," the plaintiff may also show malice in fact—that is, actual malice; a desire and intention to injure. *True v. Plumley*, 36 Me. 486. And as bearing upon the question of actual malice it is competent for the plaintiff to show that the defendant has repeated the slander charged, or has used the same or similar words, upon other occasions. *Smith v. Wyman*, 16 Me. 13; *True v. Plumley*, supra; *Conant v. Leslie*, 85 Me. 257, 27 Atl. 147. Such other communications, whether claimed to be privileged or not, are admissible, but solely for the purpose of showing actual malice in the slander sued for—to show the state of mind, the purpose and intention, of the slanderer.

Upon examination of the charge of the presiding justice, which is made a part of the bill of exceptions, we find that in this case the jury were told that the slanderous communications, other than the one which was the basis of the action, were not admitted to prove the allegation of slander charged in the writ, but "as bearing upon the question of motive and intent and actual malice on the part of the defendant." Such communications are to be viewed, not only in the light of the words themselves, but in the light of the surrounding circumstances. The words themselves, when spoken, where spoken, and to whom spoken, the occasion of their utterance, the spirit and purpose of the speaker, are all to be taken into consideration, in pursuing the single inquiry whether such words, spoken under such conditions, have any tendency to show that, in uttering the slander sued for, the defendant was moved by actual malice. If yes, then they are properly to be considered. If no, then they are to be disregarded. It is easily apparent that slanderous words, otherwise privileged, may be uttered in such a spirit or under such circumstances as to indicate that they themselves are the product of a hostile or malevolent disposition. If so, they certainly would have a tendency to show that in uttering some other, but similar, slander, the speaker was moved by the same disposition. The materiality, then, of evidence of other statements than the one sued for, depends not upon whether they are privileged or not, but upon whether or not they have

a tendency to show actual malice in the utterance of the slander in suit.

It was immaterial, therefore, upon the only question to which it could be referred, whether the defendant's communication to Webster was privileged or not. The jury were entitled to consider it as bearing on the question of the actual malice of the defendant in the substantive slander sued for. The defendant's exception to the instruction under consideration must be overruled. *Blake v. Parlin*, 22 Me. 395; *Neal v. Paine*, 35 Me. 158. And the defendant asked for no other instructions relating to this issue.

2. It is alleged in one count that on account of the slanderous reports uttered by the defendant he had been greatly injured in his "business as a trader by persons boycotting his store." The defendant requested a ruling that "because the word 'boycotting' necessarily involved the idea of combination, before special damages could be proved, the plaintiff must lay a foundation by showing a combination of parties to injure the plaintiff's business," which ruling the presiding justice refused to give. This refusal was right. The defendant relies upon etymological definitions to show that the idea of "combination to injure" is necessarily involved in the word "boycott." The word is comparatively new. As it first came into use in connection with the treatment which the tenants of Captain Boycott extended to their landlord, it undoubtedly did embody the notion of a combination. But the word quickly and generally came to have a more enlarged sense. The defendant's counsel frankly concedes that "the word is sometimes loosely used in conversation to express a certain amount of injurious discrimination, without any special agreement or understanding on the part of those who discriminate." That is indeed a common colloquial use of the word. So is refusal by one's customers to trade, for some reason that is common, though there be no combination. And under that allegation in the plaintiff's writ it was open to him to show refusal to trade on the part of old customers, on account of defendant's slander; and that, with or without combination.

The defendant does not press the remaining exception. We perceive no error in the ruling.

Motion: It is not seriously controverted that, in this state, to say of one that he is the greatest rumseller in town, taking the words in their natural and ordinary signification, either imports a criminal charge *ex vi termini*, or is susceptible of that construction, and, as imputing a criminal charge, is actionable *per se*. What is sought is not ingenious interpretation, but ordinary significance, and the import of the language used is for the jury. *Usher v. Severance*, 20 Me. 9, 37 Am. Dec. 33. The defendant, denying the use of the precise language alleged, admitted the use of language of similar purport, and, as to the language proved, he plead-

ed the truth in justification. The jury found that he did use the language charged, and that the justification failed. The evidence warranted both findings.

The only remaining question open under the motion is whether the jury manifestly erred in the amount of damages awarded. The plaintiff claims damages to reputation, for mental suffering, and for loss of business, and in addition to this he claims that punitive damages were allowable. The defendant urgently contends that nominal damages at the most are all the plaintiff is entitled to recover; that as to the one slander upon which he claims the jury have based their verdict, namely, the communication to Augustus Hahn in the presence of Eugley, as testified to by Eugley, there is no proof that it caused injury to the plaintiff, that it was induced by the inquiries of Hahn, and that, if repeated to the injury of the plaintiff, he is not responsible for the repetition. We do not agree with the defendant's conclusion. In the first place, plaintiff is entitled to recover compensation which the law will presume must naturally, proximately, and necessarily result from the utterance of the slander, such as injury to the feelings and injury to the reputation, and these damages may be more or less according to circumstances. They are by no means confined to the limit of nominal damages. The plaintiff is also entitled to recover such special damages alleged and proved as have resulted exclusively from the utterance of the slander. But the defendant says that none have been proved; that there has been no causal connection proved between the defendant's language and the plaintiff's loss of trade. And the defendant relies upon the familiar rule that one who utters a slander is not responsible, either as on a distinct cause of action or by way of aggravation of damages for the original slander, for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control. *Hastings v. Stetson*, 126 Mass. 329, 30 Am. Rep. 683. But this rule has one important qualification. It is a general principle that every one is responsible for the natural and necessary consequences of his act. And it well may be that the repetition of a slander may be the natural consequence of the defendant's original publication. *Odgers on Libel and Slander*, p. 294. The same thought is expressed in the note to *Gilson v. Delaware & Hudson Canal Co.*, 65 Vt. 213, 26 Atl. 70, 36 Am. St. Rep., at page 844, where the editor says: "If the test of natural and probable consequence is to be applied, there should certainly be no difficulty in holding that the original slanderer must be taken to have intended all the damages that the widest possible spread of the slander could produce, for it is the most threadbare of truisms to say that nine persons out of every ten to whom a slander is spoken are certain to repeat it." Without going to the full extent

of this last citation, we think it may be said with reason in this case that the repetition of the slander by those to whom it was uttered, and after that by others, may be regarded as fairly within the contemplation of the original slander, and a consequence for which the defendant may be held responsible.

Aside from the damages to reputation and for injury to feelings, which can only be estimated, but not computed, there is evidence which warranted the jury in finding that the plaintiff had suffered a loss of business as a trader on account of the slanderous statement uttered by the defendant. The plaintiff himself places it at one-third of his trade, which before this slander he says was from \$100 to \$150 a month. His pecuniary loss, of course, is only the loss of profits on that one-third, at his own estimate. We think, however, that it is clearly proved that all of this loss was not due to the defendant's slander. It is evident that after this suit was commenced the people in Warren, to some extent, "took sides," and that the defendant lost some custom in this way; also, it appears that after the slander, and before the trial, a new store with new goods in the plaintiff's line was opened in Warren, and to this fact some of the plaintiff's loss of trade was undoubtedly due.

And as bearing upon the loss to reputation, it is shown that the plaintiff, for some years prior to this slander, had been suffering from the reputation of being a rumseller, though the scandal was manifestly increased after the defendant uttered his slander. The plaintiff also claims that punitive damages were recoverable, on the ground that express malice was shown. Repetitions of a slander by the defendant, even after suit brought, are admissible to show express or actual malice, and to enhance damages. *Smith v. Wyman*, 16 Me. 14; *True v. Plumley*, 36 Me. 466; *Jellison v. Goodwin*, 43 Me. 287, 69 Am. Dec. 62. Such repetitions are not conclusive of actual malice. They are evidence from which the jury may infer it. The defendant claims that his acts and words were proper, and lawful even, and that he did no more than any citizen should do in an endeavor to repress crime. The law permits, and even encourages, good citizens to aid in the enforcement of law. If this defendant believed, and had reason to believe, that the plaintiff was a rumseller, the law authorized him to make a complaint under oath against the plaintiff; and if he had done so he would have been protected, whether the charge turned out to be true or not. But if he chose to talk rather than to act, he came under the necessity of proving that his charges were true unless privileged.

So it has been held that to justify by pleading the truth, if the justification fails, may be regarded as an aggravation of damages. *Smith v. Wyman*, supra; *Sawyer v. Hopkins*, 22 Me. 268; *Jackson v. Stetson*, 15

Mass. 48. But taking all considerations into account, after carefully weighing all the evidence, we are of opinion that the verdict is unwarrantably large. We think that in any event, upon the evidence now presented, no verdict for more than \$600 ought to stand.

Exceptions overruled. If the plaintiff remits all of the verdict in excess of \$600, within 30 days after the rescript in this case is received, motion overruled; otherwise, motion sustained, and new trial granted.

(37 Me. 575)

VIRGIN v. MARWICK et al.

(Supreme Judicial Court of Maine. June 30, 1903.)

ADOPTION—RIGHTS ACQUIRED—LIFE INSURANCE—WILL.

1. The term "child," by the statutes of this state regulating adoption of children, has a broader significance than "issue."

2. When a statute authorizes a full and complete adoption, the child adopted thereunder acquires all of the legal rights and capacities, including that of inheritance, of a natural child, and is under the same duties.

3. A policy of life insurance, issued in 1863 in this state, payable to the assured, his executors, administrators, or assigns, for the benefit of his widow, if any, otherwise for the benefit of his surviving children, passes by the will of the assured to a child adopted afterward, no widow or issue surviving, it being the intention of the testator to provide for that person surviving him who stood in the legal relation of a child.

4. Such beneficiary must be regarded as the testator's child, not by birth, but by law, and entitled to the proceeds of the policy as clearly as if he had been designated by name in it.

5. Held, that the adopted child's right thereto was by virtue of the contract in the policy, and so vested in him that it could not be altered or taken away by will or otherwise.

6. The provisions of Rev. St. c. 75, § 10, relating to the premiums for the last three years, do not apply to one who takes, not by descent, but as a beneficiary designated in the policy.

(Official.)

Bill by Harry R. Virgin, executor, against Ernest H. Marwick and others. Decree rendered.

Argued before WISWELL, C. J., and EMERY, STROUT, PEABODY, and SPEAR, JJ.

Franklin C. Payson and Harry R. Virgin, for plaintiff. Frank W. Butler, for defendant Marwick. Robert T. Whitehouse, Jed F. Fanning, and Charles E. Burbank, for other defendants.

STROUT, J. This is a bill asking construction of the will of Capt. Edward A. Marwick, but, to facilitate settlement of the estate, the parties request that it may also be regarded as a bill of interpleader, so far as the disposition of money received upon two life insurance policies is concerned, and, as all parties interested in the fund are before the court, we accede to the request.

July 17, 1863, Capt. Marwick took a policy

of insurance upon his life, in the New England Mutual Life Insurance Company, for \$5,000, in which the company promised to pay that sum to "the said assured, his executors, administrators or assigns sixty days after due notice and proof of the death of the said assured * * * for the benefit of his widow, if any, otherwise for the benefit of his then surviving children."

January 28, 1865, he took another policy for \$5,000 in the same company, with the same provisions as to payment as in the first policy—"for the benefit of his widow, if any, and his then surviving children, in equal shares to each." Marwick was married in 1860. His wife was living when these policies were issued. In 1861 she gave birth to a child, which deceased in about two weeks after its birth. She never bore another child, and died before her husband, who did not again marry. Marwick died February 16, 1895, leaving neither widow nor issue of his body.

In October, 1872, Capt. Marwick and his wife petitioned the probate court for leave to adopt a boy named Ernest H. Gruntzow, and that court, at a term held on the first Tuesday of October, 1872, after hearing, "decreed and declared that from and after the date hereof the said child shall be to all legal intents and purposes the child of said petitioners, and that his name be hereby changed to that of Ernest Herman Marwick," and delivered to Capt. Marwick and his wife a certificate signed by the judge, under seal of the court, in which it was stated "that from this day said child shall to all legal intents and purposes be your child. * * * You therefore assume the relation of parents to said child, and will hereafter cherish, support, educate and otherwise provide for him as though you were his natural parents." Thenceforward Ernest was the legal child of Capt. Marwick, from whom he was entitled to receive the same respect, obedience, and service as from a natural child, and to whom he owed all the duties of a parent. This relation existed until the death of Capt. Marwick.

Ernest now claims the proceeds of these policies of insurance, which have been paid to the executor, as legal child of Capt. Marwick. The claim is resisted by other parties interested in Capt. Marwick's estate.

If Ernest is to be regarded as a child of Capt. Marwick, within the scope and meaning of these policies, then he is entitled to their proceeds as clearly as if he had been designated by name in them. His right thereto was by virtue of the contract, and so vested in him that it could not be altered or taken away by Capt. Marwick, by will or otherwise. The estate of Capt. Marwick can take no part of them.

The statute in force when this adoption was had, Rev. St. 1871, c. 67, provided, in section 30, that, after the prescribed proceedings in the probate court had been taken, the

¶ 3. See Insurance, vol. 28, Cent. Dig. § 1463.

judge of probate "shall make a decree setting forth the facts, and declaring that from that date such child is the child of the petitioners," and, by section 31, such adopted child "shall be, for the custody of the person and right of obedience and maintenance, to all intents and purposes, the child of the adopters, as if they had been his natural parents," except as to the right of inheritance.

Rev. St. 1857, c. 59, §§ 28, 29, in force when these policies were issued, contained the same provisions as those in Rev. St. 1871, c. 67. They applied to these policies, with such consequences as might legally result therefrom, in case of any future adoption. The contract was not limited to issue. The term "child" has a broader significance than "issue."

The status of an adopted child is well defined by the court in *Power v. Hafley*, 85 Ky. 674, 4 S. W. 681: "It is the event of adoption that fixes, under the law authorizing the adoption, the legal status of the adopted child; and the child, by the event of adoption, becomes the legal child of the adopting parent, and stands, as to the property of the adopting parent, in the same light as a child born in lawful wedlock, save in so far as the exceptions in the statute authorizing the adoption declare otherwise. And when the statute authorizes a full and complete adoption, the child adopted thereunder acquires all of the legal rights and capacities, including that of inheritance, of a natural child, and is under the same duties." See, also, *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788; *Wagner v. Varner*, 59 Iowa, 532.

In *Waldoborough v. Friendship*, 87 Me. 211, 32 Atl. 880, it was held that an adopted child took the pauper settlement of the party adopting him. *Peters, C. J.*, in that case, said: "The common law established certain legal relations between a father and his child, and the statute substitutes the same legal relations between the father and his adopted child. The latter are as legal as the former—both are legal, the latter superseding the former." The adoption in that case was under the Revised Statutes of 1871, which also govern the present case, and under the statute which provided that legitimate children have the settlement of the father. The same doctrine was held in *Massachusetts in Washburn v. White*, 140 Mass. 568, 5 N. E. 813, under a statute which provided that "legitimate children shall follow and have the settlement of their father." The court said: "One of the legal consequences of the natural relation of a child born to parents in lawful wedlock is that it shall take the settlement of its father, if he has any within the state. To this legal consequence the adopted child, Dora, became subject immediately upon her adoption." The law of that state in regard to adoption of children was no broader than that of this state at the time of the adoption of Ernest,

except that it gave the adopted child the right of inheritance.

In *Warren v. Prescott*, 84 Me. 483, 24 Atl. 948, 17 L. R. A. 435, 30 Am. St. Rep. 370, a legacy was given to a person who died before the testator. The legatee had an adopted child. The question was whether that child took the legacy, and it was held that he did, not by inheritance as heir, "but as a statutory lineal descendant, and as lawfully in the line of descent as if he were placed there by birth."

With two exceptions as to inheritance, the statute made an adopted child "to all intents and purposes the child of his adopters, as if they had been his natural parents."

In *Martin v. Aetna Life Insurance Co.*, 73 Me. 25, a policy upon the life of John Wall, Jr., was issued to his wife, and payable to her or her legal representatives for her sole separate use, and, in case of her death, before that of her husband, the amount to be paid to "their children." They had no child by birth, but had one by gift and adoption. It was held that the adopted child took the insurance under the express terms of the policy. The court said: "The word 'child' in legal documents is not always confined to immediate offspring. It may include grandchildren, stepchildren, children of adoption, etc., as may be necessary to carry out the intention." See, also, *Warren v. Prescott*, 84 Me. 483, 24 Atl. 948, 17 L. R. A. 435, 30 Am. St. Rep. 370.

We think it clear that Ernest must be regarded as the child of Capt. Marwick, not by birth, but by law.

Does he come within the intention of Capt. Marwick, when he effected these policies? By them he intended to provide for a wife, which he then had, in the event of her surviving him, and, in case of her death, that the beneficiary should be his child or children that might be living at his decease. His wife had given birth to a child in 1861, which lived only two weeks. For 11 years thereafter no child had been born, and it is altogether probable that he had abandoned expectation of a natural child. Both he and his wife adopted Ernest, and must have desired and intended him to take the place of a child by birth. The law invoked by them made Ernest their child to all intents, except right of inheritance.

To ascertain the intention of parties to a contract, its language is to be considered in the light of conditions existing at the time of its execution. Their position and relations to the subject-matter often afford aid in its interpretation. When these policies were taken Capt. Marwick had a wife, but no child. He contemplated the probability that a child might be born to him; probably desired it. With that end in view, he made the provisions contained in these policies. It was not in his power to change the beneficiary of the fund, by will or otherwise, if either wife or child survived him.

It was manifestly the intention of Capt. Marwick, when he took these policies, to provide for that person surviving him who stood in the legal relation of a child. He asked the law to make Ernest his child. It did so by formal decree. The rights and duties of parent and child then arose. It would be a reflection upon the sense of justice of Capt. Marwick, as a statutory father to the child, to hold that he did not intend this policy to apply to him. There is no evidence that when these policies were written he intended to exclude from its provisions any one who should occupy the relation of a child, by birth or otherwise. The contract, construed according to the intention at the time, if not inconsistent with its language, must govern.

It is urged that when, in 1835, Capt. Marwick made a will, and later in 1895, one month before his death, when he made his last will, he treated the money to be paid upon these insurance policies as belonging to his estate, and made legacies the full payment of which could not be effected without including it, he thereby indicated an intention that Ernest should not be a beneficiary under these policies. Whether so or not, it was many years after the contracts were made, and it was beyond his power to change them or the beneficiaries under them. Making bequests beyond the ability of the estate to pay is not very uncommon, and is entitled to little weight in ascertaining the scope of a contract made many years previous. *Hathaway v. Sherman*, 61 Me. 475; *Gould v. Emerson*, 99 Mass. 157, 96 Am. Dec. 720.

Upon the death of Mrs. Marwick the adopted son became the beneficiary designated under each of the policies, as the only surviving child, and is entitled to the whole fund realized from them, less the expense of collection, if any. We cite, as bearing upon the question, *Sewall v. Roberts*, 115 Mass. 276.

The provisions of Rev. St. c. 75, § 10, in regard to the premiums for the last three years, do not apply. Ernest does not take by descent, but under the contract, as the beneficiary designated therein.

Certain releases were given by Ernest and other legatees under the will, in deference to the supposed wish of Capt. Marwick, but these appear to have been without consideration and of no effect. They are not relied on by any of the parties to this suit. We therefore do not consider them.

Our conclusion that Ernest H. Marwick is entitled to the entire proceeds of the insurance policies affords an answer to all the questions propounded in the bill which are now insisted upon.

By the agreement of parties, the decree to be filed shall allow to each of the attorneys in defense the sum of \$50 for services, to be paid by the executor from the fund in controversy in this case.

Decree in accordance with this opinion.

(35 R. I. 212)

SIMMONS v. MORGAN et al.

(Supreme Court of Rhode Island. June 4, 1903.)

WILLS—DEVISE OF MORTGAGED REALTY—SALE ON FORECLOSURE—RIGHTS OF DEVISEE—TRUSTS—VALIDITY—CONSTRUCTION OF WILL.

1. A will gave mortgaged realty to testator's brother in trust for testator's son. It was sold on foreclosure, after testator's death, for a sum in excess of the mortgage debt. *Held*, that the son was entitled to the excess.

2. A will gave to testator's brother in trust all of testator's property "for the following purposes, to let for the best price that can be obtained any and all of my property and the proceeds thereof to be used to pay all taxes, insurance, repairs and incumbrances of every nature, and when the property is entirely free from all incumbrances, then I give, devise and bequeath to my son" certain described property. The balance of the property belonging to testator was also disposed of. The property devised to the son was covered by a mortgage, and, after testator's death, was sold on foreclosure for a sum in excess of the mortgage debt. *Held* that, in addition to being entitled to the excess arising from the sale, the son was entitled to all that part of the net income of the entire property, including that not devised to him, due up to the date of the foreclosure sale, and which had not been applied to reduce incumbrances.

3. A will, after making the specific provision for testator's son, authorized a trustee thereunder to let or sell any of the rest of the property, and provided "the net income of rents together with income from money received from sale of real estate to be paid to my daughters * * * for and during the term of their natural lives" and after their decease to their children, "to hold to said children, their heirs and assigns, and one third part to my said son, * * * his heirs and assigns," etc. *Held*, that the trust was valid.

4. Testator's daughters took an estate for life in the entire estate.

5. After their decease, testator's son had an estate in fee in one-third of the estate.

6. The children of the daughters had an estate in fee in the other two-thirds of the estate.

Bill in equity for instructions by Lewis L. Simmons, trustee, against Frank Morgan and others.

Argued before STINESS, C. J., and TIL-
LINGHAST and DUBOIS, JJ.

Clark Burdick, for complainant. John C. Burke, for respondents.

DUBOIS, J. This is a bill in equity brought by Lewis L. Simmons, trustee under the will of Frank Morgan, for instructions as to the conduct of the trust. Only the following portion of the will is necessary to be considered:

"I direct my Executor hereinafter named to pay all my just debts and funeral expenses out of my estate as soon after my decease as can be conveniently done. I give, devise and bequeath to my brother, Henry B. Morgan, of Providence, R. I., in Trust, all the property that I now possess or may hereafter acquire, whether real personal or mixed, for the following purposes, to let for the best price that can be obtained any and all of my property and the proceeds thereof to be used to pay all taxes, insurance, repairs and

incumbrances of every nature, and when the property is entirely free from all incumbrances, then I give, devise and bequeath to my son, Frank Morgan, Jr., all the land and buildings situated on Broadway, Collins Street and West Broadway, adjoining, and not any other real estate on W. Broadway, to hold to him, said Frank Morgan, Jr., his heirs and assigns forever: and I further authorize my said trustee, to let, or sell in his discretion for the best prices that can be obtained any of the rest of my property, giving and executing all necessary deeds and receipts; and the net income of rents together with income from money received from sale of Real Estate to be paid to my daughters, Mary E. Elliott, wife of Alexander Elliott, and to Sarah B. Muenchinger, wife of Herman Muenchinger, for and during the term of their natural lives, and after the decease of said Mary E. Elliott and Sarah B. Muenchinger, then said income to be paid to the children of said Mary E. Elliott and said Sarah B. Muenchinger to hold to said children, their heirs and assigns, and one third part of said income to be paid to my said son, Frank Morgan, Jr., his heirs and assigns. Should my trustee think in his discretion, that the property devised on Broadway, Collins and West Broadway, would bring a large price, then said trustee sell the same and make and execute all necessary deeds for the conveyance of the same, and the net income of the same to be paid over to my said son, Frank, his heirs and assigns, the income from the rents, or from the sale of said property, to be first paid to my brother, Henry B. Morgan, Trustee, and by him paid to my said son, Frank Morgan, discretionally."

It appears that said Frank Morgan, testator, died at Newport, R. I., October 4, 1892, and that said will was duly admitted to probate on the 31st day of said October. That Henry B. Morgan, trustee, deceased, and that Lewis L. Simmons was by this court appointed trustee under said will, in his place, February 4, 1899. That at the time of the death of said testator his real estate was mortgaged for \$12,000, and that on March 10, 1903, the same had been reduced by the trustee to \$8,000, which was secured by mortgage on the parcel devised to said Frank Morgan, Jr. That said property was sold under said mortgage on March 10, 1903, for \$11,374.54, above the amount of the mortgage debt and expenses of foreclosure. That said trustee has other moneys in his hands obtained from sales, the income of which and the income from the balance unsold of said property he was holding to apply toward the reduction of said mortgage indebtedness upon said first parcel.

The complainant asks the court to instruct him in answering the following questions: First. What disposition he shall make of the said balance arising from said foreclosure sale. Second. What disposition he shall make of the proceeds from rents in his hands, col-

lected prior to said foreclosure sale both from said first parcel and from the rest of the property. Third. Whether or not said trust contained in said third clause of said will is void. Fourth. If said trust is valid, what estate the said Mary E. Elliott, Sarah B. Muenchinger, and Frank Morgan, Jr., took under said third clause.

In the case of Frank Morgan et al. v. Henry B. Morgan et al., 20 R. I. 600, 40 Atl. 736, we decided that said Frank Morgan, Jr., had an equitable fee, subject to the incumbrance, in the land and buildings situated on Broadway, Collins street, and West Broadway adjoining. As this parcel of land was sold for a sum in excess of the mortgage debt and expenses, such sum represents the value of the land above the incumbrances, and is substituted for the land; therefore it should be paid to Frank Morgan, respondent. As the net income of the entire property was to be held to reduce the incumbrances, which were obliterated by said foreclosure sale, all the net income due up to that time for that purpose which was not so applied should be paid to said Frank Morgan, whose cash balance in said estate was diminished to that extent.

The trust contained in the third clause of said will is not void. "It has been repeatedly held that a devise of the income, or, what is equivalent, of the rents and profits or use and occupancy of land, is, in legal effect, a devise of the land itself. Whether or not, under such a devise, the estate is for life or in fee, must be determined by the limitations expressed in the devise, or the intention of the testator to be gathered from the will." *Greene v. Wilbur*, 15 R. I., at page 255, 3 Atl. 4, and cases there cited.

The limitations expressed in the devise to the daughters, their children, and the son of the testator create an estate for life in the whole estate in said daughters, and after their decease an estate in fee in one-third of said estate in said son, and an estate in fee in two-thirds of said estate in the children of said daughters, because there can be no doubt that the whole income is directed to be paid to said daughters for and during the term of their natural lives, and the devise to the children is limited by the words immediately following—"and one-third part of said income to be paid to my said son Frank Morgan, Jr., his heirs and assigns." All the estates in fee are thus postponed until the expiration of the life estate, and all begin their term of enjoyment together; and therefore we make answer as follows: First, the balance arising from said foreclosure sale shall be paid to said Frank Morgan; second, the proceeds in his hands from rents collected prior to said foreclosure sale shall be paid to said Frank Morgan; third, the trust contained in the third clause of the will is valid; and, fourth, Mary E. Elliott and Sarah B. Muenchinger took a life estate in the whole estate mentioned in said third clause of the will, and Frank Morgan, Jr., took an estate in fee

in one-third part of said estate after the expiration of the life estate of his said sisters therein.

(25 R. I. 304)

**PROBATE COURT OF WESTERLY v.
POTTER et al.**

(Supreme Court of Rhode Island. May 19, 1903.)

**PARTIES — WANT OF INTEREST — PLEADING —
DECREE — CONCLUSIVENESS — IMMATERIAL
ISSUE — PLEA PUIS DARREIN CONTINUANCE —
SEPARATE PLEAS.**

1. A decree recited in the declaration in debt on an executor's bond, by which it was adjudged that one of the persons for whose benefit the action was brought was interested in the estate, and entitled to have the executor return an inventory and account, was conclusive as to such person's interest on the date it was rendered, and all pleas setting up a prior extinguishment of such interest without denying the rendition of the decree tendered immaterial issues, and should be stricken out.

2. In debt on an executor's bond defendants filed a plea puis darrein continuance, setting up a release by one of the persons for whose benefit the suit was brought of all claims against them. *Held* a waiver of all previous pleas as to this person's interest.

3. The plea puis darrein continuance set up a substantial defense as to the person named therein.

4. Where, in separate pleas, defendant sets up that the various persons for whose benefit the action is brought have no further interest in the litigation, instead of combining the defenses in one plea the pleas will be construed together, and, so construed, *held* sufficient.

Action by the probate court of Westerly against William J. Potter and others. Heard on demurrers to pleas, and demurrers to second, third, and sixth pleas overruled.

Argued before STINESS, C. J., and TIL-
LINGHAST and DOUGLAS, JJ.

Albert B. Crafts, for plaintiff. Thomas H.
Peabody, for defendants.

DOUGLAS, J. The action is debt upon an executor's bond, brought under the provisions of section 32, c. 220, of the General Laws of 1896. The breaches assigned are: (1) Neglect to file an inventory after being duly cited; (2) neglect to file an account after being duly cited. It is brought for the benefit of Sarah J. Potter, Elbert S. Potter, and Grace E. Potter, whose names are indorsed on the writ. The defendants filed 38 pleas, of which 7 have been stricken out in the common pleas division. To the remaining ones the plaintiff demurs, assigning from 10 to 17 reasons for each demurrer.

We cannot accept the invitation to thread this maze of pleading. It would be a task fit for the leisure hours of an arctic winter, or to relieve the monotony of life imprisonment without useful labor. Life is short, and the members of the court are considerably advanced towards the end of the journey. If we succeed in ascertaining whether there are

any substantial defenses embodied in these pleas, without much regard to the question whether such matter is in proper form or not, we think we shall be observing the spirit of the statute (Gen. Laws 1896, c. 235, § 3), which reads as follows: "No summons, writ, declaration, return, process, judgment, or other proceeding in civil causes in any court, shall be abated, arrested, quashed, or reversed, for any defect or want of form, but the court shall proceed and give judgment according as the right of the cause and matter in law shall appear unto it, without regarding any imperfections, defects, or want of form, in such writ, declaration, or other pleadings, return, process, judgment, or proceeding whatsoever."

The pleas are all in support of the claim that the parties whose names are indorsed upon the writ are not now interested in the estate. There is no denial that the defendants made the bond, or that the principal defendant was cited to file an inventory and an account, and there is no averment that the principal defendant complied with either requirement. Neither is there any denial of the record of the decrees of this court set forth in the declaration. Of the three persons whose names are indorsed upon the writ, Sarah J. Potter is dead, and is not represented; Grace E. Potter was given a legacy of \$1,500 by the will, and was not otherwise interested; and Elbert S. Potter is residuary legatee, together with the defendant. It is contended by the plaintiff's counsel that the decrees recited in the declaration settled as between these parties that on November 28, 1899, when the later decree was entered, Grace E. Potter was interested in the estate, and that, therefore, all pleas setting up a previous extinguishment of her interest, without denying the record of these decrees, tender immaterial issues. We think this position is well taken. The cases referred to were appeals taken by Grace E. Potter from decrees of the probate court, and the decrees are adjudications by this court that Grace E. Potter was interested in the estate and entitled to have the executor return an inventory and an account. Such of the pleas in this case, therefore, as allege the non-interest of Grace E. Potter previous to November 28, 1899, must be stricken out. The defendants have still further nullified all challenge of Grace E. Potter's former interest by filing, February 27, 1893, a plea puis darrein continuance, wherein they set up a general release from Grace E. Potter of all claims against these defendants, including her claims under the will of William D. Potter, executed February 25, 1903. The effect of this plea is to waive all previous pleas as to the interest of Grace E. Potter, and to admit that, but for the matters set up therein, she is competent to promote the action. 1 Chitty Pl. 690, *n (a), (b); 2 Chitty, Pl. 454. If Grace E. Potter were the only indorser of the writ, this plea would undoubtedly be

¶ 1. See Pleading, vol. 39, Cent. Dig. § 323j.

good. The plea presents a substantial defense available against one of the indorsers of the writ.

The second plea denies the interest of Elbert S. Potter in the suit, and sets up a general release from said Elbert S. Potter to the defendants dated February 16, 1894. The third plea sets up a decision of this court adjudging that Elbert S. Potter, November 14, 1893, had no interest in the estate of William D. Potter, deceased. The sixth plea avers that before the commencement of this suit the executor fully paid to Elbert S. Potter the whole share of the estate which said Elbert S. was entitled to. Either of these pleas would be sufficient matter of defense if the suit were brought for the benefit of Elbert S. Potter alone. If either the second, third, or sixth plea were joined with the matter of the plea puis darrein, it would be a complete bar to the further prosecution of this suit. It is a defect in form only, if it be a defect in pleading at all, that this matter is not so joined. The privilege is sometimes given a pleader to set out his defense to different parts of the cause of action by different pleas, provided that the pleas taken together form a complete answer to the cause of action. The rule is laid down in Gould's Pleading (4th Ed.) c. 6, pt. 2, §§ 102, 103, that: "Though the defense must in all cases answer the whole declaration or alleged cause of action, it is not necessary that the whole be answered by one plea. It is only necessary that the whole matter of defense pleaded cover the whole complaint. The defendant may, therefore, plead several different matters of defense in several different pleas to as many different parts of the declaration or alleged cause of action. And, if all the pleas taken together form a sufficient answer to the whole matter of complaint, the defense is complete." We think the rule may well apply here, where, instead of the cause of action being severable, the question of interest of two separate persons is involved. It makes little difference whether the defendant says in one plea A's interest in the estate and his capacity to carry on this suit have terminated, and in another plea, filed simultaneously, B's interest in the estate, etc., has terminated; or, in one plea, the interest of A. and the interest of B. have terminated. The two pleas together submit a substantial defense, as well as the one plea combining the two averments does. The plaintiff can take issue on either or both averments of failure of interest, and, if either issue is found in his favor, the right to maintain the action will be assured.

The demurrers to the second, third, and sixth pleas are therefore overruled, and the plaintiff is required to reply to these and to the plea puis darrein continuance. The remaining pleas either tender immaterial issues or, in so far as they contain issuable matter, are repetitions of the defenses already set up, and must be stricken out.

(77 Md. 364)

SMITH v. HALLWOOD CASH REGISTER CO.

(Court of Appeals of Maryland. June 29, 1903.)

PLEADING—ACTION ON CONTRACT—FILING OF AGREEMENT SUEB ON—SUFFICIENCY—APPEAL.

1. The charter of Baltimore, § 312, provides that in any suit when the cause of action is a contract the plaintiff, if he makes affidavit, shall be entitled to a judgment on a motion in writing at any time after 15 days from the rule day, though the defendant may have pleaded, unless such plea contains a good defense, and unless the defendant shall, under oath, state that every plea is true, etc. Section 313 provides that the plaintiff shall not be entitled to judgment under the preceding section unless he files with his declaration an affidavit of the true amount the defendant is indebted to him, over all discounts, and also the note or other writing by which the defendant is so indebted. *Held*, that the incorporation of the agreement constituting the cause of action into the body of the declaration which was filed at the institution of the suit is a filing of the agreement, within the meaning of section 313.

2. Orders passed and proceedings had in the lower courts, to be before the court on appeal, must form part of the bill of exceptions or the duly certified record. They cannot be brought before the court on agreements of counsel subsequently made.

Appeal from Baltimore City Court; Henry Stockbridge, Judge.

Action by Munro Smith against the Hallwood Cash Register Company. Judgment for plaintiff by default, and from an order refusing to strike out the same, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

John O. Rose, for appellant. James J. McNamara, for appellee.

SCHMUCKER, J. This appeal presents for our consideration a question of practice, under chapter 184, p. 304, of the Acts of 1886, which provides for obtaining speedy judgments in certain classes of actions in the courts of Baltimore City. The act, with some amendments, was re-enacted in sections 303 to 319 of the present charter of Baltimore City (Acts 1893, pp. 389-395, c. 123). Section 170 of the act (being section 312 of the charter) provides that, in any suit when the cause of action is a contract, the plaintiff, if he makes affidavit as thereafter stated, shall be entitled to a judgment on a motion in writing at any time after 15 days from the rule day to which the defendant shall have been summoned, although the defendant may have pleaded, unless such plea contains a good defense, and unless the defendant, or some one in his behalf, shall, under oath or affirmation, state that every plea so pleaded is true, "and shall further state the amount of the plaintiff's demand, if anything, admitted to be due or owing.

¶ 1. See Pleading, vol. 26, Cent. Dig. §§ 939, 940.

and the amount disputed. * * *” Section 313 of the charter provides that the plaintiff shall not be entitled to judgment under the preceding section unless at the time of bringing his action he shall file with his declaration an affidavit or affirmation “stating the true amount the defendant is indebted to him over and above all discounts, and shall also file the bond bill of exchange, promissory note or other writing or account by which the defendant is so indebted. * * *”

The cause of action in the present suit consists of a written contract signed by the appellant, and several of his promissory notes given in connection with the contract. The appellee, as plaintiff below, instituted the suit against the appellant in the Baltimore City court on October 12, 1901. The plaintiff declared upon the notes and contract, and also upon the common money counts. The original contract was incorporated into and made part of the declaration, and the original notes were annexed to and filed with it. There was also annexed to and filed with the declaration an affidavit, in the form prescribed by section 313, stating that the sum of \$160 was due from the defendant on the annexed agreement and promissory notes, over and above all discounts. On October 25, 1901, which was within the time provided by the Code, the defendant filed the general issue pleas, verified by his affidavit. This affidavit was in proper form in all respects, except that it failed to state “the amount of the plaintiff’s demand, if anything, admitted to be due and owing, and the amount disputed.” On October 30, 1901, on the written motion of the plaintiff, a judgment by default for want of a sufficient affidavit to the pleas was entered against the defendant, and was extended by the court, upon satisfactory proof, for \$160, with interest and costs. On November 26, 1901, the defendant moved the court to strike out the judgment “because the writing by which the defendant was alleged in the declaration and affidavit to be indebted to the plaintiff was not also filed by the plaintiff, and the plaintiff was therefore not entitled to demand an affidavit of defense to the defendant’s pleas, and was not entitled to a judgment against the defendant for want of such affidavit of defense to his said pleas.” This motion was overruled on October 27, 1902, by the order from which the present appeal was taken.

It is admitted upon the briefs of both the appellant and the appellee that the real question presented by the record is whether the incorporation of the agreement constituting the cause of action into the body of the declaration which was filed at the institution of the suit was a filing of that agreement, within the meaning of section 313. In our opinion, this question must be answered in the affirmative. All that the statute requires in such cases is that the agreement should be

filed with the declaration at the time of bringing the action. It would be a convenient and appropriate method of filing the original written cause of action to attach it to the declaration, or to file it as a separate paper in the case. But as the very purpose and function of the declaration is to set forth the cause of action, and when that consists of a written instrument it often becomes necessary to state either its contents or its substance and purport, it would present no impropriety, from the standpoint of pleading or the intent of the statute, to incorporate the instrument itself into the declaration, when it is convenient to do so. The object of the statute was said by this court, in *Thillman v. Shadrick*, 69 Md. 530, 16 Atl. 138, when construing the very sections now under consideration, to be “to obtain from both plaintiff and defendant a definite and sworn statement of both the claim and defense, if any, so that the parties might know exactly wherein they differed, and shape their action accordingly.” The purpose of the statute, as thus defined, is gratified as fully by incorporating the written cause of action in the declaration as by filing it with that pleading, and therefore such incorporation must be regarded as a compliance with the terms of the law. The case of *City Passenger R. Co. v. Nugent*, 86 Md. 362, 38 Atl. 779, cited on the brief of the appellant, is quite distinguishable from the one now under consideration. In *Nugent’s Case* we held that a prayer by a plaintiff for a jury trial should not be incorporated in the body of the declaration, because it was a distinct step in the case, relating only to the mode of trial, and had no concern with the declaration, and because a withdrawal of the declaration by leave of court would have withdrawn the election for a trial by jury, although the rules of court forbid the withdrawal of such an election without the consent of both parties. For those and other reasons we held that it was the obvious intent of the rule of court regulating an election for a trial by jury that the election should be a separate and independent act, evidenced by a writing distinct from the pleadings. The reasoning which in that case we applied to an election of a jury trial has no bearing upon the construction of the statutory requirement that the written cause of action which forms the basis of the declaration should be filed “at the time of bringing the action.” The statute does not prohibit the incorporation of the original cause of action in the declaration if it is of such a character as to make that course convenient. If a plaintiff, having thus incorporated his cause of action in his declaration, were to withdraw the latter with leave of the court, he might thereby be deprived of the benefit of the speedy judgment provided for by the sections of the charter now under consideration, but no right of the defendant would be violated or impaired, nor

would the orderly progress of the suit be disturbed.

The counsel for the appellant candidly admits upon his brief that, if the appellee is to be regarded as having fully complied with the requirements of section 313 by incorporating the original agreement in his declaration, then the pleas of the defendant, verified in the manner shown by the record, interposed no legal obstacle to the granting of the judgment which he sought to have stricken out.

There appears in the record an agreement of counsel, dated December 24, 1902, stating that pending the controversy over the validity of the judgment the defendant's counsel had placed certain of their own money in the hands of the plaintiff's counsel, who at once applied such money to the payment of the judgment, and entered it satisfied of record, and that the defendant, disputing the correctness of such use of the money, had moved the court to strike out the entry of satisfaction, but the court, by its order of October 27, 1902, of which the agreement purports to give a copy, had overruled the motion without prejudice. We have not noticed this agreement, nor the alleged matters to which it relates, in our opinion, because neither the motion, nor the order of court, nor the testimony referred to in the agreement, form part of the record in the case. We have repeatedly held in other cases that orders passed and proceedings had in the lower courts cannot be brought before us on appeal by agreements of counsel subsequently made. All such orders and proceedings must form part of the bills of exception or the duly certified record. Furthermore, in the present case, the appeal is only from the order refusing to strike out the judgment.

From what we have said, it follows that the order appealed from must be affirmed. Order affirmed, with costs.

(97 Md. 373)

NELSON v. WILLEY et ux.

(Court of Appeals of Maryland. June 29, 1903.)

BONDS—REFERENCE TO AGREEMENT—PAROL EVIDENCE.

1. A contract by which N. agreed to advance money to W., to engage in the canning business and to purchase supplies therefor, W. to repay him, and to give bond for performance of his part of the agreement, may be shown by parol to be the agreement referred to in a bond of even date, reciting that W. is to engage in the canning business, and that N. has agreed to advance certain money to him in connection therewith, and pay for certain goods to be used therein, and conditioned to be void if W. repay to N. said advances and the money expended in such purchases.

Appeal from Circuit Court, Howard County; William H. Thomas, Judge.

¶ 1. See Evidence, vol. 20, Cent. Dig. §§ 1903, 1906, 2034.

Action by William O. Nelson against George P. Willey and wife. Judgment for defendants. Plaintiff appeals. Reversed.

The following is the agreement referred to in the opinion:

"This agreement, made this 8th day of April, in the year 1897, by and between George P. Willey, hereinafter styled the 'principal,' and William O. Nelson, hereinafter styled the 'agent,' witnesseth: Whereas, the principal is about to engage in the business of manufacturing canned goods at his factory, situate at Patuxent, Anne Arundel county, Maryland, and desires to constitute the agent as his sole representative for the sale of his manufactured products; now, therefore, the said principal and agent hereby mutually covenant and agree as follows:

"(1) That the principal shall can fruits and vegetables at his said factory in a first-class manner, and in as large quantities as possible consistently with the capacity of his factory and the demands of the market, paying all expenses of said factory and the conduct of the said business; and that he shall give the agent free access to the said factory at all times, free supervision of all books and papers relating to the said business, including his correspondence, and a full report of the condition of the said business whenever the agent shall see fit to demand it; and that he shall also give the agent an advisory position in the management of the said business, if the said agent shall desire it.

"(2) That the agent shall purchase for the principal, at the beginning of the ensuing canning season, that is to say, on or before the first day of August, 1897, the following goods, to-wit: Twenty-five pounds of tomato seed, fifty bushels of sugar corn seed, ten bushels of lima bean seed, ten bushels of red valentine bean seed, one hundred tons of fertilizer, and one thousand dollars worth of stock for the use of the factory store, the said goods to be bought for account of the principal and in his name, and delivered at Patuxent, Maryland, the agent making advances, if necessary, to pay for the said goods and their freight, and that thereafter the agent shall purchase and forward to Patuxent such goods or stock as may be necessary to meet the demands of the said factory, and such cans, solder, acid, cases, and labels as may be needed, and to make advances of cash, if needed by the principal: provided, however, and it is hereby specially agreed, that the aggregate amount advanced by the agent as herein provided, whether for the purchase of goods or in cash, shall not exceed at any one time the net cost of the canned goods manufactured up to that time, and shall in no case be more than sixty-six per cent. of the market or selling value of the said goods.

"(3) That the principal shall transfer to the agent by means of warehouse receipts the title to the said goods as fast as they

are manufactured, for the purpose of securing the said advances, and shall give to the agent exclusive control of the same, and the exclusive right to sell the product of his factory at prices in the discretion of the agent; that the principal shall pay to the agent a commission of five per cent. on the price of all goods purchased by the said agent on account of the principal, five per cent. on the price of all manufactured goods sold by the agent, and six per cent. per annum on all sums of money advanced by the agent under the terms of this agreement. The agent on his part agrees to sell the canned goods manufactured by the principal as rapidly as the demands of the market will allow, and to pay over to the principal all moneys collected by him from such sales, after deducting the commissions herein specified, and the amount of all bills contracted for by him on behalf of the principal as herein provided, such payment to be made to the principal only upon a settlement of accounts at the end of each canning season.

"(4) That the goods purchased by the agent and forwarded by him to Patuxent for the use of the said factory shall be exchanged only for labor or materials used in producing the said canned goods, and shall at all times be represented by checks given out by the principal for labor done or material furnished to the said factory, which checks shall be forwarded weekly to the agent as vouchers.

"(5) That the principal shall give to the agent a bond of indemnity, signed by the principal and his wife jointly, for the faithful performance of his part of this agreement, and shall have the improvements on property belonging to the principal, or to his said wife, insured for the agent's benefit and to the agent's satisfaction against possible losses by fire.

"Witness the hands and seals of the said parties the day and year above written.

"[Signed] George P. Willey. [Seal.]

"Wm. O. Nelson. [Seal.]

"Test: Wm. H. Buckler."

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SOHMUCKER, and JONES, JJ.

R. R. Boorman, for appellant. James R. Brashears, for appellees.

PEARCE, J. This suit was brought by William O. Nelson against George P. Willey and Alice E. Willey, his wife, upon a bond in the penalty of \$10,000, executed by them to him, and bearing date April 8, 1897. The recital and condition of this bond is as follows: "Whereas the said George P. Willey is about to engage in the canning business, and the said William O. Nelson has agreed to make certain advances of money to him in connection with said business, as well as to pay, if necessary, for certain goods to be used by the said Willey in connection with

the same: Now, therefore, the condition of this obligation is such that if the said George P. Willey shall well and truly repay to the said William O. Nelson the said advances with interest, and shall also reimburse to him the sums of money expended in the purchase of goods as aforesaid, then this obligation to be void; otherwise it is to remain in full force and effect in law."

The declaration set forth a verbatim copy of an agreement under seal entered into between the said Nelson and George P. Willey, of even date with said bond, in which the said Willey was styled the "principal" and the said Nelson was styled the "agent." We shall request the reporter to set out the agreement in full in reporting the case. This agreement recites that whereas the principal is about to engage in the business of manufacturing canned goods at his factory situate at Patuxent, Anne Arundel county, Md., and desires to constitute the agent as his sole representative for the sale of his manufactured products; "now, therefore, the said principal and agent hereby mutually covenant and agree as follows." Then follow a number of detailed stipulations, the substance of which may thus be condensed: (1) That the principal shall can fruits and vegetables in as large quantities as the capacity of his factory will permit. (2) That the agent should purchase for the principal on or before August 1, 1897, certain quantities of tomato, sugar corn, and bean seed, 100 tons of fertilizer, and \$1,000 worth of stock for the use of the factory store, all to be bought for account of the principal and in his name, and to be delivered at Patuxent, and thereafter to purchase and forward such goods and make such advances as may be necessary to conduct said business for the season of 1897, provided the aggregate amount so furnished and advanced shall not at any one time exceed the net cost of canned goods then manufactured, nor more than 68 per cent. of the market value thereof. (3) That as fast as the canned goods are manufactured the title shall be transferred to the agent by warehouse receipts to secure the advances; that the agent shall have the exclusive right to sell the manufactured goods; that from the proceeds of sale he shall deduct all advances and the cost of all goods furnished, and shall pay the overplus to the principal. (4) Not material to this case. (5) "That the principal shall give to the agent a bond of indemnity, signed by the principal and his wife jointly, for the faithful performance of his part of this agreement, and shall have the improvements on the property belonging to the principal, or to his said wife, insured for the agent's benefit and to the agent's satisfaction against possible losses by fire." The declaration further set forth that Willey and wife, in accordance with said agreement, and at the same time it was made, executed the above-mentioned bond for the faithful performance of said agreement;

also, that Willey did engage in canning in said county in pursuance of said agreement; that Nelson did make him large advances and pay for large amounts of goods furnished him, all of which were used in carrying on the business under said agreement, and amounting to \$15,308.23; and that Nelson had received from Willey under said agreement \$8,892.15, showing a balance due under said agreement, \$6,476.08; and there was filed with the declaration an account styled a "bill of particulars," showing in detail all the charges and credits, and the balance due under said agreement.

The defendants pleaded (1) non est factum; (2) payment and satisfaction; (3) that plaintiff prevented performance by defendants of their contract; (4) that plaintiff broke and repudiated his contract with these defendants; (5) that defendants had performed their part of said contract mentioned in the declaration. Issues were then joined, and at the trial the bond was put in evidence, and the plaintiff offered the agreement mentioned, which was admitted subject to exception. The plaintiff himself testified, subject to exception, that he purchased the goods and advanced the money mentioned in the bill of particulars, and that the agreement and the bond were made on the same day, and it was proved by another witness that a large quantity of such goods as were described in the bill of particulars was received at Willey's canning house during the season of 1897. One of the firm of Kirwan & Tyler, can makers, testified that they sold Nelson that season about 6,000 cases of cans, which were shipped to Willey; and Mr. Shriner, a canned goods broker, testified that he sold for Nelson and Willey a large part of the goods canned by Willey in the summer of 1897, and that the goods were not on condition. The plaintiff then closed his case, and the defendants moved to strike out the agreement of April 8, 1897, and all testimony of Nelson in reference to the agreement, and to the purchase of goods and the advance of money thereunder. The court granted this motion, and the first exception was taken to this ruling. The defendants then offered the following prayer: "The defendant prays the court to instruct the jury that under the pleadings in this case the plaintiff has offered no evidence legally sufficient to entitle him to recover, and their verdict must be for the defendant"—which the court granted, and the second exception was taken to this ruling.

It was not distinctly stated, either at the argument or in the briefs, upon what ground the court struck out the agreement of April 8, 1897, and the testimony of Nelson in reference to the money advanced and the goods furnished thereunder, but we infer from the appellees' brief that it was upon the view that the bond did not refer in express terms to the agreement so as to identify it, and that parol testimony was not admissible to supply

the connection. But we cannot agree with this view. Where the parties have put their contract in writing, it is true, as stated in Taylor's Law of Evidence, § 1026, that "the entire contract must be collected from the writings, verbal testimony not being admissible to supply any defects or omissions in the written evidence." But it is also true, as stated in the same section, that "it will suffice if the contract can be plainly made out in all its terms from any writings of the party or even from his correspondence. Nay, a signed letter will be sufficient, though it does not contain in itself any one of the terms of the agreement, if it distinctly refers to and recognizes any writing which does contain them all, for in such case the well-known maxim of the law '*Verba illata inesse videntur*,' will be held to apply."

In *Cave v. Hastings*, L. R. 7 Q. B. Div. 128, the court said: "The only document in this case that was signed by the defendant was the letter of the 11th of February, which does not in itself contain the terms of the agreement. Now, I adopt the statement of the law on this subject contained in *Dobell v. Hutchinson*, 3 A. & E. 355. Lord Denman, C. J., there says: 'The cases on this subject are not at first sight uniform, but on examination it will be found that they establish this principle: that, when a contract in writing or note exists which binds one party, any subsequent note in writing signed by the other is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them.' The letter in this case refers to 'our arrangement.' It was argued that that might refer to some other and different parol arrangement; but it seems to us that this reference to the former document is sufficient, in accordance with the principle laid down in *Ridgway v. Wharton*, 6 H. L. C. 238. In that case, instructions were referred to, and it was held that parol evidence might be given to identify the instructions referred to with certain instructions in writing."

The principle applied in *Ridgway v. Wharton* is very clearly stated in Taylor's Law of Evidence, § 1024, where it is stated that, if one agrees in writing to liquidate the debt of another, the memorandum need not specify the amount of the debt. The author says: "If it be contended that the memorandum is insufficient, as two or more debts may be owing from a third party, and it does not appear to which of these the writing applies, the answer is clear, namely, that the court will not presume the existence of more debts than one, but will call upon the party impeaching the document to furnish proof of that fact."

Here the bond does not in express terms refer to the agreement by its date, or otherwise in itself identify it, but it does expressly refer to an agreement by Nelson to make certain advances of money to him in

connection with the business of canning, in which he was about to engage, and to pay, if necessary, for certain goods to be used by him in connection with said business. An agreement in writing, corresponding in its terms with the recital of the bond, and bearing even date therewith, was offered in evidence, and upon the principle stated in Taylor's Law of Evidence, and in *Cave v. Hastings*, supra, it should have been admitted. The court will not presume the existence of more than one agreement, but will call on defendant to furnish proof that there was some other agreement to which the bond did or might refer. And upon the same authority parol testimony was properly admissible here to identify the agreement referred to in the bond as the same offered in evidence.

These principles were recognized and applied in *Owings v. Emery and Gault*, 7 Gill, 410. In that case, Owings, on July 11, 1840, leased to Emery and Gault his Fox Rock Quarry for six years, to commence November 10, 1840; the lessees to get out yearly 40,000 cubic feet of stone at $1\frac{1}{4}$ cents per foot, or pay for that amount in quarterly installments. On July 5th, before the execution of the lease, the lessor gave the lessees a receipt stating that he had received from them \$868, "to be returned to them in granite stone to the amount of 169,300 feet between Nov. 1st, 1840, and Nov. 10th, 1846, from my quarry, known by the name of Fox Rock Quarry." The court held that the two papers must be taken together as one contract, must be construed with mutual reference to each other, and that the amount mentioned in the receipt must be considered as advanced on account of rents to accrue under the lease; saying: "The receipt is open to no rational interpretation unless it can be made to refer to the subsequent lease." In this case we may say with equal confidence that the bond is open to no rational interpretation unless it can be made to refer to the agreement of even date, corresponding in its essential stipulations with the recitals of the bond.

The case of *Marvin v. Brewer*, 30 Md. 257, is a very analogous case, though there the bond referred to the agreement by its date, without, however, containing in itself any one of the terms of the agreement, and without even stating the amount secured by the bond, which omission the court said was supplied by reference to the agreement, and held that "the two papers constituted in fact one executed and consummated agreement," and that they "effectuated the obvious intention of the parties." The reference in this bond to the essential stipulations of the agreement, in connection with the fact that the two papers were concurrently executed, are quite as satisfactory identification of the agreement as was the express reference to the date of the agreement in *Marvin v. Brewer*.

For these reasons we are of opinion that the court erred in striking out the agreement of April 8, 1897, and the testimony of Nelson in reference thereto, and it necessarily follows that there was error in granting the defendants' prayer.

Judgment reversed, with costs to the appellant above and below, and new trial awarded.

(97 Md. 443)

WEIGAND v. FRATERNITIES ACCIDENT ORDER.

(Court of Appeals of Maryland. June 30, 1903.)

BENEFICIAL ASSOCIATIONS — CONTRACT — RIGHTS OF BENEFICIARY — PROVISIONS FOR DETERMINATION — APPEAL TO SUPREME BODY — FAILURE TO APPEAL — SUIT.

1. A contract between a beneficial association and a member was made with reference to the by-laws and regulations of the association. One of the by-laws provided that any beneficiary considering himself aggrieved by the decision of the grand executive committee in respect to a claim for benefits must appeal to the grand council. *Held*, that a beneficiary who failed to appeal as provided for in the by-laws could not maintain an action at law on her claim.

Appeal from Court of Common Pleas; Henry D. Harlan, Judge.

Action by Barbara Weigand against the Fraternities Accident Order. From a judgment for defendant, complainant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, and SCHEMUCKER, JJ.

William S. Bryan, Jr., for appellant. R. B. Tippet and Wm. S. Bansemer, for appellee.

BRISCOE, J. This is an action at law brought in the court of common pleas of Baltimore City, by the appellant, the widow of Philip Weigand, of Baltimore City, against the appellee, a corporation, conducting a fraternal insurance business for the benefit of its members. It appears that the appellee on the 28th day of January, 1900, issued a certificate of membership to Philip Weigand, payable to the appellant as beneficiary, for a sum not exceeding \$3,000, in accordance with and under the provisions of the laws governing the order. Philip Weigand died on the 9th of June, 1900, and subsequently the appellant, the beneficiary, filed her claim for benefits with the order, which was approved by the grand executive committee, for the sum of \$150. The appellant declined to accept the amount as thus allowed, and on the 5th of December, 1901, instituted this suit to recover the sum of \$3,000, the amount of the insurance stated in the policy. To the declaration the defendant pleaded, first, never indebted as alleged; second, never promised as alleged; and, third, a special plea. The first and second pleas were withdrawn, and a demurrer was interposed to

¶ 1. See *Beneficial Associations*, vol. 8, Cent. Dig. § 47; *Insurance*, vol. 28, Cent. Dig. § 1987.

the third, and, as this plea contains the defense relied upon by the company, and presents the material question in the case, it will be set out here. The plea is, in effect, as stated by the appellee in its brief, as follows: "(1) The appellee is a social and beneficial order having a lodge system, and conducting itself for the sole benefit of its members, with no attempt at profit making. Its funds are raised by mutual and voluntary assessments and contributions. (2) The contract between the appellant's husband and the appellee is embodied in his application for membership, the certificate of membership, and the laws of the defendant order; the latter of which are declared to be binding upon the applicant and his beneficiary. (3) Under said laws the grand executive committee of the order was required to pass upon and decide whether payment should be made of the claim of the appellant. (4) That under section 32 of the laws of the appellee any beneficiary who considers the decision of said grand executive committee against him in respect to a claim for benefits is unjust, and not in accordance with the order, is required to appeal in the following manner; that is, 'from the decision of the grand executive committee to the grand council, within sixty days after the decision is rendered.' (5) The appellant made application for the payment to her of benefits in the amount of three thousand dollars (\$3,000). The grand executive committee, acting upon the application, came to a decision (upon the evidence offered to prove that the deceased died by such accidental means as was within the intent and meaning of the laws of the order) that, under the laws of the order, the appellant was entitled to one hundred and fifty dollars (\$150), and no more. (6) The decision of the grand executive committee was immediately made known to the appellant, and she was further notified that, if she was not satisfied with the decision, she should appeal as prescribed in section 32 of the laws of the order. The appellant refused to appeal, which, in effect, was a refusal to exhaust her remedies before the tribunals of the defendant order." The demurrer to this plea was overruled, and, judgment being entered against the defendant for the amount awarded, the plaintiff has appealed.

The legal question raised on the demurrer, and the one submitted for our decision, is whether a beneficiary in a certificate of fraternal insurance, to whom the policy is payable, is precluded from bringing a suit in a court of law to recover her claim by reason of the existence of the laws of the order, which require any beneficiary who considers the decision of the grand executive committee as unjust, and not in accordance with the laws of the order, to appeal from the decision of the grand executive committee to the grand council within 60 days after the decision is rendered. Now, whatever may be the decisions of the courts elsewhere—

and it may be conceded they are not in accord—the question here raised has been settled in this state by the decisions of this court in *Anacosta Tribe v. Murback*, 13 Md. 94, 71 Am. Dec. 625, and *Osceola Tribe v. Schmidt*, 57 Md. 98. These cases were relied upon and adopted in the recent case of *Triesler v. Wilson*, 89 Md. 177, 42 Atl. 926, and it is there said that in private beneficial institutions, operating on the members only, they may, for reasons of policy and convenience affecting their welfare, and perhaps their existence, adopt laws for their government, to be administered by themselves, to which every person who joins them assents, and which require the surrender of no right that a man may not waive; and that a by-law, in the absence of fraud, would be held conclusive on the member. In the case at bar it will be seen that "the laws of the order as then in force and to be hereafter enacted by the grand council" were specifically made a part of the contract of assurance, and the fund was payable in accordance with and under the laws of the order as stated in the certificate of membership. The law of this association provided an appeal by the beneficiary from the decision of the grand executive committee to the grand council within 60 days after the decision was rendered against her, and, the rule being a valid and reasonable one, the appellant was clearly bound by it.

But it is urged upon the part of the appellant that the rules and regulations of beneficial and voluntary associations regulating appeals to its tribunals are only valid in so far as they relate to questions of doctrine and the internal management of the order, and have no reference to property rights. We do not so construe the cases upon this subject. In *Vandyke's Case*, 2 Whart. 312, 30 Am. Dec. 263, the Supreme Court of Pennsylvania held that, where a beneficial society decided under its by-laws that a member was not entitled to benefits, the decision was conclusive upon him. This case was cited with approval by this court in *Osceola Tribe v. Schmidt*, 57 Md. 98. Applying the principle settled by these cases to the one now before us, there seems to be no valid reason why the rule should not apply to a beneficiary as well as to the member insured. The contract of membership is made with reference to the by-laws and regulations of the association, and these are treated as part of the contract. Section 32 of the laws of the order provides that it shall apply to any member, beneficiary, or other claimant, and, as these by-laws constitute a part of the contract between the company and the insured, and as the benefit fund is made payable to the beneficiary "in accordance with and under the provisions of the laws governing the order," the appellant must be held subject to them.

Finding no error in the rulings of the court, the judgment will be affirmed. Judgment affirmed, with costs.

(97 Md. 341)

CAMPBELL v. BALTIMORE & O. R. CO.

(Court of Appeals of Maryland. June 29, 1903.)

MALICIOUS PROSECUTION—EVIDENCE—CROSS-EXAMINATION—MALICE—PROBABLE CAUSE—EVIDENCE.

1. Where, in an action for malicious prosecution, plaintiff had called the prosecutor in order to show the arrest, circumstances, etc., it was proper to admit him to be asked whether he had any malice.

2. In an action for malicious prosecution the existence of the facts relied on to constitute the want of probable cause is a question for the jury, but what will amount to the want of probable cause is for the court.

3. In an action for malicious prosecution the actual guilt or innocence of the plaintiff is immaterial, for, even if innocent, that fact is without value to show want of probable cause, provided there is no legally sufficient evidence from which it can be rationally inferred that the arrest was made without reasonable cause.

4. In an action for malicious prosecution consisting of the arrest of plaintiff, a boy, for being unlawfully on the cars of a railroad company, evidence held not to show that the arrest of plaintiff was made without probable cause.

Appeal from Court of Common Pleas; Henry D. Harlan, Judge.

Action by Henry Campbell, by his next friend, Rosa Campbell, against the Baltimore & Ohio Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, and SCHMUCKER, JJ.

Ward P. Littig, for appellant. Duncan K. Brent, for appellee.

FOWLER, J. This appeal grows out of a suit for malicious prosecution. It appears from the evidence that Henry Campbell, a boy about 17 years old, was arrested on a warrant sworn out by Daniel Scully, a special officer of the Baltimore & Ohio Railroad Company, charging him with being unlawfully on the cars of that company, in violation of Act 1892, p. 543, c. 397. He was committed to jail in default of bail, was subsequently released on bail, tried in the criminal court of Baltimore City before a jury, and acquitted; whereupon this suit was brought against the railroad company in the court of common pleas to recover damages for malicious prosecution and false arrest. At the instance of the defendant the learned judge below took the case from the jury, and instructed them that no legally sufficient evidence of want of probable cause had been offered by the plaintiff. This instruction, of course, resulted in a verdict and judgment in favor of the defendant, and the plaintiff has appealed.

During the trial four exceptions were taken by the plaintiff; two of them relating to the rulings of the court upon the admissibil-

ity of testimony, one to the granting of the defendant's prayer, and the remaining one to the overruling of his special exception to that prayer. This exception is based upon the objection that the prayer submits questions of law to the jury as to what is probable cause, what is malicious prosecution, and what is false arrest. We will briefly consider these exceptions in the order named.

1. During the cross-examination of the witness Scully, who caused the arrest of the plaintiff, and who, it is conceded for the purpose of this case, was acting on behalf of the defendant, was asked whether he had any malice or reason of that kind for arresting the plaintiff. The objection of the plaintiff to the asking of this question was overruled by the court. The propriety of this ruling constitutes the first exception. It is apparent from the connection in which this question was asked, as well as from the answer of the witness, that the word "malice" was here used in its ordinary and colloquial meaning, and not in its legal sense, as defined by the law relating to actions for malicious prosecutions and false arrest. In the former sense it is called "malice in fact" or "express malice," and its existence may be established by proof of actual bad feeling, personal hatred, or ill will on the part of the defendant towards the plaintiff. But malice, in its legal sense, as used in actions like this, "is not to be considered in the sense of spite or hatred against an individual, but of malus animus, and as denoting that the party is actuated by improper and indirect motives" (Johns v. Marsh, 52 Md. 323); or as defined by Newell on Mal. Pros. c. 71, § 7, p. 239, it means "a general wickedness of intent; a depraved inclination to do harm, or to disregard the rights or safety of mankind generally." It is said (Poe, Pl. § 194) that malice in fact, in contradistinction to legal malice, may always be shown by proof of actual bad feeling and personal hatred; and therefore when the plaintiff called the witness Scully to prove that he arrested the plaintiff, and the circumstances under which the arrest was made, it was clearly competent for the defendant to show that he was not actuated by any feeling of ill will, in order to exclude an inference of malice in fact. The answer to the question demonstrates that the witness understood the question as it was explained to him at the time it was asked as referring to actual malice or ill will, for he said he had no malice, because he did not know the plaintiff or any of the family. We find no reversible error in this ruling.

2. After the witness had answered the question just referred to, he was asked, in continuing the cross-examination, when he swore out the warrant, and what were the facts which led him to do it. The plaintiff's objection to this question was also overruled. We think there can be no doubt the question was proper. It will be remembered that the witness, under cross-examination, had been

¶ 2. See Malicious Prosecution, vol. 33, Cent. Dig. §§ 25, 135.

called by the plaintiff to prove that he, at the instance of the defendant, and as its agent and officer, had made the arrest in accordance with certain printed general instructions. He was not asked, however, nor did he state on his examination in chief, the facts which induced him to make the arrest. These facts undoubtedly form a part, and a most important part, of the transaction which was being inquired into, and had a direct relation to one of the issues at least, namely, whether, under all the circumstances, the arrest was justifiable; in other words, whether the defendant or its officer had probable cause for making the arrest. It would have been most unfair to allow the plaintiff's witness to testify to the jury that the arrest was made, and prevent him from giving in evidence most important and necessary facts to show that, so far from being illegal, the conduct of the officer was entirely justifiable. If the cross-examination of a witness could be limited and confined as here proposed by the plaintiff, this important right would cease—and very properly so—to be regarded as one of the principal and most efficacious tests which the law has devised for the discovery of truth. 1 Greenleaf on Ev. § 446.

3. The third exception relates to the granting of the defendant's prayer taking the case from the jury on the ground that there was no legally sufficient evidence of want of probable cause. In the first place, what is the well-settled law in regard to this question? The want of probable cause, it has often been said by this and many other courts, is a mixed question of law and fact. As to the existence of the facts relied on to constitute the want of probable cause, that is a question for the jury, but what will amount to the want of probable cause in any case is a question of law for the court. *Boyd v. Cross*, 35 Md. 197. In the opinion of this court in the case just cited it is said, "The jury, in our practice, are always instructed hypothetically as to what constitutes probable cause, or the want of it, leaving it to them to find the facts embraced in the hypothesis." But in the case before us the controlling question is whether the testimony discloses any facts or circumstances from which it could be rationally inferred that Scully acted without reasonable cause to believe that the plaintiff was guilty of the violation of law for which he was arrested. *Bowen v. Tascoe*, 84 Md. 497, 38 Atl. 436. This is a question of law for the court, and in considering it we must remember that the actual guilt or innocence of the plaintiff is immaterial, for, even if it be conceded that he was innocent, yet that fact is without value to show want of probable cause, provided there is no legally sufficient evidence from which it can be rationally inferred that the arrest was made without reasonable cause. What, then, are the facts upon which the plaintiff relies to establish a want of probable cause? In the first

place, there is proof of acquittal, and that in point of fact the plaintiff was not guilty of the charge on which he was arrested. But these facts were, of course, unknown to the defendant and its officer. The latter testified that, as he and a companion officer thought, they saw two persons or boys standing on the coal cars of the defendant. They retreated, and approached in another direction, in order to catch the boys. When they arrived at the place near where the boys were, they saw them. One of them was standing there with a coal bucket in his hand, filled with coal, and the other one (Henry Campbell, the plaintiff) was standing within four or five feet of the other boy, whose name was Geldt. Geldt was arrested, but the plaintiff escaped by running away. Geldt told the officers that the plaintiff was the boy who had been on the car with him, and gave information as to his own and the plaintiff's residence. This information as to residence, upon careful inquiry, the officers found to be correct. Upon this state of case, the arrest was made, and, in our opinion, after a very careful examination of the testimony, we have not found any fact or circumstance from which it could be rationally inferred that Scully made the arrest without reasonable cause to believe that Campbell was guilty of the charge on which he was arrested. The officer relied, and, we think, under the circumstances, he had a right to rely, upon the information given to him by the plaintiff's companion. In *Boyd v. Cross*, supra, quoting from the opinion of Justice Washington in *Munns v. De Nemours*, 3 Wash. C. C. 31, Fed. Cas. No. 9,928, it is said: "Courts and juries, and the law officers whose duty it is to conduct the prosecution of public offenders, must in most instances, if not in all, proceed upon the information of individuals; and if these actions [for malicious prosecution] are too much encouraged—if the informer acts upon his own responsibility, and is bound to make good his charge at all events, under the penalty of responding in damages to the accused—few will be found bold enough, at so great a risk, to endeavor to promote the public good. The informer can seldom have a full view of the whole ground, and must expect to be frequently disappointed by evidence which the accused only can furnish. Even if he be possessed of the whole evidence, he may err in judgment; and in many instances a jury may acquit, where, to his mind, the proofs of guilt were complete." These remarks apply with equal force to officers of the law whose duty it is to make the arrest.

4. But finally it was contended that the granted prayer is bad in form, because it submits questions of law to the jury. It does not, however, submit anything to the jury—either questions of law or of fact. They were told that the evidence offered by the plaintiff to prove an essential part of his case was not legally sufficient for that purpose, and that

therefore their verdict must be for the defendant. This, we have already said, was, under the facts of this case, a proper instruction.

Judgment affirmed, with costs.

(205 Pa. 558)

WEBER v. ASCHBACKER.

(Supreme Court of Pennsylvania. May 4, 1903.)

FRAUDULENT CONVEYANCE—QUESTION OF GOOD FAITH.

1. Two months after verdict against him, one who had purchased real estate pending the trial, and taken title in his wife's name, with his wife conveyed the land to a third person. Plaintiff brought ejectment against the grantee after purchasing the property at sheriff's sale as that of defendant. There was evidence that the property was taken by defendant in the name of his wife in order that he might not lose it if anything happened to him, and that the purchaser and his wife conveyed it to defendant without consideration. *Held*, that the question of the good faith of the transaction was for the jury.

Appeal from Court of Common Pleas, Philadelphia County; Beltler, Judge.

Action by Harriet Weber, administrator of Elizabeth Dawes Bewley, against Anna Maria Aschbacher. From a judgment for defendant, plaintiff appeals. Reversed.

Errors assigned were in the following form: "(1) The court below erred in ruling out plaintiff's evidence showing the chain of circumstances constituting the fraud upon plaintiff's rights as creditor of Aman, and showing that both Aschbacher and wife had knowledge that the conveyance to defendant was a fraudulent conveyance, designed to hinder and delay plaintiff in the collection of her judgment against Aman. (2) The court erred in refusing to allow cross-examination of defendant's witness upon material points testified to in his examination in chief. (3) The court erred in affirming defendant's point and giving binding instructions to the jury. The point of defendant affirmed was: 'Under all the evidence in this case, your verdict must be for the defendant. Decision: I affirm defendant's point, and direct the jury to find for the defendant.' (4) The court erred in not submitting the facts of the case to the jury."

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Carrie B. Kilgore, for appellant. Charles Knittel, for appellee.

BROWN, J. In 1889 Elizabeth Dawes Bewley, now deceased, who was the plaintiff below, was a creditor of Anton Aman. She brought suit against him in court of common pleas No. 1 of Philadelphia county to December term, 1889, No. 203, and in April, 1891, recovered a verdict against him. She revived the judgment entered on the verdict, and in the spring of 1899 there was due on it the sum of \$2,150.10, when she issued exe-

cution, and had the sheriff sell the premises in controversy as the property of Aman, alleging that the title of Anna Maria Aschbacher, formerly Mary Iffrig, and so named in the testimony, was that of a fraudulent grantee, who had taken the title from Aman and his wife for the purpose of aiding him in his effort to delay, hinder, and defraud her, his judgment creditor. Four assignments of error were filed when this case was argued. The first and second, in general terms, allege error, and, being in violation of our rule, cannot be considered. After argument additional assignments were filed, but we will not pass upon them. Some of them may possess merit, but there was no reason for not filing them in time and inserting them in the original paper book. We will consider only the third and fourth assignments originally filed, which are substantially one, and complain of the court's affirmation of defendant's point that, under the evidence, the verdict must be in her favor. The plaintiff offered testimony to show that Anton Aman had been the purchaser of the lot, but that the title was put in the name of his wife that he might not lose it "if anything happened" to him. The deed to the wife is dated October 17, 1890. At the time the suit of Mrs. Bewley to recover her claim against Aman was pending in the common pleas, upon which, six months later, she recovered her verdict. There was, therefore, sufficient to justify the contention of the plaintiff below that the property really belonged to Anton Aman, and that the conveyance to his wife was for the purpose of delaying, hindering, and defrauding her. Within two months from the time the verdict was obtained against him for his indebtedness to Mrs. Bewley, Aman and his wife conveyed the lot to Mary Iffrig. The testimony of Mrs. Aman is that they did not receive a penny from Mary Iffrig for the conveyance of the property, and that she agreed she would give it back again—"sign it back to our name." The learned trial judge, during the progress of the trial, said to counsel for plaintiff that it would be proper to prove that the property was conveyed by Aman to Iffrig with the understanding on the latter's part "that she should hold it to cover the property from Aman's debt." Whether she did so hold it or not—whether she took title to it for such a purpose and so held it—was the one question for the jury's consideration. But it rarely, if ever, happens that the victim of a fraud, such as is charged here, can prove by a direct admission of the fraudulent grantee what the purpose of the conveyance was, for, as in all cases of a conspiracy to do a wrong, the parties to it try to conceal their iniquity; and only by considering all the circumstances in connection with a conveyance alleged to be fraudulent can it be determined what the real intention of the parties to it was.

As unsatisfactory as the presentation of this case has been to us, we are of one mind that, under the facts developed on the trial, the learned judge below should have submitted to the jury the question of Mary Iffrig's good faith. There was sufficient to justify a finding that she was not an honest purchaser, but a party to a scheme to delay, hinder, and defraud the plaintiff.

Judgment reversed, and a venire facias de novo awarded.

(205 Pa. 552)

KNIGHT v. SOMERTON HILLS CEMETERY.

Supreme Court of Pennsylvania. May 4, 1903.)

ASSUMPSIT—AFFIDAVIT OF DEFENSE.

1. Plaintiff sued a corporation to recover moneys alleged to have been loaned. Defendant filed an affidavit of defense, averring that the moneys claimed to have been loaned to the defendant were not the moneys of plaintiff, but were the proceeds of certificates placed in the hands of plaintiff by persons named, in trust to sell and apply the proceeds to the purpose of the defendant. *Held* a sufficient affidavit of defense.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Samuel I. Knight against the Somerton Hills Cemetery to recover on a loan. From an order discharging a rule for judgment for want of an affidavit of defense, plaintiff appeals. Affirmed.

The defendant's affidavit of defense was as follows: "The moneys in the plaintiff's statement of claim, mentioned as having been loaned by the said plaintiff to the said defendant, were not the moneys of the plaintiff, but were the proceeds of certificates placed in the hands of said plaintiff by Reese Carpenter and others, in trust to sell and apply the proceeds to the purposes of the defendant. He was not the owner, but was acting in the matter as the agent of the said Carpenter, and for convenience the certificates were placed in his name. The receipts, of which copies are annexed, were executed by him to himself, and the seal of the company affixed without the authority of the board, and without the knowledge and authority of any officer of the company. Some months before suit was brought, his authority to act in the matter was revoked, and he no longer has any interest in the claim which he now makes, nor right nor authority to represent the same, and the defendant is not indebted to him in any amount whatever."

The supplemental affidavit of defense was as follows: "Joseph Ogden, being duly sworn according to law, doth depose and say that in the original affidavit of defense deponent stated that the moneys claimed to have been loaned by the plaintiff to the defendant company were not his own, but were the proceeds of certain certificates placed in his hands by Reese Carpenter and others. In

the supplemental brief submitted on behalf of the plaintiff it is alleged that the affidavit did not disclose the names of the principals, nor aver that the real owner has made demand for payment or had threatened suit. In order to prevent any misapprehension, deponent asks leave to say further that he became vice president of the defendant company in January, 1899, and from that time until about November 1, 1901, the plaintiff never mentioned the existence of any such claim as he now sets up. About November 1, 1901, after he had left the office, the plaintiff first stated to the deponent that he had such a claim. Deponent expressed surprise, went to New York and made inquiry upon the subject, and was told by Reese Carpenter that he had placed certain certificates of interest in the company in the hands of Knight for sale, as his agent and trustee, with instructions to apply the proceeds to the uses of the company. It had not been determined in what way the company would be asked to recognize these advances, nor had there been any agreement as to the compensation he was to allow to the plaintiff. Reese Carpenter had been mainly instrumental in starting the company, and his relations to it and the other parties in interest were such that he did not wish to enforce repayment of the advances in such way as to endanger the operations of the company, or to bring suit against it. Reese Carpenter further stated to deponent that the plaintiff's authority to act for him in the matter had been revoked, and his agency ended. Deponent endeavored to secure interviews between the plaintiff and Reese Carpenter, with a view to adjustment, but the plaintiff refused to go to New York for the purpose. Deponent therefore avers that Reese Carpenter was the owner of the certificates of interest placed in the hands of the plaintiff for sale; that the plaintiff had no interest therein except to a reasonable compensation, for which he had been willing to trust to Carpenter, without having any express agreement as to the amount; that the plaintiff's agency had been revoked before this suit was brought; and that Carpenter told these facts to the deponent, but had then, and has now, no purpose to enforce repayment by suit, as by so doing he would impair his other interests in the company and prejudice those to whom the plaintiff, as his agent, had sold and delivered the certificates, for the proceeds of which he now brings suit."

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Joseph de F. Junkin, for appellant. Richard C. Dale and Samuel Dickson, for appellee.

PER CURIAM. The affidavit of defense avers explicitly and positively that "the moneys in the plaintiff's statement of claim mentioned as having been loaned by the said

plaintiff to the said defendant were not the moneys of the plaintiff, but were the proceeds of certificates placed in the hands of said plaintiff by Reese Carpenter and others in trust to sell and apply the proceeds to the purposes of the defendant." It is true that the affidavit is weakened somewhat by the concluding averment that deponent "is informed and believes and expects to prove" the said matters, which was unnecessary where the first part was stated positively as of his own knowledge. The supplemental affidavit enlarges the recital of facts, and perhaps gives ground to infer that the whole story is not yet before the court. But in the face of the positive averment above quoted that the moneys sued for by plaintiff were not his own, but were paid over by him as agent or trustee for the benefit of defendant, the court could not safely give judgment. The case is one for fuller development of the facts before a jury.

Judgment affirmed.

(305 Pa. 548)

**In re FIRST CHURCH OF CHRIST,
SCIENTIST.**

(Supreme Court of Pennsylvania. May 4,
1903.)

**CORPORATIONS—APPLICATION FOR CHARTER
—CHRISTIAN SCIENCE.**

1. Petitioners applied for a charter to establish a place of public worship to preach the doctrine as found in the Bible and the Christian Science text-book of Mary B. G. Eddy. The evidence showed that the purpose was not merely to establish a form of worship, but to educate persons for treatment of disease by inaudible prayer, and that nothing was necessary to qualify as such a teacher, except to study the system taught in the book of Mrs. Eddy, without any knowledge of anatomy, physiology, or hygiene; the theory of the system being that all diseases, even of a contagious character, were mere beliefs, and not real facts. *Held*, that the application for the charter was properly denied, as opposed to the general policy of the state in reference to the treatment and existence of diseases.

Appeal from Court of Common Pleas, Philadelphia County.

In the matter of the application of the First Church of Christ, Scientist, for a charter. From a decree dismissing exceptions to the master's report, Charles J. Moore and others appeal. Affirmed.

The following is the master's report:

"The applicants are members of a congregation, composed of about 180 persons, who have been worshipping in the church edifice on Chestnut street, above Eighteenth street. They have been a congregation for about 10 years, and desire to be incorporated as a church under the laws of the state of Pennsylvania. The purposes for which they desire to be incorporated are stated in clause I of their application, as follows: 'To establish and maintain a place for the support of public worship and to preach the gospel according to the doctrines of Christ Jesus as found

in the Bible and the Christian Science text-book, 'Science and Health, with Key to the Scriptures,' by Mary Baker G. Eddy.' The witnesses uniformly agree that the Christian Science Church 'differs from other Christian beliefs in endeavoring to practice the entire command of the Master, who founded the Christian religion, in which he said: 'Preach the gospel and heal the sick.' The ordinary church attempts merely to preach the gospel. The Christian Science Church preaches the gospel and heals the sick.' It appears that the method of healing the sick is simply and solely by inaudible prayer. The book of Mrs. Eddy, entitled, 'Science and Health, with Key to the Scriptures,' shows that the church is not only an organization to inculcate a creed or to establish a form of worship, but also to accomplish the cure of disease. Not only does the church preach the gospel as found in the Bible and in the book of Mrs. Eddy, but it also, through its healers, attempts the cure of disease. In fact, the longest chapter in the book is entitled 'Christian Science Practice,' and contains instructions in detail as to the mode of treatment. The fundamental principle of the teaching is that what is termed 'disease' has no real existence. The doctrine is set forth on page 188 as follows: 'What is termed "disease" does not exist;' and on page 184 as follows: 'The so-called laws of health are simply laws of mental belief. The premises being erroneous, the conclusions are wrong. Truth makes no laws to regulate sickness, sin, or death; for these are unknown to the truth, and should not be recognized by man as reality.' Again, on pages 393, 394, the doctrine is taught that man is never sick, that his belief that he is is the disease and the cause of it, and that the universal and perfect remedy is to understand that his sickness is not real; and again, on page 395: 'When divine science overcomes faith in materia medica, and faith in God destroys faith in drugs and all material methods of healing, sin, sickness, and death will disappear;' and again, on page 400: 'When disease is once destroyed in mind, the fear of it is gone, and therefore it is thoroughly cured;' and again, on page 176: 'Christian Science heals organic disease, as well as functional. It finds that decided types of acute disease are quite as ready to yield to truth as the less distinct types and chronic forms of disease. It handles the most malignant contagion with perfect assurance.' The chapter on 'Christian Science Practice' contains instructions for the treatment and cure of disease upon the idea that disease is simply an idea of the mind, as set forth in the above extracts from the book. The healers who engage in the cure of the disease are constituted by the readers at the different churches, and in fact, according to the book, any of its students can acquire the power to heal and cure disease in the mode therein prescribed. It is the common, but not universal, practice for these healers

to receive a compensation for their services. As I have already said, their services chiefly consist in inaudible prayer, and either in the presence or far away from the patient. The facts are substantially the same as those passed upon by Judge Pennypacker in court of common pleas No. 2, in a similar action, although they have been not testified to in such great detail as appeared in the report of that case, from which it can be said, as he said there: 'It is quite clear, therefore, that what is proposed is much more than a church, since there is besides to be established a system for the treatment of disease, to be carried into effect by persons trained for the purpose, who may receive compensation for their services.' It seems clear to the master that the evidence and the teaching of Mrs. Eddy's book show that there is to be established, not only a place for worship, but also for the establishment of a system for the practice of the art of healing. Medicine has been defined to be 'the art of preventing, curing, or alleviating diseases, and remedying, as far as possible, the results of violence and accident.' The system taught by Mrs. Eddy's book certainly would come under this definition of the word 'medicine,' and it would seem that she herself conceded it; for, on page 463 of her book, she states the result of her work as follows: 'In founding an ethical and medical system, I have labored to expound divine principle, not to exalt personality.' The witnesses who testified before the master in this case are very clear that one of the prime purposes of their church, and the one that distinguishes it from the orthodox church, is that it attempts to heal the sick. It is impossible to conceive of the Christian Science Church, except as associated with the idea of healing or curing the sick."

The master recommended that the application should be refused, on the ground that it would be injurious to the community to incorporate a group of citizens for the purpose stated. On exceptions to the master's report, Arnold, P. J., filed an opinion refusing a charter, on the ground that the application was for a charter for an association for profit, organized to enforce the sale of Mrs. Eddy's books by its members. Subsequently Arnold, J., filed a supplemental opinion which was as follows:

"Objection having been made that we went outside of the record in our former opinion, attention is called to the fact that applications for charters are generally conducted ex parte; no opposition being made unless another association alleges that the applicants are infringing upon its corporate name. When an application for a charter is made, the court acts for the commonwealth, and should not permit the applicants, by withholding evidence of material facts, to obtain a charter for one purpose in the guise of another. The court should search for and obtain all the information necessary to a proper

knowledge of the purposes of the intended corporation, in order to enable the court to determine its power and its duty in the case before it. We appoint masters to assist us in these matters, but we are not confined to or bound by the evidence produced before them. Even if the court had power to charter this association, it should refuse to give its sanction to a body organized for the purpose for which this association has been established. The master has found that 'the witnesses uniformly agree that the Christian Science Church "differs from other Christian beliefs in endeavoring to practice the entire command of the Master, who founded the Christian religion, in which he said: 'Preach the gospel and heal the sick.' The ordinary church attempts merely to preach the gospel. The Christian Science Church preaches the gospel and heals the sick.'" It appears that the method of healing the sick is simply and solely by inaudible prayer.' The master also finds that 'the book of Mrs. Eddy, entitled "Science and Health, with Key to the Scriptures," shows that the church is not only an organization to inculcate a creed or to establish a form of worship, but also to accomplish the cure of disease. Not only does the church preach the gospel as found in the Bible and in the book of Mrs. Eddy, but it also, through its healers, attempts the cure of disease.' He also finds that 'the fundamental principle of the teaching is that what is termed "disease" has no real existence. The doctrine is set forth on page 188 as follows: "What is termed 'disease' does not exist;" and on page 184 as follows: "The so-called laws of health are simply laws of mental belief. * * * Truth makes no laws to regulate sickness, sin, or death; for these are unknown to truth, and should not be recognized by man as reality.'" Quoting from pages 393 and 394 of 'Science and Health,' the master finds that 'the doctrine is taught that man is never sick, that his belief that he is is the disease and the cause of it, and that the universal and perfect remedy is to understand that his sickness is not real.' From page 395 he quotes: 'When divine science overcomes faith in materia medica, and faith in God destroys faith in drugs and all material methods of healing, sin, sickness, and death will disappear.' And from page 400, 'When disease is once destroyed in mind, the fear of it is gone, and therefore it is thoroughly cured.' He also quotes from page 176 as follows: 'Christian Science heals organic disease, as well as functional. It finds that decided types of acute disease are quite as ready to yield to truth as the less distinct types and chronic forms of disease. It handles the most malignant contagion with perfect assurance.' These statements are palpable fallacies, and as long as they are merely inactive beliefs they may do no harm; but when they are put into practice they are pernicious and injurious to the community. When this prac-

tice is confined to the healers, no harm results to others; but when they apply it to children or persons so racked with pain that in their desperation they resort to any theory or practice which promises relief, such practice results in neglect of proper treatment and often in death. The master has found that 'the healers who engage in the cure of disease are constituted by the readers at the different churches, and in fact, according to the book, any of its students can acquire the power to heal and cure disease in the mode therein prescribed. It is the common, but not the universal, practice for these healers to receive a compensation for their services. As I [the master] have already said, their services chiefly consist in inaudible prayer either in the presence of or far away from the patient.' He also finds that 'the evidence and the teachings of Mrs. Eddy's book show that there is to be established, not only a place for worship, but also for the establishment of a system for the practice of the art of healing. * * * The witnesses who testified before the master in this case are very clear that one of the prime purposes of their church, and the one that distinguishes it from the orthodox church, is that it attempts to heal the sick. It is impossible to conceive of the Christian Science Church, except as associated with the idea of healing or curing the sick.' When persons who make a business of practicing the art of healing with or without medicine are not regular and registered physicians, they violate the law, which was intended to prevent the practice of medicine by nonqualified persons. It was for this reason that Judge Pennypacker, in the court of common pleas No. 2, refused a charter to an association of persons like those before us, and we agree with him. See 6 Pa. Dist. R. 745."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

James W. Laws, for appellants. John Weaver, for appellee.

POTTER, J. The appellants in this case are members of an unincorporated society, and desire to be incorporated as a church, under the laws of the state of Pennsylvania. Their application, as presented to the court below, sets forth that the purposes for which the said corporation is to be formed are to "establish and maintain a place for the support of public worship and to preach the gospel according to the doctrines of Christ Jesus as found in the Bible and the Christian Science text-book, 'Science and Health, with Key to the Scriptures,' by Mary Baker G. Eddy." The application was referred to Hon. Dimmer Beeber as master, who reported that an examination of Mrs. Eddy's book showed that the church which it was proposed to organize was not merely to inculcate a creed, or to establish a form of worship, but was also intended for the treatment and cure of

disease, through the healers which it is to train and constitute; that the method to be pursued by these healers in curing the sick is simply and solely by inaudible prayer, whether in the presence of the sick or at a distance being immaterial; that to qualify for the practice of healing disease according to this method nothing was necessary except the study of the system taught in Mrs. Eddy's book, no knowledge of anatomy, physiology, pathology, or hygiene being required, and the fundamental principle of the teaching of Mrs. Eddy being that what is termed "disease" has no real existence; that "sickness, sin, and death are unknown to truth, and should not be recognized by man as reality." According to the testimony she teaches that inflammation, tuberculosis, hemorrhage, and decomposition are beliefs, and not real facts. The master points out that this theory is directly opposed to the general spirit and purpose of the laws of Pennsylvania with regard to the public health and the treatment of disease, and that the quarantine and inspection laws, and the enactments designed to prevent contagion and infection, are all based upon the theory that disease is a reality and that it exists without reference to the condition of mind of its subject. The master reaches the conclusion that "it would be injurious to the community to incorporate a group of citizens who would teach the doctrine that there is no such thing as a contagious disease, or any disease, and practice the art of curing what are called 'contagious diseases' in the manner above described." He further refers to the established policy of the commonwealth, which, in the interest of the public good, requires certain qualifications in persons who presume to treat and cure disease, and he tersely adds: "What the good of the community requires under the law as it exists ought not to be imperilled by the incorporation of a group of citizens whose fundamental doctrine is that the public good requires no such thing." He therefore recommended that the application for the charter be refused. The court below did refuse to approve the charter, and filed a short opinion, basing the refusal upon the ground that the proposed incorporation was, in part, at least, for profit. Afterwards, in a supplemental opinion, he summarized and adopted the findings of the master, and refused his sanction to the charter upon the ground that the purpose disclosed was improper, and in violation of the law, which was intended to prevent the practice of medicine by nonqualified persons.

We are inclined to think that the evidence was not sufficient to support a finding that the corporation itself was to be one for profit. There was proof that the individual healers, who are constituted and sent out by the society, do receive compensation for their services; but this seems to be a personal recompense, with which the society has nothing to do. But the court below, in its

supplemental opinion, went beyond this question, and adopted in substance the conclusion of the master that the practice of the art of healing or curing disease in the manner set forth in Mrs. Eddy's book is injurious to the community, because it is opposed to the general policy of the law of Pennsylvania relative to the existence and treatment of disease. It was the duty of the court below to refuse the charter, if, in the exercise of sound legal discretion, he found its purpose, in whole or part, included anything injurious to the community. Can it be said that there was an abuse of discretion in the finding in this case? We are not to consider the matter from either a theological or metaphysical standpoint, but only in its practical aspects. It is not a question as to how far prayer for the recovery of the sick may be efficacious. The common faith of mankind relies, not only upon prayer, but upon the use of means which knowledge and experience have shown to be efficient; and when the results of this knowledge and experience have been crystallized into legislative enactments, declarative of what the good of the community requires in the treatment of disease, and of the qualifications of those who publicly deal with disease, anything in opposition thereto may fairly be taken as injurious to the community. Our laws recognize disease as a grim reality, to be met and grappled with as such. To secure the safety and protect the health of the public from the acts of incompetent persons, the law prescribes the qualifications of those who shall be allowed to attempt the cure or healing of disease. It is not for the purpose of compelling the use of any particular remedies, or of any remedies at all. It is only designed to secure competent service for those who desire to obtain medical attendance. In certain diseases the individual affected may be the only one to suffer for lack of proper attention; but in other types, of a contagious or infectious nature, they may be such as to endanger the whole community. And here it is the policy of the law to assume control, and require the use of the most effective known means to overcome and stamp out disease, which otherwise would become epidemic. In such cases, failure to treat, or an attempt to treat by those not possessing the lawful qualifications, are equally violative of the policy of the law. It may be said that the wisdom or the folly of depending upon the power of inaudible prayer alone, in the cure of disease, is for the parties who invoke such a remedy. But this is not wholly true; "for none of us liveth to himself, and no man dieth to himself," and the consequence of leaving disease to run unchecked in the community is so serious that sound public policy forbids it. Neither the law, nor reason, has any objection to the offering of prayer for the recovery of the sick. But in many cases both law and common sense re-

quire the use of other means which have been given to us for the healing of sickness and the cure of disease. There is ample room for the office of prayer, in seeking for the blessing of restored health, even when we have faithfully and conscientiously used all the means known to the science and art of medicine.

The findings of fact by the learned master, and his conclusions of law therefrom, and the opinion of the court below, in which they are summarized and approved, vindicate the action taken. Under the well-defined policy of the law of Pennsylvania, as at present existing, we are satisfied that there was no abuse of sound legal discretion in refusing the application for a charter.

The appeal is quashed, and the order refusing to approve the charter is affirmed.

(205 Pa. 535)

In re THOMPSON'S ESTATE.

(Supreme Court of Pennsylvania. May 4, 1903.)

LANDLORD AND TENANT—LEASE—OPTION TO RENEW.

1. A lease gave a tenant an option on written notice to renew, with a provision that if he did not renew he was to pay the landlord a certain sum at the end of his term. Before the end of the term the tenant transferred his business to his sons, but did not surrender the premises nor give notice of an intention to renew, nor pay the amount stipulated on failure to renew. *Held*, on refusal of the landlord to release the tenant or to accept the sons as tenants, the tenant would be liable for the rent as if the lease had been renewed.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of E. O. Thompson, deceased. Appeal by Elizabeth H. H. Thompson from a decree dismissing exceptions to adjudication. Affirmed.

The material portion of the adjudication was as follows: A claim for rent of premises No. 1338 Chestnut street, in the sum of \$7,110.76, of which \$402.45 was interest, was presented by Albert H. Mershon, trustee. It was founded upon a lease executed by decedent, and dating from September 1, 1896, for two years, with an option to the lessee to renew or extend the lease for a further period of three years. The lease was alleged to have been renewed, and the claim is for rent which accrued during the last seven months of the renewal period. A lease executed by the testator as lessee and dated July 20, 1895, to go into effect September, 1896, was produced, which provided that the lessee should have the above described option to extend the term, and in case he should not avail himself of the privilege should pay to the lessor the sum of \$1,500. It also provided for a further option to extend from September 1, 1901, but at an increased rental, and added: "The said option shall be exercised by the said Ethan O. Thomp-

son, by his giving written notice thereof to said Albert H. Mershon, trustee (the lessor), nine calendar months previous to the expiration" of the then current term. This lease was executed by Benjamin Thompson, as attorney in fact, for E. O. Thompson by virtue of a power of attorney attached to the instrument. On March 15, 1897, the decedent transferred his business to his sons Benjamin and E. O. Thompson, Jr. He gave no notice of an intention to terminate the lease, and he did not pay the sum of \$1,500 stipulated in the lease to be paid in case he did not exercise the option to continue. During the continuance of the term the lessor received a note dated November 27, 1898, and worded as follows: "Agreeable to our conversation we will accept a continuance of our lease. Yours truly, E. O. Thompson's Son, for E. O. Thompson." On the strength of that note the lease was renewed and rent was paid thereon until March 1, 1901. It was alleged that all dealings respecting this renewal were had with Benjamin Thompson. It was not denied, however, as, indeed, it could not be, that he acted in a representative character. He had a power of attorney from the original lessee to execute a lease in the name of the lessee. The power extended no further, and was exhausted when the attorney in fact signed the lease. The acceptance of this offer ostensibly made in decedent's name could not, of course, without notice to him, bind the decedent.

But there was evidence that he knew of the proposal and assented to it. Rejecting the testimony of the lessor, who was probably incompetent as a witness under the act, it was shown by the secretary of the Real Estate Trust Company that at the request of the decedent he prepared an assignment on or about March, 1900, of the lease in question, to E. O. Thompson's Sons, but that the lessor refused to accept such assignment, and that in consequence it was never executed. This was after the original term had expired, but its effect was to show that the decedent recognized his liability under the lease, because this action in seeking to assign would otherwise have been meaningless. It was also shown that the receipts for the rents during the occupancy of the new firm were made out in the name of the decedent as lessee, and that some of them, at least, were read by him. To the letter, which he wrote under date of November 13, 1899, asking that his sons might be accepted as tenants in his place, and that he might be released, the trustee replied that his sons had not been accepted as tenants. The decedent had made a similar request in April, 1897, when he transferred his business to his sons, and had been refused. Various letters and receipts were produced, which tended strongly to show the continuance of the original relation of the lessor and lessee between the decedent and claimant. Among them may be mentioned a letter dated April 3, 1900, from the trustee to

the decedent for rent due for March and unpaid, which inclosed a bill for the same against the decedent. This was followed by a receipt from the trustee to E. O. Thompson dated April 5, 1900, for the rent named in the letter. A similar letter, under date of August 17, 1900, addressed to decedent, demanded the rent due in the preceding month, and a receipt dated September 3, 1900, for the money made out in decedent's name, and also produced at the audit. The evidence taken as a whole, the auditing judge thinks, shows definitely enough that the decedent was never released as a tenant. The claim is allowed in the sum named, less \$418.20 as the cost of an elevator placed in the premises by decedent.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

C. Berkeley Taylor, Charles E. Patterson, and John G. Johnson, for appellant. Alex. Simpson, Jr., and Mershon & Graham, for appellee.

POTTER, J. The decedent, E. O. Thompson, rented certain premises from A. H. Mershon for two years from September 1, 1896, at \$10,000 per annum, with the right to extend the lease for three years from September 1, 1898, at \$11,500 per annum. In case the option to renew was exercised, written notice was to be given nine months previous to the expiration of the term. If the lease was not renewed, Thompson was to pay Mershon \$1,500 additional, upon September 1, 1898. The decedent transferred his business to his two sons on March 15, 1897. He gave no notice of an intention to terminate the lease, nor did he pay the \$1,500 which he was to pay in case the option to renew was not exercised. In April, 1897, he asked to have his sons accepted as tenants in his stead, but the appellee refused. Again, in November, 1899, he asked for a written release of himself as tenant of the premises, and the acceptance of his sons in his stead. The appellee replied, stating that there had been no acceptance of the sons as tenants in his place. The matter then apparently rested until March, 1900, when the decedent employed an attorney to secure his release, if possible; but he was not successful. The learned auditing judge of the orphans' court reviewed the evidence as a whole, and found as a fact that decedent was never released as a tenant, and he therefore allowed the claim for the balance of unpaid rent against the estate.

We agree with the conclusion of the court below thus reached. It is apparent that the decedent could not relieve himself of liability under the lease by merely assigning it to his sons. They must be accepted by the lessor as tenants in place of the lessee in order to discharge him, and the evidence falls short of showing any such acceptance. The persistent attempts of the decedent to

obtain his release are in themselves strong indications of his recognition of his continued liability.

The decree is affirmed, and the appeal is dismissed, at the cost of appellant.

(205 Pa. 561)

IN RE EYRE'S ESTATE.

(Supreme Court of Pennsylvania. May 4, 1903.)

DEED OF TRUST—CONSTRUCTION—CHILDREN—VESTED ESTATES.

1. A trust deed provided that a designated portion of the income should be paid to the settlor for life, and the remainder to his wife for her maintenance. On the death of the settlor the wife was to receive one-third of the income. The remaining two-thirds were to be paid to his children then living, and the issue of those who should be dead, in equal shares; the payments to continue until the death of the last survivor of the children, when the estate was to be divided. The deed further directed that, if the wife died during the lifetime of the settlor, then the whole of the surplus income should be paid to the children and their issue, as before provided. After the death of the wife surviving the settlor, the whole of the income was to be paid to the children and their issue. Distribution of the principal was provided for upon and immediately after the death of the last survivor of the said children of the said settlor. *Held*, that payments of the income to the surviving children and the issue of deceased children was to be continued until the death of the last survivor of the children.

Appeal from Court of Common Pleas, Philadelphia County.

In the matter of the estate of Joseph K. Eyre. From an order dismissing exceptions to report of trustees, Marie E. Eyre appeals. Affirmed.

Since the death of Charles Eyre, November 13, 1883, the trustees under the deed of trust made by his father, Joseph K. Eyre, on December 1, 1869, have been paying to the surviving brother and sisters of the former the entire income from the trust estate. Upon the filing of the account of the trustees, exception was taken thereto by the widow of Charles Eyre, on the ground that she is entitled to receive one-fiftieth of the net income of the estate during the period which has elapsed since the death of her husband. The matter is before us on a case stated. The question presented for decision is, simply, to whom was the income of the trust payable after the death of the settlor, his wife and son Charles?

The deed of trust, after providing for the active management of the estate and the payment of the expenses thereof, proceeds as follows: "Then out of said rents, issues, income and profits to pay unto him the said Joseph K. Eyre in equal quarterly payments, the annual sum of \$3,000, the first quarterly payment to be made on the first day of January, 1870, and quarterly thereafter, for and during the term of his natural life, for his own use and for his support and maintenance, and without any power on his part of

charge, anticipation, or alienation. * * * And upon the further trust, after making the payments aforesaid, including the said annual sum of \$3,000, to pay over the remaining net income of the trust estate unto the said Anna M. Eyre for and during the lifetime of the said Joseph K. Eyre, if she shall so long live, for her support and maintenance and for the support and maintenance of her children at her discretion, without power on her part of anticipation or alienation. And from and immediately after the death of the said Joseph K. Eyre if the said Anna M. Eyre shall be then living upon further trust to pay over one full equal third part of said rents, issues, income and profits of the said trust estate, after deducting the charges, taxes, expenses and commissions aforesaid, to the said Anna M. Eyre for and during her natural life and for her support and maintenance and without power on her part of anticipation or alienation as aforesaid. And to divide and pay over the remaining two thirds of said net rents, issues, income and profits to and among such of the children of the said Joseph K. Eyre as shall then be living and the issue of such of them as shall then be dead in equal shares, such issues taking and dividing nevertheless such share only as his, her or their parent or parents would have taken if living at the time of the death of the said Joseph K. Eyre, which payments to the said children and issue shall continue to be made until the death of the last survivor of the said children, when the estate is to be divided as hereinafter set forth. Provided, nevertheless, that if the said Anna M. Eyre shall die during the lifetime of the said Joseph K. Eyre, then the whole of the surplus income of the trust estate as aforesaid which may remain after the aforesaid deductions, including the said sum of \$3,000 annually to be paid to the said Joseph K. Eyre, shall be paid to the said children and issue in the proportions aforesaid. And in like manner upon the death of the said Anna M. Eyre, if she shall survive the said Joseph K. Eyre, the whole of the said net rents, issues, income and profits of the said trust estate shall be paid to the said children and their issue in the proportions aforesaid until the death of the last survivor of the said children of the said Joseph K. Eyre. And provided further that all such payments to the said children and issue of deceased children shall be made for their support and maintenance and without power on their part of anticipation and alienation and in such way and manner that the same shall not be subject to their debts, contracts or engagements, nor in the case of females to the debts, contracts or engagements of any husbands they may respectively have or take. And upon and immediately after the death of the last survivor of the said children of the said Joseph K. Eyre, upon the further trust to divide and partition the whole and

entire capital of the trust estate as it may then exist and be invested, after deducting all reasonable expenses and commission, into as many equal shares and purparts as there were children of the said Joseph K. Eyre who had died before that time leaving issue then surviving and thereupon by good and sufficient conveyances and assurances to grant, convey, assign, transfer and set over in fee and absolutely one of such equal shares and purparts to the issue collectively of each of the said children of the said Joseph K. Eyre as shall have left issue then surviving as aforesaid, which conveyances and assurances shall be made to such respective issue if more than one as tenants in common, and in such way and manner that such respective issue shall only receive the share of their respective parent, a child of the said Joseph K. Eyre, and as if the division had been made among the said children instead of their said issue and so also as that the said shares shall inure to the said grantees free, clear and discharged of all trusts whatever hereby created."

The wife of the settlor predeceased him. All of his five children survived him. His son Charles Eyre subsequently died, leaving to survive him his brother and three sisters and a wife, but no children.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

M. Hampton Todd and Julius C. Levi, for appellant. John G. Johnson, for appellees.

POTTER, J. In the present case we have to deal with the distribution of income, and the question is whether the settlor intended that, in case a child died without issue, his personal representative should take the share of income which the deceased child had received.

The direction for final distribution, upon the death of the life tenants, is as follows: "And upon and immediately after the death of the last survivor of the said children of the said Joseph K. Eyre, upon the further trust to divide and partition the whole and entire capital of the trust estate as it may then exist and be invested, after deducting all reasonable expenses and commission, into as many equal shares and purparts as there were children of the said Joseph K. Eyre who had died before that time leaving issue then surviving, and thereupon by good and sufficient conveyances and assurances to grant, convey, assign, transfer, and set over in fee and absolutely one of such equal shares and purparts to the issue collectively of each of the said children of the said Joseph K. Eyre as shall have left issue then surviving as aforesaid, which conveyances and assurances shall be made to such respective issue if more than one as tenants in common, and in such way and manner that such respective issue shall only receive the

share of their respective parent, a child of the said Joseph K. Eyre, and as if the division had been made among the said children instead of their said issue, and so also as that the said shares shall inure to the said grantees free, clear and discharged of all trusts whatever hereby created."

It is clear that the principal was to go only to the issue of the children of Joseph K. Eyre; and throughout the deed, wherever we find any reference to the parties taking the income after the death of the settlor and his wife, they are set forth as "children and issue of deceased children."

The appellant contends that this means children living at the death of Joseph K. Eyre, and the issue of children which were deceased at the time of his death, and that each one of the children of Joseph K. Eyre, living at the time of his death, took a vested interest in the income of the estate, for the term of the life of the last survivor of the children of Joseph K. Eyre. But this construction is inconsistent with one of the other alternatives in the deed. He provided that if his wife Anna should die during the lifetime of himself, Joseph, "then the whole of the surplus income of the trust estate as aforesaid * * * shall be paid to the said children and issue in the proportions as aforesaid"; that is, to such of the children of Joseph K. Eyre as shall then be living—at the time of the distribution, which in this event was to occur in the lifetime of the settlor.

It seems obvious, therefore, that in using the words "children and issue" they were intended to apply to those in being at the time of the particular distribution of income. These periods of distribution began, not at the death of the settlor, but the first year after the execution of the deed of trust, and continued during some 10 years of the lifetime of the settlor. His general intent, as it appears from the deed of trust, was to provide an income for himself of \$3,000 per annum during his life. During that period the remaining-net income of the trust estate was to go to his wife for her support and that of her children. In case of her death during the lifetime of the settlor, the whole of the surplus income was to go to the children living at the periods of distribution of income, and the issue of such children as may have deceased.

It was manifestly the intention of Joseph K. Eyre that his wife and children should take the remainder of the income from the trust estate during his life; that in the event of the death of his wife the children should have the portion which had gone to the wife theretofore; that in case of the death of any of his children, leaving issue, such issue should take the portion of the income which had been enjoyed by their parent; and that, as to those of his children who should die without issue, his provision extended only to giving them participation in the income

during the term of their lives. They began to take the income as soon as it accrued under the deed of trust. The amount which they received was increased at the death of the wife of the settlor, and again at the death of the settlor himself, to the extent of the sums previously paid to them out of the income. But we see nothing in the provisions of the deed which would change the character of the interest held by his children at the death of Joseph K. Eyre. They were, as a class, entitled to the income, and if any of them should die, leaving issue, the share of the parent in the income went to such issue. But the amount to be paid to the children of Joseph K. Eyre, and the issue of his deceased children, up to the period of distribution of the principal, was always limited to the income; for the final distribution of the principal was not to the children, but was confined to the issue of deceased children of Joseph K. Eyre.

We conclude, therefore, that it was the intention of the settlor that payments of the income only to the surviving children and the issue of deceased children should be continued until the death of the last survivor of the children.

The assignments of error are overruled, and the decree of the court below is affirmed.

(205 Pa. 538)

HUNTERSON v. UNION TRACTION CO.

(Supreme Court of Pennsylvania. May 4, 1903.)

CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

1. The burden is on a person injured by stepping on or off a moving street car and receiving an injury thereby to show why the case should go to the jury.

2. Where plaintiff signals an electric car to stop at a crossing, and the signal is heeded, and the car is slackening its speed, and he attempts to get on while it is running three miles an hour, and is injured thereby, he cannot recover.

Mestrezat, J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County; Ralston, Judge.

Action by John C. Hunterson against the Union Traction Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Charles H. Edmunds, for appellant. Thomas Leaming and Russell Duane, for appellee.

BROWN, J. The plaintiff below attempted to get on a moving electric street car. Just as he put one of his feet on the lower step of the rear platform and his right hand had grasped the hand rail, he was thrown, by the accelerated speed of the car, down on the street, and dragged about the length "of two

pavements," sustaining injuries for which he seeks compensation. The learned trial judge directed a judgment of nonsuit to be entered, for the reason that the plaintiff's attempt to get on the moving car was an act of negligence, and, as he was injured in such attempt, he could not recover.

"To step on or off a moving car, whether the power which propels the car be steam or electricity, is per se negligence, and, if injury results to the passenger, he cannot recover damages. To this rule, as in all rules, there are some rare exceptions." *Powelson v. United Traction Company*, 204 Pa. 474, 54 Atl. 282. And to this we now add that, where one is injured in stepping on or getting off a moving car, the burden is upon him to clearly demonstrate to the court why his case should go to the jury, as a rare exception to the rule. The question to be settled on this appeal is whether the appellant's case is one of the rare exceptions to the rule and a jury should have been allowed to pass upon his negligence. Standing on the northeast corner of Fifth and Wharton streets, in the city of Philadelphia, the appellant saw a car approaching up Fifth street. When near him, he signaled the motorman to stop at the north crossing over Fifth street. In response to the signal the motorman slackened the speed of the car, but, without waiting for it to stop, the plaintiff attempted to step on it as it was passing the crossing. While, in a general way, he says the car was moving slowly, when pressed by the appellee to state more definitely what the speed was—as was its right to know in this controversy, involving his negligence as well as its own—he admits it to have been that of a man walking at an ordinary gait, or three or four miles an hour. With his case so presented by himself, it was the duty of the court to say he had been negligent. The duty of the plaintiff was to get on a car that had stopped. His signal to the motorman clearly was to stop, and not merely to slow up. The motorman so understood it, and was slackening the speed of the car, that he might stop at the usual stopping place. The slackened speed was not notice to the plaintiff to get on the moving car, but was that it would come to a full stop, if he would wait. No other inference can be drawn. But the plaintiff, impatient, as many of us so often are, even of a second's delay, tried to board the moving car, instead of waiting until he could safely get on it; and in doing so he voluntarily assumed the risk of experiencing just what happened to him. Whatever "rare exceptions" there may be to the rule that it is negligence per se to step on or off a moving car, no recovery can be permitted where an injured plaintiff, as in this case, at a crossing signals an approaching car to stop, whose signal is heeded, and he so understands by the slackened speed of the car as it approaches the usual stopping place, but who, before it stops, and while running at the

¶ 2. See *Carriers*, vol. 9, Cent. Dig. § 1369.

speed stated, attempts to get on it. It is the negligence of the injured person in such a case that is a contributing cause to his injuries, and he cannot escape the rule that his carelessness is in the way of his right to recover.

Our attention has been called to several of our own cases as authority for the contention of the appellant that the jury should have been permitted to pass upon the question of his negligence, but no one of them is in conflict with the rule which we have applied to the facts now before us. In *Stager v. Ridge Ave. Pass. Ry. Co.*, 119 Pa. 70, 12 Atl. 821, the court below refused to take off the judgment of nonsuit, assigning as a reason for its refusal to do so that the evidence of the plaintiff showed that the injury which resulted in the death of Harry W. Stager was caused by his own negligence in attempting to get upon a moving car by way of the front platform; that he had signaled the driver to stop, and the car's speed was slackened nearly to a full stop, when, without waiting, he jumped on the front platform of the car, lost his hold, fell off, and was run over; that the accident occurred at a point from three to five feet below the street crossing; that, had he waited a second or two, the car would have been completely stopped, and he could have entered it by the rear platform, and, if he had fallen off, he would not have been run over. It is true we said in that case, "We are not prepared to say, as matter of law, that the attempt of a passenger to board a street car whilst it is in motion is to be considered an act of negligence, no matter what may be its rate of speed," but we affirmed the judgment because we were "of opinion that the learned court below was right, upon the grounds stated in his opinion, in entering the nonsuit." As to *Walters v. Phila. Traction Co.*, 161 Pa. 36, 28 Atl. 941, upon which the appellant chiefly relies, we need only repeat what we said of it in *Powelson v. United Traction Co.*, supra: "There was no relaxation of the rule, in the case cited, that to get on a moving car is negligence. The language quoted was affirmed in a per curiam opinion. It was not intended by this court to say that in that case, under the circumstances, it was not negligence in defendant to get on a moving car." In *Jagger v. People's Pass. Ry. Co.*, 180 Pa. 436, 36 Atl. 867, 38 L. R. A. 786, the court below, in an opinion refusing to take off a nonsuit, described the accident as follows: "The case as presented, then, is simply this: The plaintiff motioned to the conductor to stop, the conductor rang the bell to have it done, the motorman slackened the car. Meantime the plaintiff had risen from his seat, and gone out on the rear platform. Without waiting for the car to come to a standstill, the plaintiff, suiting his own convenience, got off while it was in motion. The car gave a jerk, and he was thrown down and injured." The judgment was affirmed per curiam. In that

case the plaintiff jumped off a moving car; here he jumped on. For the same reason that no recovery was permitted there, none can be had here.

Judgment affirmed.

MESTREZAT, J. (dissenting). The question involved in this case is correctly stated by the learned counsel for the appellant, to wit: "Whether or not it is negligence per se for a man, after having signaled the motorman to stop, to undertake to get on a street passenger car at a crossing of the highway when the car is moving so slowly that it had almost stopped." The learned trial judge answered the question in the negative, and granted a nonsuit. The plaintiff himself was the only witness in his behalf as to the circumstances attending the accident, and in considering this appeal his testimony must be taken to be true. He testifies, *inter alia*: "I was standing at the northeast corner of Fifth and Wharton streets, waiting for a Fifth street car. One came up Fifth street briskly. Just as it had reached Wharton street, another car reached Fifth street on Wharton. Both cars came to a dead stop on the other side of each street. I stepped out on the crossing, the car coming up Fifth street, nodded to the motorman, and he slowed his car to the crossing for me to get on. As it reached the crossing, I stepped on with one foot, and took hold of the hand rail with my right hand. The conductor was standing in the doorway, with his back to me, with his hand on the bell cord. At the same moment that I stepped on the car he signaled the motorman to go ahead. The car was started quickly, and I was thrown to the street and dragged about two pavements. Q. Now, when the rear platform of the car reached the flag upon which you were standing, how fast was the car moving? A. Scarcely moving. Q. What do you mean by that? A. Well, I don't know that I can be more definite. It stopped just as all cars stop at crossings for men passengers to get upon them. Everybody knows what that is. Q. You say the car was scarcely moving? I wish you would contrast the motion of that car with the motion of a person walking or running. How would the motion of a car compare with a person walking along at the usual rate of speed? A. I think the car was moving slower than a person would walk quickly." On cross-examination, he said "that the car was moving slowly. It had almost absolutely stopped." He further stated, in reply to a question of appellee's counsel, that he thought the car was not moving faster than three or four miles per hour. He said that he did not think the conductor saw him. They exchanged no signals prior to the accident. He further testified on cross-examination: "A. Yes, now one foot was on the car. I do not think they both were. My hand was on the hand rail that is placed in the rear of the cars for pas-

sengers to take hold of. I had hold of that hand rail when the car was suddenly started and I was thrown off. Q. Where was your foot? A. One foot, I am sure, was on the car. I don't think two were." This was the testimony on which the trial judge held the plaintiff guilty of negligence. It will be observed that the testimony is somewhat conflicting as to the rate of speed at which the car was traveling when the plaintiff attempted to board it. The jury would have been justified in finding that the car was moving slowly, and had almost absolutely stopped. It was not for the court to resolve the apparently conflicting statements of the witnesses as to the speed of the car at the time the plaintiff attempted to enter it. That was for the jury. If any part of the plaintiff's testimony justified its submission to the jury on the question at issue, although other parts of the testimony showed apparent contradictions, the case should not have been withdrawn from the jury. In a personal injury case—*Ely v. Pittsburg, etc., Ry. Co.*, 158 Pa. 233, 27 Atl. 970—in which the testimony was "extremely muddled and conflicting," Justice Mitchell, speaking for the court, said: "This testimony was contradictory, and the net result of it by no means clear. On part of it, he [plaintiff] was plainly entitled to go to the jury; on the other part of it, equally plainly he was not. Under these circumstances the case must go to the jury, whose province it is to reconcile conflicting statements, whether of the same or different witnesses, or to draw the line between them, and say which shall prevail." This language was repeated by Justice Dean and approved by him in the very recent case of *Strader v. Monroe County*, 202 Pa. 626, 51 Atl. 1100, to which he added: "The court was bound to submit it to them. In trials of fact, if it were required that all the testimony should be consistent either with itself or that of other witnesses, but few cases would reach a jury."

In entering the nonsuit, the learned trial judge said: "I think, if I were to instruct the jury in this case, I would be obliged to instruct them that it was negligence to board a moving car, and, as I am at present informed, I will grant this motion." This is the single and only question presented here for consideration, and was so regarded and argued by the learned counsel of both parties. The rule or principle thus announced by the court below must be affirmed before the plaintiff can be deprived of his right to have the case presented to a jury. The majority opinion speaks of "some rare exceptions" to the rule, and that the plaintiff must "clearly demonstrate why his case should go to the jury as a rare exception," but its argument is devoted to sustaining the rule, and concludes with the statement that no recovery can be permitted in this case, because the plaintiff jumped "on a moving car." In my judgment, it is not negligence

per se to board a moving street car, and that, therefore, the judgment of the court below is clearly erroneous, and should be reversed.

Street railway companies are incorporated for the purpose of carrying passengers in towns and cities and along suburban highways in thickly populated communities. To accommodate their patrons, they are required to stop frequently, and should stop at the intersection of streets, to receive and discharge passengers. They are common carriers, and the public has a right to demand of them a service that will give it frequent opportunities for entering and leaving their cars with safety. Hence they are expected to stop at the intersection of streets, if not oftener, so that those who desire may avail themselves of the service of the cars. The passenger enters and leaves the car quickly. It is a matter of common observation that great numbers of people board the car and leave it while it is in motion. This is permitted by the conductor, and by his action he very frequently invites it. This is the very well understood way in which street cars are operated in this country, and therefore a large percentage of passengers act upon the assumption that they are expected by the company to enter and depart from a car when it arrives at a crossing, whether it has entirely stopped or not. That this can be done with perfect safety if the car is moving slowly, is the hourly experience of thousands of people. It presupposes, of course, that the person attempting it has the use of his faculties and limbs, and that there is no obstruction on or near the platform that would interfere with or prevent access to or departure from the car. Why, then, should such action on the part of the passenger be declared negligence per se? What is done with such frequency, and with the tacit acquiescence of the company's servants, by great numbers of people, who evidently regard it as safe, cannot be characterized as negligence in itself. On the contrary, the proper and logical inference from such action is that it is not attended with danger, and hence that it does not disclose a want of care. A reasonably prudent man would not attempt to get on or off a rapidly moving street car, as the danger would be apparent, and, if he did so, his act would convict him of negligence; but, should he enter or alight from a car almost at rest, the circumstances would be different, and the character of his act must be determined in the light of those circumstances. In the former the rapidity of the car would make the danger apparent to the dullest intellect; in the latter, the speed of the car would raise no doubt in the mind of a prudent man that he could accomplish the act with safety. The position of the majority of the court is not supported by any decision in this state. On the contrary, the authorities not only of this but of other states sustain

speed stated, attempts to get on it. It is the negligence of the injured person in such a case that is a contributing cause to his injuries, and he cannot escape the rule that his carelessness is in the way of his right to recover.

Our attention has been called to several of our own cases as authority for the contention of the appellant that the jury should have been permitted to pass upon the question of his negligence, but no one of them is in conflict with the rule which we have applied to the facts now before us. In *Stager v. Ridge Ave. Pass. Ry. Co.*, 119 Pa. 70, 12 Atl. 821, the court below refused to take off the judgment of nonsuit, assigning as a reason for its refusal to do so that the evidence of the plaintiff showed that the injury which resulted in the death of Harry W. Stager was caused by his own negligence in attempting to get upon a moving car by way of the front platform; that he had signaled the driver to stop, and the car's speed was slackened nearly to a full stop, when, without waiting, he jumped on the front platform of the car, lost his hold, fell off, and was run over; that the accident occurred at a point from three to five feet below the street crossing; that, had he waited a second or two, the car would have been completely stopped, and he could have entered it by the rear platform, and, if he had fallen off, he would not have been run over. It is true we said in that case, "We are not prepared to say, as matter of law, that the attempt of a passenger to board a street car whilst it is in motion is to be considered an act of negligence, no matter what may be its rate of speed," but we affirmed the judgment because we were "of opinion that the learned court below was right, upon the grounds stated in his opinion, in entering the nonsuit." As to *Walters v. Phila. Traction Co.*, 161 Pa. 36, 28 Atl. 941, upon which the appellant chiefly relies, we need only repeat what we said of it in *Powelson v. United Traction Co.*, supra: "There was no relaxation of the rule, in the case cited, that to get on a moving car is negligence. The language quoted was affirmed in a per curiam opinion. It was not intended by this court to say that in that case, under the circumstances, it was not negligence in defendant to get on a moving car." In *Jagger v. People's Pass. Ry. Co.*, 180 Pa. 436, 36 Atl. 867, 38 L. R. A. 786, the court below, in an opinion refusing to take off a nonsuit, described the accident as follows: "The case as presented, then, is simply this: The plaintiff motioned to the conductor to stop, the conductor rang the bell to have it done, the motorman slackened the car. Meantime the plaintiff had risen from his seat, and gone out on the rear platform. Without waiting for the car to come to a standstill, the plaintiff, suiting his own convenience, got off while it was in motion. The car gave a jerk, and he was thrown down and injured." The judgment was affirmed per curiam. In that

case the plaintiff jumped here he jumped on. I think that no recovery was to be had here.

Judgment affirmed.

MESTREZAT, J. (dissenting). The question involved in this case is one which has been decided by the learned counsel for the plaintiff: "Whether or not a man, after having signaled a man to stop, to underpass a passenger car at a crossing when the car is moving almost stopped." The court answered the question by granting a nonsuit. The only witness in the case, under the circumstances attending the accident, considering this appeal, may be taken to be true. "I was standing at the corner of Fifth and Wharton Fifth street car. On a briskly. Just as it started, another car came from Wharton. Both cars were on the other side of each other on the crossing, the street, nodded to the other car to the crossing. As it reached the crossing, one foot, and took it with my right hand standing in the crossing, with his hand at the same moment that he signaled the motorman the car was started upon the street and the crossing. Q. Now, the car reached the crossing were standing, he was A. Scarcely moving by that? A. Well, it would be more definite. It would stop at crossings upon them. Even Q. You say the car was moving I wish you would say that car with the motorman or running. How would the car compare with the car at the usual rate? The car was moving almost walk quickly." The witness said "that the car had almost absolutely stopped, in reply to the counsel, that he was moving faster than the hour. He said the motorman saw him prior to the accident cross-examination was on the stand. The witness were. The witness is placed

the view herein stated. *Stager v. Ridge Ave. Passenger Railway Company*, 119 Pa. 70, 12 Atl. 821, is very similar in its facts to the case in hand. Mr. Justice Clark, delivering the opinion of the court, states the facts as follows: "It is admitted that Stager [plaintiff] attempted to board the car at the front platform whilst the car was in motion. He succeeded in getting on the lower step with one foot only, and before he could establish himself there a sudden motion of the car forward threw him off, and he fell under the wheels. It is not definitely shown at what rate the car was moving at the time of the occurrence. Stager had given the conductor a signal to stop, and as the car approached the crossing it 'slowed up,' but before it had fully arrived at the place where the stop was to be made, and whilst it was still in motion, he attempted to enter by the front platform, with the result stated. The evidence seems to show that the car was moving quite slowly, but it did not stop." The learned justice then says: "We are not prepared to say, as matter of law, that the attempt of a passenger to board a street car whilst it is in motion is to be considered an act of negligence, no matter what may be its rate of speed. A car may be moving so slowly that there would be no apparent danger whatever in attempting to enter it—so slowly that a person of reasonable prudence in the exercise of ordinary care would not hesitate to make the effort. It would be a hard rule that would hold a passenger guilty of culpable contributory negligence in such a case. In all cases of doubt the question must be left to the jury to say, under all the circumstances, whether the danger of boarding the train when in motion was so apparent as to have made it the duty of the plaintiff to desist from the attempt." *Walters v. Philadelphia Traction Co.*, 161 Pa. 36, 23 Atl. 941, was an action for personal injuries sustained while the plaintiff was attempting to board a cable car which he had signaled to stop. The trial judge charged the jury as follows: "If you arrive at the conclusion that the car was in motion, and was not in that condition of motion which would induce any reasonable man to get on, then the plaintiff cannot recover. If, however, you should come to the conclusion that it had stopped, or was in the act of stopping, or was in such a condition of running or stopping as induced the plaintiff to think it was about to stop, then he had a right to get on; and, if the car started before he was safely seated in the car, and an injury resulted therefrom, then your verdict should be for the plaintiff." There was a verdict and judgment for the plaintiff, and this court affirmed the judgment, observing in the opinion that "the plaintiff's right to recover depended on questions of fact which were clearly for the consideration of the jury." In *Linch v. Pittsburg Traction Co.*, 153 Pa. 102, 25 Atl. 621, the

plaintiff attempted to alight from a moving cable car. The court below was requested to direct a verdict for the defendant, because no negligence was shown on the part of defendant, and plaintiff was guilty of contributory negligence. But the court refused the request for instructions, and charged as follows: "The car did not come to a full stop at all, and at the time of the sudden start he [plaintiff] was actually getting off. The question, then, for you to determine is whether it was negligence for him to attempt to get off in this way. If you should conclude that it was negligence in him to do it, you will probably hesitate very little in concluding that that negligence contributed to the injury. If he had been in some other position than alighting from the car, the probabilities are that he would not have got hurt. But was it negligence for him in that position to get off the car? Ordinarily, it would be considered negligence for a man to get off a moving car. We cannot say, as matter of law, that it is an act which a careful man would not, under any circumstances, do, and therefore we must leave it for you to determine whether this plaintiff was in the exercise of due care when he attempted to get off this car while it was in motion." This court held that the case was for the jury, and affirmed the judgment. These cases have been recognized and followed as the law of this state in the very recent case of *Austrain v. United Traction Co.*, 19 Pa. Super. Ct. 329. There the plaintiff attempted to enter an electric open or summer car, and was injured. It was held that: "If a street railway car has stopped, or is in the act of stopping, or is in such a condition of running or stopping as induces an intended passenger to think it is about to stop, the passenger has a right to get on, and, if the car started before he is safely seated in the car, and an injury results therefrom, the company is liable." In *Powelson v. United Traction Co.*, 204 Pa. 474, 54 Atl. 282, we reversed the judgment of nonsuit, and Justice Dean, delivering the opinion, stated the facts thus: "On 25th of January, 1900, he [plaintiff] boarded a summer car in Allegheny City. When he saw the car coming about 100 feet distant, he waived his hand to the motorman to stop, who at once put on the brakes, so that when it reached plaintiff it had almost stopped, and he stepped on the running board, and was about to go into the body of the car, when the conductor rang the bell for the car to start. It was instantly started with a jerk, which threw the plaintiff off, ran over his leg, so crushing it that amputation followed." The court below on these facts was of opinion that there was no sufficient evidence of negligence on the part of the defendant, and that there was clearly contributory negligence on the part of the plaintiff. He therefore instructed the jury to find for the defendant. This court reversed the court below, the opinion con-

cluding as follows: "There was conflicting evidence as to his negligence and that of the company. He says: 'It was not my carelessness in getting on the car when moving that threw me off, but yours in suddenly starting up before I had reasonable time to be seated.' We think the court erred in not leaving the truth of the matter to be determined by the jury."

While our decisions have settled the question under consideration here adversely to the contention of the appellee, the decisions of the other states are in harmony with our own authorities. In the recent case of *Cicero & Proviso Street Ry. Co. v. Meixner* (Ill.) 43 N. E. 823, 31 L. R. A. 331, an action to recover damages received while attempting to board an electric car, the Supreme Court of Illinois says: "The doctrine is established in nearly all of the states where the question has arisen that it is not negligence per se for a passenger to board or alight from a street car operated by horse power, and the question of contributory negligence is one of fact for the jury. * * * It would be impossible for a court to lay down the rule as to what particular rate of speed would be sufficient notice to a passenger that, if he attempted to get on or off, he would be held guilty of contributory negligence. It would also be a great hardship and unjust to lay down a general rule that a passenger attempting to board a street car while in motion at all should be held guilty of contributory negligence." The court also considered the question whether the rule as to persons boarding or alighting from horse cars should apply to electric cars, and concludes as follows: "While in electric cars the possibilities of speed are greater than in the case of horse cars, yet the general operation and management of such cars so nearly approach those of horse cars that it must be held that the same rule of law which in the cases cited and a long line of other cases holds that it is not negligence per se to board or depart from such cars while in motion is also applicable to electric cars." In *Corlin v. West End Street Ry. Co.*, 154 Mass. 197, 27 N. E. 1000, and in *Central Pass. Ry. Co. v. Rose* (Ky.) 22 S. W. 745, it was also held that the same rule should be applied to electric as to horse cars in determining the question of negligence in entering or leaving a street car, and that in both cases the question is for the jury. The same rule prevails in many other states, and it is there held that plaintiff's negligence is a question for the jury, and cannot be determined by the court as matter of law. *North Birmingham Railway Co. v. Liddicoat*, 99 Ala. 545, 13 South. 18; *Railway Co. v. Atkins*, 46 Ark. 423; *Railway Co. v. Williams*, 140 Ill. 275, 29 N. E. 672; *Railway Co. v. Spahr*, 7 Ind. App. 23, 33 N. E. 446; *Railroad Co. v. McCandless*, 33 Kan. 366, 6 Pac. 587; *Ober v. Railroad Co. (La.)* 11 South. 818, 32 Am. St. Rep. 366; *B. & O. R. R. Co. v. Kane* (Md.) 13 Atl. 387, 9

Am. St. Rep. 387; *N. Y. P. & N. R. R. Co. v. Coulbourn* (Md.) 16 Atl. 208, 1 L. R. A. 541, 9 Am. St. Rep. 430; *Wyatt v. Railway Co.*, 55 Mo. 485; *Scheepers v. Railroad Co.*, 126 Mo. 665, 29 S. W. 712; *Sexton v. Railway Co. (Sup.)* 57 N. Y. Supp. 577; *Sahlgard v. St. Paul City Ry. Co.*, 48 Minn. 232, 51 N. W. 111; *Omaha Street Ry. Co. v. Martin*, 48 Neb. 65, 66 N. W. 1007; *Munroe v. Third Avenue R. R. Co.*, 18 Jones & S. 114; *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28, 45 Pac. 996. Where one attempts to board a moving car and is injured by his own carelessness, he cannot recover, and it is immaterial at what rate of speed the car is running. But it is equally clear, it seems to me, that when a person is boarding or departing from a car, using due care, and the negligent act of the motorman by quickly and suddenly accelerating the speed of the car, or by any other careless act, causes injury to the person, the street railway company is responsible. The reason is that the act of the injured party in entering or leaving the car in no way contributes to his injuries, which are the result solely of the carrier's negligence.

I would reverse the judgment of the court below, and submit the case to a jury to determine the negligence of the plaintiff and of the defendant company.

(72 N. H. 190)

LIBBY v. HUTCHINSON.

(Supreme Court of New Hampshire. Coos.
June 2, 1903.)

EXECUTORS AND ADMINISTRATORS—CLAIMS—FAILURE TO PRESENT—RIGHTS OF CLAIMANT—CLAIMS NOT ACCRUED—DEEDS—BREACH OF WARRANTY—WHO ENTITLED TO SUBVERDICT—GENERAL EXCEPTION—DAMAGES.

1. Pub. St. 1901, c. 191, § 27, provides that, when one has a claim against the estate of a decedent which has not been prosecuted within the time limited by law, he may apply to the Supreme Court, at a trial term, by petition, and if the court shall be of opinion that justice requires it, and that the claimant is not chargeable with neglect, they may give him judgment for the amount due. *Held*, that whether justice required claimant to have judgment, and whether he was guilty of culpable neglect, were determined by the decision in the superior court, and are not subject to review.

2. Pub. St. 1901, c. 191, § 27, applies not only to claims which might have been sued on within the time limited by statute, but also to contingent claims, which could not have been sued, but which might have been presented, and to claims which come into existence after the expiration of the statutory period.

3. When possession attends the conveyance, the covenants of warranty and for quiet enjoyment run with the land, and the party dispossessed by a superior title is the proper person to bring suit.

4. A mere general exception by plaintiff to the verdict in his favor raises no question for review.

5. Mere proof in a suit for breach of warranty in a deed that the part of the land from which plaintiff was evicted was essential to the use of water power on the land, and that the water power constituted one-half the value of the land, the entire cost of which was \$10,-

000, does not establish that the value of the land from which plaintiff was evicted was \$5,000, even if it be found that the water power was worth that sum.

Exceptions from Superior Court; Young, Judge.

Action by Jesse F. Libby against Freedom Hutchinson. Judgment for plaintiff. Both parties excepted. Exceptions overruled.

August 5, 1891, Timothy H. Hutchinson, the defendant's testator, conveyed by warranty deed to Henry Marble a tract of land situate in Gorham, by the following description: "Being a part of lot No. 164 in said Gorham, commencing at a red oak tree on the bank of the Androscoggin river, running from thence south sixty per cent. west to a mound or hill; thence around the east side of said hill, up to the road leading from Gorham to Shelburne to a stake and stones—said road now known as Main street; thence easterly along the line of said road or Main street to the bank of the Peabody river; thence down said river to the Androscoggin river; thence up said Androscoggin river to the first-mentioned bounds, excepting the lots sold and deeded by the late Timothy Hutchinson from said premises." January 30, 1892, Marble conveyed by warranty deed an undivided half of the same premises to the plaintiff, and November 12, 1893, conveyed to him the remaining half, in each case with substantially the above description, with sundry exceptions not material to the case. In 1893 and 1894, and by judgment of the court in the action of Hitchcock v. Libby, 70 N. H. 399, 47 Atl. 269, the plaintiff was dispossessed by Dawn L. Hitchcock of about 10 acres of the premises, situated in the angle between the Peabody and Androscoggin rivers; it being established in that suit that Hutchinson's title at this point did not extend to the Peabody river, but was bounded by an agreed line striking the Androscoggin river some distance west of the mouth of the Peabody river. When Timothy H. Hutchinson made the conveyance to Henry Marble, both understood that Hutchinson owned all the land south of the channel of the Androscoggin and west of the channel of the Peabody river, and that it was included in the conveyance. Timothy H. Hutchinson died September 1, 1891, and the defendant qualified as his executor October 1st of the same year. Hutchinson was in possession of the premises when he conveyed to Marble, and Marble entered into and retained possession until his conveyance to the plaintiff. No claim for this breach of covenant was ever presented to the defendant until some time in 1900, but justice and equity require that the claimant be permitted to maintain this action. He is not chargeable with culpable neglect in not bringing an action at law within the time limited by the statute, and the defendant has sufficient estate in his hands to meet the judgment in this action. The defendant offered to show by

several witnesses that there are indications on the ground of a former channel of Peabody river near the agreed line. *Hitchcock v. Libby*, 70 N. H. 399, 47 Atl. 269. The evidence was excluded, subject to exception. It was agreed that in 1891, and for many years prior thereto, the channel of Peabody river was substantially where it is now. The land of which the plaintiff was dispossessed is a part of lot No. 165 in the town of Gorham. This lot and lot No. 164, with about a thousand acres on the north side of the Androscoggin river, directly opposite to them, were conveyed to Marble for \$10,000. There is a fall in the river of about 10 feet at this place. The land from which the plaintiff was evicted was essential to the beneficial use of this water power. The plaintiff testified, and the evidence was undisputed, that the water power constituted one-half the value of the lands purchased for \$10,000. The court awarded the plaintiff \$957 as damages, and he excepted.

Jesse F. Libby and Chamberlin & Rich, for plaintiff. Alfred R. Evans and Hutchinson & Hutchinson, for defendant.

PARSONS, C. J. "Whenever any one has a claim against the estate of a deceased person which has not been prosecuted within the time limited by law, he may apply to the Supreme Court, at a trial term, by petition setting forth all the facts; and if the court shall be of opinion that justice and equity require it, and that the claimant is not chargeable with culpable neglect in not bringing his suit within the time limited by law, they may give him judgment for the amount due him." Rev. St. 1901, c. 191, § 27. Whether justice and equity require that the plaintiff should have judgment for the amount due him, and whether he is or not chargeable with culpable neglect in not bringing his suit within the time limited by law, are questions of fact, which have been determined by the superior court in favor of the plaintiff, and which are not subject to revision here. *Webster v. Webster*, 58 N. H. 247; *Page v. Whidden*, 59 N. H. 507; *Powers v. Holt*, 62 N. H. 625. The defendant's first position is that the case is not within the purview of the statute. The reason assigned is that the statute is intended to furnish a remedy only for claims which might have been sued upon within the time limited by the statute, and does not furnish a remedy for claims which did not come into existence until after the expiration of the statutory period for suit against the executor. Pub. St. 1901, c. 191, §§ 2, 4. *Spelman v. Talbot*, 123 Mass. 480, is relied upon. As a construction of the similar provision of the Massachusetts statute (*Laws Mass.* 1861, p. 71, c. 174, § 2), the case cited fully sustains the defendant's position. The section under consideration was first adopted here in 1872 (*Laws* 1872, p. 18, c. 7, § 2), and was

then practically identical with the Massachusetts statute. *Parsons v. Parsons*, 67 N. H. 419, 420, 29 Atl. 999. The decision in *Spelman v. Talbot* was not announced until 1878 (six years after the enactment here); hence the rule that the adoption of a statute from another jurisdiction is also an adoption of the meaning given to it by judicial construction in such jurisdiction (*Commonwealth v. Hartnett*, 3 Gray, 450) has no application. The interpretation of the statute by the Massachusetts court is, however, entitled to careful consideration in determining the meaning attached to the same language by the Legislature of this state, and, if founded upon considerations applicable here, would be of great weight. *Parsons v. Parsons*, 67 N. H. 419, 29 Atl. 999. So far, however, as the purpose of the Legislature of Massachusetts in 1861 is deduced from the provisions of statutes of that state then in force, which are not found here, and consequently were not within the contemplation of the Legislature, the conclusion reached cannot be of aid. It is probable that the provision was enacted in each state to remedy a defect in existing legislation, and with the understanding that the provision then adopted would become a homogeneous part of existing law. Hence, in one state the remedy intended may have been of limited extent because of the narrowness of the mischief to be cured, while in the other it may be plain it was intended to apply to cases not found in the other. By Gen. St. Mass. 1860, c. 97, §§ 5, 6, suits against administrators were limited to two years after the date of the administration bond, with a further provision for the allowance of additional time if new assets came to the hands of the administrator after two years. A creditor having a claim justly due from an estate, but whose cause of action did not accrue within the two years, could at any time before final settlement of the estate present it to the probate court and secure an order for the retention of funds to meet it, and maintain a suit within a limited time after the claim became payable. Gen. St. Mass. 1860, c. 97, § 8; *Spelman v. Talbot*, 123 Mass. 489; *Grow v. Dobbins*, 124 Mass. 560. But there was no provision then for collection against an administrator upon a claim depending upon a contingency which might never happen, and which had not happened before the application to the probate court. *Ames v. Ames*, 128 Mass. 277. See Laws Mass. 1879, p. 454, c. 71; Pub. St. Mass. 1882, c. 136, § 13. But a creditor whose right of action accrues after the expiration of two years and after the settlement of the estate, and whose claim could not have been sued against the administrator, and had not been presented and allowed, is given a suit within one year after the time when such right of action accrues, to recover the claim against the heirs and next of kin of the deceased, and the devisees and legatees under his will.

Gen. St. Mass. 1860, c. 101, §§ 31, 35; *Ames v. Ames*, supra. Provisions being found for the prosecution by filing in the probate court, at any time before settlement of the estate, of claims accruing after the expiration of the statutory limit of two years, and no liability of the administrator existing as to claims depending upon a contingency not happening before the estate was settled, as to which other provision had been made, the only matter as to which it appears probable the new provision was intended to apply is the case of claims which might have been proved, but were not, within the two years. The statute was therefore construed, not as granting a new remedy, but as merely intended to prevent the bar of the statute according to the rules of equity. *Wells v. Child*, 12 Allen, 383. This construction, in effect, results from the conclusion also held here, that the statute was not intended to give a remedy where one already existed. *Joslin v. Wheeler*, 62 N. H. 169. In the present case, assuming, from the fact that the executor still retains funds in his hands, that the estate has not been settled, the plaintiff would have in Massachusetts a remedy by proceedings in the probate court, while, if the estate had been settled, the statute gives him a remedy against the parties now holding the estate. Hence the statute would be unnecessary as a remedy in one case, and useless in the other.

In this state no suit can be maintained against an executor unless the demand was exhibited to him within two years from the original grant of administration. Pub. St. 1901, c. 191, § 2. The plaintiff must prove this fact affirmatively to recover under the general issue. *Clough v. McDaniel*, 58 N. H. 201. Although the limitation of suits is three years, the plaintiff has no cause of action against the administrator unless his claim has been presented within two. (The discussion relates to the limitation in force at the time. See Laws 1899, p. 246, c. 2.) A limitation of the remedial statute, therefore, to cases where a plaintiff has a cause of action, and applying the remedy only where there is excusable delay in bringing suit in the strict terms of the statute, as in *Spelman v. Talbot*, would, under the provisions of New Hampshire law, render the statute of little use. In this state, therefore, a broader construction has been given, and it has been held in *Webster v. Webster* and *Page v. Whidden*, supra, that in proceedings thereunder it was not necessary to prove an exhibition of the claim to the administrator within two years, or a demand for payment, upon the ground that the same mistake which prevented the commencement of a suit might also prevent the exhibition of the claim. Claims due and not then payable, and demands depending upon a contingency, are required to be exhibited to the administrator within two years, as well as those then due. *Walker v. Cheever*, 39 N. H. 420; *Cutter v.*

Emery, 37 N. H. 567, 573. "The design of the statute being to bring claims to the knowledge of the administrator, so that he may be enabled to judge in what manner the estate may be settled" (Ayer v. Chadwick, 66 N. H. 385, 386, 23 Atl. 428), it is important that he should be informed of claims that may arise against the estate as well as of those that have already accrued. Unless so presented, contingent claims, even if accruing before the estate is settled, cannot be here prosecuted against the executor, although in Massachusetts they can be. The neglect to exhibit contingent claims within two years presents here precisely the same barrier to the future prosecution of them against the representative of the estate as the failure to commence a suit upon accrued claims does in Massachusetts. Facts which would excuse neglect in one case would in the other; hence the case of contingent claims which could not be sued, but must be presented, are equally within the intent of the statute to afford relief when required by justice and equity, and the neglect to take advantage of legal remedies is not culpable. As it is unnecessary to prove an exhibition or demand in a proceeding under this statute, it is immaterial whether one could have been made. It is further to be observed that no statutory provision is to be found, affording a remedy against the heirs and next of kin of the deceased, and the devisees and legatees of his will. But it has been held that a claim which could not be prosecuted against the administrator could be against the heirs or devisees of the deceased (Sawyer v. Jeffs, 70 N. H. 393, 47 Atl. 416; Russ v. Perry, 49 N. H. 547; Hall v. Martin, 46 N. H. 337; Judge of Probate v. Brooks, 5 N. H. 82; Hutchinson v. Stiles, 3 N. H. 404), while the existence of such remedy against legatees is denied in Ticknor v. Harris, 14 N. H. 272, 40 Am. Dec. 186.

In the present case the plaintiff's cause of action arises upon a breach of the covenants in a deed made by the defendant's testator. The defendant has in his possession funds sufficient to meet the claim, which is found to be just and due. The cause of action was not fully established until nine years after the grant of administration. The plaintiff acquired title to an undivided half of the premises within two years after the grant of administration, and if his possession under his warranty deed constituted a claim contingent upon the future assertion of the adverse title, which he could have exhibited to the administrator, his failure to do so is found not to constitute culpable neglect—a finding sustained by the allegation of the bill, which is not denied, that he had no knowledge of the adverse title until long afterward. As to the remainder of the premises, the plaintiff acquired his title four years after the grant of administration, and never had any claim which he could have presented within the statutory period. It is suggested

that in such case the question of culpable neglect cannot arise. *Spelman v. Talbot*, supra. But if absence of culpable neglect to bring a suit can be found, as it plainly must be, from faultless ignorance of the existence of a claim (*Wells v. Child*, 12 Allen, 333, 336; *Waltham Bank v. Wright*, 8 Allen, 121, 122), such finding would seem to be equally well supported by the nonexistence of the claim. The practical advantage of defeating the plaintiff here, and putting him to a pursuit of the same funds after a distribution of them to the parties entitled, does not seem obvious. In may be questioned, under *Ticknor v. Harris*, 14 N. H. 272, 40 Am. Dec. 186, whether the plaintiff has such a remedy. If he has not, it would be clear that justice requires that the fund should be used to liquidate his just claim, rather than conferred as a gift upon some other. In short, the plaintiff having a valid claim against the estate in the hands of the executor, it is entirely equitable and just, both to the plaintiff and other parties interested in the estate, that the matter now be settled. It seems probable, though the conclusion is not necessary to this case, that the statute in question, when adopted by the Legislature in 1872, was intended not merely to release the bar of the statute under the practice in chancery, but to afford a new remedy in cases where no remedy then existed, whenever, upon broad grounds of equity and justice, as understood in this jurisdiction, the court should be of opinion there was occasion therefor. Compare *Powers v. Holt*, 62 N. H. 625, 627, and *Wells v. Child*, 12 Allen, 333. This view is supported by the action of the Legislature in Pub. St. N. H. 1901, c. 191, § 4, where cases falling within this section are expressly excluded from the three-years bar.

It is not intended and it is not necessary to criticize or dispute the conclusion of the Massachusetts court, whose construction announced in *Spelman v. Talbot* has been followed in the Public Statutes, where the provisions in question are made expressly to apply to the two-years limitation. Pub. St. Mass. 1882, c. 136, §§ 9, 10. Neither is there any conflict between the principles by which apparently conflicting results are reached in this case and in *Spelman v. Talbot*. In both states the fundamental legislative purpose was the same. The intent was to provide an equitable remedy where the legal remedy failed. Claims accruing after two years are not within the equitable remedy in Massachusetts, because they are not barred by the two-years limitation, but may be presented in the probate court at any time before the estate is settled. In this state such claims are within the two-years bar, and hence are included within the equitable remedy. The cases merely afford an illustration of the fact that the same language, used under different circumstances, may plainly have been intended to convey entirely different meanings.

Kendall v. Green, 67 N. H. 557, 562, 563, 42 Atl. 178.

The defendant's next contention, that the plaintiff is guilty of culpable neglect in not filing his claim with the judge of probate, has already been considered.

The defendant's third position, that there was no breach of the warranty in the deed of his testator to Marble, upon the ground that it was decided in *Hitchcock v. Libby*, 70 N. H. 399, 47 Atl. 269, that the description in the deed from Marble to Libby, which, so far as the premises in question are concerned, was the same as in the deed from Hutchinson to Marble, did not include the land between the agreed line and the river, is hardly deserving of serious consideration. The question in that case was not what the description covered, but whether Hutchinson owned the land easterly to the Peabody river, which his deed purported to convey. It did not appear that either of the parties claimed under a common owner, and the title of the plaintiff in that suit was not affected by erroneous descriptions in the defendant's chain of title. In that suit it was determined that Hutchinson's easterly line was an agreed line west of the Peabody river, and the defendant, Libby, was defeated because his grantor did not own to the Peabody river—not because the description in his deed did not carry him there. The understanding of the parties as to what was included in the deed may not be material upon its construction; but the location of the Peabody river, to which the terms of the conveyance extended, was in 1891, and for many years prior thereto, where it is now. Evidence of indications that many years ago a former channel of the river was where the agreed line was found to be, might be material upon the question whether the agreed line corresponded with the true line, and as an explanation of the line meant by the Peabody river in conveyances made at that time; but such evidence was immaterial upon the question of what line was meant by the Peabody river in 1891, as to which there was no dispute.

The defendant further claims that the plaintiff, the grantee of Hutchinson's grantee, was not the proper party to bring suit for a breach of the covenants in the Hutchinson deed. The covenants of seisin and right to convey are broken, if at all, when made, and do not run with the land. When possession attends the conveyance, the covenants of warranty and for quiet enjoyment run with the land, and the party dispossessed by a superior title is the proper person to bring suit upon the covenant, as to which there is no cause until there is a breach. *Haynes v. Stevens*, 11 N. H. 28; *Loomis v. Bedel*, Id. 74; *Moore v. Merrill*, 17 N. H. 75, 48 Am. Dec. 593; *Russ v. Perry*, 49 N. H. 547; *Chandler v. Brown*, 59 N. H. 370, 372. The case finds that Hutchinson was in possession of the premises when he made the deed in

question (i. e., was seised in fact), and that Marble and the plaintiff went into possession under their deeds, and the plaintiff retained such possession until he was dispossessed by Hitchcock. Such possession was sufficient to enable the plaintiff to sue upon the covenant of warranty. The defendant claims this finding is not warranted by the pleadings. If so, the pleadings can be corrected. The answer admits that the testator was not seised or possessed of the premises; but the allegation of the bill to which this admission is supposed to be responsive is merely that the testator was not the owner, and was not seised thereof in his own right in fee simple. There is no allegation that the testator was not in possession—seised in fact. The defendant's exceptions are overruled.

The court awarded the plaintiff \$957 as damages, and the plaintiff excepted. The general exception to the verdict raises no question which can be determined here. It does not appear that the court was requested to make any ruling of law as to the assessment of damages, or to report his finding of facts in relation thereto (*Pub. St. N. H. 1901, c. 204, §§ 9-11*), or that any motion was made to set the verdict aside as against the law or the evidence. If such motion can be made here, the facts are insufficient to determine it. The only facts appearing—that the premises in question are part of the land on both sides of the Androscoggin river purchased by Marble, the plaintiff's grantor, for \$10,000, and that the land from which the plaintiff was evicted was essential to the use of a water-power on the premises, and the undisputed evidence that the water power constituted one-half in value of lands purchased for \$10,000—do not establish the value of the lands of which the plaintiff was evicted to be \$5,000, even if it should be found that the water power was worth that sum. It is to be presumed the land upon the opposite side of the river and the flowage were also essential to the use of the water power. If all together constituting the water privilege should be found of the value claimed, it is clear each of the parts making up the whole cannot equal in value the whole. As the case stands, the plaintiff's exception must be overruled. The parties do not disagree as to the rule of damages, and the case presents no occasion for its consideration.

Exceptions overruled.

BINGHAM, J., did not sit. The others concurred.

(72 N. H. 222)

GERRISH v. WHITFIELD et al.

(Supreme Court of New Hampshire. Hillsborough. June 30, 1903.)

FIRE—NEGLIGENCE—RES JUDICATA—EVIDENCE—ORDER OF PROOF.

1. Rule of Court No. 50 (56 N. H. 589) provides that the plaintiff shall put in his whole

case before resting, and shall not put in other evidence, save such as is strictly rebutting, save by permission of the court. *Held*, that in an action for negligence in operating a sawmill, whereby plaintiff's house was destroyed by sparks from the mill, evidence tending to show that such a mill had thrown sparks as great a distance as plaintiff's house was a part of the case which should have been put in before resting.

2. Whether justice requires that rule No. 50 (56 N. H. 589) shall be relaxed in a certain case in favor of one offering evidence after resting is not a question of law, and an exception to the action of trial court for refusing admission of evidence presents nothing for decision by the Supreme Court.

3. In an action against several persons for negligence in operating a sawmill so that sparks escaped therefrom and destroyed plaintiff's building, wherein it appeared that one of the defendants owned and operated the mill, a judgment in his favor, after nonsuit in favor of the others, at the close of plaintiff's case, was conclusive as to the other defendants, they having been parties to the record and participants in the defense.

4. The owner of premises on which he is conducting a sawmill is not liable for damages owing to the escape of sparks therefrom, in the absence of any negligence on his part.

5. On appeal by plaintiff in an action against the owner of a sawmill for damages resulting from sparks escaping therefrom, a contention that the owner was liable irrespective of any negligence was of no avail, since, if such were the doctrine, the verdict in favor of defendant involved a finding that the buildings were not fired by fire escaping from the mill.

Exceptions from Superior Court; Stone, Judge.

Action by Mary Jane Gerrish against Harrison Whitfield and others. Judgment for defendants. Transferred from superior court on exceptions by plaintiff. Exceptions overruled.

The property destroyed was located 430 feet from the mill. The defendants Patch, Fletcher, and Brooks, as partners, had bought of the plaintiff certain lots of lumber, and let the sawing to the other defendant Whitfield, who was not a partner, at a certain price per thousand feet. Whitfield owned and operated the mill, but Patch selected the location for the mill, and paid the rental for the ground where it was placed. One of the plaintiff's witnesses testified upon cross-examination that he had never known sparks from pine wood to be carried over 100 feet so as to set any fire. The same witness, who was a brother of the defendant Whitfield, testified to the same effect upon direct examination as a witness for the defendants. Evidence offered by the plaintiff upon rebuttal that such a mill as Whitfield's had thrown live sparks and cinders from 500 to 600 feet was excluded as not rebutting, and the plaintiff excepted. At the close of the plaintiff's evidence the defendants Patch, Fletcher, and Brooks moved for a nonsuit as to them, upon the ground that upon the evidence Whitfield was an independent contractor, and that the negligence complained of, if any, was the negligence of Whitfield. The motion was

granted, subject to the plaintiff's exception. There was a verdict for the defendant Whitfield.

George F. Jackson and Doyle & Lucier, for plaintiff. Brown, Jones & Warren, for defendants.

PARSONS, C. J. The only exception bearing upon the verdict found by the jury in favor of the defendant Whitfield is that taken by the plaintiff to the exclusion, as not rebutting, of evidence offered by her after the close of the defendant's case. This evidence tended to show that fire might be communicated from such a mill as the defendant Whitfield's to buildings situated at no greater distance than the plaintiff's, and therefore, if otherwise competent, had some tendency to sustain the plaintiff's claim that fire had been so communicated in this instance. Such evidence was part of the plaintiff's case, the whole of which the rule required her to submit before resting. Rule of Court No. 50, 56 N. H. 589. Whether, under the circumstances of the case, justice required that the rule should be relaxed in her favor, is not a question of law, and the exception to the ruling of the superior court presents nothing for decision by this court. *King v. Bates*, 57 N. H. 443, 448. The defendant Whitfield is therefore entitled to judgment.

The verdict and judgment establish that the injury to the plaintiff—the burning of her buildings—was not occasioned by the negligent operation of the mill by Whitfield, whether such negligence consisted in operating such a steam mill in that situation, or in the careless conduct of the business. As the other defendants, Patch, Fletcher, and Brooks, not only had notice of the suit, and an opportunity to defend, but were parties upon the record, and did in fact participate in the defense, the facts judicially determined therein are binding and conclusive as between them and the plaintiff. *B. & M. Railroad v. Brackett*, 71 N. H. 494, 53 Atl. 304; *Gregg v. Company*, 69 N. H. 247, 46 Atl. 28. What would be the effect of a judgment for the defendant in a suit against Whitfield alone, of which the defendants Patch, Fletcher, and Brooks had no notice, in a subsequent suit against them by the plaintiff for the same negligence charged against Whitfield alone, it is not necessary to inquire. See *Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627; *Castle v. Noyes*, 14 N. Y. 329; *Freem. Judg.* § 179. As Whitfield's negligence was not the cause of the plaintiff's injury, whether the other defendants would or not be liable for such negligence is not material in this controversy, and there is no occasion to inquire as to the validity of the verdict ordered for them upon this issue, or to examine into any rulings bearing upon the question of such liability. The rule of *Fletcher v. Rylands*, L. R. 1 Exch. 205, upon which

¶ 4. See *Negligence*, vol. 37, Cent. Dig. § 22.

the plaintiff relies, is not understood to be the law in this jurisdiction (*Brown v. Collins*, 53 N. H. 442, 18 Am. Rep. 372); but, if this impression were incorrect, the result would be no different. At the time complained of, Whitfield was in possession and occupation of the land leased by Patch for the mill location. If the landowner's duty required him at his peril to keep upon his own premises all dangerous substances there collected by him, this duty rested on Whitfield, who employed fire upon his premises in the operation of the mill. Under this view of the law the verdict of the jury must have been founded upon the finding of fact that the buildings were not set on fire by sparks from the mill—a fact fully as fatal to the maintenance of the plaintiff's suit as a finding that the injury was not due to the negligent operation of the mill.

Exceptions overruled. Judgment for the defendants. All concurred.

(72 N. H. 183)

DOLE v. FARWELL et al.

(Supreme Court of New Hampshire. Sullivan. June 2, 1903.)

ASSIGNMENTS—FUTURE EARNINGS—VALIDITY—FRAUD—GARNISHMENT.

1. Where claimants in foreign attachment took an assignment of defendant's wages for a valid consideration, and there was no fraud in fact, their knowledge that defendant desired to prevent attachment of his future earnings by other creditors in making the assignment did not invalidate the same.

2. An assignment of a debtor's future wages to his grocers could not be declared fraudulent in law, as against creditors, in so far as such assignment was made for the support of defendant and his family.

3. On an attachment by trustee process, the plaintiff, as against the trustee, was not entitled to raise the question that an assignment by defendant of his future earnings was fraudulent in law.

Exceptions from Superior Court; Peaslee, Judge.

Action in foreign attachment by George W. Dole against William H. Farwell; Howe & Quimby, claimants. The claimants hold an assignment of the defendant's wages, which the plaintiff seeks to avoid as fraudulent. The claimants are grocers, and, being creditors of the defendant, took an assignment of wages to become due him from the trustee for a term of months. The assignment was duly executed and recorded. The object of the claimants was to secure an old debt, and obtain pay for what they might thereafter sell the defendant. His object was to obtain credit, and also to defeat attachments by his other creditors. These facts were known to the claimants, but they were not guilty of any fraud in fact. When the assignment was made, they agreed with the defendant to let him have money from time to time out of that collected from the

trustee, with which to pay his rent, doctor's bills, etc. There was no agreement as to how much they would let him have, or when they would pay it to him. They understood that they could apply the whole to their account if they saw fit. They drew the pay fortnightly, retained a greater or less part of it at their pleasure, and paid the balance over to the defendant. After the service of the writ the trustee paid the claimants the wages earned by the defendant before the service of the writ, and the claimants paid a part thereof to the defendant. His debt to the claimants at the time of the trustee process was greater than the sum due him from the trustee. The trustee was discharged, and the plaintiff excepted. Exceptions overruled.

Hermon Holt, for plaintiff. Ira Colby & Son, for claimants.

BINGHAM, J. It appears that the claimants took the assignment for a valid consideration, and that there was no fraud in fact. Under such circumstances, their knowledge that the defendant desired to prevent attachments of his future earnings by other creditors did not invalidate the assignment. *Fradd v. Charon*, 69 N. H. 189, 44 Atl. 910.

So far as the assignment was for the support of the defendant and his family, it could not be declared fraudulent in law. *Provencher v. Brooks*, 64 N. H. 479, 481, 13 Atl. 641.

When the trustee process is invoked, the plaintiff stands in the shoes of the principal defendant, as respects charging the trustee, and can raise only such questions as are open to the defendant. He cannot raise the question of fraud in law. *Corning v. Records*, 69 N. H. 390, 397, 398, 46 Atl. 462, 76 Am. St. Rep. 178, and cases there cited.

Exception overruled. All concurred.

(72 N. H. 185)

STATE ex rel. HYDE v. LYNCH.

(Supreme Court of New Hampshire. Grafton. June 2, 1903.)

INTOXICATING LIQUORS—LIQUOR NUISANCE—ABATEMENT—PETITION—WITHDRAWAL—AMENDMENT—SUBSTITUTION OF STATE'S ATTORNEY—APPEAL.

1. Where the superintendent of police applied for leave to withdraw a petition for the abatement of a liquor nuisance, which was opposed by the county solicitor, who asked leave to prosecute the same to judgment, whether the petitioner was entitled to withdraw over objection of the state's counsel, and whether such withdrawal abated the proceeding, was immaterial, since, if a liquor nuisance existed, the state solicitor could be substituted for the withdrawing complainant, and the proceeding amended so as to denominate the same an information for violation of the liquor law.

2. Pub. St. c. 222, §§ 7, 8, 11, authorizing amendments in civil cases which do not introduce a new cause of action, authorize the amendment of a petition for the abatement of a liquor nuisance, brought on relation of the superintendent of police of a city, by substi-

¶ 2. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 115.

tuting the state solicitor for the relator, and denominating the proceeding an information for violation of the liquor law.

3. Whether a petition for the abatement of a liquor nuisance on application of the petitioner to withdraw the same over objection of the county solicitor should be amended by changing the same into an information for the violation of the liquor law, and substituting the county solicitor for the withdrawing relator, is a question of fact, not reviewable on appeal.

Transferred from Superior Court; Pike, Judge.

Petition by the state, on the relation of Edwin P. Hyde, as superintendent of police, against Joseph E. Lynch, for the abatement of a liquor nuisance. Relator asked leave to withdraw his petition, and the defendant moved that the same be dismissed. The county solicitor opposed the motion, and asked leave to appear in the place of the plaintiff and to prosecute the suit to judgment. The motion of the solicitor should be granted if the court has power. Case discharged.

George F. Morris, for the State. Martin & Howe, for defendant.

PARSONS, C. J. The substantive fact upon which the proceeding depends is the existence of the alleged illegal use at the commencement of the proceedings. *State v. Strickford*, 70 N. H. 297, 47 Atl. 262; *State v. Saunders*, 66 N. H. 39, 90, 25 Atl. 588, 18 L. R. A. 646. Such use is the cause of action. Whether the injunction against such use is asked in the name of the state by a petition at the instance of an officer of the town, or by an information by the law officer of the county or state, the state is the real plaintiff. *State v. Wilkins*, 67 N. H. 164, 165, 29 Atl. 693. The issue and the judgment are the same in each case. *Laws 1899*, p. 322, c. 81, § 1. Whether the petitioner can withdraw against the objection of the state's counsel, and whether such withdrawal abates the proceeding, are immaterial questions. If necessary to maintain the proceeding, and required for the promotion of justice, the substitution of the solicitor for the withdrawing complainant and the denomination of the proceeding as an information by amendment render these questions immaterial. The suggested amendments introduce no new cause of action, and are within the statute authorizing amendments in civil cases. *Pub. St. c. 222*, §§ 7, 8, 11; *State v. Batcheller*, 66 N. H. 145, 20 Atl. 931; *State v. Wilkins*, 67 N. H. 164, 29 Atl. 693; *State v. Collins*, 68 N. H. 46, 36 Atl. 550. If permitted, the amendments relate to the commencement of the proceeding. *State v. Collins*, supra; *Whittier v. Varney*, 10 N. H. 291, 303. Whether such amendments should be allowed is a question of fact. The superior court having ruled, in substance, that such substitution should be made, such order presents no question of law.

Case discharged. All concurred.

(73 N. H. 173)

STATE ex rel. MUNSEY v. CLOUGH.

(Supreme Court of New Hampshire. Merrimack. June 2, 1903.)

EXTRADITION—FUGITIVE—GOVERNOR'S HEARING—RIGHTS OF ACCUSED—PROOF.

1. In extradition proceedings the accused is not entitled, as of right, to be heard before the Governor in his determination in the first instance of the question whether or not she is a fugitive from justice.

2. The determination of the Governor of a state in extradition proceedings that an accused is a fugitive from justice may be reviewed on habeas corpus.

3. While the Governor of a state, in extradition proceedings is required by *Rev. St. U. S. § 5278* [*U. S. Comp. St. 1901*, p. 3597], and *Pub. St. 1901*, c. 263, §§ 7, 8, to require proof that accused is a fugitive from justice before issuing his warrant, it is only necessary that such proof should be sufficient to satisfy him of the fact, and it is immaterial that the proof received failed to meet the requirements of legal proof.

4. *Rev. Laws Mass. c. 217, § 11*, provides that, on an application for a requisition to the Governor of that state, sworn proof that the accused is a fugitive from justice shall accompany the application. On an application for a requisition to the Governor of New Hampshire, a copy of an affidavit certified and authenticated by the Governor of Massachusetts was attached to the requisition, purporting to have been sworn to before a justice of the peace, averring that accused had fled from Massachusetts and was a fugitive from justice, and that at the time of the commission of the crime she was in the state of Massachusetts. *Held*, that the copy of such affidavit was sufficient to warrant a finding by the Governor of New Hampshire that accused was a fugitive from justice.

Exceptions from Superior Court; Stone, Judge.

Habeas corpus, on relation of Martha S. Munsey, against M. Swain Clough, to obtain the relator's release from custody in extradition proceedings. Relator, after submitting the record evidence presented before the Governor, and showing that she was denied a hearing before him, moved for her discharge. From an order denying the motion, relator brings exceptions. Overruled.

See 53 Atl. 1086.

Edward A. Lane and Sargent, Niles & Morrill, for the State. Mitchell & Foster, for defendant.

BINGHAM, J. The relator contends that the warrant upon which she was arrested was illegally issued, because she was not permitted to be heard before the Governor upon the question whether she was a fugitive from justice, and assigns this as a reason why she should be discharged from arrest. It was a question of fact, to be determined in the first instance by the Governor, whether the relator was a fugitive from justice. In *re Cook* (C. C.) 49 Fed. 833, 838. But she was not then entitled as of right to be heard. It was discretionary with the Governor to grant or deny her request. It is not the practice in such proceedings to give the accused

¶ 2. See *Habeas Corpus*, vol. 25, Cent. Dig. § 90.

notice before the rendition warrant is issued, and the act of Congress and the statutes of this state do not contain a provision requiring that she should be notified. The reason for the omission of such a provision is apparent. If notice were required, the practical operation of the law would be rendered nugatory and its purpose defeated. It is an *ex parte* proceeding, and necessarily so. In *re Cook* (C. C.) 49 Fed. 838. While the presence of the relator at the hearing obviated the usual objection to giving the accused notice, yet her presence did not create a legal right to be heard, and no such right previously existed.

If the relator had the right not to be removed from the state without a judicial trial, the issuing of the warrant for her arrest did not conclude her right in this respect. Under the law of this state, she could sue out a writ of habeas corpus, and test the question whether she was a fugitive from justice; and, if it were made to appear to the court that the finding of the Governor on this question was erroneous, she would be entitled to her discharge. *State v. Clough*, 71 N. H. 594, 600, 601, 53 Atl. 1086. It was also expressly provided in the rendition warrant that she should be afforded an opportunity to sue out a writ of habeas corpus before being delivered over to the Massachusetts authorities. She has availed herself of that privilege; but in the trial before the superior court she declined and expressly waived the right to then or at any future time offer evidence showing that she was not a fugitive from justice, and contented herself with submitting the record evidence presented to the Governor, and causing it to appear that she had been denied a hearing before him. As the relator was entitled, in the trial before the superior court, to review the action of the Governor, and to be discharged if his finding upon this question of fact was erroneous, or if there was no evidence from which he was warranted in making the finding, we are unable to see wherein she has been deprived of any right to be heard to which she was legally entitled.

As the Governor should not have issued his warrant without proof that the accused was a fugitive from justice (*State v. Clough*, 71 N. H. 598, 599, 53 Atl. 1086; *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250), it is argued that the record evidence was incompetent and insufficient to warrant such a finding. But the character of proof essential to establish the fact is not prescribed by the act of congress (Rev. St. U. S. § 5278 [U. S. Comp. St. 1901, p. 3597]) or the statutes of this state (Pub. St. 1901, c. 263, §§ 7, 8). And while it has been said that "the executive of the state in which the accused is found * * * does not fail in duty if he makes it a condition precedent that it be shown to him by competent proof that the accused is in fact a fugitive from justice" (*Ex parte Reggel*, supra), this does not mean

that he shall not receive evidence that falls to meet the requirements of legal proof, if he deems it advisable. It appears to have been the policy of Congress and of the Legislature to permit the chief executive to determine the question upon such proof as seems to him worthy of credit; and in *Roberts v. Reilly*, 116 U. S. 80, 95, 6 Sup. Ct. 291, 29 L. Ed. 544, and in *re Cook* (C. C.) 49 Fed. 838, it was held that the executive of the state upon which the demand is made is to decide the question "upon such evidence as he may deem satisfactory."

Among the documents accompanying the requisition of the Governor of Massachusetts, and which he certified to be authentic and duly authenticated, was a copy of an affidavit made by Jophanus H. Whitney, purporting to have been sworn to before a justice of the peace, in which it was stated that the relator had fled from the limits of said commonwealth and was a fugitive from justice; also that at the time of the commission of said crime she was in the state of Massachusetts. This copy of an affidavit would not answer the requirements of legal proof in a court of justice, and the same is true of the original affidavit. But legal rules prescribing the competency of proof do not, in the absence of statute, govern the admission of evidence in extradition proceedings, except so far as the executive may see fit to adopt them. A statute of Massachusetts provides that sworn proof that the accused is a fugitive from justice shall accompany an application for a requisition to the Governor of that state. Rev. Laws Mass. c. 217, § 11. The original affidavit of Whitney, from which the copy here under consideration was made, is without doubt the sworn proof required by the statute of that state to be there filed with the Governor; and we cannot say that the Governor of this state was not justified in receiving a copy of that sworn proof in evidence and treating it as worthy of credit. That the Whitney affidavit contained evidence warranting a finding that the accused was a fugitive from the justice of Massachusetts, and was actually present in that state at the time of the commission of the crime charged, has already been decided. *State v. Clough*, supra.

The relator's motion to be discharged was properly denied. Exception overruled. All concurred.

(75 Conn. 704)

STATE ex rel. WILLIAMS v. KENNELLY.

(Supreme Court of Errors of Connecticut. July 24, 1903.)

MUNICIPAL CORPORATIONS—OFFICERS—REMOVAL BY MAYOR.

1. A city charter provided for the appointment by the mayor of a "director of public works" for four years, unless sooner removed by the mayor for cause. There were other provisions relative to the removal or expulsion from office of any officer on account of corruption or mis-

feasance. *Held*, that the removal of the director involved the exercise of an executive discretion rather than that of a quasi judicial power, and it was only necessary for the mayor to state to the director the cause which induced him to contemplate his removal, it being a proper and sufficient cause, and to give him an opportunity to be heard, and to assign such cause in making the removal.

2. It was immaterial that the removal was in fact induced by reprehensible motives.

3. The discretion of the mayor in making the removal was absolute.

Appeal from Superior Court, Fairfield County; Gager, Judge.

Quo warranto by the state, on the relation of Charles E. Williams, against Patrick Kennelly. Respondent answered; relator replied; respondent demurred to the replication. The court sustained the demurrer, and, on relator's refusal to make further reply, rendered judgment for the respondent. Relator appeals. *Affirmed*.

Robert E. De Forest and William H. Comley, for appellant. Elmore S. Banks and William A. Redden, for appellee.

HAMERSLEY, J. This is an information in the nature of a quo warranto, filed by the state's attorney at the relation of Charles E. Williams, charging the respondent, Patrick Kennelly, with usurping the office of director of public works of the city of Bridgeport. The information alleges that the mayor of Bridgeport, under and in pursuance of the charter of that city, on May 26, 1900, appointed the relator director of public works for the term of four years from June 1, 1900; that the relator duly qualified and entered upon the duties of the office; and that the respondent has since May 19, 1902, illegally usurped and still continues to usurp said office. The answer admits the appointment of the relator on May 26, 1900, and that the respondent now occupies and exercises said office, and alleges that he exercises said office by virtue of an appointment thereto by the mayor of Bridgeport, and further alleges the following facts, namely: The said mayor summoned the relator to appear before him on April 30, 1902, to answer to charges of incompetency and negligence in performing the duties of his office, and particularly to the following charges, to wit: That he had been and still was interested in the compensation paid for stone furnished the city, during his term of office, by the Williams & Dewhirst Company; that he employed one Dewhirst as assistant and subordinate, who was interested in the compensation so paid for stone furnished by said Williams & Dewhirst Company, knowing that he was so interested; that he negligently permitted the stone so purchased of the Williams & Dewhirst Company to be furnished the city, without having any representative of the city, other than an officer of said company, to supervise the measurement of the stone, and without any method or system by which the quantity of stone so furnished could be accurately deter-

mined, and had thereby caused the city to be defrauded and damaged; that in answer to said summons the relator appeared before the mayor with counsel, and heard and examined the witnesses who testified in support of the charges, and offered such evidence and arguments as he desired; that on May 19, 1902, and after said hearing, the mayor found that said charges were true, and that sufficient cause existed for the removal of the relator from office, and did therefore remove the relator from his said office; and that afterwards, and on May 19, 1902, the mayor appointed the respondent to fill the vacancy created in the office of director of public works by said removal of the relator. The replication admits the summons and hearing as alleged in the answer, and admits that, after said hearing, the mayor did assume to remove the relator from office, setting forth his reasons therefor as alleged in the answer, and did assume to appoint the respondent to said office as alleged, and alleges that the removal the mayor thus assumed to make is illegal and void, because, first, no evidence was produced on said hearing to legally substantiate the charges, and no legal cause for the relator's removal was in fact shown on said hearing; second, the mayor did not remove the relator for any legal cause whatever, but removed him solely for political reasons; third, said hearing was not a fair and lawful one, because the mayor, before and after the hearing, in the absence of the relator, consulted with and was advised and influenced by the attorneys who represented the prosecution of said charges, and the persons interested in having the relator removed for political reasons only. The respondent demurred to this replication, and the trial court sustained the demurrer. The relator claims that the court erred in sustaining the demurrer, and this is the only question raised by the appeal.

The charter of the city of Bridgeport, as revised in 1895 (12 Sp. Laws, p. 527, § 32), provides, among other things, that "the mayor of the city shall be the chief executive officer thereof, and it shall be his duty to be vigilant and active in causing the laws to be executed and enforced within the city." The common council shall consist of the mayor and 20 aldermen. Various powers and duties are assigned to subordinate executive boards, including the board of public works, of which boards the mayor is a member and chairman, but without the power of voting unless in case of tie. The members of each of these boards are appointed by the mayor, to hold office for a definite term, unless sooner removed for cause. Any member of these boards may be removed by the common council by a two-thirds vote for cause. It shall be the duty of the mayor to fill by appointment any vacancies in offices in all cases in which he is given the power to appoint, and to perform all duties imposed upon him by the charter and ordinances of the city,

the laws of the state, and of the United States. The general clause applicable to all officers appointed under the charter limits their respective terms to their removal from office.

It seems evident from the language used, in connection with other provisions of the charter, that this mode of removal does not depend on an exercise of that quasi judicial power to hear and determine official offenses punishable by a forfeiture of office, as in the case of the amotion of a corporate officer by a municipal corporation for some offense which forfeits his right to the office, or the deprivation of an ecclesiastical corporation for a similar offense, or where an administrative board is authorized to punish in this way some misfeasance in office. Removals dependent on the conviction or quasi conviction of some offense are otherwise provided for. Section 41 of the charter authorizes the common council to enact ordinances relative to the removal or expulsion from office of any officer on account of corruption or misfeasance therein. Section 80, in authorizing the boards of fire and police commissioners to remove a fireman or policeman, specially provides for a hearing had in open session. Section 85, in authorizing the mayor to remove a member of the board of apportionment and taxation, requires a conviction of some corrupt practice.

Although the power of removal may be limited by the necessity of assigning some cause, or of informing the officer removed of the cause of his removal, and giving him an opportunity for explanation, and stating the ground of removal, the act belongs rather to the field of executive discretion than to that of quasi judicial finding. And the action of the removing officer complying with the limitation is final. *People ex rel. Keech v. Thompson*, 94 N. Y. 451; *People ex rel. Gere v. Whitlock*, 92 N. Y. 197; *State v. McGarry*, 21 Wis. 496; *People v. Martin*, 19 Colo. 565; 36 Pac. 543, 24 L. R. A. 201; *State v. Hawkins*, 44 Ohio St. 115, 5 N. E. 228.

In 1899 (13 Sp. Laws, p. 376) the city charter was amended by abolishing the board of public works and giving the powers and duties assigned to that board to the "director of public works," and the amendment provided that this officer should be appointed by the mayor for a term of four years, unless sooner removed by the mayor for cause. Considering all the provisions of the charter as thus amended, we think the removal of this officer is a mode of exercising this power of removal incident to executive appointment, and that the limitation placed on its exercise is satisfied, possibly more than satisfied, when the mayor has stated to the officer the cause which induces him to contemplate his removal, being a proper and sufficient cause, has given him an opportunity to be heard in relation thereto, and assigns this cause in making the removal.

It follows that the facts alleged in the an-

swer, and admitted by the replication, establish a valid removal of the relator and a valid appointment of the respondent. The affirmative allegations of the relator's replication are immaterial and irrelevant, because, if true, they do not alter the fact of the relator's removal from office. *Avery v. Studley*, 74 Conn. 272, 50 Atl. 752; *Hoboken v. Gear*, 27 N. J. Law, 286-288. An executive removal may be unjust and induced by reprehensible motives, but it is not therefore invalid. The executive discretion, whether in appointment or removal, is absolute. The person abusing that discretion may be punished, but not by judicial reversal of his application by the courts. When the absolute discretion, whether in appointment or removal, is limited by law, while the due observance of those limits may be enforced, yet the action of the executive within the limits prescribed cannot be controlled by the court.

Whether the validity of executive appointment or removal should or could be made to depend upon a prior judicial trial and finding under the rules governing judicial trials, and subject to be reviewed and set aside by the court for errors in the conduct of the trial, and upon the absence of any controlling improper motive inducing the executive action—absence of such motive to be determined by the court—are questions not before us. Such judicial control of executive action has heretofore been deemed inconsistent with the efficient performance of executive duties. The relator's claim seems to assume that the city charter, in authorizing the mayor to appoint a director of public works for a term of four years, or until sooner removed by him for cause, and upon his removal to appoint another to fill the vacancy, requires, as an essential condition precedent to any removal, the existence of a sufficient cause to be judicially found as a fact, and declares a removal following such cause, and assigning the same as its reason, to be void, if in fact the inducing motive is not the existing cause assigned, but a desire to have the office filled by a member of the mayor's own political party, and that the superior court, upon proceedings in the nature of quo warranto, is made the final judge of the sufficiency of the cause and its existence as a fact, and of the operating motive of the mayor in making the removal. This assumption is plainly unfounded. The demurrer was properly sustained.

There is no error in the judgment of the superior court. The other Judges concurred.

(76 Conn. 41)

TEMPLE v. BUSH.

(Supreme Court of Errors of Connecticut. July 24, 1903.)

ACTION FOR MONEY HAD AND RECEIVED—EVIDENCE—STATUTE OF FRAUDS.

1. Evidence in an action against the president of a company for money alleged to have been placed by it in his hands to pay plaintiff's

notes against it, that before this was done he told her she need not worry, for there would be enough to pay them in full, does not tend to show that he was subject to a trust in her favor.

2. The declaration of defendant, when charged by plaintiff with having money in his hands reserved to pay her notes against the corporation of which he was president, that he would pay the interest on her house as long as her mother lived—he, however, denying her charge—does not tend to show he had money due to her.

3. Defendant's oral promise to plaintiff to himself pay notes owed to her by the corporation of which he was president is unavailing, because of the statute of frauds (Gen. St. 1902, § 1089).

Appeal from Court of Common Pleas, Fairfield County; Howard J. Curtis, Judge.

Action by Charlotte Temple against Edwin H. Bush to recover money. From a refusal to set aside nonsuit, plaintiff appeals. Affirmed.

John J. Walsh and Joseph A. Gray, for appellant. John H. Light and William F. Tammany, for appellee.

BALDWIN, J. The power of the court, under Gen. St. 1902, § 761, to grant a nonsuit, after the production of the plaintiff's evidence, if of opinion that a prima facie case has not been made out, is a salutary safeguard against the presentation of frivolous claims to the consideration of a jury. In the case at bar it was admitted or proved that the defendant, being the president and managing officer of an insolvent corporation, and in control of its funds, was authorized by the corporation and its other officers to use them in making the best settlement which he could effect with its creditors, and that the plaintiff held two of its notes. It was alleged by the plaintiff and denied by the defendant that part of these funds were placed in his possession for the purpose of paying these notes in full, under an agreement to that effect between him and all the creditors. The plaintiff offered evidence that the defendant told her, before the creditors had entered into any such agreement, that she need not worry about her notes, for there would be enough to pay them in full when all the claims were settled. This was properly excluded. Such declarations had no legitimate tendency to strengthen or to support the claim that he assumed a personal liability to the plaintiff, or was subject to a trust in her favor. His responsibility at that stage of the transaction was solely to the company, and, at most, his remarks only indicated his opinion that he should be, as its agent, able to effect such settlements with its other creditors as would enable him to pay her in full.

Evidence was introduced that all the creditors agreed that certain notes, including the plaintiff's, should be paid in full; that the

others would accept 75 per cent. of their claims in full settlement; and that it should be left with the defendant to make these payments, he orally undertaking to supply any balance himself in case of a deficiency. She also testified that afterwards, when taxed by her with having money in his hands reserved to pay her notes, he denied it, but promised to pay the interest on a mortgage upon her house as long as her mother lived. No reasonable inference could be drawn from this promise that he had or admitted that he had in his hands moneys due to the plaintiff. His oral undertaking to supply further funds himself to complete the payment of her notes, in case of any deficiency of those of the company, could not avail her, by reason of the statute of frauds (Gen. St. 1902, § 1089). It was vital to her case to show that funds were placed in his hands to pay her notes; and of this there was, in point of law, no substantial evidence. *Cook v. Morris*, 68 Conn. 196, 208, 33 Atl. 994.

The reason of appeal founded on the exclusion of evidence did not describe in any way the evidence excluded. Such an assignment of error would have been too general to satisfy the statute in an ordinary case. Gen. St. 1902, § 798. Without deciding whether it can be considered sufficient upon an appeal in a case of nonsuit, we have thought proper to give it full consideration, in view of the possibility of the institution of another action.

There is no error. The other Judges concurred.

(75 Conn. 709)

PRESTON v. FOSTER et al.

(Supreme Court of Errors of Connecticut. July 24, 1903.)

WILLS—DETERMINATION OF BENEFICIARY—CONSTRUCTION—APPEAL—REVIEW.

1. In an action to recover a legacy, a conclusion of the court, upon the facts, as to which of two persons was the beneficiary intended by the will, is a legal conclusion, reviewable on appeal.

2. Testator's will gave a sum in trust for the Baptist Church and Society in K. for the support of preaching. There were two Baptist churches in K., each having a society connected with it, one church being the K. Baptist Church and the other the K. Free Will Baptist Church and Society. The latter had a settled pastor, held regular services, and was the one which testator had attended, while the other had no settled pastor, and had not had for eight years. *Held*, that testator meant the Free Will Baptist Church.

Appeal from Superior Court, Windham County; Milton A. Shumway, Judge.

Action by Frank T. Preston against one Foster and others to recover the amount of a legacy. From a judgment for plaintiff, defendant East Killingly Free Will Baptist Church and Society appeals. Reversed.

Harry E. Black, for appellant. Arthur G. Bill, for appellee.

¶ 1. See *Frauds*, Statute of, vol. 23, Cent. Dig. § 24.

TORRANCE, C. J. In July, 1899, Anthony D. Warren, of Killingly, in this state, died there, leaving a will containing the following clause: "I do give and bequeath to the Baptist Church and Society in East Killingly the interest on one thousand (1,000) dollars to be used for the support of the preaching of the gospel so long as they maintain preaching. The principal not to be impaired. Said thousand dollars to be deposited in the Windham County Savings Bank." The will was made in 1895, and at that time and before, and at the time the testator died, there were in the village of East Killingly, in the town of Killingly, two churches and societies of the Baptist denomination; the legal name of one being the East Killingly Baptist Church, and the legal name of the other being the East Killingly Free Will Baptist Church and Society. Hereinafter, for brevity, the first will be called the Baptist Church, and the second the Free Will Baptist Church. In December, 1899, Frank T. Preston was by the proper court of probate appointed trustee of said fund named in said clause of Warren's will, and, he having duly qualified as such trustee, subsequently as such trustee, and also acting in behalf of the aforesaid Baptist Church, brought suit against the executors of Warren to recover said legacy. In that suit the executors filed a cross-complaint in the nature of a bill of interpleader, in which they alleged that the aforesaid Free Will Baptist Church claimed said legacy, and threatened to bring suit therefor; and prayed that said Free Will Baptist Church might be made a defendant in the case, and that it and said Preston, as trustee as aforesaid, be ordered to interplead concerning their claim to said legacy. Thereupon the Free Will Baptist Church was duly made a party defendant in said cause, and the court ordered it and the said trustee to interplead as prayed for, and they did so interplead. Upon the trial of said interpleader the court found, in addition to those stated in the pleadings, the following facts: The Free Will Baptist Church was, at the date of the will in question, and for a long time theretofore, and ever since has been, a church and society in East Killingly. It was always commonly known and described as the East Killingly Free Will Baptist Church and Society. During said period there was also a church and society in said village commonly known and described as the East Killingly Baptist Church. The Free Will Baptist Church was during said period, and ever since has been, the only Baptist church in said village that has continually and without interruption maintained preaching. The testator, during the last 15 years of his life, seldom attended church, but up to within 5 years of his death did rarely attend the Free Will Baptist Church. The testator, at the time of making said will, for a long time theretofore, and until his death was a supporter of the Free Will Baptist Church by

contributions thereto for the purpose of maintaining religious services held by it in its church edifice and the maintenance of its property used for church purposes. For at least five years before the testator's death the Baptist Church had not maintained preaching without interruption, and said Baptist Church had not had a settled pastor since about the year 1888, and during most of the time since that date preaching in said church was only occasional. The services of a preacher were had as often as the church society had funds to pay for them.

It was upon these facts, substantially, that the court held that the Baptist Church was entitled to the income of said fund under the conditions named in the will, and rendered judgment accordingly. From this judgment the Free Will Baptist Church appeals, and the reasons of appeal may be properly condensed into one, namely, that the trial court erred in holding that the Baptist Church was entitled to the income of said trust fund. We think this assignment of error must be sustained. Aside from the bill of exceptions filed by the plaintiff, the case presents no question as to the admissibility of evidence, or as to the weight to be given to evidence. The facts found were substantially agreed to by the parties, and the sole question is whether they support the conclusion to which the trial court came that by the words in his will "the Baptist Church and Society in East Killingly" the testator meant the church and society in whose favor the court rendered judgment. The facts thus found are the adjudicated facts upon which the trial court based its conclusion that the Baptist Church, rather than the Free Will Baptist Church, was entitled to the interest of the trust fund; and such a conclusion, under our decisions, must be regarded as a legal conclusion reviewable in this court. *Nolan v. New York, N. H. & H. R. Co.*, 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305. There were two Baptist churches in East Killingly, each having a society connected with it, and it is clear from the will that the testator intended to benefit one of them, and only one of them. In designating the beneficiary he did not use the legal name of either, but he uses words which describe both, and which would adequately describe either if the other did not exist. As, however, both exist, we have a case where there are two beneficiaries who substantially come within the description in the will; and the question is, what did these words of description mean to the testator? Did they mean to him the Baptist Church or the Free Will Baptist Church? The meaning he gave to them must be ascertained in the light and by the aid of the facts found. One of these churches had a settled pastor, held regular services, was the one with which the testator was connected and identified, whose services he attended when he attended any religious services, and was the one whose services he supported by

contributions of money. The other had no settled pastor when the will was drawn, and had not had for some seven or eight years. It maintained no regular services, and had practically ceased to be "a going concern." With it he was in no way identified or connected, had never attended its services, nor contributed in any way to its support. In the light of these facts we think the reasonable conclusion is that the testator, by the words of description in question, meant the Free Will Baptist Church and Society in East Killingly, and not the other.

Such facts as the foregoing, in the absence of any other controlling facts, have, in our own decisions, been uniformly held to be controlling on the question of interpretation (*Brewster v. McCall's Devisees*, 15 Conn. 274, 295; *Dunham v. Averill*, 45 Conn. 61, 29 Am. Rep. 642; *Bristol v. Ontario Orphan Asylum*, 60 Conn. 472, 22 Atl. 848; *Cosgrove v. Cosgrove*, 69 Conn. 416, 38 Atl. 219), and we think they ought to be so held in the case at bar. So much of the judgment of the court below, in this case, as determines "that the East Killingly Baptist Church is the church intended by the testator to receive the income from said \$1,000" is set aside, and the cause remanded to said court, with directions that judgment shall be rendered in favor of the East Killingly Free Will Baptist Church and Society, in accordance with the views herein expressed.

This disposition of the case renders it unnecessary to pass upon the questions raised by the bill of exceptions.

There is error. The judgment is reversed, and the cause remanded to be proceeded with as hereinbefore indicated. The other Judges concurred.

(75 Conn. 714)

SHMILOVITZ v. BARES.

(Supreme Court of Errors of Connecticut. July 24, 1903.)

WORK AND LABOR — AGREED PRICE — COMPLAINT — ALLEGATION — PROOF — REASONABLE VALUE — RECEIPT — EFFECT.

1. Rules under Practice Act, § 131, provides that, in an action for goods sold at an agreed price, plaintiff may recover a reasonable price if the proof fail to establish the price alleged. *Held* that, in an action for the contract price for the erection of a building, plaintiff might recover on proof that the services were rendered for reasonable value.

2. In an action for the reasonable value of services in erecting a house, testimony as to how long a time the plaintiff worked on the house, and testimony that he could not have done the work in a less time, were competent.

3. Defendant's answer having alleged payment in full, and no claim of a receipt or release in full as a bar having been made until argument, and a receipt introduced by defendant having been uncertain, in that it read, "Received of ——— fifteen dollars For Rent of ——— in full of act to Date For ——— Month Ending 190—," defendant could not complain of an instruction to the effect that the receipt was conclusive evidence of payment in full of everything due at its date unless it was satisfactorily

shown that the receipt was given through ignorance or mistake, or under circumstances showing that it did not speak the truth in any respect.

Appeal from Court of Common Pleas, Hartford County; John Coats, Judge.

Action by Nathan Shmilovitz against Nathan Bares for services rendered, brought to a justice of the peace for Hartford county on the 24th of March, 1902, who rendered judgment for the plaintiff, and thence by the defendant's appeal to the court of common pleas for Hartford county at its May term, 1902, and tried to the jury. Verdict and judgment for the plaintiff, and appeal to this court by the defendant, assigning errors in the admission of evidence and the charge of the court. No error.

Joseph P. Tuttle, for appellant. Sidney E. Clarke, for appellee.

HAMERSLEY, J. This is an action to recover the value of services rendered by the plaintiff to the defendant at his request. The dealings between the parties were conducted orally, and no written agreement or contract of any kind was made. The circumstances of the employment are stated in the first and second paragraphs of the complaint, as follows: "On or about February 15, 1902, the defendant employed the plaintiff to build a one-story wood building in said Hartford, thirty feet by sixteen feet on the ground, to be ten feet high, with one floor and one door, and to build a fence; the defendant agreeing to furnish all of the materials therefor, and the plaintiff agreeing to do said work for the sum of forty-five dollars." At the time of the beginning of said work the defendant altered the size of said building, making the same eighteen feet high, with two floors, four doors, and three extra windows, together with a wood partition in the same for an office, and agreed at the time to pay the plaintiff any additional sum that said extra work should amount to, and employed the plaintiff to do the same." The remainder of the complaint alleges that the plaintiff completed his work, that the services were worth \$145, and that the defendant has paid \$45 on account, and claims \$100 damages. The answer admits that the defendant employed the plaintiff to do the work for a one-story wood building and a fence for \$45; denies the employment as stated by the plaintiff, the completion of the work, the value of the services, and the payment on account; and alleges that the defendant paid the plaintiff the sum of \$45 in full payment for all services rendered. The plaintiff's reply admits the payment of \$45, but denies it was for all services rendered. The verdict of the jury finds the issues thus framed for the plaintiff; that is, it finds that the defendant employed the plaintiff to do the work for a two-story wood building; that the plaintiff did the work; that the defendant paid him \$45 on account, and not for all services

rendered; and that the services unpaid were worth \$100.

The defendant claims that the complaint should be construed as alleging that some of the services were rendered for an agreed price, and a part only for their reasonable value; and his real grievance seems to be—although it is not properly presented by the record—that the jury found that all the services were rendered for a reasonable value, and so found a fact not alleged, or ascertained the value of the services not rendered for an agreed price by first ascertaining the reasonable value of all the services, and deducting from this the amount of the agreed price, and so deprived the defendant of the advantage he had secured for himself in making an agreement as to price. Even if this construction of the complaint could be held correct, yet if upon the trial the proof was that all the services were rendered for a reasonable value, and not for an agreed price, the plaintiff was not precluded, on the ground of variance, from recovering that value. Rules under Practice Act, § 131; *Brewster v. Aldrich*, 70 Conn. 51, 38 Atl. 894. If the jury found that a part of the services were rendered for an agreed price, and a part for their reasonable value, there is nothing in the record to show that the court did not correctly instruct the jury as to the rule of ascertaining such reasonable value, or that the jury applied an illegal rule in reaching their verdict. There is nothing in the record to support the assignment of an error of this kind, and it does not appear, as implied in the reasons of appeal, that the trial court did rule that "the measure of damages for extra work on a builder's contract was the difference between the whole value of the work and the amount of the original contract."

The trial court did not err in admitting, as tending, in connection with other evidence, to support the allegations of the complaint, testimony as to how long a time the plaintiff worked upon the two-story house, and testimony that he could not have done the work in a less time.

The only other error assigned and claimed in argument relates to a passage in the charge of the court to the jury. The defendant having introduced in evidence three receipts, each for \$15, the last of which reads as follows:

"March 8, 1902.

"Received of N. Bares fifteen dollars For Rent of ——— in full of act to Date For ——— Month Ending 190—.

"\$ ——— N. Shmilovitz."

—And defendant's counsel, upon argument, having claimed that said receipt was binding on the plaintiff as a receipt in full, the court charged the jury upon the receipt as follows: "Now, I ought to speak to you with reference to the effect of this receipt which has been produced. A receipt is not a contract. It is simply an acknowledgment by the party

who signs the receipt in accordance with the contents and purport of the receipt which he has signed. And if that acknowledgment is shown in a satisfactory way to have been in error—either the receipt having been given through ignorance, through mistake, through any circumstance according to which the receipt does not speak the truth in any respect—then the parties are at liberty to go behind the receipt, and show facts as they actually exist, in spite of the receipt." The court practically tells the jury that the paper produced is evidence that the defendant paid \$15, and that this payment was received by the plaintiff in full payment of all that was due on an account between them at the date of payment, and is conclusive evidence of these facts, unless it is satisfactorily shown that the receipt was given through ignorance or mistake, or under circumstances which prove that it does not speak the truth in any respect. It is to be noted that the defendant's answer does not allege the execution of a release or of a receipt in full as a defense or bar to the action, and that no claim of this kind appears to have been made until argument; that the main issue framed by the pleadings is the question of whether the admitted payment of \$45, including the \$15 mentioned in the receipt, paid for all the services rendered, or only for a part of them, and that the paper produced in evidence bears on its face suggestions of mistake and uncertain meaning. The defendant certainly has no reason to complain of the language used by the court in commenting on this evidence.

There is no error in the judgment of the court of common pleas. The other Judges concurred.

(75 Conn. 718)

LOOMIS v. HOLLISTER.

(Supreme Court of Errors of Connecticut. July 24, 1903.)

MASTER AND SERVANT—LIABILITY FOR ACTS OF SERVANT—DEVIATION FROM EMPLOYMENT—INSTRUCTIONS.

1. Defendant's servant was employed to deliver ice over a route covering several miles, and drive back to the stables. Defendant showed him the specific route to take. The servant, on returning to the stables, drove out of the prescribed route to the extent of about half a mile for the purpose of stopping at the post office to get his mail. At the post office he negligently left the team unhitched. The team started for the stables, and ran against the wagon of plaintiff, injuring her. *Held*, that an instruction that for all acts done by a servant in the execution of his master's business within the scope of the employment, and for acts warranted by the authority conferred on him, the master was liable, while for other acts the servant alone was responsible, and that a mere departure by the servant from the strict course of duty, though for a purpose of his own, was not of itself such a departure from the master's business as to relieve him from liability, but that where there was a total departure, so that the servant might be said to be on a frolic of his own, the master would not be liable, and that the jury, in determining whether there was

such a deviation as would relieve defendant, should consider all the circumstances of the case, properly submitted to the jury the question whether the negligent act was done in the course of the master's business.

2. The part of the instruction that a master would not be liable for the negligent act of his servant where there was not merely a deviation, but a total departure, from the course of the master's business, so that the servant might "be said to be on a frolic of his own," was not erroneous, as leading the jury to believe that the court intended to say that no deviation on business of the servant could become a total departure unless that business was of a hilarious nature.

Appeal from Superior Court, Hartford County; Alberto T. Roraback, Judge.

Action by Clara A. Loomis against Wesley Hollister. From a judgment for plaintiff, defendant appeals. Affirmed.

On August 11, 1899, a heavy ice cart, drawn by a pair of horses, being the property of the defendant, collided with a wagon in which the plaintiff was seated, whereby she was thrown upon the ground and received the injuries complained of. The defendant's team was in charge of his servant, named Beebe. The following facts were claimed by the parties to have been proved: The defendant had employed Beebe the preceding May. His daily duties were, early in the morning, to take the defendant's team and deliver ice over a route covering several miles, and drive the horses back to the defendant's stables. Upon returning to the stables his duties ended for the day, until 6 o'clock, when he would ordinarily feed the horses. When Beebe was first employed, in May, the defendant went about with him in the peddling of ice, and showed him the specific route to take. On the day in question Beebe started with the team from the stables at an early hour in the morning, and was returning to the stables after making the last delivery of ice, on the natural route home, and the one specifically prescribed for him by the defendant; but instead of continuing on this route he took a roundabout and longer route for the purpose of stopping at the post office to get his paper. He went into the post office, leaving the horses unhitched and unattended. It was then about 1:30 p. m. The horses had not been fed for seven hours, and were left standing, headed towards the stables, which were about a quarter of a mile distant. While Beebe was in the post office the horses started for home, ran against the wagon of the plaintiff, and so caused her injury.

The defendant asked the court (Roraback, Judge) to charge the jury that, even if they should find that Beebe was negligent, the plaintiff could not recover against the defendant if they also find "that the driver had departed from the route required by the service and business of the defendant for purposes of his own, and that but for such departure the injury complained of would not have happened." The court did

not so charge, but did charge in respect to the deviation from the course prescribed as follows: "The defendant contends that upon the day and time in question that part of the street where the accident happened was not on Mr. Beebe's route, that he had no occasion or business to go there for the defendant, and that his being at this point was contrary to the instructions given him by the defendant in his business. Now, in treating this question, gentlemen, I shall quote a little from our highest authority in this state on this subject. The general rule relating to a question of this kind in this class of cases may be stated as follows: 'For all acts done by a servant in obedience to the express orders or directions of a master, or in the execution of the master's business within the scope of his employment, and for acts in any sense warranted by express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible. For acts which are not within these conditions the servant alone is responsible.' This rule tells us that the master's liability depends upon whether the acts were done within the scope of his employment. Whether, then, the alleged negligent act of the defendant in this case, for which it is now sought to make the defendant liable, was done in the execution of the defendant's business, within the scope of his employment, or not, is a question of fact, which you are to determine, like these other questions, gentlemen, from all of the evidence concerning this transaction. To repeat, the defendant contends that his servant, by going to the post office upon the day and time in question, so far deviated from his authority—the course of his employment—as to relieve the defendant from all liability for negligence upon this occasion. In case of deviation from the scope of employment from the defendant's business, a mere departure by the servant from the strict course of duty, even for a purpose of his own, will not, in and of itself, be such a departure from the master's business as to relieve him from responsibility. Not every deviation of the servant from the strict execution of his duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibility. But where there is not merely a deviation, but a total departure, from the course of the master's business, so that the servant may be said to be on a frolic of his own, the master is no longer liable for a servant's conduct. Now, gentlemen, was there such a total departure from the defendant's business when this accident occurred that the defendant is not answerable for this act of negligence, if you find that fact to exist? The plaintiff contends, gentlemen, that there has been no such deviation—no such total departure—

from the business of the defendant as to permit him to escape responsibility. Well, gentlemen, that is a question of fact. And in that connection you will consider the instructions, if any, that this defendant gave to this man Beebe; you will examine the maps as to the location of these streets, if necessary, consider the defendant's business, with all of its bearings, the location of his stables, the distance by different routes, and all of the other facts and circumstances pertaining to this question; and in that way, gentlemen, you will determine this issue of the case." The appeal assigns error in the charge as given, and in the neglect to charge as requested.

Harry M. Burke, for appellant. Hugh O'Flaherty and Herbert O. Bowers, for appellee.

HAMERSLEY, J. (after stating the facts). When the accident occurred, Beebe had been the servant of the defendant for some two months, and his duties as such included the daily use of his master's horses and cart for the delivery of ice. For this purpose he was directed to take the team each morning from his master's stables, proceed to the route assigned him, deliver the ice as needed, and return to the stables. While thus engaged, from the start in the morning to the return and stabling of the horses, his care and management of the team so intrusted to him would be in the execution of his master's business, within the scope of his authority. While returning to the stables on the day in question, he reached the corner of a parallelogram inclosed by four streets. Instead of following the street leading directly to the stables, he drove through the streets bounding the parallelogram on the other three sides. This detour was nearly a half a mile longer than his direct course, and was made for the purpose of passing the post office on his return to the stables, in order to stop there and get a newspaper for himself. When he was first employed, Beebe was instructed as to the specific route he should follow, and his return to the stables by the post office was in violation of those instructions. Was Beebe, in driving and managing his master's team during the time occupied by this detour, in the execution of the master's business, within the scope of his employment? This question the trial court left to the jury as one of fact, to be determined by them from all the evidence concerning the transaction. This action of the court is not complained of. The only contention of the defendant is that the language used by the court in submitting the question to the jury does not fully and fairly show the relation between the fact to be determined and the law governing the liability of the defendant, and was calculated to confuse and mislead the jury.

A person guilty of negligence which causes injury to another may be liable to pay the

injured party damages. He may also be liable if the acts of negligence are not done by himself personally, but by another acting under his express direction. Such liability for the negligent acts of another is controlled by the general law of agency. But the law goes further than this, and makes a master liable for acts of negligence done by his servant, although such acts are unauthorized, or even contrary to instructions, when the negligent acts are done in the execution of the master's business for which the servant has been employed. This law is based on a rule of public policy which declares that substantial justice is, on the whole, best served by making a master responsible for the injuries caused by his servant acting in his service, when set to work by him for his own benefit. *Hearns v. Waterbury Hospital*, 66 Conn. 98, 123, 126, 33 Atl. 595, 31 L. R. A. 224. It is this rule of policy that has established, as applicable to that class of cases to which the one before us belongs, the rule of law, namely, the master is liable for his servant's negligence if the negligent acts are done in the execution of the master's business within the scope of the servant's employment, and this rule of policy must be kept in mind in determining the meaning of the language used to express the rule of law. That meaning would seem sufficiently clear. As applicable to cases like the present, it may be amplified in this way: Where a servant's employment includes the daily or occasional driving, use, and management of his master's horses and wagon for the purposes of that employment, and the servant, while thus employed, is guilty of negligence in the management of the team, whether by reason of reckless driving or of recklessly leaving the horses unhitched and unattended, that negligence is done in the execution of his master's business within the scope of his employment; and this is true although the master may have forbidden such negligent acts, and although the immediate occasion of the negligence is the accomplishment of some purpose purely personal to the servant, as the overtaking of some one he wishes to speak with on his own business, or stopping to enter a house on an errand of his own, or disobedience of orders as to the precise route he shall follow; that is to say, the servant may be engaged in the execution of his master's business within the scope of his employment, although in conducting that business he is negligent, disobedient, and unfaithful. On the other hand, if the servant takes his master's team without authority, and goes off on an errand of his own, he is not engaged in his master's business, and the master is not liable for his negligence. Likewise, when the servant has taken his master's team in pursuance of his employment, and, abandoning the purpose for which he started, goes off on some business of his own, he may thus take his master's team into his own possession without

authority for the transaction of his own business; and in such case his acts are not in the execution of his master's business, and his master is not liable for his negligence. Such amplifications of the brief statement of the rule are illustrations of its meaning, and may be regarded as propositions of law. *Stone v. Hills*, 45 Conn. 44, 51, 29 Am. Rep. 635; *Whatman v. Pearson*, L. R. 3 Com. Pleas, 422, 425; *Joel v. Morris*, 6 Car. & Payne, 501, 502; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 523, 10 Sup. Ct. 175, 33 L. Ed. 440. But where it is conceded that a servant is using his master's team within the scope of his employment, and that he departs from the instructions of his master for some purpose of his own, and the conflicting claims are made on the one hand that the departure indicated a disobedient or unfaithful conduct of his master's business, and on the other hand that the departure indicated an abandonment of that business and a taking of the team by the servant without authority, and solely for the transaction of his own business, and the circumstances supporting these conflicting claims are of such doubtful import that a trier might not unreasonably reach either conclusion, a question of fact is presented, which should be determined by the jury, in view of the instructions of the court as to the true meaning of the rule of law governing the master's liability in such case. It is claimed that the question of fact submitted to the jury in the present case was of this nature: Under all the circumstances established by the evidence, was Beebe, while driving the horses back to the stables by way of the post office, engaged in the employment upon which he had started in the morning, or was he in the possession of his master's team without authority for the mere purpose of transacting his own business? In other words, was Beebe engaged in prosecuting his master's business, although conducting it in a negligent and disobedient manner, or had he abandoned his master's business for the prosecution of his own? We think the court, in submitting this question to the jury, gave a sufficiently full and accurate statement of the law. This portion of the charge is substantially in language used by the court in *Ritchie v. Waller*, 63 Conn. 155, 160-166, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. Rep. 361, where we held, upon a state of facts closely analogous to those presented by this record, that the conclusion of the master's liability, whether treated as one of fact or of law, was clearly correct. In that case the master pointed out to the servant the route to be taken in going and returning upon his master's business, and supposed that the same route would subsequently be followed, but did not specifically instruct him so to do. In the present case the master pointed out to the servant the route to be taken in going and returning upon his business, and instructed him to follow that route in subsequent trips. Whether this distinc-

tion is really important or not, the court did charge the jury to consider these instructions, in connection with all the other circumstances proved, in determining whether the deviation from the prescribed route was such that it could not be considered as a continuance of the journey on the master's business, but constituted in fact a total departure and separate journey on his own business. To illustrate the complete severance from the master's business involved in the change of a journey commenced on the master's account into a separate journey on the servant's account, the court said that the master would not be liable "where there is not merely a deviation, but a total departure, from the course of the master's business, so that the servant may be said to be on a frolic of his own." This is an illustration occasionally used by the courts for more than 30 years. The defendant claims that the average jurymen is so ignorant or uncultured that the use of this illustration would confuse him, and mislead him into believing that the court intended to say that no deviation on business of the servant could become a total departure unless that business were of a hilarious nature. We think the defendant is mistaken. At all events, we cannot treat the use of an illustration thus sanctioned as a fatal error.

There was no error in neglecting to charge in the language of the defendant's request. All that the defendant was entitled to was sufficiently stated in the charge as given.

There is no error in the judgment of the superior court. The other Judges concurred.

(76 Conn. 58)

TOWN OF MERIDEN et al. v. BENNETT et al.

(Supreme Court of Errors of Connecticut. July 24, 1903.)

RAILROADS—GRADE CROSSINGS—NEW HIGHWAYS—ESTABLISHMENT BY RAILROAD COMMISSIONERS—AUTHORITY—DISCONTINUANCE—POWERS OF SELECTMEN.

1. Gen. St. 1888, § 3489 (Gen. St. 1902, § 3713), empowers railroad commissioners, for the purpose of removing a grade crossing of a highway and railroad, to determine what alterations or removals shall be made in such crossing, its approaches, the method of crossing, the location of the highway or railroad, etc. *Held*, that where, on an application to the railroad commissioners for the determination of the mode of crossing of a highway at grade by a railroad, the commissioners discontinued a certain portion of the highway, and directed that a new highway be laid out and constructed by the railroad company in place of the highway discontinued, which highway was constructed and accepted, such highway was in effect established by the General Assembly, and the selectmen of the town had no authority to discontinue the same under section 2708 (section 2056), giving them authority to discontinue highways except such as were laid out by a court or by the general assembly.

2. The order of the commissioners directing construction of such new highway was not rendered invalid by the length of such highway, the length thereof necessary to be constructed un-

der the circumstances of the case being within the reasonable discretion of the railroad commissioners.

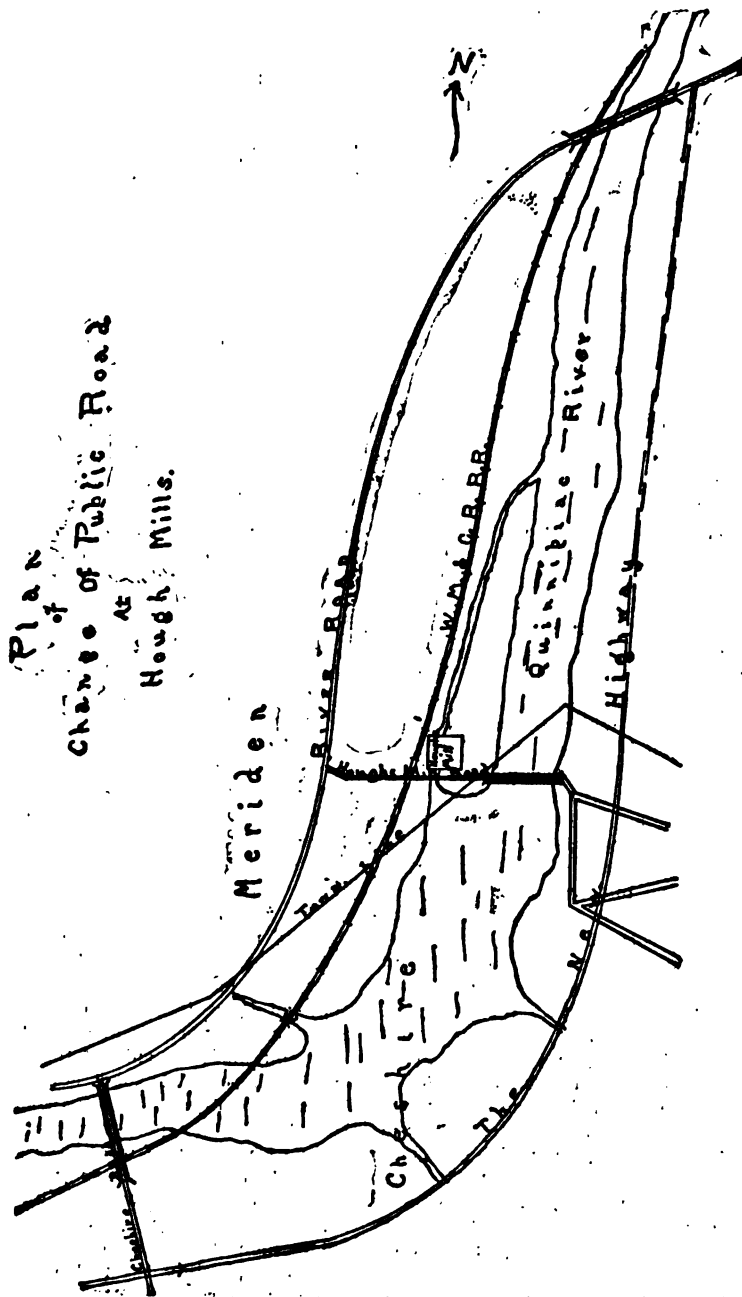
Case reserved from Superior Court, New Haven County; William T. Elmer, Judge.

Action by town of Meriden and others against Alfred S. Bennett and others. Case reserved for the advice of the Supreme Court on facts found. Judgment advised for defendants.

The following is a plat of the premises in question:

William L. Bennett, for plaintiffs. Charles Kleiner and D. W. Coleman, for defendants.

HALL, J. On the 19th of July, 1901, the defendants in this proceeding, who are six citizens of the town of Cheshire, brought a complaint to the county commissioners of New Haven county, under section 2674, Gen. St. 1888 (section 2021, Gen. St. 1902), alleging that a certain highway in the town of Meriden, extending from a point near Hough's Mills, so called, northeasterly along



the east bank of the Quinnipiac river to the River Road, so called, was out of repair, obstructed, and impassable. This complaint came before the county commissioners on the 24th of September, 1901, and by continuance on the 3d of October, 1901, when the parties were heard, and on the 17th of May, 1902, the county commissioners found that said highway was out of repair and obstructed, by reason of the embankments upon which the work was constructed having fallen in, and for other reasons, and ordered the selectmen of Meriden to repair said road by rebuilding said embankments and removing said obstructions on or before the 1st of July, 1902. The present action is an appeal to the superior court by the town of Meriden and one of its citizens from such order, under section 2677, Gen. St. 1888 (section 2024, Gen. St. 1902). The reasons for such appeal, as stated in said proceedings, are: "(1) Said so-called public road or highway was not at the time of said hearing before said board, and at the time of said decision, a public road or highway. (2) Said so-called public road or highway was by the selectmen of the town of Meriden on the 1st day of August, 1901, duly and legally discontinued as a public road or highway, which action of the selectmen was on the 2d day of October, 1901, duly approved by the town of Meriden. (3) At the time of said hearing and said order said so-called public road or highway had been legally discontinued."

In support of the first of these reasons of appeal, it is contended by the plaintiffs that the railroad commissioners, in ordering on the 25th of June, 1889, as hereinafter described, that the location of a certain highway be changed so that it should not cross the tracks of the Meriden, Waterbury, etc., Railroad Co., at Hough's Mills, but should be connected with other existing highways by a new highway, of which the highway ordered to be repaired is a part, exceeded their powers. In support of the second and third reasons of appeal, the plaintiffs claim (1) that said new highway, a part of which was ordered by the county commissioners to be repaired, was not in fact laid out by the railroad commissioners, but was laid out by an agreement between the said railroad company and the selectmen of Meriden; and (2) that, whether laid out by the railroad commissioners or by the selectmen under such agreement, it was within the power of the selectmen of Meriden to discontinue that part of said new highway within their town, since such highway was not laid out either "by a court or the General Assembly," within the meaning of section 2708, Gen. St. 1888 (section 2056, Gen. St. 1902), which provides that "the selectmen of any town may, with its approbation, by a writing signed by them, discontinue any highway or private way therein, except when laid out by a court or the General Assembly."

With reference to these reasons of appeal

and said claims of the plaintiffs, the following facts were, in substance, found by the superior court, by agreement of the parties: The highway, the northerly part of which has been ordered repaired, and the whole of which we shall call the "New Highway," extends for a distance of about two-thirds of a mile along the easterly side of the Quinnipiac river, about one-half of it being in the town of Meriden, and the remainder in the adjacent town of Cheshire, from a highway at its northern terminus called the "River Road" to a highway at its southern or western terminus called the "Cheshire Road." Said River Road crosses the Quinnipiac river, and the Meriden, Waterbury, etc., Railroad, at a point near the northern terminus of the new highway, and extends southerly along the west bank of the river, crossing the Cheshire Road, which also crosses the river and the railroad, at a point near the southern or western terminus of the new highway. In June, 1887, the Meriden, Waterbury, etc., Railroad Company submitted to the railroad commissioners, for their approval, the layout of its road along the west bank of the Quinnipiac river, between the river and River Road, by which the railroad would not only cross the River Road and the Cheshire Road at the points above described, but would also cross, at grade, at a point near Hough's Mills, about midway between said two crossings of the River and Cheshire Roads, another road, which may be designated as the "Hough Mills Road," running from the town of Cheshire westerly across the river, and into the town of Meriden, and connecting with the River Road a short distance west of said proposed crossing of the Hough Mills Road. Said Hough's Mill Road was in general use between said towns. On June 30, 1887, the railroad commissioners, by their order in regard to the streets and highways proposed to be crossed at grade by said railroad, "declined" to accept said proposed layout and location, but by their said order authorized the railroad company "to so alter the location of said streets and highways, and to raise or lower the same at said crossings as to cross over or under the same, as [may] be agreed upon with the selectmen of the towns, * * * or, in case of failure to agree," then as might thereafter be ordered by the railroad commissioners. The town of Meriden was a party to said proceedings. Thereupon, in June, 1888, the town of Meriden discontinued a portion of said Hough's Mills Road on the west side of the river from the point where said road connects with the River Road to a point 112 feet easterly, near Hough's Mills; including that part of said highway which was to be crossed by the railroad. The town of Cheshire appealed from said action of the town, and by agreement of the parties a judgment was rendered setting aside such discontinuance. While said appeal was pending the railroad company constructed its railroad at grade over said dis-

continued portion of the Hough Mills Road. In May, 1889, the directors of the Meriden, Waterbury, etc., Railroad Company, apparently under section 3489, Gen. St. 1888 (section 3713, Gen. St. 1902), brought an application to the railroad commissioners, alleging that public safety and convenience required an alteration in the method of crossing and in the location of said Hough's Mills Road. The towns of Meriden and Cheshire appeared by their selectmen, and were heard in said proceeding, and the railroad commissioners on the 25th of June, 1889, made this order: "Now, therefore, on consideration, with the approval and consent of the selectmen of both of said towns, we do authorize and empower said railroad company to change the location of said highway so that the same shall not cross said track at said Hough's Mills, but shall be connected with other existing highways by a new highway [the new highway in question] sixty feet in width, to be laid out and located in the place and manner delineated on a map thereof on file in this office. * * * Said highway to be constructed and finished to the satisfaction of the selectmen of said towns of Meriden and Cheshire, or, in case said company cannot agree with said selectmen, then to the satisfaction of this board. And when said new highway is completed the existing crossing at Hough's Mills to be closed, at right of way of said railroad. * * * The railroad commissioners having refused a request of the railroad company for a modification of this order, the railroad company complied with the same. On the 12th of May, 1891, the railroad company brought its application to the railroad commissioners, alleging that it had constructed said new highway in a good and substantial manner, and to the acceptance of the town of Cheshire, but that the town of Meriden unjustly refused to accept the same, and that it was unable to agree with the selectmen of Meriden as to its acceptance, and asking the railroad commissioners to inspect the road, and, on finding it properly constructed, to direct it to be opened, and the existing crossing at Hough's Mills to be closed as a highway. The towns of Meriden and Cheshire were made parties to this proceeding. The town of Meriden objected at the hearing to the acceptance of the new highway, mainly upon the ground that the retaining walls and a culvert were not properly constructed. The railroad commissioners on July 2, 1891, found that, while there was a question as to the sufficiency of said wall, it would be unreasonable to require it to be rebuilt at that time; that the location of the Hough Mills Road had been changed in accordance with their order of June 25, 1889; and that the new highway had been constructed and finished to the satisfaction of the board—and directed it to be forthwith opened to public travel, and that the crossing at Hough's Mills be thereupon closed. The crossing at Hough's Mills was

thereupon closed, and the new highway was opened and used as a public highway until about the year 1898, when that part of the same situated in the town of Meriden, became dangerously defective and out of repair, and was closed to travel by the selectmen of Meriden. On the 1st of August, 1901, after the commencement of the proceedings by citizens of the town of Cheshire to compel said road to be repaired, from the decision in which proceeding the present action is an appeal, and before the hearing upon said proceeding, the selectmen of Meriden, by a writing signed by them, resolved that so much of said new highway as lay within the town of Meriden be, and that the same was thereby, discontinued; and on the 2d of October, 1901, the town of Meriden, at a duly called meeting, voted "that the doings of the selectmen" in closing such part of the new highway, "be approved."

Whether we regard the order of the railroad commissioners of June 25, 1889, directing a change of the location of the Hough Mills Road so that it should connect with the River Road and the Cheshire Road, by the new highway delineated on the map, and the order of July 2, 1901, confirming that of June 25th, as made by virtue of the authority conferred upon the railroad commissioners by section 3476 or section 3483 or section 3489 of the General Statutes of 1888, the facts above stated fail to show that the railroad commissioners exceeded their powers in directing the railroad company to construct the new highway. Section 3489, Gen. St. 1888, under which the application of the railroad directors of May 17, 1889, and the order of June 25, 1889, seem to have been made, expressly empowers the railroad commissioners, for the purpose of removing a crossing at grade of a highway and a railroad, to determine "what alterations or removals shall be made" "in such crossing, its approaches, the method of crossing, the location of the highway or railroad * * *." Equally extensive powers as to the elimination of such grade crossings are conferred upon the railroad commissioners, although by different language, by the other two sections referred to.

But it is said that the railroad commissioners have laid out a new highway, and that they have no authority to do so under these statutes, and that their power is limited to the alteration of an existing highway, or of its location, and that such power does not include the right "to determine whether a new highway shall exist, and that public convenience and necessity demand its existence"; and, as supporting this contention, we are referred to the case of *Town of Fairfield's Appeal from R. R. Com'rs*, 57 Conn. 167-171, 17 Atl. 764, and to the following language of this court in the case of *State's Attorney v. Selectmen of Branford*, 59 Conn. 402-407, 22 Atl. 386, 388: "It cannot be claimed that the commissioners have author-

ity under the statute above recited (Pub. Acts 1884, p. 378, c. 100, § 1), or by any other statute, to lay out any new highway, as an independent matter. They have no such power. They cannot interfere with the general powers of towns and selectmen to lay out all the needed new highways within their town limits." But the new highway in question was not laid out "as an independent matter." While in one sense it was a new road, it was in fact laid out as a substitute, in connection with parts of the River Road and the Cheshire Road, for, and as serving with said portions of said two roads, the purposes of that part of the Hough Mills Road which was discontinued in order to remove a railroad crossing. It was manifestly laid out as a necessary and proper way of accommodating that public travel which had before been over the Hough's Mills crossing, by rendering the River Road and Cheshire Road crossings available for such travel. Both of the cases just cited hold that the railroad commissioners are empowered by statute to construct short portions of new highways as alterations of discontinued ways. This court said in *Cullen v. N. Y., etc., R. R. Co.*, 66 Conn. 211-222, 33 Atl. 910, 911: "It has always been the policy of the state to allow railroad companies, with the approval of the railroad commissioners, to lay out and construct their roads in the best possible line, and, if necessary for this purpose, to change the course of existing highways. * * * Such a change may result in the discontinuance of a part of a highway, and the substitution of a new section of a road, or the diversion of travel upon another existing highway." The length of the new highway in question does not, necessarily and as a matter of law, render the order of the commissioners directing its construction invalid. The amount of new highway, necessary to be constructed in altering or changing the location of existing ways, in order to remove or avoid railroad crossings, must necessarily depend to a great extent upon the circumstances of each particular case, and is left to the reasonable judgment of the railroad commissioners, reviewable upon appeal to the superior court. *Bristol v. New England R. Co.*, 70 Conn. 305-319, 39 Atl. 235, 40 L. R. A. 479; *Town of Suffield v. New Haven & Northampton Co.*, 53 Conn. 367-370, 5 Atl. 366; *Waterbury v. Hartford, Prov. & Fishkill R. Co.*, 27 Conn. 146-155.

With reference to the powers conferred upon railroad commissioners by section 3489, we said in *Cullen v. N. Y., etc., R. Co. et al.*, 66 Conn. 223, 33 Atl. 910, 911: "Their authority sometimes trenches upon what would otherwise be within the exclusive jurisdiction of some particular municipality, and wherever it does the latter must give way, for so only could any general policy of administration be carried out. * * * As highways must give place to railroads where both cannot occupy the same ground, so

municipal control and management of highways must yield at times to state control and management, when safety of railway operation is in question."

The new highway was laid out and constructed by the railroad company under an order of the railroad commissioners, and not merely by the consent of the towns. The writing of June 25, 1889, signed by the railroad commissioners, authorizing and empowering the railroad company to close Hough's Mills Road, and to change its location so that by the new highway it should be made to connect with the River and Cheshire Roads, was a judgment of the railroad commissioners upon the matters alleged in the petition of the railroad directors, and was a determination by them, under the statutes, after a hearing and "on consideration," of precisely what alterations should be made in the discontinuance of old highways, and in the substitution thereof of new ones, in order to remove the Hough Mills crossing. The fact that the entire decision rendered by the railroad commissioners was "with the approval and consent of the selectmen of both of said towns" does not render it any the less the order of the commissioners. *New Haven Steam Sawmill Co. v. New Haven et al.*, 72 Conn. 276-283, 44 Atl. 229, 609. And see form of order in *Cullen v. N. Y., etc., Railroad*, 66 Conn. 213, 33 Atl. 910. Nor does it make the laying out of the new highway any more the act of the towns than it does the closing of the Hough Mills Road on the removal of the grade crossing. If anything further is required to show that the new highway has become the substituted highway, by direction of the railroad commissioners, it is found in the language of their order of July 2, 1891, in which they say: "We therefore direct it [the new highway] to be forthwith opened to public travel, and that the crossing at Hough's Mills be thereupon closed." The act of the railroad commissioners in changing the location of a portion of the Hough Mills Road, so that that road should connect with the river and the Cheshire Roads by the new highway, was the act of the state; and the selectmen of Meriden had no power, under section 2708, Gen. St. 1888, to discontinue the portion of said highway within that town. The railroad commissioners, in discontinuing certain highways, and in substituting others therefor, in the removal of grade crossings, under the General Statutes referred to, like commissioners appointed by a special act of the Legislature to remove particular grade crossings, act by the supreme power of the state, and as the instrumentalities of the state itself. *N. Y. & N. E. R. Co.'s Appeal from Railroad Com'rs*, 62 Conn. 527-535, 26 Atl. 122. The taking of the land for the new highway is an appropriation of the same by the state, for the purposes of a highway, necessary for the abolition of a public nuisance, and is an exercise of the paramount authority of the

state through the agency of the railroad commissioners. *Bristol v. New England R. Co.*, 70 Conn. 815-817, 39 Atl. 235, 40 L. R. A. 479. Provision is made in the statutes for the payment of damages resulting from such taking.

By the statutes referred to, and others of a similar character, the state has established a tribunal to determine when and in what manner grade crossings shall be removed. *Town of Westbrook's Appeal from R. R. Commissioners*, 57 Conn. 95-101, 17 Atl. 368. "Whether or not public safety requires any change of a highway at a grade crossing, to the end that such crossing may be removed, is a question that the Legislature has intrusted solely to the railroad commissioners, as an original one, and to the superior court only by an appeal from their doings. * * * No appeal having been taken from the decision of the commissioners, that question was res adjudicata." *State's Atty. v. Selectmen of Branford*, 59 Conn. 411, 22 Atl. 339. This language is equally applicable to the decision of such tribunal as to what changes, if any, are to be made at such a grade crossing. In *Town of Waterbury v. Hartford, Prov. & F. R. Co.*, supra, the defendant had occupied about a mile of a public highway through a deep gorge, and, with the approval of the commissioners of the railroad, had established therefor another highway. Upon an application by the plaintiff town for a mandamus to compel a restoration of the road taken, or the construction of another highway in place of that thus substituted, this court, in denying the application, said: "The mile of this old highway taken became, as is agreed, a part of the substituted railroad track; and this was done by the Legislature itself, for it was done by the commissioners, who represented the Legislature. * * * What was done was authorized by the charter, and directed under it, by the agents of the government, as necessary for the public safety, and, when executed, was obligatory and irrevocable, save by the government itself." As to whether there should be a highway or a railroad through the gorge, the court said: "The Legislature have decided the question by their commissioners. * * * A highway laid out by 'special delegated authority of the Legislature' is laid out by the General Assembly, within the meaning of the exception in section 2708. In *Simmons v. Town of Eastford*, 80 Conn. 286-289, it was held that a highway laid out by a turnpike company under authority from the Legislature was laid out by the General Assembly, and that the portion of such highway within the limits of the defendant town, which, by an agreement with the turnpike company confirmed by the General Assembly, had been assumed by the town as a public highway, could not be discontinued by the selectmen of said town, under section 2708. As was said in that case, such limitation of the powers

of the selectmen under this statute "is necessary to prevent a conflict of action between the selectmen and the General Assembly or the courts." It is necessary in the present case to prevent such a conflict between the selectmen and the railroad commissioners in the important work of the removal of grade crossings.

Conceding, for the purposes of this case, that the new highway was not laid out by a court, within the meaning of that word in said section, it was laid out by the General Assembly; and no part of it, therefore, was discontinued by the action of the selectmen of Meriden, and the vote of the town approving such action. Section 2726, Gen. St. 1888 (section 2078, Gen. St. 1902), provides a method for the discontinuance of highways which cannot be discontinued by selectmen under section 2708.

Judgment is advised for the defendants (appellees). Costs will be taxed in this court in favor of the defendants. The other Judges concurred.

(75 Conn. 695)

LAVIGNE v. CITY OF NEW HAVEN.

(Supreme Court of Errors of Connecticut. Jul. 24, 1903.)

HIGHWAYS—DEFECTS IN PART OCCUPIED BY STREET RAILWAY—PERSONAL INJURIES—LIABILITY OF TOWN—COMPLAINT—ALLEGATION OF DEMAND FOR RELIEF.

1. In framing a complaint in an action against a city to recover the penalty prescribed by Gen. St. 1902, § 2020, for neglect to repair a highway, it is better to state in the claim or prayer for relief that the relief demanded is that given by the statute.

2. Gen. St. 1902, § 2013, provides, in substantially the language of the act of 1672 as revised in 1750, that towns shall, within their respective limits, build and repair all necessary highways, "except where such duty belongs to some particular person." Special charters authorizing the construction of railroads in the highways imposed on the companies the duty of keeping the part of the highway occupied by their tracks in a safe condition. General laws imposed the same duty on all companies authorized to build railway tracks in highways. The General Statutes of 1902 imposed such duty on street railway companies. Gen. St. 1902, § 2020, authorizes any person injured by reason of a defective highway to recover damages "from the party bound to keep it in repair." Held, that an action for damages sustained by reason of a defect in the portion of a highway occupied by the tracks of a street railway company could not be maintained against the town alone.

3. Gen. St. 1902, § 3838, providing that a person injured by reason of any defect in that part of the highway which any street railway company is bound to keep in repair may sue both such company and the town or city which is bound to keep the highway in repair, does not authorize one injured by reason of a defect in such part of the highway to sue the town alone; the section only authorizing an action as a substitute for the one authorized against the company by section 2020.

Appeal from Superior Court, New Haven County; Alberto T. Roraback, Judge.

Action by George Lavigne against the city of New Haven to enforce against the city

the penalty provided by Gen. St. 1902, § 2020, for neglect to repair a highway. Defendant suffered default, and moved for a hearing in damages. From a judgment for substantial damages, defendant appeals. Reversed.

Leonard M. Daggett, for appellant. Benjamin Slade, for appellee.

HAMERSLEY, J. In framing the complaint for such an action, it is better to state in the claim or prayer for relief that the particular relief demanded is that given by force of the statute. 2 Swift's Digest 1871, p. 596; Rules under the Practice Act, form No. 185.

The judgment of the trial court depends upon the proposition affirmed by it, that our statutes authorize an action against a town or city by a person injured by means of a defect in that portion of a highway within the municipal limits which is legally occupied by the tracks and roadway of a street railway company, other than the special action against a railroad and municipality authorized by section 3838, Gen. St. 1902. If this proposition is unsound, the court clearly erred in rendering judgment for substantial damages and in not rendering judgment for nominal damages. Error in this ruling is the principal one assigned in the reasons for appeal, and the only one which need be considered.

The maintenance of highways in a reasonably safe condition for the legitimate use of the traveling public is a governmental duty. That duty belongs to towns, unless imposed, in exceptional cases, upon some particular person. This duty was to a certain extent voluntarily assumed by towns from our earliest settlement, and occasionally imposed upon particular towns in respect to particular highways by special orders of the General Court. In 1643 the general duty was committed to public officers called "surveyors," to be appointed by the several towns. In 1672 the several townships were ordered to keep in sufficient repair all highways and bridges within their limits, and the context clearly shows that the general duty did not include highways, "the care whereof doth belong * * * to particular persons to repair." St. 1672, p. 7. In the act as revised and published in 1750, the general duty to repair all highways is expressly qualified by adding, unless where it belongs to any particular person or persons in any particular case, and the imposition of the duty to repair has ever since been expressed in similar language, and is stated in the last revision (Gen. St. 1902, § 2013) as follows: "Towns shall, within their respective limits, build and repair all necessary highways and bridges, except where such duty belongs to some particular person."

In the absence of legislation, persons using a public highway do so at their own risk.

If injury occurs from any defect in the way not resulting from the personal tort of an individual, but solely from the manner in which the state executes its function of providing avenues for public travel, such defect and injury is not an occasion from which any cause of action arises. No legal right of the person injured has been invaded; no legal duty to him has been violated. This is equally true when execution of the function is committed to the inhabitants of a municipality. The governmental duty thus imposed is a burden which the inhabitants are compelled to carry, and the failure to obey the law, or neglect in its execution, may be punished in any manner the state may prescribe. But the mere imposition of the burden creates no duty and correlative right as between the municipality and the persons using the highway. Where the burden is voluntarily assumed in the promotion of private benefit, another principle may become involved, although such assumption may be of the nature of a governmental duty.

Different modes of punishing neglect of this duty and of compelling obedience have been provided by law. But that most effective and generally used is the fine or forfeiture, measured by the actual damage suffered by an injured person. In this way the state voluntarily compensates the person injured through his reliance upon its reasonable execution of this governmental function, and punishes the municipality upon which it has imposed such execution, for neglect of duty in this respect, by compelling it to pay the compensation thus authorized, as a penalty for its neglect. By force of this legislation only, and within the limits of its terms, can any action or proceeding against a town in respect to a defect in a public highway be maintained. No duty and no liability exists that is not imposed by statute. *Chidsey v. Canton*, 17 Conn. 475, 478; *Stonington v. States*, 31 Conn. 213, 214; *Burr v. Plymouth*, 48 Conn. 460, 472; *Beardsley v. Hartford*, 50 Conn. 529, 537, 47 Am. Rep. 677; *Lounsbury v. Bridgeport*, 66 Conn. 360, 364, 34 Atl. 93; *Daly v. New Haven*, 69 Conn. 644, 648, 38 Atl. 397; *Bartram v. Sharon*, 71 Conn. 686, 693, 43 Atl. 143, 46 L. R. A. 144, 71 Am. St. Rep. 225; *Upton v. Windham*, 75 Conn. 288, 292, 53 Atl. 660.

The liability to the penalty is limited by the same terms used to limit the duty for the neglect of which the penalty is the punishment. As expressed in the Public Acts of 1750, p. 17: The duty of the town ends where the duty of maintenance in sufficient repair belongs to any particular person or persons in any particular case, and the liability to penalty extends only to "the town or person which ought to secure and keep in repair such ways"; that is, to the town or person through whose neglect (of duty imposed by the statute) such hurt is done. When this language was originally used, there were few instances of the duty to re-

pair resting on persons other than townships. In respect to some highways it was imposed upon the county. Special orders of the General Court may have put the duty upon a particular town in respect to a bridge or highway without its limits. Possibly the duty of repairing certain bits of highway leading to ferry landings may have belonged to owners of ferry franchises. But it is evident that the language is used chiefly to express with certainty the principle on which the legislation is based, applicable alike to future and present conditions. That is, when the state commits to any person the execution of its functions of providing safe highways, in respect to any highway or any portion of a highway, it will punish neglect by that person of the governmental duty thus imposed, whenever an innocent traveler is injured by a defect in the highway existing through such neglect. This duty is, by a general statute, specifically imposed upon the several towns in respect to highways and portions of highways within their limits, whose maintenance is not committed to other persons. It is, by particular statute, specifically imposed upon some particular persons in respect to particular highways and portions of highways. The penalties for neglect are directed to the person who neglects the duty imposed. The general statute necessarily includes, by reference, all particular statutes; and the duty to repair, and the penalty for neglect, in respect to any portion of highways designated in a particular statute, is imposed on the particular persons therein named, and is not imposed upon the several towns.

The first occasion for applying the principle of the statute to new conditions arose when turnpike companies began to be chartered. In an action upon the statute against such a company to recover damages for an injury caused by a defect in the highway which the company had neglected to repair, it was claimed that the defendant was not liable, because the statute did not authorize the action. Admittedly, turnpike roads are necessary highways within the limits of the town through which they pass. It was urged that the statute imposed the duty to repair a necessary highway, and the penalty for neglect, upon the town, unless the duty to repair in a particular case was imposed upon some other person, and that no statute imposed upon the defendant this duty, or a penalty for its neglect, enforceable by action upon the statute. But this court held that a turnpike company, in accepting its charter, building its road, and collecting tolls, became bound by law to keep the highway in safe repair, and so the statute imposed the statutory duty, in this particular case, not upon the town, but upon the company, and that the penalty for neglect and the action authorized for its enforcement was, by the terms of the statute, directed, not against the town, but against the turnpike company.

Goshen & Sharon Turnpike Co. v. Sears, 7 Conn. 88. When cities and boroughs began to be incorporated within the limits of towns, the duties and liabilities of towns in respect to highways within the limits of a new municipality were occasionally, and eventually were generally, transferred from the town to the city or borough. But the imposition of the duty to repair was never, to our recollection, accompanied by any penalty for neglect. The moment the particular statute imposed the duty, that moment the general statute, by its express terms, provided the penalty, and authorized the action for its enforcement. Sometimes certain powers of control and certain police powers in connection with highways were given to the city, while the duty to repair remained in the town. *Mead v. Derby*, 40 Conn. 205.

In this connection it must be remembered that cities, on whom has been imposed the governmental duty of keeping the streets in safe condition for travel, have also other powers, whose exercise may affect the condition and use of highways, as they may be affected by the acts of any private person, and that it is quite possible for the liability of the city for negligence in the exercise of such powers, or in the performance of any act it does as a private corporation, to become complicated with its liability to pay the penalty prescribed by statute for a specified neglect of its governmental duty. We are dealing now solely and exclusively with the liability to this statutory penalty.

When, in 1859, horse railroads, now called "street railroads," began to be chartered, the original principle of this legislation was applied to such corporations. Each charter authorized the construction of a railroad upon the highway, defined the width of the highway which should be treated as occupied by the railroad structure, and directed the company to keep the highway, within the lines defining the width of the railroad thus constructed, in safe condition for public travel, and gave to the town within which the railroad should be built control of its location and manner of its construction, and of the manner in which the company should conform with its duty of keeping in safe repair a highway occupied by such a structure. In accepting such charter, and enjoying the benefit of taking toll from travelers who employed the additional facilities for the public use of the highway supplied by the railroad, the company accepted the burden of keeping that highway in repair; and the general statute, by its terms, imposed that duty and penalty for its neglect upon the company, and authorized an action against it for enforcement of the penalty. When the neglect of the duty of repairing this highway is followed by an injury, the statutory penalty is incurred, and the general statute authorizes an action for its enforcement against the railroad company, and not against the town. As these charters differed in the lan-

guage used for defining the duties of the railroads and powers of the towns, as well as in prescribing the width of the highway to be treated as occupied by the road constructed, the Legislature, by public act, enacted these same rules for all, and gave to the towns additional powers for compelling railroad companies to perform the duty of maintenance thus put upon them, and, *ex abundanti cautela*, declared the corollary inherent to the imposition of the duty of the company, that no action should be maintained against a town to enforce a penalty incurred through the neglect of the company to perform the duty imposed upon it. Pub. Acts 1863, p. 22, c. 31. In 1866 horse railroads had come to be included in railroad legislation, and in the revision of that year were classed with steam railroads, under the chapter dealing with railroads. The provisions of the act of 1863 were incorporated in this chapter. This declaration of the act of 1863 of the legal effect of an assumption by a railroad of the duty of a town was in 1869 extended to the case of any railroad authorized to place any structure in a highway, by providing that no action shall be maintained against the town for injury received on a highway by reason of any structure placed therein by any railroad company by authority of law. And the general statute was so amended as to state plainly that the railroad company which by authority of law places in a highway any structure is the party bound to keep that highway in repair, and it, and not the town or person otherwise bound to repair, is liable to the action authorized to enforce the penalty prescribed in such case for neglect of duty to repair. Pub. Acts 1869, p. 350, c. 140 (Revision 1875, p. 232, § 10). It is immaterial whether such railroad structure occupies the highway longitudinally in furtherance of its use as a common way, or transversely in limitation of that use. *Lee v. Barkhamsted*, 46 Conn. 217; *Allen v. New Haven & N. Co.*, 50 Conn. 215, 216.

In 1883 the statutory liability of a person bound to repair a highway, for neglect to perform that public duty, was limited to cases where the party injured has given to the person neglecting to repair the prescribed written notice (Pub. Acts 1883, p. 283, c. 105); and the grounds and extent of the original statutory action authorized to enforce that liability were restated in the language now in force. Gen. St. § 2020 (Revision 1902). The requirement of a written notice applies to private corporations operating a railroad over or across a highway, because the duty of maintaining in a safe condition for public travel that portion of the highway covered by their tracks is imposed upon them by law; and the Legislature intended to, and properly may, authorize, as against them, the same statutory action, with the same limitations, as that it authorizes against municipal corporations for neglect of a similar govern-

mental duty. *Crocker v. Hartford*, 66 Conn. 387-390, 34 Atl. 98; *Shalley v. Danbury*, etc., *Horse Ry. Co.*, 64 Conn. 381, 386, 30 Atl. 135.

The general meaning and effect of section 2020 (Revision 1902), read in connection with section 2013, is well settled, and is this: The person on whom the state imposes the duty of executing, in respect to any highway, its function of maintaining in safe condition the avenues for public travel, shall be liable to a penalty for neglect of that duty whenever injury happens to a traveler by means of a defect in the highway chargeable to such neglect. This penalty may be enforced by a civil action, and a party injured, who has given the necessary written notice as prescribed, may maintain such action and recover therein just damages for his injury against (1) a town on whom the duty is imposed by Gen. St. § 2013 (Revision, 1902), when the defect by means of which the injury is caused is in a highway within its limits, in respect to which the duty to repair in that particular instance has been imposed on no particular person, but not otherwise; (2) a city or borough upon whom the duty of towns to repair has been imposed by particular statute, when the defect is in a highway within its limits, in respect to which the duty to repair in that particular instance has been imposed on no particular person, but not otherwise; (3) a turnpike or other corporation, upon whom, by force of particular statutes, the duty to repair the highway, or that portion of the highway, in which the defect exists, has been imposed; (4) a railroad corporation, when the defect in the highway is a defect in the railroad track or other structure legally placed upon the highway by said corporation, and in such case, whether the duty to repair that portion of the highway has been specifically imposed upon it by particular statutes or not, the railroad company, and not the party bound to keep the road in repair, if it were not covered by such structure, shall be liable to the statutory action. The complaint in this case states facts sufficient to support an action against the defendant under the statute, and states no other cause of action. The defendant, in submitting to the default, gave sufficient notice that he would contest, upon the hearing in damages, the facts essential to bring the case within the statute.

The trial court has found that the defect specified in the complaint, by reason of which the injury alleged happened, was in that portion of the highway legally occupied by the railroad track or structure of the Fair Haven & Westville Railroad Company, and was within the lines marking the portion of the highway in respect to which the duty to repair was imposed upon that company by force of its charter and the statute. Section 3833, Gen. St. 1902. The plaintiff has therefore no cause of action, and the assessment of substantial damages is erroneous. It is claimed that section 3833, Gen. St.

1902, in authorizing a peculiar statutory action when injury happens "by reason of any defect in that part of the highway which any street railway company is bound to keep in repair," against the railroad company and the city, impliedly authorizes an action against the city alone, which is forbidden by the express terms of section 2020, Gen. St. 1902, which is in violation of the principle which has controlled legislation on this subject for more than two centuries, and apparently unjust. Such an implication cannot be justified. This section was enacted in 1893 as a part of the law intended to regulate the whole subject of street railways. Its first section formally repealed most of the existing statutes on the subject, although their substance was re-enacted in the following sections. This act is incorporated in the revision of 1902. It imposes upon street railways absolutely the same duty first imposed upon them by the act of 1863, of keeping the highway within the specified lines of their railroad track in repair, and gives to the municipalities the same control over the manner in which that duty shall be performed, with certain additional powers. And the general act (section 2020, Gen. St. 1902) applies with the same force, authorizing an action for neglect of this duty against the railroad company, and not authorizing it against the municipality. It provides, however, for another statutory action against the railroad company, at the option of the party injured, in which the municipality may be made a defendant for the purpose of enabling the party injured, upon complying with certain conditions, to collect his judgment of the municipality, giving to it a lien upon all the tracks and property of the company within its limits, which may be foreclosed unless the company shall reimburse the municipality for this advancement. Provision is also made for a sort of informal interpleader during the course of the trial between the two defendants, and an equitable reduction of the amount for which the company is bound to reimburse the municipality, if the court or jury shall find that the defect the company neglected to repair was due to any negligence of any kind on the part of the municipality, and guards against any implied modification of the company's sole liability to the statutory action for neglect of its duty to repair by expressly affirming that although the municipality may exercise its power of control unwisely, and the company may have kept its part of the highway in repair to the satisfaction of the municipal authority, that fact shall not operate to shift the responsibility for injuries occurring by reason of defects therein from the railway company to the municipality. It is evident that this is a very peculiar statutory action, only authorized as a substitute, at the option of the party injured, for the action against the railroad company authorized by section 2020, Gen. St. 1902, and must be confined within the

limits expressed. To our knowledge, no action on this statute has been brought since its passage in 1893. It is obviously to the interest of the injured party, unless under exceptional circumstances, to bring his action against the railroad company, rather than to adopt the cumbersome machinery of this proceeding for the sake of procuring municipal guaranty of his judgment. In one case (*Carstesen v. Stratford*, 67 Conn. 428, 35 Atl. 276) we referred incidentally to the act authorizing this action, but have never had occasion to consider the questions that may arise in its practical use. It is unnecessary to do so now, any further than may be involved in the decision that this peculiar proceeding is the only statutory action authorized against a town, city, or borough in behalf of "any person injured in person or property by reason of any defect in that part of a street or highway which any street-railway company is bound by law to keep in repair."

There is error. The judgment of the superior court is reversed, and that court directed to assess nominal damages, and render judgment accordingly. The other Judges concurred.

(76 Conn. 1)

BERLIN IRON BRIDGE CO. v. AMERICAN BRIDGE CO.

(Supreme Court of Errors of Connecticut. July 24, 1903.)

CONTRACTS—TRANSFER OF UNCOMPLETED CONTRACTS—CONSTRUCTION OF AGREEMENTS—EVIDENCE—SUFFICIENCY.

1. Plaintiff, a bridge building company, agreed to sell to a third person all its property, and also to go out of the bridge building business. The agreement stipulated that the purchaser should assume the uncompleted contracts of plaintiff. Defendant became the assignee of the third person, entitled to his rights and subject to his obligations under the agreement. Plaintiff and defendant subsequently entered into agreements which stipulated that plaintiff guaranteed "that the amount of expenditures actually made by it on the contracts" assumed by defendant after deducting the moneys received on account of the contracts was a designated sum, which sum defendant agreed to pay to plaintiff. *Held*, that the phrase "the amount of expenditures actually made" included not only the expenditures actually made by plaintiff in part performance of the contracts, but also those made by it in procuring them.

2. The expenses incurred by plaintiff in obtaining the contracts included mainly the salary and traveling expenses of the agent while engaged in procuring them and the ordinary expenses of the engineers while engaged in making estimates upon them. The evidence showed no detailed items of expenses, but the officers of plaintiff testified that a rule was adopted, after years of experience, to allow as such expenses 5 per cent. of the amount of the contract obtained, and that this rule led to substantially correct results. *Held*, that the testimony warranted a finding that such expense to the amount of 5 per cent. of the amount of the contracts was "expenditures actually made" by plaintiff on the contracts, within the meaning of the agreements.

3. The term "the amount of expenditures actually made" on the contracts turned over to defendant included an actual expenditure in

procuring the contracts incurred by plaintiff pursuant to agreements with other bidders to the effect that the successful bidder should pay to the unsuccessful bidders a certain part of the profits which it was estimated that the successful bidder would receive from the completion of the contract.

4. The term also included the unusual expenses incurred by plaintiff in procuring the contracts.

5. Plaintiff, a bridge building company, and defendant entered into agreements whereby plaintiff turned over to defendant certain uncompleted contracts. Plaintiff guaranteed that the contracts so turned over would net defendant a clear profit of not less than 15 per cent. of the "shop cost" of performing the contracts. It was stipulated that the term "shop cost" should include labor, material, and general shop expenses f. o. b. cars at plaintiff's works. Before entering into the agreements plaintiff had works of its own in Connecticut, and had begun to establish works in Pennsylvania. By the agreements these works were to be turned over to defendant. Before the agreements, plaintiff, in order to perform the uncompleted contracts, had made contracts with third persons having works of their own to furnish materials to be sent directly to the places where the uncompleted contracts were to be performed. Held that the term "shop cost," as used in the agreements, meant shop cost only at the works of plaintiff in Connecticut and Pennsylvania, and not at the works of others, and did not include freight from the works to the places where the contracts were to be performed.

Appeal from Superior Court, Hartford County; Ralph Wheeler, Judge.

Action for breach of contract by the Berlin Iron Bridge Company against the American Bridge Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles E. Perkins, for appellant. William Waldo Hyde and Arthur L. Shipman, for appellee.

TORRANCE, C. J. The Berlin Iron Bridge Company and two of its stockholders are named as plaintiffs in this case, but as, in the trial court, the corporation was treated as sole plaintiff, it will be so treated here, and the word "plaintiff" as hereinafter used will mean said corporation. The defendant is a New Jersey corporation. In March, 1900, the plaintiff entered into a written contract (hereinafter called "Contract A") with one I. Gifford Ladd, in which it agreed, among other things, to sell and convey to him or his nominee or assigns, on or before May 1, 1900, all its property and estate of every kind, and to go out of the bridge building business. Subsequently the defendant became the nominee or assignee of Ladd, and succeeded to all his rights and became subject to all his obligations under said contract, and ultimately, in May, 1900, became the owner of all the property of the plaintiff. As a part of said transaction, the plaintiff and the defendant entered into certain written contracts, one dated May 11, 1900 (called hereinafter "Contract B"), and one dated as of June 1, 1900 (hereinafter called "Contract C"). In these contracts the parties, among other things, agreed that the defendant should assume certain uncompleted contracts

of the plaintiff, and should pay to it whatever money the plaintiff had actually expended thereon prior to May 12, 1900; and the plaintiff guaranteed that the amount so expended by it was \$305,682.95, hereinafter called the "guaranteed sum." The defendant agreed to pay 90 per cent. of said guaranteed sum upon certain conditions, and did so. The remaining 10 per cent. has not been paid, and to recover that, with interest, this suit is brought.

In the court below the defendant claimed that the plaintiff had charged in said guaranteed sum more than it was rightfully entitled to charge as against the defendant, and that by reason thereof the defendant, in paying said 90 per cent., had paid more than it was obligated to pay; and the case was, without objection, tried upon the assumption that the defendant had the right to make this claim, and to have it tried and determined in the court below. Whether in this case, and upon the pleadings therein, the claim thus made and tried was a permissible one, if proper objection to it had been made, may perhaps admit of some doubt; but under the circumstances we shall treat the case as court and counsel have heretofore treated it, namely, as one in which said claim was properly made. The parts of said three contracts having any material bearing upon the questions in this case are the following: In contract A it was provided, in case of the consummation of the sale and purchase therein contemplated, that Ladd or "his nominee or assigns" should assume the uncompleted contracts of the plaintiff upon a basis that would "net" to them "a clear profit in any event of not less than fifteen per centum of the total shop cost of performing such contracts." In contract B the plaintiff guaranteed that said contracts would net to the defendant "a clear profit in any event of not less than fifteen per cent. of the shop cost of performing such contracts," and the parties agreed in said contract that "the term 'shop cost' shall include labor, material, and general shop expense f. o. b. cars at works of the party of the first part." Contract B also provided that a certain committee, appointed therein with power to determine and appraise the value and profits of the contracts assumed by the defendant, should "within thirty days determine and appraise the value and probable profits of such contracts in its opinion." It further provided that, if said committee should "certify that in its opinion such contracts will not net a clear profit of at least fifteen per cent.," then the plaintiff was to pay the defendant "in cash the estimated difference"; "but any contract not so appraised and estimated by the committee shall be deemed to fully comply with the guaranty" of the plaintiff above specified. Contract C recited that the parties had agreed "to defer the valuation or appraisal" of the contracts assumed by the defendant, "and to provide for the payment of the expenditures repre-

mented to have been made thereon" by the plaintiff, "less a proportion thereof to be retained" by the defendant as hereinafter provided. It also contained this provision: That the plaintiff "represents and guarantees that the amount of expenditures actually made" by it "prior to May 12, 1900," upon the contracts of the plaintiff assumed by the defendant, "after deducting any moneys received" by the plaintiff "on account of such contracts prior to said date, is the sum of \$305,682.95"; and a further provision that the defendant would pay 90 per cent. of said sum in three equal installments on or before specified dates, "provided the bridge company [the defendant] shall have on said dates, respectively, collected out of said contracts so assumed sufficient moneys to cover said payments." Contract C further provided that "the ten per cent. balance shall be retained by the bridge company [the defendant] as a guaranty fund until the committee appointed" by contract B "shall certify that in its opinion the said contracts so assumed will net to the bridge company an average clear profit, in any event, of at least fifteen per cent. of the total shop cost of performing the same, as guaranteed in said original agreement [L. e., in contract B], and thereupon shall be paid by the bridge company to the party of the first part [the plaintiff], as hereinafter provided. The said committee may determine and appraise the profits of such contracts, or any of them, either before or after the complete performance thereof." It further provided, in effect, that, if the committee should not certify that the contracts assumed would net the guaranteed profit, and upon performance such contracts should not net such profit, or if the committee should certify that said contracts would not net the guaranteed profit, "specifying the amount of the appraised deficiency, then and in either event the amount of said guaranty fund so reserved shall from time to time be applied by the bridge company [the defendant] to the payment of any deficiency in such guaranteed profit of fifteen per cent., resulting from the performance of such contracts, or so determined by said committee. Any surplus of such guaranty fund thereafter remaining shall be paid over" to the plaintiff.

The trial court found, in substance: (1) That the plaintiff actually expended upon the contracts turned over to the defendant the guaranteed sum; (2) that rightfully included in this sum were two sums expended by the plaintiff in procuring said contracts, namely, one amounting to \$32,736.63, called "contracting expenses," and the other amounting to \$13,026, entered in plaintiff's books under the heads of "Pool," "Loop," "L," "S," or "Special," as is hereinafter more fully explained; (3) that the defendant "netted" from the contracts turned over to it "a much greater sum than 15 per cent. of the total shop cost of performing the same"; (4) that the defendant owed to the plaintiff the sum of \$30,568.29

(being 10 per cent. of said guaranteed sum), with interest.

The errors assigned are four in number. The fourth relates to the refusal of the court below to amend the record as requested; but, inasmuch as we think that the questions of law raised by the first three reasons of appeal are fairly presented upon the record as it stands, it will be unnecessary to consider the fourth assignment. The other assignments will be considered in their order.

The first alleges that the trial court erred in including in the guaranteed sum the amount called "contracting expenses." The material facts bearing upon this question are as follows: Under each of the contracts assumed by the defendants the plaintiff had charged in the guaranteed sum a certain sum as "contracting expenses." This expense was the ordinary expense incurred by the plaintiff in obtaining those contracts. It includes mainly the salary and traveling expenses of the agent who procured them, while engaged in procuring them, and the ordinary expenses of the engineers in the estimating department while engaged in making an estimate upon them. Such expense cannot ordinarily be well distributed to each individual contract "except by an average per cent." It was the rule of the plaintiff, adopted after years of experience had shown them that it led to substantially correct results, to allow as "contracting expense" 5 per cent. of the amount of the contract obtained. That rule was followed by the plaintiff in the case of the contracts turned over to the defendant. No detailed items of such contracting expense were put in evidence in the court below. In the case of each of the contracts turned over to the defendant the contracting expense thereon, estimated in the manner above indicated, was entered in the cost books of the plaintiff at the time when the contract was obtained. No testimony was offered tending to show that such charge was improper or excessive. "Testimony of officers of the plaintiff company, having long experience in its business, and full knowledge of the cost of its work and expenses in all its departments, and expert in manufacturing methods and business, was admitted, tending to show the propriety and necessity of charging such contracting expenses, as above stated, by a general average, and the substantial correctness of the charge made, and that the average ordinary expense of selling or procuring its contracts for a long series of years prior to the date of the turning over of the contracts in question to the defendant was five per cent. of the contract prices. Upon all the evidence adduced, being of the tendency above stated, whether of officers or others it is found by the court that the sum of \$32,736.63 had been actually expended by the plaintiff upon the contracts turned over to the defendant for the ordinary expenses" of procuring the contracts. Upon these facts the defendant claimed that, as it is only liable under con-

tracts B and O to repay the plaintiff the amounts which the plaintiff proved it had "actually expended in the part performance of said contracts," the "mere charge of a percentage of five per cent. on the amount to be paid for their performance, ascertained merely from an experience of witnesses, was not sufficient legal evidence that said amounts had been really or actually expended on such performance, and that such sums should not be included in the aforesaid" guaranteed sum. As we understand this contention, it appears to be based upon two claims: (1) That the defendant, upon the contracts turned over to it, had agreed to repay to the plaintiff only the expenditures actually made by the plaintiff "in the part performance of said contracts," and not those made by the plaintiff "in procuring them"; (2) that the facts found did not warrant the court below in holding that the "contracting expense" was money actually expended upon said contracts within the meaning of contracts B and C. We think that neither claim is well founded.

The first claim is based upon the contention that the defendant in contracts B and O has agreed, not to repay the amount of expenditures actually made upon the contracts taken over, but only to repay the amount of expenditures actually made by the plaintiff in part performance of said contracts—a very different proposition. The construction here contended for is not, we think, the true one. It limits the amount to be repaid, to expenditures of a particular kind, when the agreement itself contains no such limitation. The agreement provides for the repayment of all actual expenditures. When the agreement was made the "contracting expense" objected to stood charged on the plaintiff's books, and subject to the inspection of the defendant, as a part of the expenditures actually made upon the contracts taken over. It was just as much an expenditure actually made upon said contracts as were the sums expended in part performance of them; and we think that when the defendant agreed to take the benefit of the contracts, and to repay the amount actually expended upon them, he agreed to repay the sums actually expended in procuring said contracts.

As to the second claim, we think the record fails to show that the trial court erred in its conclusion that the contracting expense was "an expenditure actually made" by the plaintiff upon the contracts turned over, within the meaning of contracts B and C. It is found, in effect, that an expense of the nature indicated by the finding was in fact incurred in procuring the contracts; that the method adopted to ascertain the amount of such actual expense was a proper and necessary one; and that by that method such amount could be ascertained with reasonable certainty. We think the conclusions of the trial court upon this part of the case, whether regarded as conclusions of law or of fact, are fully warranted by the record.

The second assignment alleges that the trial court erred in holding that the amounts charged in the guaranteed sum, as "Pool," "Loop," "L," "S," or "Special" were properly so chargeable. The facts found bearing upon the questions involved in this reason of appeal are these: The terms "Pool," "Loop," "L," and "S" have the same meaning. As annexed to certain of the contracts turned over to the defendant, those terms meant that an actual expenditure in procuring those contracts was incurred by the plaintiff under the following circumstances: The plaintiff and other corporations put in bids for said contracts, and it was agreed by all the bidders, including the plaintiff, that the successful bidder should pay to the unsuccessful bidders a certain part of the profits which it was estimated the successful bidder might receive from the completion of the contract. The bids were made in view of such an agreement. In all the contracts turned over to the defendant, with which the above terms are connected, the plaintiff was the successful bidder, and in pursuance of said agreement paid to the unsuccessful bidders a sum total of \$12,098, as set forth in detail in a schedule appearing in the record, and charged the same as part of said guaranteed sum; and this was allowed by the trial court. As the legal validity of the above-mentioned agreement between the plaintiff and other bidders upon contracts is not questioned by either party, we will, for the purposes of this case, assume that said agreement was a valid one. The term "special" meant that the agent in procuring a contract had incurred some unusual expense in so doing, which the plaintiff had paid. In procuring some of the contracts taken over by the defendant, the plaintiff had paid and charged as "special" expenses amounting to \$1,035. This was charged in the guaranteed sum, and allowed by the court below. These expenditures, like the contracting expense hereinbefore referred to, were a part of the price the plaintiff had actually paid for the contracts turned over to the defendant, which expenditures presumably would have been repaid to the plaintiff, had it completed the contracts, by the profits arising from such performance. The defendant has taken the benefit of all these contracts, and it knew or might have known before it assumed them just what the plaintiff had actually expended upon them up to May 12, 1900, and it agreed to repay such expenditure. Upon the facts found and upon the construction hereinbefore put upon contracts B and C, we think the trial court was justified in holding that the sums last above mentioned were properly chargeable in said guaranteed sum.

In the remaining reason of appeal it is alleged, in substance, that the trial court erred in its construction of the phrase "shop cost" as it occurs in contracts A, B, and C, in the guaranty of profits. To understand the claim of the defendant and the ruling of the court

(76 Conn. 53)

O'BRIEN v. BROTHERHOOD OF THE UNION.

(Supreme Court of Errors of Connecticut. July 24, 1903.)

BENEFICIAL ASSOCIATION—BY-LAWS—SUSPENSION OF MEMBER—REINSTATEMENT—RIGHTS.

1. The by-laws of a beneficial association provided that the death benefit of a member dying, within 183 days from his admission, of any of certain named diseases, should be not more than \$5, but in other cases \$500; and it was also provided that a member expelled might be reinstated by making application and executing an agreement recognizing the by-law in regard to death within 183 days. *Held*, that where at a meeting of the local branch of the association an entry was made that a member was expelled, but no actual vote or action was taken on the case, and, while he did not have immediate notice, he did have notice of the suspension, and did not appeal, and paid no assessments for several months, when he was reinstated, and signed an agreement recognizing the by-law as to death within 183 days, he acquired a new membership on reinstatement, and on his death, within 183 days thereafter, of one of the specified diseases, his beneficiary was entitled only to \$5.

2. It appeared that the registration blank signed by insured on reinstatement contained, in addition to the words "within 183 days from admission," the words "or if expelled then from the date of reinstatement." *Held*, that the question whether the addition was authorized or not was immaterial, as the words added nothing to the force of the by-law.

Appeal from Court of Common Pleas, Fairfield County; Howard J. Curtis, Judge.

Action by Bridget O'Brien against the Brotherhood of the Union. From a judgment for plaintiff, defendant appeals. Reversed.

John J. Phelan, for appellant. Thomas M. Cullinan, for appellee.

HAMERSLEY, J. The plaintiff seeks to recover the sum of \$500, claimed to be due her by force of a contract between the defendant association and its dead member, one Daniel P. Conklin. The defendant is a secret fraternal society or order organized under the laws of the state of Pennsylvania. The contract in question is the one which arose between the defendant and Conklin upon his becoming a beneficial member of the order, and its nature is determined by the following facts, which appear from the finding of the trial court, including the laws, forms, and rules of the defendant, made a part of the record. The order is governed by an organization called the "Supreme Circle." Membership is acquired through local circles, subject, in states where, as appears to be the case in this state, no grand body exists, to the direct jurisdiction of the supreme circle. The supreme circle administers a fund called the "Funeral Benefit Fund of the Supreme Circle." Each member of this fund complying with the rules of the order is entitled at his death to the payment of a death benefit. The amount of this bene-

below thereon upon this part of the case, it is necessary to state the substance of some part of the facts found. Prior to entering into contracts A, B, and C, the plaintiff had works of its own at East Berlin, in this state, and had also begun to establish works in Pennsylvania, and by said contracts these works in both states were to be turned over to the defendant. Prior also to May, 1900, the plaintiff, in order to enable it to perform the uncompleted contracts subsequently assumed by the defendant, had made subcontracts with other parties having works of their own to furnish and prepare material and to perform labor necessary to be done in performing the uncompleted contracts assumed by the defendant, all of which materials, whether work was done upon them or not, were to be sent directly to the places where the uncompleted contracts were to be performed. It was under such circumstances that the plaintiff guaranteed to the defendant that the transferred contracts would net to the defendant a certain profit of the shop cost of performing them. In contract A the guaranty is upon "the total shop cost"; in contract B it is upon the "shop cost"; while in contract C it is upon "the total shop cost" "as guaranteed" in contract B. The parties themselves have in contract B agreed upon the meaning of the words "shop cost" as used in said three contracts. They there say "that 'the term 'shop cost' shall include labor, material, and general shop expense f. o. b. cars at works of party of the first part"; i. e., of the plaintiff. The defendant claimed that under the head of "shop cost," as used in these three contracts, "shipments of structural iron and steel work direct from mills to sites of erection, and also all subcontracts for carrying out the transferred contracts, should be included in determining the amount of shop cost of the contracts transferred to the defendant, and that the expression, 'f. o. b. cars at works of the party of the first part,' was to be considered as a provision that freight was not to be included in shop cost." The trial court overruled this claim, and held, in effect, that "shop cost," as used in these three contracts, meant shop cost only at the works of the plaintiff in this state and in Pennsylvania, and not at the works of other parties. We think this ruling was correct. The parties themselves have said what "shop cost" should mean, and we see no good reason why that meaning should not prevail. In plain terms they limit that meaning to shop cost at the works of the plaintiff, and not elsewhere. Doubtless their definition greatly narrows the meaning which the words "shop cost" or "total shop cost" would bear in the absence of such definition; but they had the right to adopt such a definition, and, having done so, they are bound by it.

There is no error. The other Judges concurred.

fit is determined by section 15 of article 16 of the laws of the supreme circle, as follows: "The death benefit of a member of this fund, dying, within 183 days from date of admission, with nephritis (Bright's disease), phthisis, phthisis pulmonalis (consumption), or valvular disease of the heart shall be five dollars and no more. In all other cases it shall be five hundred dollars." No one can be admitted as a beneficial member of the order unless he is "in sound bodily health, and between the age of 18 and 45 years." Any person duly admitted by initiation, reinstatement, or admission by card, as a beneficial member in a local circle, shall thereby become a member of the funeral benefit fund of the supreme circle. The candidate for admission in the local circle must make written application upon the application blank for admission into the funeral benefit fund, acknowledging his familiarity with section 15 of article 16 of the supreme laws, and accepting membership in the fund on these conditions, and, before admission, must execute an agreement with the supreme circle upon the registration blank, whereby he again acknowledges his familiarity with section 15, and his acceptance of membership in the fund on these conditions. The only contribution to the fund required of members is the payment of 50 cents a month, or, under certain conditions, of 60 cents a month. Members may be expelled for nonpayment of the monthly dues, and for various causes set forth in the laws. A member suspended or expelled from membership in a local circle for any cause shall forfeit membership in the fund. No member expelled from the fund shall be again admitted or reinstated without again making application on the application blank, and executing the agreement on the registration blank. The officer of the supreme circle, called the "Supreme Scroll Keeper," keeps the register of the members of the funeral benefit fund; recording their admission, expulsion, and reinstatement. The officer of the local circle called the "Honorable Scroll Keeper" certifies to the supreme scroll keeper, from the records of the circle, the admission of members and their suspension or expulsion. When a member is registered by the supreme scroll keeper, the local circle remains responsible for the monthly payment of his dues until he is expelled or suspended, and, if it fails for one month to make this payment, the circle may be expelled, and all its members thereby forfeit membership in the fund. The death benefit is payable to the beneficiary named by the member in his application, or, if there is no such beneficiary, to certain relatives of the deceased, as prescribed by their rules, or, if there are no such relatives, to the legal heirs of the deceased.

We think it clear that the contract arising upon the admission of a beneficial member involves on the part of the defendant an agreement to pay upon the death of a mem-

ber to his beneficiary the sum of \$5 in case he dies, from any one of the diseases named, within 183 days from the date of his admission, and in case he does not die from one of those diseases, or dies after the expiration of the 183 days, to pay to his beneficiary the sum of \$500, and involves on the part of the member an agreement to pay his circle the monthly dues required, and his acceptance of the laws of the order relating to the administration of the funeral benefit fund and expulsion from the fund, and the same contract arises whenever a former member is reinstated after suspension or expulsion.

It further appears that Conklin was duly entered on the register of the supreme circle as a member of the funeral benefit fund, through admission as a beneficial member of the Ferris Bishop Circle, No. 6, on February 20, 1899; that he did not pay his dues for the months of July, August, September, and October, 1900, as required by the laws. At a meeting of the local circle held October 15, 1900, record was made of Conklin's suspension for nonpayment of dues. On October 29th the honorable scroll keeper certified to the supreme scroll keeper the expulsion of Conklin for nonpayment of dues, and on October 31st the supreme scroll keeper recorded the expulsion. On December 3, 1900, Conklin attended a meeting of his circle, and paid his indebtedness to the circle for the funeral benefit fund dues up to the time of his expulsion, including the dues for October, which were payable on the 15th of that month; being the date of the last stated meeting for the month. Having thus made good his standing in the circle, he afterwards, on January 21, 1901, made application for reinstatement in the funeral benefit fund—signing, as required, the application blank—was elected to membership of the fund by the circle, executed the requisite agreement with the supreme circle upon the registration blank, and paid the registration fee. The written application and agreement were duly forwarded to the supreme scroll keeper, and by him duly recorded February 1, 1901; the written agreement being retained by the supreme circle, as its laws require when the admission of a member is registered. July 1, 1901, Conklin died of phthisis pulmonalis. Proofs of his death were duly made out and presented to the supreme circle. Upon this state of facts, it is clear that the plaintiff is entitled to recover \$5, and is not entitled to recover \$500.

Upon the trial, the validity, under the rules of the order, of Conklin's expulsion from the funeral benefit fund, was contested. In respect to this claim the court found the following facts: At the meeting of the circle held October 15, 1900, the honorable register called off the name of Conklin for nonpayment of assessment for the funeral benefit fund of the supreme circle, and then entered in his funeral benefit fund book of the supreme circle the suspension of Conklin on

that day. The honorable scroll keeper entered in his book at said meeting the suspension of Conklin for nonpayment of dues. No action was taken at said meeting in reference to said Conklin, by vote or otherwise, and the entries in said books were based on the action of the honorable register. From these facts, in connection with the other facts appearing in the finding, the court drew the conclusion that Conklin at the time of his death had been a member of the funeral benefit fund for more than 183 consecutive days. In this we think the court erred. It was the duty of the honorable register to keep an accurate account between the circle and each member, to notify each member monthly of his indebtedness to the funeral benefit fund, and at the end of each semiannual term to report to the circle the names of all members liable to suspension. It was the duty of the honorable scroll keeper to keep an accurate record of the proceedings of the circle. By the supreme laws, a person suspended from membership in a circle forfeits membership in the fund, unless he gives immediate notice of appeal upon receiving notice of the suspension. The suspension without appeal apparently operates as expulsion from the fund. It was the duty of the circle to transmit to the supreme circle all expulsions as soon as the action takes place, and this duty devolved on the honorable scroll keeper, acting for the circle. Assuming, however, that the failure to take an actual vote at the meeting of the circle rendered its action in transmitting his expulsion to the supreme circle unlawful, and that Conklin did not have immediate notice of this action, yet it clearly appears that on the following December 3d he did have notice of his suspension from the circle, and consequent expulsion from the fund, and did not appeal from this action, and elected to accept this action, and received the benefit of exemption from payment of dues for the succeeding months, and on the following January 21st, still retaining the benefit of nonmembership during the months of November and December, applied for reinstatement in the funeral benefit fund, and entered into a written agreement with the supreme circle whereby the benefits of nonmembership from the date of his expulsion to that of his reinstatement were secured to him, and the date of his admission to membership in the fund as an expelled member reinstated was conclusively determined as between him and the supreme circle. Notwithstanding any failure to follow the rules of the order in the expulsion of Conklin on October 15th, he has by his subsequent acts severed the membership acquired by his initiation, and acquired a new membership by his reinstatement. His right, therefore, to a death benefit, depends on the agreement he made with the supreme circle on January 21, 1901. By that agreement the amount of the benefit is fixed at \$5 in case he dies within 183 days from its

date. It appears that the registration blank upon which this agreement was executed contains an addition to the words "within 183 days from the date of admission to this fund," of the words "or if expelled then from the date of reinstatement." It is immaterial whether the use of this addition was authorized or not. The words add nothing to the force of section 15 of the funeral benefit fund laws. They are merely a gloss, accurately expressing the meaning of that section.

There is no occasion to consider questions arising upon other defenses made by the defendant. Upon the facts as found by the court, the plaintiff is entitled to a judgment for \$5, and is not entitled to a judgment for \$500. No question as to costs is properly presented by this appeal.

The judgment of the court of common pleas is reversed. A further hearing, limited to the question of costs, may be had, and judgment rendered in accordance with this opinion. The other Judges concurred.

(76 Conn. 70)

BASSETT v. CITY OF NEW HAVEN
(two cases).

(Supreme Court of Errors of Connecticut. July 24, 1903.)

**MUNICIPAL COURT—SEWERS—ASSESSMENTS—
DETERMINATION OF BENEFITS—ARBITRARY
RULE—FRONT-FOOT RULE—EXCESSIVE AS-
SESSMENT.**

1. On appeal in an application for relief from a sewer assessment, findings of the lower court that the sewer benefits the land assessed to the amount of the assessment, and that the assessment is a reasonable part of the cost of construction, conclusively disposes of any claim based on a disproportionate and excessive assessment.

2. Where the authorities of a city, in making an assessment for a sewer through a certain street, used as a "guiding basis" in their action a certain sum per front foot, calculated on a previous experience with a system of sewers, such action did not invalidate the assessment, in the absence of any showing that the scheme was adopted and applied arbitrarily, and without a finding that the special benefit would be fairly and justly apportioned by the application of such scheme.

3. In an application for relief from a special assessment for a sewer, an objection that the assessments were laid after reference to the bureau of compensation, and not by the original and independent action of the court of common council, was of no merit; it being sufficient that the court adopted the report of the bureau.

4. 12 Sp. Laws, p. 1139, § 86, provides that the amount of the assessment for benefits by reason of any work or improvements shall not exceed the cost; but by page 1150, § 135, the cost of constructing a main sewer, into which another sewer is discharged, may be taken into consideration in making an assessment for the latter sewer. *Held* that, where the total assessment on a sewer for a certain avenue amounted to \$100 more than the cost of constructing the sewer in such avenue, the excess did not invalidate the assessment; the new sewer having been discharged into another.

5. The assessment was not excessive; the new sewer not being limited to the avenue in question, and the cost of the entire sewer having exceeded by several thousand dollars the assessment made on its account.

Appeal from Superior Court, New Haven County; William S. Case, Judge.

Applications by Sarah B. Bassett for relief from sewer assessments imposed by the city of New Haven. From judgments confirming the assessment, applicant appeals. Affirmed.

John K. Beach and John W. Bristol, for appellant. Leonard M. Daggett, for appellee.

PRENTICE, J. These two cases were tried below and argued before us together. As they involve substantially the same state of facts and the same questions of law, save in one minor particular, they may now be considered by us in a like manner.

In April, 1897, the court of common council of the defendant city, after compliance with the necessary preliminary action, awarded a contract for the construction of a sewer extending through Shelton avenue and Ivy and Newhall streets, and connecting at the corner of Newhall and Division streets with a sewer already built, through which, and other laterals and mains, service to the outlet, two miles distant from Newhall street, was obtained. The construction having been completed prior to May 31, 1898, the assessment of benefits therefor was referred to the bureau of compensation. This board, after due notice and hearing, made its report. This report took the form of three reports, in which the assessments made against the abutting landowners upon the three streets through which the sewer extended were separated; each report dealing only with the assessments made against the landowners upon a single street. The applicant, being a landowner upon Shelton avenue and Ivy street, had assessments made against her in the reports involving those portions of the sewer. These reports were afterwards accepted by the court of common council, whereupon the applicant began these proceedings, praying that the several assessments made against her be annulled. The first case in the order of the docket grows out of the Ivy street assessment; the second, out of the Shelton avenue assessment. The total cost of the sewer was \$16,288.81. The assessment along Shelton avenue amounted to \$5,733.36; along Ivy street, to \$2,854.62; and along Newhall street, to \$3,271.67; the total amount being \$11,859.65. By an apportionment, made at the time of the trial of the appeals in the superior court, of the cost of the sewer, which was an entire gross sum, and so carried upon the books of the director of public works, it appeared that the cost of the Shelton avenue portion of the sewer was \$5,623.79. All the assessments along the entire length of the sewer were made at the uniform rate of \$1.75 per front foot, except that a 75-foot allowance was made upon one side of corner lots. At the corner of Shelton avenue and Ivy street this allowance was made on the Ivy street side. "About the year 1871 a general sewerage system was planned for

the city of New Haven, in accordance with which plan the sewers in said city have since been constructed. At that time an estimate was made of the probable cost of the sewer system so planned, including main sewers, outlets, and laterals, or branch sewers, and such total estimated cost was divided into three equal parts. Upon the supposition that one of such third parts would be met by the city from general taxation, and that the other two-thirds would be paid by the owners of property adjoining the streets in which such sewers might be constructed, the two-thirds of such total estimated cost was divided by the total frontage of land in the city upon the streets in which sewers might be constructed, and the result thus obtained was approximately \$1.75 per front foot. Said computation was made by the city engineer and by those by whom said general plan was devised, and said result, namely, \$1.75 per front foot, was adopted by them as a guiding basis upon which assessments for sewers might be figured, in the expectation that, if the assessments were so figured, it would result in the city paying a third of the total cost of the sewerage system, the property owners on one side of the street paying a third, and the owners on the other side paying a third. Since said plan was devised and said computation made, it has been the practice for the department of public works, through the city engineer, to furnish to the board or bureau of compensation, when about to make an assessment of benefits for a sewer, a map of the street or streets upon which such sewer has been constructed, showing the names of those owning property on each side of such street or streets, and their respective frontages, and also showing in figures upon each of such lots what the amount of the assessment would be if it should be laid at the rate of \$1.75 per front foot. It has been the practice of the members of said bureau, after hearing the parties interested and after an inspection of the premises, to accept and adopt the computation so made by the city engineer, and lay the assessments accordingly, except in particular instances, where, by reason of the situation of property, irregularity in dimensions, character of the property or of its use, or other circumstances, the owners of such property were not, in the judgment of the bureau, benefited by the construction of a sewer as much as \$1.75 per front foot, or to so great an extent as were the owners of property not presenting such unusual features. In such particular instances it was the practice of the board to exercise its judgment in determining to what extent the owners of such property should be assessed." This practice was followed in the making of the assessments in question, and the figures entered by the city engineer upon his map of the work as the result of his computations at the rate of \$1.75 per front foot were, without change, adopted by the bureau of compensation as the assessments against

the property owners. The applicant's property against which the assessments were laid is outlying, undeveloped property, on the market for sale.

The appeals assign as reasons therefor the overruling of certain claims that the assessments in question were illegal and unauthorized for substantially the following reasons: (1) That they were not laid in accordance with the city charter; (2) that they were not laid with reference to special benefits received; (3) that they were not proportional or reasonable parts of the expense of the work; (4) that the authority laying them did not assess upon the applicant and the other landowners a proportional and reasonable part of the expense of construction, and did not estimate the particular amount of such expense to be paid by them; (5) that the assessments were calculated as a proportional part of the estimated cost of the entire city sewer system, constructed and to be constructed; (6) that the assessments were not fixed with reference to the cost of the sewer in the street in question, but with reference to the total estimated cost of the whole city system; and (7) that the rule of assessment adopted was one of uniform assessment per front foot throughout the city.

These reasons relate in part to the manner of assessment, and in part to the results arrived at. In so far as they relate to the results, the finding effectually negatives them. It is distinctly found that the sewer in each street in fact benefited the land assessed to the amount of the assessment and more; that the total amount assessed upon the owners of property upon the three streets was a proportional and reasonable part of the cost of construction of the sewer, and the total sum assessed upon the property owners by each of the three reports likewise a proportional and reasonable part of the expense of said construction; and that the particular amount of such expense so estimated to be paid by the complainant upon such assessment was a reasonable and proportional part of the expenses of the construction of said sewer. This finding conclusively disposes of any claim based upon a disproportionate and excessive assessment.

The results having thus been found to be correct ones, we have only to consider the objections urged as to the methods by which they were reached. These latter objections, as they are stated, naturally fall into two general groups, to wit, those which urge that the assessments were not made with reference to special benefits, and those which insist that they were not laid solely with regard to the particular public work in question. The charter provides that, in estimating the reasonable part of the expense of any sewer for the purposes of assessment, the cost of constructing any main or trunk sewer into and through which such other sewer is discharged may be taken into consideration. Save as the assessing authority may

have acted under this grant of power, the objections of the second form do not in the present case differ in principle from those of the first, and call for no separate discussion. Broadly stated, all the applicant's objections to the method of assessment resolve themselves into a single general objection, to the effect that the assessments in question were laid by the application of a front-foot rule, determined upon and adopted arbitrarily, and upon the basis of an entire city sewerage system, and not laid, as the charter clearly requires, upon the basis of special benefits received from the public work in question. The fallacy of the argument made in support of this contention exists in the assumptions of fact that are made. We look through the record in vain for support for the assumed proposition that the assessments were not in fact made with a sole regard for the special benefits deemed by the assessing authority to have accrued from the construction of the line of sewer which was the occasion of the assessment. A front-foot assessment was, indeed, made, but such assessments are not by any means necessarily inconsistent with an application of the special-benefit rule. Common knowledge proves that not infrequently the front-foot rule furnishes as fair an expression of the proportionate benefits received as any other process. It is true that the bureau of compensation used as "a guiding basis" for their action a scheme long since worked out by others, and a schedule mathematically prepared according to such scheme. But it by no means appears that this scheme and schedule were adopted and applied arbitrarily, and without a preliminary finding that the special benefits would be fairly and justly apportioned in the situation in hand by their application. It is true, also, that this scheme was originally formulated with a regard for the entire proposed system of city sewerage, and its estimated cost. That fact, however, has no significance, save as a tribute to the foresight of the originators of the scheme, if it appears that the results worked out by them, taking a broad view of the whole city situation, in fact accomplished in this particular instance what it was designed to accomplish, and did in fact represent a correct assessment of the cost of this particular line of sewer, based upon special benefits. The adoption and application in the laying of assessments of a rule of any sort, and from whatever source derived, is not in violation of a requirement that they be laid with regard to special benefits, if that rule is, in the discretion and judgment of the assessing authority, chosen for the reason that it leads to the required result. The supreme requisite of an assessment proportioned to special benefits is, in the absence of specific legislative directions, the exercise of judgment and discretion by the assessing authority in the choice of means or otherwise to the end that the required results may be reached. Given

such results, and such an exercise of judgment and discretion in reaching them, no assessment can be successfully assailed upon the ground that it is not made upon the basis of special benefits.

The findings of fact in these cases plainly disclose that whatever rule was adopted was not adopted as an arbitrary one, or as one which the bureau of compensation was bound to apply, but as one which appealed to the judgment of its members as one fairly leading, as it did in fact, to the results to be secured, to wit, an assessment of a proportional and reasonable part of the expense of the public work in hand upon the basis of special benefits. The parties interested were heard, the premises inspected, and neither the frontage method nor the \$1.75 rate adopted until it appeared, as the result of such hearing and examination, that their adoption would lead to the required result. The finding with regard to the method pursued by the bureau of compensation clearly negatives any other assumption.

A few incidental questions demand a passing consideration. We have treated the court's finding as to the results of the assessments made as stating the fact. The applicant, however, takes issue with this portion of the finding, and contends that, as a matter of law, it cannot be true that the assessments laid embodied a distribution of a reasonable and proportional share of the expense of the construction of the sewer in question upon the property owners specially benefited thereby, and made upon the basis of the special benefits accruing to each, and urges that necessarily, and as a matter of law, the assessments, as made, and upon the basis adopted, must have produced and did produce disproportionate results, and results excessive as to the applicant. It is quite clear that so sweeping a general statement cannot be justified. The court has found nothing which could not readily be true.

The applicant's brief objects to the assessments, for the reason that they were actually laid by the bureau of compensation, after reference to it by the court of common council, and not by the original and independent action of said court. The finding negatives such an assumption. It is found that the court of common council passed upon and adopted the report which the bureau of compensation made to it. In so doing it exercised its judgment and discretion, and the assessments became its assessments.

The assessment made against the applicant's land fronting on Shelton avenue is particularly objected to, as being in violation of that provision of the city charter which directs that the whole amount of assessments for benefits by reason of any work or improvement shall in no case exceed the cost thereof. 12 Sp. Laws, p. 1139, § 85. It appears that the total assessments along said avenue, which were separated into an independent report, amounted to \$5,733.36, while

the computed cost of that portion of the entire line of sewer was \$5,623.79. This contention is beset with two difficulties: In the first place the charter provides, as we have seen, that, in estimating the reasonable part of the expense of any sewer for the purposes of assessment, "the cost of constructing any main or trunk sewer, into or through which such other sewer is discharged, may be taken into consideration." 12 Sp. Laws, p. 1150, § 135. In the present case the newly constructed sewer sought the harbor through two miles of other sewers, some of which cost as high as \$38 per foot to construct. In the second place there remain the facts that the newly constructed sewer was one not limited to Shelton avenue, and that the cost of the entire sewer exceeded by several thousand dollars the assessments made on its account. As it is unnecessary to accumulate justifications for the assessment, it is needless to follow the applicant's nicely critical argument, which seeks to give significance to the separation of assessment reports, which for some reason was resorted to.

There is no error. The other Judges concurred.

(76 Conn. 107)

BARLOW BROS. CO. v. JOHN W. GAFFNEY & CO. et al.

(Supreme Court of Errors of Connecticut. July 24, 1903.)

MECHANICS' LIENS—CONTRACTOR UNDER SUB-CONTRACTOR—PREVIOUS PAYMENT OF SUBCONTRACTOR—EFFECT.

1. Gen. St. (Revision 1902) § 4135, gives a lien to one furnishing material or services under agreement with or consent of the owner. Section 4137 requires persons who are neither contractors nor subcontractors under written contracts assented to by the owner to serve a specified notice on the owner, and provides that no subcontractor, without a written contract, "and no person who furnishes material or renders services by virtue of a contract with the original contractor or any subcontractor," shall be required to obtain the owner's consent as provided in section 4135, in order to claim a lien under section 4137. *Held*, that a contractor under a subcontractor could claim a lien under section 4137.

2. The fact that a contractor has paid a subcontractor before a contractor under the latter makes a claim of lien will not relieve the contractor, the statute not requiring that the lienor's principal should be unpaid.

Appeal from Superior Court, New Haven County.

Action by the Barlow Bros. Company against John W. Gaffney & Co. and others. Judgment for defendants, and plaintiff appeals. Reversed.

Nathaniel R. Bronson, Edwin S. Hunt, and Wilson H. Pierce, for appellant. Lucien F. Burpee and Terrence F. Carmody, for appellees.

TORRANCE, C. J. The bond in suit was made by John W. Gaffney & Co. as principals, and the other defendants as sureties, and was given for the release of a mechanic's lien claimed by the plaintiff upon certain

premises in Waterbury. The condition of the bond recited the facts upon which the lien was claimed, and ended with these words: "Now, therefore, if said John W. Gaffney and Company shall well and truly pay to The Barlow Brothers and Company all that money that may be justly and legally due it, with interest and costs, under said mechanic's lien, this bond shall be void, otherwise good and valid." The sum claimed by way of lien is \$1,225, and the answer, in substance, admits that, if the lien is a valid one, this sum, with interest, is due upon the bond.

The controlling facts relating to the validity of the lien are these: On January 3, 1902, Gaffney & Co. entered into a written contract with an ecclesiastical corporation of Waterbury, owning land there, to erect and complete a building on said land; and on the 6th day of the same month Gaffney & Co. contracted with a corporation called the Seeley & Upham Company to do the plumbing work on said building. Subsequently, in January, 1902, the Seeley & Upham Company sublet the plumbing contract to the plaintiff. The plaintiff completed said plumbing work on the 30th of August, 1902, but has been paid nothing thereon. On the 28th of August, Gaffney & Co. paid the Seeley & Upham Company in full for said plumbing work. On September 27, 1902, the plaintiff gave written notice to the ecclesiastical corporation, as required by law, of its intention to claim a lien upon said building and land for said plumbing work, and three days later filed its certificate of lien as required by law. When said certificate was filed there was due to Gaffney & Co. from said ecclesiastical corporation the sum of about \$5,000. On the sole ground that in doing this plumbing work the plaintiff was a subcontractor of the Seeley & Upham Company, the trial court held that the plaintiff, under our law, was not entitled to a lien; and whether it erred or not in so holding is the main question in the case. The answer to this question depends upon the construction of our statutes relating to mechanics' liens. The statutes specially bearing upon this question are now to be found in sections 4135 and 4137 of the General Statutes (Revision 1902). Section 4135 provides, among other things, as follows: "If any person shall have a claim for materials furnished or services rendered in the construction" of any building, "and such claim shall be by virtue of an agreement with or by consent of the owner of the land upon which such building is erected * * * or of some person having authority from or rightfully acting for such owner in procuring such labor or materials, such building with the land on which it stands shall be subject to the payment of such claim. And such claim shall be a lien on such land" and building. Section 4137 provides, among other things, as follows: "No person other than the original contractor

for the construction * * * of the building, or a subcontractor whose contract with such original contractor is in writing, and has been assented to in writing by the other party to such original contract, shall be entitled to claim any such lien, unless he shall, after commencing, and not later than sixty days after ceasing to furnish materials or render services for such construction, * * * give written notice to the owner of such building that he has furnished or commenced to furnish materials, or rendered or commenced to render services, and intends to claim a lien therefor on said building. * * * No subcontractor, without a written contract complying with the provisions of this section, and no person who furnishes material or renders services by virtue of a contract with the original contractor or with any subcontractor, shall be required to obtain an agreement with or the consent of the owner of the land as provided in section 4135, to enable him to claim a lien under this section."

Legislation of the kind here in question appears to have begun in this state in 1836. It extended at first only to buildings erected in cities, in favor of original contractors having claims exceeding \$200. Pub. Acts 1836, c. 76. In 1839 it was extended to any dwelling house or other building, and to subcontractors having a claim of \$50 or more, and having an agreement in writing with the original contractor, assented to in writing by the proprietor of the building and land. Pub. Acts 1839-51, p. 147, c. 159. Legislation of this kind between 1836 and 1855 was embodied in chapter 76, p. 96, of the Public Acts of the latter year. That act provided, among other things, that the claim of the mechanic need only exceed the sum of \$25, and that any person having such a claim for materials furnished or services rendered in the erection of the building should have a lien; but it also provided that no person except the original contractor should have a lien unless within 60 days from the time he began to furnish materials and render services he notified the owner of such fact, and that he intended to claim a lien therefor. It also provided that the provision as to notice should not apply to the original contractor, "nor to any subcontractor whose contract with such original contractor is in writing, and has been assented to in writing by the other party to such original contract." The law embodied in the act of 1855 remained the law upon this subject, without any change which it is material to note, down to the Revision of 1875. In 1875 the important provision requiring the claim to be "by virtue of an agreement with or by consent of the owner" or his agent was added by chapter 15, p. 9, of the Public Acts of that year. In 1879 it was provided that "no subcontractor, with or without a written contract, shall be required to obtain an agreement with, or the consent of such owner, to his procuring or

furnishing such labor or material, to enable such subcontractor to claim a lien." Chapter 43, p. 884, of the Public Acts of 1879. In the Revision of 1888 the above provision appears in this form: "No subcontractor, with or without a written contract complying with the provisions of this section [as to being in writing and assented to in writing by the owner of the land] shall be required to obtain an agreement with, or the consent of, the owner of the land, as provided in section 3018 to enable him to claim a lien under this section." Gen. St. 1888, § 3020. By Acts passed in 1899 and 1901 this provision was amended to read as follows: "No subcontractor, with or without a written contract complying with the provisions of this section, and no person who furnishes materials or renders services by virtue of a contract with the original contractor or with any subcontractor, shall be required to obtain an agreement with, or the consent of, the owner of the land, as provided in section 3018 of the General Statutes, to enable him to claim a lien under this section." Chapter 121, p. 1052, of the Public Acts of 1899, and chapter 80, p. 1228, of the Public Acts of 1901. This is substantially the form in which this provision appears in section 4137 of the Revision of 1902, hereinbefore recited.

Speaking generally, it may be said that our statutes give a mechanic's lien to two classes of persons: (1) To those whose claim is by virtue of an agreement with the owner of the land and building, or by his "consent," and consequently with his knowledge and allowance; (2) to those having a claim of the statutory description, without any such agreement or consent. In the first class, whoever else it may include, come (a) the original contractor; (b) any contractor with him by virtue of a written contract assented to in writing by the owner; and (c) any one having the statutory claim by consent of the owner. In the second class, whoever else it may include, come (a) all contractors with the original contractor under contracts not assented to in writing by the owner; and (b) all persons whose claim is by virtue of a contract with any such subcontractor. Persons in the second class must give the notice required by section 4137 of the General Statutes of 1902, while those in the first class need give no such notice. Without deciding the point, it may be conceded, for the purposes of this case, that the word "subcontractor," as used in section 4137, means one who comes in under the original contractor, and not one who comes in under such a subcontractor. *Spaulding v. Thompson Eccl. Society*, 27 Conn. 573-577. We think the plaintiff comes within the second of the above classes, and is entitled to a lien. The Seeley & Upham Company may be regarded, for the purposes of this case, as a subcontractor, within the meaning of the statute; and the admitted fact is that the plaintiff did the plumbing work in and about the building under a contract with

such subcontractor. We think the plaintiff must be regarded as a person who furnished materials and rendered services in the construction of the building "by virtue of a contract with a subcontractor," and thus comes within the letter, and we think also within the spirit, of our existing statutes relating to mechanics' liens. The case of *Alderman v. Hartford & N. Y. Transp. Co.*, 66 Conn. 47, 33 Atl. 589, relied on to some extent in the court below and in this court as sustaining the claim of the defendant, was decided in March, 1895, before the amendments of 1899 and 1901 allowed a person having the statutory claim "by virtue of a contract with any subcontractor" to have a lien; and we think there is nothing in the opinion in that case which sustains the defendant's claim, or is inconsistent with the views expressed in this case.

Another point made in the case is that the plaintiff's lien is defeated by the fact that the original contractor paid the Seeley & Upham Company in full for the plumbing work on the 28th of August, 1902. That fact was alleged in the answer and denied in the reply, and whether it is true or not does not appear from the record. Assuming, however, without deciding, that such payment was made, it does not, we think, defeat the plaintiff's lien. The plaintiff's right to a lien is given solely by statute, and is not made to depend in any way upon the act of the original contractor in paying or not paying his immediate subcontractor. The legislative conditions upon which the plaintiff's right to a lien is made to depend do not include such an act, and, if the court should make such an act one of these conditions, that would be an act of judicial legislation, rather than one of construction and interpretation. If the original contractor is, under the present law, unprotected, in that he may be compelled to pay twice for the same work and materials, the fault is not with the plaintiff, and the remedy must be sought in the Legislature, and not in the courts.

There is error. The judgment is set aside, and the cause remanded to be proceeded with according to law. The other Judges concurred.

(76 Conn. 84)

GEARY v. CITY OF NEW HAVEN.

(Supreme Court of Errors of Connecticut. July 24, 1903.)

CONTRACTS—EXTRA WORK—SPECIFICATIONS—CONSTRUCTION—REFERENCE—OBJECTION TO EVIDENCE—FINDINGS—ADDITION OF FACTS—APPEAL.

1. The plan of piers for a bridge, which was a part of a contract for the construction thereof, showed the depth of the piers to foundation by perpendicular lines measured from high-water mark downward, and indicated the depth to be 26 feet below high-water mark, with plus or minus signs, intended to indicate that the measurement was approximate only. The contract provided that the piers were to be founded on rock bottom, except that the center one might

be founded on such gravel bottom as was acceptable to the engineer, and declared that the contractor agreed to receive \$14 per cubic yard as full compensation for all labor and materials in excavating and building the piers and completing the same as required, and also in full for all loss and damage arising from the nature of the work, or from any unforeseen obstructions or difficulties encountered. Held, that additional excavation below the 26-foot level in order to reach foundation and additional mason work necessary was not extra work for which the contractor was entitled to additional compensation beyond the contract price per cubic yard.

2. Errors in the admission or rejection of evidence on a trial before a committee should be corrected by a written remonstrance to the acceptance of the committee's report, filed in the trial court.

3. Where an action was referred to a committee, a remonstrance filed, which complains only of the manner in which the committee's rulings on questions of evidence were stated in the report, and not of the rulings themselves, cannot be reviewed on appeal.

4. Where an action is tried before a committee, and a report rendered in favor of defendant, plaintiff is not entitled to have mere evidential facts, not necessary to enable him to present all questions of law arising on the committee's report, added to the committee's findings.

Appeal from Superior Court, New Haven County; John M. Thayer, Judge.

Action by James J. Geary against the city of New Haven to recover for alleged extra work in the construction of the substructure of a bridge. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Hobart L. Hotchkiss and Harry W. Asher, for appellant. William H. Ely and Richard J. Goodman, for appellee.

HALL, J. In May, 1896, the plaintiff entered into a written agreement with the city and town of New Haven "to furnish all the necessary materials and labor and to construct and erect in a substantial and workmanlike manner, the substructure for a bridge on Grand avenue, over the Quinnipiac river, * * * of the dimensions, in the manner and under the conditions" specified in said agreement, made a part of the complaint. By the contract the work was to be completed on the 12th of October, 1896. It was in fact completed on about the 15th of September, 1897. The plaintiff claims to be entitled to recover for extra labor and materials, for damages sustained from delays caused by the defendant, and for the use by the defendant of a temporary bridge constructed by the plaintiff. The total amount of the plaintiff's bill of particulars, comprising 12 items, is \$45,423.21. The defendant having filed an answer, in substance denying that the plaintiff had performed any extra work, and that the delays were the fault of the plaintiff, and alleging that the delays were caused by the plaintiff's incompetency and inferior work, the case was referred to a committee to hear the evidence and report the facts to the court. The committee reported specifically the facts estab-

lished by the evidence and relevant to the issues, and practically found in favor of the defendant upon all the controverted and material questions of fact relating to each item of the bill of particulars, excepting as below stated regarding the first item, and also fully set forth in his report the objections and rulings upon all questions of evidence. The plaintiff filed a remonstrance to the committee's report, which was overruled by the court, and the plaintiff thereupon claimed to be entitled to recover upon the report as accepted, under the first item of his bill of particulars, the sum of \$1,029. The overruling of this claim raises the principal question presented by this appeal.

The following is the first item of the bill of particulars:

"To extra work and materials furnished in the construction of the west rest pier as ordered by the city engineer—said work consisting of additional masonry required in going down from a depth of twenty-six feet below mean high water, as the original plan called for, to a depth of thirty-three feet nine inches, which is the present foundation—\$13,352.00.

"This includes the dredging and towing of materials, and all incidentals.

242 cubic yards of masonry (extra)	\$ 5,082 00
2,600 cubic yards of dredging....	5,200 00
Vessel, pumping and divers, and recutting of stone, etc.....	3,070 00
	\$13,352 00"

The bridge in question is a drawbridge. The pier upon which the draw span rests is referred to as the "center pier," and the two upon which the ends of the draw rest, the westerly one of which is called in the above item the "west rest pier," are called the "east and west piers."

It is the plaintiff's contention that, by the written contract and plans, he agreed to build said west pier to a depth below high-water mark of 26 feet only, at the contract price of \$14 for each cubic yard of masonry; that he was required to construct it to a depth of 33 feet and 9 inches below high-water mark; that the building of the pier below the 26-foot line was much more expensive per cubic yard than the building of it above that line; and that, under the report of the committee, he is entitled to recover the extra expense above \$14 per cubic yard for the building of the pier below said 26-foot line. The committee reports that it was found necessary to dredge to the depth of 33 feet and 9 inches for the foundation of said west pier, that the construction of the masonry below the 26-foot line was worth 50 per cent. more than that above the line, and that the 147 cubic yards of masonry below that line was worth \$21 per cubic yard for construction; amounting, after deducting the sum of \$14 per cubic yard already paid the plaintiff for the construction below the 26-foot line, to the sum of \$1,029. The commit-

tee further finds that "there was no extra work done or materials furnished in the construction of the west pier, as ordered by the city engineer as set forth in item No. 1 [of bill of particulars], unless, as a conclusion of law from the facts hereinbefore stated, the work on the west pier below the twenty-six feet mentioned in the plans must be held as extra work, and that if, as a conclusion of law, the court holds that the plaintiff is entitled to extra compensation, * * * the amount due is \$1,029."

Whether the plaintiff is entitled to recover for extra work under this item becomes, therefore, a question of construction of the written contract. As sustaining his claim that by the provisions of the contract the work below the 26-foot line is extra, the plaintiff calls our attention, among other things, to this language of the contract, under the head of "Masonry": "The dimensions of piers and abutments shall be as shown on the plans on file in the office of the city engineer;" and under the head of "General Provisions": "All work embraced in this contract shall be built truly to the line and gradient throughout in a first-class manner and according to the plans and directions furnished from time to time by the engineer." The plaintiff claims that it appears by the map, Exhibit C, one of the plans referred to by the above language, that at a depth of 26 feet below high-water mark a rock foundation would be found, upon which this west pier could be constructed. With regard to this map, thus made a part of the contract, the committee finds that the city engineer prepared a map or plan, drawn to a scale, of the work to be done under the contract, which showed, among other things, "the substructure of the new bridge to be constructed, and in that connection perpendicular lines measured from high water downward. In that connection a perpendicular line in connection with the center pier indicated forty feet no inches from high-water mark to bottom of timber foundation and a horizontal line at the bottom marked, 'Approximate depth of timber foundation if founded on rock.' In connection with the east rest pier a perpendicular line indicated thirty-two feet no inches, plus or minus, from high water to foundation; the word 'plus' or 'minus' being indicated by a sign. * * * In connection with the west rest pier a perpendicular line indicated twenty-six feet no inches, plus or minus, from high water to bottom of foundation. The plan also showed approximate estimates of masonry * * * in each of the three piers." It is found that this plan, Exhibit C, was referred to in the advertisement for bids, and was examined by and explained to the plaintiff. As to the significance of the signs "plus" and "minus" after the figures, as above stated, and of the statement that certain estimates and figures were approximate, the finding of the committee is that

"these signs and words are used by engineers in drawing plans to inform those bidding for a job, that the figures are not exact, and show that the exact depth at which a suitable foundation can be found cannot be given by the engineer, but that they may vary," and that "the plans as drawn did in fact indicate, in the ordinary, proper way, that the figures on the plans were not exact, and conveyed that information." Even the measurements, statements, and signs upon this map, Exhibit C, considered apart from certain written provisions of the contract pertinent to them, and especially when examined in connection with the above facts from the committee's report, fail, therefore, to show that the undertaking of the plaintiff was to build the west pier, but 26 feet below high-water mark. On the contrary, the perpendicular line at the side of the west pier, evidently designed to extend from high-water mark to rock foundation, the signs showing that the given measurements of that line were not intended to be exact, and the statement that the given depth of the rock foundation of the center pier and the given estimates of the masonry of the three piers were approximate, seem to indicate, rather, that the pier in question was to be built either to a rock foundation, the depth of which below high water was uncertain, or to some other foundation, the depth of which was uncertain. But turning to the written contract, we find it expressly provides that the east and west and center piers are to be founded on rock bottom, except that the center pier may be founded on such hard gravel bottom, acceptable to the engineer, as may be found before rock is encountered. Again, with regard to the payment which the plaintiff is to receive, the contract contains this provision: "The said party of the second part [the plaintiff] hereby agrees to receive the following price as full compensation for furnishing all labor and materials in building and in all respects completing the aforesaid work in the manner and under the conditions before specified, also all loss or damage arising out of the nature of the work aforesaid, or from the action of the elements, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the work, and for well and faithfully completing the same and the whole thereof in the manner hereinbefore specified, viz. * * * For each cubic yard of masonry in the pivot (center) pier the sum of fourteen dollars (\$14.00). For each cubic yard of masonry in the new piers at each end of the draw span (east and west piers) the sum of fourteen dollars (\$14.00)." (The charge of \$14 per cubic yard of masonry included the expense of excavation, etc., charged as separate items in the first item of the bill of particulars.) The contract further provides that the engineer "shall have the power also with the consent of the joint committee [committee on bridges

of board of public work of city, and the selectmen of town of New Haven] to vary, extend or diminish the quantity of the work during its progress without vitiating the contract." After dredging 33 feet and 9 inches for the west pier foundation, it was in fact, though with the consent of the engineer, founded on other than rock bottom. While the plaintiff excavated 7 feet and 9 inches below the estimated depth for that pier, it is found that, by reason of having been required to dredge less than the estimated depths for the east and center piers, the total depth of dredging for the three piers in excess of the estimated depth was 1 foot and 11 inches, and the excess of the actual amount of masonry in the three piers, over the estimated amount, was 16.64 cubic yards. All these facts, showing that the written contract, of which the map, Exhibit C, was properly held to be a part, provides for the building of the west pier to rock bottom; that the depth of such foundation was uncertain; that the amount of masonry was only estimated approximately upon the plans; that no different price was fixed for construction below than for that above the estimated depth; and that the contract price for construction, instead of being a gross sum for a definite or estimated amount of masonry, was a certain sum for each cubic yard—furnish sufficient reasons for sustaining the decision of the trial court that the work on the west pier below the said 26-foot line was not extra work for which the plaintiff is entitled to compensation above the fixed contract price, of \$14 per cubic yard, and that, having been paid that price for the claimed extra work, he cannot recover under the first item of the bill of particulars.

The remaining items of the bill of particulars do not require discussion. The allegations of fact upon which they are based have been conclusively decided by the committee adversely to the plaintiff.

Numerous reasons of appeal are assigned, based upon the action of the trial court in overruling the plaintiff's remonstrance to the committee's report, and in denying certain motions of the plaintiff concerning a correction of the record. Generally the grounds of the remonstrance were that the committee had failed to specifically and properly report the facts relevant to the issues, and established by the evidence, and to make various exhibits a part of his report, and to properly state the objections and rulings upon evidence. There appears to be no good reason for stating these grounds in detail here. They were all properly overruled by the trial court—many of them because the facts alleged in the remonstrance were not proved, and others because the alleged facts were insufficient. The court correctly ruled that the committee had adopted the right method of reporting the facts, and of stating his rulings upon questions of evidence.

Another reason of appeal is that the trial

court did not sustain plaintiff's exceptions to rulings upon questions of evidence, taken upon the trial before the committee, and did not reject the committee's report on account of said rulings. It does not appear that the trial court was asked to decide whether the rulings of the committee upon questions of evidence were correct, or was asked to reject the report on account of such rulings, or that the court did decide these questions of evidence. The proper way of correcting errors in the admission or rejection of evidence in a trial before a committee is by a written remonstrance to the acceptance of the committee's report, filed in the trial court, where such errors, if there are any, may be corrected, and the case may be recommitted for a further hearing or finding; and in such remonstrance the claimed erroneous rulings should be distinctly stated as grounds of remonstrance. *Kennedy v. Scovil*, 14 Conn. 61-71; *Maples v. Avery*, 6 Conn. 20-23; *Redfield v. Davis*, 6 Conn. 439-442. In the remonstrance filed and decided by the trial court, the committee upon questions of evidence, the plaintiff complains, not of the rulings of but only of the manner in which the rulings were stated in the report. While, therefore, we are not called upon to review these rulings of the committee, we deem it proper to say that we have examined them, and that we are satisfied that they are correct, and that they present no questions which require discussion here. The facts which the plaintiff, by his motion to the superior court and his application to this court, asked to have added to the finding of the committee, were of an evidential character, and were not necessary to enable the plaintiff to present either to the superior court or this court all proper questions of law arising upon the committee's report or upon this appeal. The granting of such a motion or such an application to add to a finding made by a committee or auditor is not authorized by our statutes or rules concerning motions to a trial judge to correct his finding, or applications to this court to rectify an appeal.

There is no error. The other Judges concurred.

(76 Conn. 79)

EMPIRE TRANSPORTATION CO. v. JOHNSON.

(Supreme Court of Errors of Connecticut. July 24, 1903.)

INJUNCTION—RESTRAINING REPLEVIN—DAMAGES—IRREPARABLE INJURY—COMPLAINT—ALLEGATIONS.

1. In a suit to restrain a threatened replevin suit, where no act is alleged to have been committed or duty omitted, and no damage caused, there is no foundation for a judgment in damages.

2. Where, in a suit to restrain defendant from replevying certain coal barges, the allegations of the complaint show that defendant must fail in such action, the sufficiency of plaintiff's legal remedy is apparent.

3. In a suit for an injunction, a mere allegation that irreparable injury will ensue is insufficient, unless facts are stated showing the apprehension to be well founded.

4. In a suit to restrain defendant from replevying certain coal barges from plaintiff, the complaint showed that plaintiff had made contracts with regard to transportation by means of the barges; but there was no allegation that such barges were not obtainable, or that the services which they were to perform could not be performed by means of charter parties. *Held*, that the allegations did not show any ground for injunction.

Appeal from Court of Common Pleas, New Haven County; Leverett M. Hubbard, Judge.

Suit by the Empire Transportation Company against Frank P. Johnson. From a judgment in favor of plaintiff, awarding an injunction restraining defendant from commencing an action of replevin for certain coal barges, and awarding damages, defendant appeals. Reversed.

James H. Webb and John Wurts, for appellant. Prentice W. Chase, for appellee.

PRENTICE, J. The complaint prays for damages, and an injunction restraining the defendant from instituting replevin proceedings to recover the possession of certain coal barges. The defendant demurred to the complaint, which demurrer the court overruled. The defendant thereafter refusing to answer over, judgment was rendered in favor of the plaintiff to recover \$1 damages, and for a permanent injunction, as prayed for.

There are two reasons of appeal, to wit, (1) that the court erred in overruling said demurrer; and (2) that the court erred in rendering a judgment for damages.

The second ground of error is clearly well assigned. The complaint seeks to restrain a threatened act. No act is alleged to have been committed or duty omitted, and no damage caused. There was no foundation, therefore, for a judgment in damages. *Foot v. Edwards*, 8 Blatchf. 313, Fed. Cas. No. 4,908; *Wildman v. Wildman*, 70 Conn. 700, 41 Atl. 1.

There remains to be considered the propriety of the action of the court in overruling the demurrer. In so far as the demurrer related to the prayer for damages, no further comment is necessary. In so far as it challenged the plaintiff's right to equitable relief by way of injunction, something further needs to be said.

The complaint, dated March 20, 1903, alleges that the defendant was threatening to institute replevin proceedings against the plaintiff to obtain possession of five coal barges; two of them lying upon the bottom of New Haven Harbor, near to the plaintiff's dock, and three being in the plaintiff's service, and all claimed to have been purchased by the former of the latter, but never delivered. The allegations of the first eight paragraphs of the complaint, which, and

which alone, deal with this aspect of the case, under the admissions involved in the demurrer, demonstrate that the present defendant must have inevitably failed in any attempt to replevy the barges in question. The sufficiency of the plaintiff's legal defense thereto is apparent.

Thus far the complaint discloses that the defendant was threatening to begin a baseless replevin action to recover the barges. The balance of the complaint is confined to a statement of the damage which would result to the plaintiff in its business if the replevy was made. The resort to equitable intervention is sought to be justified upon the ground of the extent and nature of this prospective damage. It is not suggested that the defendant, in the course of action he was threatening to pursue, was actuated by malice, wantonness, or bad faith. There is no allegation that in the progress of the proceedings at law the plaintiff would be deprived of the benefit of any claim or defense of purely equitable cognizance. It is not claimed that the barges were in any sense unique, or possessed of any peculiar or extraordinary value, either in themselves or to the plaintiff. The plaintiff rests its right to the equitable relief prayed for upon the sole ground that its loss of the use of the three barges above water, which would result from their replevy, would entail upon it pecuniary injury of such a character and magnitude that the defendant ought not, in equity and good conscience, to be permitted to resort to the process at law prescribed by statute for the recovery of goods or chattels by one who claims that they are wrongfully detained from him. The allegations made in support of this contention are, in substance, that the plaintiff is a corporation engaged in the business of transportation on the waters of Long Island Sound and elsewhere; that it daily uses in said business a large number of coal barges, including the three in question; that prior to the date of the writ it had, "in calculating the necessity of its carrying capacity, considered as available the three said coal barges, and had entered into various undertakings wherein said barges were essential to the carrying on of its business"; that the period of time during which said threatened replevin action would be pending would be the most active period of the year in the plaintiff's business; and that, if said writ of replevin issued, the plaintiff would be deprived of the use of said three barges, with the result that it would thereby be irreparably damaged, through its inability to transport the freight necessary to carry on its usual business, its inability to supply the demands of patrons, and perform its contracts, with the attendant loss of earnings and patronage, both temporary and permanent, and its subjection to litigation. The language in which these results are portrayed is somewhat strong, and the resulting injury is declared to be irreparable. The mere

¶ 1. See *Injunction*, vol. 27, Cent. Dig. § 232.

allegation that irreparable injury would ensue is, however, not sufficient, unless facts are stated showing the apprehension to be well founded. *Blaine v. Brady*, 64 Md. 373, 1 Atl. 609; *Balfe v. Lammers*, 109 Ind. 347, 10 N. E. 92; *Thompson v. Williams*, 54 N. C. 176; *Watson v. Ferrell*, 34 W. Va. 406, 12 S. E. 724; *Branch v. Supervisors*, 13 Cal. 190. The facts stated, shorn of the color which is given to them, resolve themselves into this: that the plaintiff, having made business arrangements and contracts with a regard to the carrying capacity of "a large number of coal barges," would be deprived of the use of three of this large number if the defendant should carry out his purpose to replevy them. There is no allegation that coal barges were not obtainable in plenty in substitution for those replevied; none that the service which they were expected to perform could not readily be procured to be performed by means of charter parties or contracts of affreightment. In the absence of such or similar allegations, it cannot be presumed that coal barges were so rare or so hard to secure, and that barge transportation was so out of the reach of the plaintiff, that the payment of a reasonable compensation, either as freight charges or demise rentals, would not have fully supplied the lack of the three in question, and prevented all the dire consequences resulting from their replevy, which are so glowingly pictured in the complaint. Without this presumption, it would appear from the complaint that the only injury to the plaintiff that such replevy could portend was one substantially measured by the additional expense which might be incurred in the ways indicated. Such injury could not, in the nature of things, be either so extraordinary as not to be the subject of adequate compensation in damages, or of such a nature as to elude discovery or ascertainment, or be incapable of measurement by pecuniary standards. Nor were the means of redress and satisfaction wanting. The statutory provisions regulating proceedings in replevin furnished that through the bond required to be given. The anticipated injury could not, therefore, have been in any sense irreparable. Neither could it have partaken in any other way of the peculiar nature of some injuries, which, as being not susceptible of adequate redress at law, courts of equity seek to prevent. Special equitable features are entirely lacking. The situation discloses nothing but the ordinary elements of business interference and pecuniary damage which so commonly attend the causes of litigation at law, and which courts of law are intended to redress, and are capable of fully and completely redressing. Of the circumstances of this case it might well be said, as was well said in another cause, that if courts of equity should interfere in such cases they would draw to themselves the greater part of the litigation properly belonging to courts of law. *Francis v. Flinn*,

118 U. S. 385, 6 Sup. Ct. 1148, 30 L. Ed. 165.

There is error. The judgment is set aside, and the cause remanded, with directions that said demurrer be sustained. The other Judges concurred.

(76 Conn. 92)

STATE v. NUSSENHOLTZ.

(Supreme Court of Errors of Connecticut. July 24, 1908.)

CRIMINAL LAW — HEALTH — UNWHOLESOME FOOD — SALE — STATUTES — OFFENSES — ELEMENTS — GUILTY KNOWLEDGE — EVIDENCE — CHARACTER OF ACCUSED — CROSS-EXAMINATION.

1. Where accused had offered no evidence of his good character, it was error for the court to permit the state, on cross-examining him as a witness in his behalf, to ask him whether he had been previously arrested, and then to strike out that part of his affirmative answer in which he stated he was not guilty of the offense for which he had been arrested.

2. Pub. Acts 1901, c. 154 (Gen. St. 1902, § 1346), provides that every person who shall willfully sell or offer to sell the flesh of any calf less than four weeks old when killed shall be punished by a fine, etc. *Held*, that guilty knowledge was an essential element of the crime defined by such act, and it was therefore error for the court to charge that by "willfully selling" was meant deliberately selling, without regard to defendant's motive.

Appeal from Court of Common Pleas, New Haven County; Leverett M. Hubbard, Judge.

Frank Nussenholtz was convicted of willfully selling veal less than four weeks old, and he appeals. Reversed.

Jacob B. Ullman, for appellant. Robert J. Woodruff, Pros. Atty., for the State.

TORRANCE, C. J. In this case we think that two of the errors assigned are well taken, and entitle the defendant to a new trial. One relates to certain rulings upon evidence, and the other to a certain part of the charge to the jury.

The assignment relating to the rulings upon evidence is based on these facts: The defendant became a witness in his own behalf, and upon his cross-examination was asked if he had ever before been arrested. To this question he objected, but the court ordered him to answer it, and thereupon he did so, saying: "I was arrested. I was not guilty." The court, apparently of its own motion, then ordered the words "I was not guilty" to be stricken out, and the statement of arrest to stand. We think the trial court erred in this, and that the error was harmful to the defendant. The question was apparently permitted on the supposition that, if answered in the affirmative, such answer would tend to prove such past misconduct on the part of the defendant as would injuriously affect his character. On no other supposition was the question permissible. But clearly such answer had legitimately no such tendency. Arrests are frequently made upon groundless charges, and a mere charge of misconduct, such as may impliedly be in-

volved in the mere fact of arrest, ought not to be used as the basis of an inference that the charge is true. Both the question and any possible answer to it were, under the circumstances, clearly irrelevant, and should have been ruled out. Moreover, the defendant was the accused, as well as a witness, and, although his character as witness was open to attack in this case, his character as accused was not, inasmuch as he had offered no evidence of good character; and yet by the action of the trial court in this matter the state was allowed to attack the defendant's character both as a witness and as a man, for the fact of arrest was in no way limited to its effect upon his character as a witness, but was received as affecting his character generally, and the jury were nowhere told that it could not be used to affect his character as a man. Under these circumstances, we think that the action of the court in admitting this evidence, coupled with its order striking out the claim of innocence, entitles the defendant to a new trial.

The other material error assigned relates to a certain part of the charge. The statute upon which this case was brought provides, among other things, that "every person who shall willfully sell, or offer to sell * * * the flesh of any calf which was less than four weeks old when killed," shall be punished by fine or imprisonment as therein provided. Pub. Acts 1901, c. 154 (Gen. St. 1902, § 1346). The accused was charged with selling the flesh of a calf in violation of this statute. In construing the statute the court charged the jury as follows: "The accused is charged here with willfully selling. The court would advise you that by 'willfully selling' is meant deliberately selling. It is not a question of motive. A man's motive does not enter into the account in an offense where it is simply that the act of violation was willful." The court here seems to construe the statute as if it did not contain the word "willfully." The jury are, in effect, told that, if the accused did in fact sell or offer to sell flesh of the forbidden kind, he was guilty, even if he in good faith and on sufficient grounds believed it was not flesh of that kind; in other words, that his knowledge that the flesh was of the forbidden kind was not an element of the statutory crime. This would undoubtedly be the true construction if the word "willfully" had been omitted, but we think it is not the true construction of the statute as it now reads. The case turns upon the question of intent. With what intent must a sale be made to make the seller guilty under the statute? Is a mere intent to make the sale sufficient, or must it be an intent to make the sale and also to violate the law? A., knowingly having in his possession flesh of the forbidden kind, sells it. Clearly his intent is twofold: (1) To sell the flesh; (2) to sell it in violation of law. B., having in his possession flesh of the forbidden kind, but blamelessly, without knowledge

that it is so, sells it. Clearly his intent is simply to sell, and nothing more. A. may be said to have an evil intent, a guilty intent; B., an innocent intent, or at least not an evil intent. Unquestionably A. is guilty. Is B. also guilty? That is the controlling question in this part of the case. It is quite true that guilty knowledge or evil or guilty intent is, speaking generally, an essential element of crimes at common law, but it is also true that in very many statutory crimes guilty knowledge or intent is not an essential element. "Although *prima facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal, whether there has been any intention to break the law or otherwise to do wrong, or not." *The Queen v. Tolson*, 23 Q. B. Div. 172. The statutory crimes considered in the cases of *State v. Kinkead*, 57 Conn. 173, 17 Atl. 855, and *State v. Turner*, 60 Conn. 222, 22 Atl. 542, are crimes of this latter sort. In the former the defendant was prosecuted for allowing a minor to loiter on premises where the defendant kept intoxicating liquor for sale, and in the latter the defendant was prosecuted for entering without permission upon inclosed land of another for the purpose of fishing. In both it was held that guilty knowledge or guilty intent was not an essential element of the crime, and there are very many cases of this kind in the books. It is also, however, true that, in quite a number of statutory crimes, guilty knowledge or guilty intent is either expressly or by implication made an element of the crime. An instance of this kind is found in the case of *Myers v. State*, 1 Conn. 502, where the letting of a carriage for hire on Sunday, from a belief that it was to be used in a case of necessity or charity, when no such case existed, was held to be no offense, within the statute. It is for the Legislature to determine whether the legality or illegality of a given act shall depend upon the knowledge or the ignorance of the doer, and it thus becomes a question of construction in such cases whether guilty knowledge or guilty intent constitutes an element of the statutory crime. In the statutory crimes considered in the *Kinkead* and *Turner* Cases, *supra*, neither the word "willfully" nor any word of like import was used. Certain acts were forbidden, and doing them was made punishable, whether the doer had or had not knowledge of the facts that made his act a violation of law. But the statute here in question contains the word "willfully," and its presence there means something, and cannot fairly be regarded as surplusage; but, if it means "voluntarily" only, it is mere surplusage, for that is already implied in the words "shall sell." The statute does not merely say that, if any one "shall sell" flesh of the forbidden kind, he shall be punished. It says that, if any one "shall willfully sell"

such flesh, he shall be punished. To willfully sell diseased meat ordinarily means to sell it with knowledge of its condition; and so in the statute here in question we think the words "shall willfully sell" mean to sell with knowledge that the flesh is of the forbidden kind—a sale made with guilty knowledge, and therefore with an evil intent to violate the law. This is the sense ordinarily given to the words "willful" or "willfully" in statutes creating a criminal offense, unless it clearly appears that they were used in a different sense. They are held to imply the doing of the forbidden act purposely in violation of law. *State v. Whitener*, 93 N. O. 590; *State v. Smith*, 52 Wis. 134, 8 N. W. 870; *Commonwealth v. Kneeland*, 20 Pick. 220; *State v. Clark*, 29 N. J. Law, 96; *Folwell v. State*, 49 N. J. Law, 31, 6 Atl. 619; *Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; *Felton v. United States*, 96 U. S. 702, 24 L. Ed. 875; *Potter v. United States*, 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214. In this view of the law, we think the court below erred in its charge. The jury were, in effect, told that guilty knowledge on the part of the defendant was not an essential element of the statutory crime.

As the other questions raised on the appeal are not likely to arise again upon a retrial, it is unnecessary to consider or decide them.

There is error, and a new trial is granted. The other judges concurred.

(76 Conn. 97)

STATE v. McMAHON.

(Supreme Court of Errors of Connecticut. July 24, 1903.)

MUNICIPAL CORPORATIONS—SIDEWALKS—REMOVAL OF ICE AND SNOW—BY LAWS—VALIDITY—CONSTITUTIONAL LAW—TAXING POWER—EQUALITY—POLICE POWER—PUBLIC SAFETY.

1. Meriden City By-Laws, § 9, providing that, whenever a sidewalk fronting or adjoining any lot of land in a city shall be wholly or partially covered with snow or ice, it shall be the duty of the owner, occupant, or person having charge thereof to cause said sidewalk to be made safe and convenient by removing said snow and ice within six hours after the accumulation of same, or, in case of ice, by covering the same with sand within the same time, and providing a fine for failure to comply therewith, is not void as vague and indefinite.

2. Such by-law is not unconstitutional as an improper exercise of the taxing power.

3. The law is not unconstitutional for inequality as applying only to owners of land.

4. The act is a proper exercise of the city's police power for the preservation of the public safety.

Case Reserved from Court of Common Pleas, New Haven County; Julius C. Cable, Judge.

Prosecution by the state against Matthew McMahon for violation of a city by-law requiring removal of ice and snow from sidewalks abutting defendant's premises. Demurrer to the information reserved for the advice of the Supreme Court. Overruled.

Cornelius J. Danaher, for accused. Robert J. Woodruff, Pros. Atty., for the State.

HAMERSLEY, J. The common council of the city of Meriden passed a by-law containing the following provisions:

"Sec. 7. Whenever the sidewalk fronting or adjoining any lot of land in the city of Meriden shall be wholly or partially covered with snow or ice, it shall be the duty of the owner or occupant of such building or lot of land, or persons having charge thereof, to cause said sidewalk to be made safe and convenient * * * by removing said snow or ice therefrom within six hours after the accumulation of the same thereon or in the case of ice, by covering the same with sand or other suitable substance, the same to be done within six hours after the accumulation of said ice. * * *

"Sec. 8. Any person failing or neglecting to comply with the provisions of the foregoing section shall forfeit and pay a fine of \$10 to the treasurer of the city for the use of the city, and any failure or neglect to comply with the provisions of said section shall be a misdemeanor, and it shall be the duty of the city attorney to prosecute any person so failing and neglecting to comply therewith."

The Legislature authorized the common council of the city of Meriden to enact by-laws "to compel the occupant, persons in charge or owners of lands or buildings to remove snow and ice from the sidewalks and gutters in front of such land or buildings and to keep such sidewalks safe for public travel," to impose fines for violation of such by-laws, and prescribe the mode of enforcing the fines by action of debt, or by prosecution as in case of misdemeanor. 8 Sp. Laws, p. 307, § 17; Sp. Laws 1879, p. 147. This is a prosecution by the city attorney for a violation of the provision of said by-law above quoted. The defendant demurred to the information on two grounds only—because said by-law is vague and indefinite, and because the by-law is in violation of the Constitution, state and federal, and therefore void. The case is reserved for the advice of this court as to what judgment should be rendered upon this demurrer.

The offense for which the defendant is prosecuted is not described in the by-law in terms so vague and indefinite as to render it for that reason invalid.

The other ground of demurrer presents this question: Does the Legislature, in enacting a law which makes it the duty of all inhabitants of a city, being owners or agents of owners of land abutting on sidewalks within the city limits, to aid in keeping those sidewalks safe for the common use by removing or otherwise rendering harmless accumulations of snow and ice on the sidewalks in front of their respective premises, violate any constitutional provision? It is true, as claimed by the defendant, that this

question, in its present form, is now presented to us for the first time. But we think that the trend of our decisions in cases involving similar considerations leads naturally, if not necessarily, to a negative answer. *State v. Wordin*, 56 Conn. 216, 226, 14 Atl. 801; *Levick v. Norton*, 51 Conn. 461, 469; *Yale College v. New Haven*, 57 Conn. 9, 17 Atl. 139; *Lewis v. New Britain*, 52 Conn. 568; *Hartford v. Talcott*, 48 Conn. 525, 534, 40 Am. Rep. 189.

We are referred to decisions in other states where such legislation has been held void. *Ottawa v. Spencer*, 40 Ill. 211; *Gridley v. Bloomington*, 88 Ill. 554, 30 Am. Rep. 566; *State v. Jackman*, 69 N. H. 318, 41 Atl. 347, 42 L. R. A. 438. The argument which leads to such a conclusion would seem to be this: The state imposes upon cities the duty of constructing and maintaining in condition safe for public travel highways within their limits. It punishes a neglect of this duty by appropriate penalties, including a liability to pay damages to a person injured by means of a defect in a highway existing through such neglect. The repair as well as the construction of highways is a public improvement, and contributions by individuals for that purpose through enforced labor or payment of money is a tax. Such tax may be collected from a limited taxing district, including those only whose property is specially benefited by the public improvement, or from a taxing district including the whole city, but in either case the tax must be laid upon a principle of uniformity and equality. Sidewalks are a part of the highway, and cannot be distinguished, in respect to their construction, maintenance, and care, from the rest of the highway. The general duty of maintaining highways in a condition safe for public travel has been construed as including the duty of removing or rendering harmless accumulations of snow and ice upon sidewalks. Therefore such removal is a repair of a highway and a public improvement, for which no individual can be taxed, unless upon a principle of uniformity and equality. Requiring each owner of land abutting on a sidewalk to remove the snow and ice accumulated on the walk in front of his premises is a violation of this principle, whether the requirement be regarded as an assessment for special benefits or as a general tax. Even if the requirement to remove snow and ice from a sidewalk cannot be regarded as a tax, yet it is certainly a burden, and a purely public burden cannot be laid upon a private individual, except as authorized in cases to exercise the right of eminent domain by virtue of proper proceedings to enforce special assessments or special taxation. *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640. As an exercise of the right of eminent domain, the requirement takes private property for public use without compensation. Moreover, the requirement imposes a burden and creates a duty which

does not bear on all citizens alike, and violates the principle of impartial equality which pervades the Constitution. *State v. Jackman*, 69 N. H. 318, 41 Atl. 347, 42 L. R. A. 438.

In deference to the high character and acknowledged authority of the courts which have taken this view, we have carefully considered these decisions, but we cannot accede to all the assumptions on which the conclusion reached seems to be founded. The Constitutions of the states where this view is taken contain provisions adopting as a fundamental maxim some theory of uniformity and equality in taxation, and purporting to limit the field of taxation by requiring all laws imposing taxes to conform, in respect to the subjects of taxation, the modes of valuation, and stress of the tax, to this theory of uniformity and equality. Our own Constitution contains no such provisions. On the contrary, it distinctly secures the right of the people to tax themselves through their representatives, and recognizes the duty of exercising the power of taxation wisely and only for the public good, as a legislative duty for the performance of which the General Assembly is responsible to its constituency, and recognizes the power of considering the conditions of population or property, the theories and maxims of political economy or moral philosophy which may affect taxation, and of determining what, on the whole, is a wise and fair mode of distributing the burden, as a legislative power which the judicial department is by express provision forbidden to exercise. Nor is the aphorism, "Taxation must be equal and uniform," embodied as a fundamental maxim in the United States Constitution, restricting the power of taxation vested in Congress or the state Legislatures. Such an aphorism, whatever view may be taken of its meaning and practical effect, is not a fundamental maxim of government, limiting the legislative power, unless embodied in the state Constitution. *State v. Travelers' Ins. Co.*, 73 Conn. 255, 262, 47 Atl. 299, 57 L. R. A. 481; *Travelers' Ins. Co. v. Connecticut*, 185 U. S. 364, 22 Sup. Ct. 673, 46 L. Ed. 949; *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 161, 59 Am. Dec. 759. Possibly this difference in constitutional provisions may have influenced the view taken as to the real nature of the legislation in question. In several states, however, whose Constitutions contained in some form the maxim of uniformity and equality in taxation, the courts have regarded legislation of this kind as not an exercise of taxing power, within the range of that maxim, but simply as prescribing certain duties for all citizens in respect to the preservation of public safety, reasonable in respect of the burden imposed, and such as the state may prescribe without violating the constitutional guarantees enacted for the protection of personal liberty and rights of property from arbitrary and discriminating legislation. *Goddard, Pe-*

tioner, 16 Pick. 504; *Carthage v. Frederick*, 122 N. Y. 268, 25 N. E. 480, 10 L. R. A. 178, 19 Am. St. Rep. 490; *Reinken v. Fuehring*, 130 Ind. 382, 30 N. E. 414, 15 L. R. A. 624, 30 Am. St. Rep. 247.

The legislation is not exempt from the general guaranties of the Constitution simply because it relates to those subjects of legislation commonly classed under the indefinite though convenient phrase, "exercise of police power." The whole legislative power is committed to the General Assembly, subject to the restrictions contained in the Constitution, and no manifestation of that power is exempt from these fundamental limitations. A law which takes private property for public use without compensation is equally void, whether it is classed as an exercise of educational power in building a schoolhouse, or of police power in the destruction of property dangerous to health. Clothing infected with disease may be destroyed without compensation to its owner, not because the law authorizing it is a police regulation, and so exempt from constitutional limitation, but because no right of property is invaded by such destruction. So a law defining the duties of citizens to each other or to the state, which gives special privileges to one man or set of men, or arbitrarily discriminates against certain citizens, is void, whether the duties prescribed relate to police regulations or any other subject. The law under discussion clearly belongs to this class of legislation, namely, defining and enforcing the duties citizens owe to each other and to the state. It is largely for the purpose of securing such legislation that governments are organized and legislative power is granted. The duties of citizens, as defined by the Legislature, may differ according to status, occupation, or temporary relation, without involving arbitrary partiality or discrimination. The duty of a bailee to his bailor is made much more onerous by the fact that the bailee is an innkeeper or common carrier. The duty of a principal to answer for the acts of his agent is far more oppressive when the principal and agent stand in the relation of master and servant. Throughout the whole range of duties, the Legislature may properly, upon considerations of public policy or general advantage, enlarge or limit the obligations resting upon men engaged in certain employments, or standing to each other in certain relations. The same is true of the duties or limitations attached to the ownership of land, which the Legislature may and does from time modify, but a law for this purpose is clearly not void because it applies only to persons owning land. So there are many duties a citizen owes the state which it is the province of the Legislature to define and enforce, although they may involve some limitation of freedom of action, and the expenditure of some time or effort. Such duties must depend largely upon conditions and circumstances that change. Illustrations of

this are given by Chief Justice Shaw in *Godard*, Petitioner, 16 Pick. 504, and others will readily suggest themselves. Defining and enforcing such duties is and always has been an appropriate and necessary exercise of legislative power. It is true, an act nominally for such purpose may in substance and in fact be a confiscation of property, or an arbitrary and partial discrimination between citizens equal before the law; and, if so, the act is void. It is sometimes said that in determining the invalidity of such an act the court merely passes upon a question of degree. This is not quite true. The extent of trouble involved in connection with the conditions and circumstances under which the stress of the duty may fall upon each, as related to the character of the common good to be served, its importance, necessity, and the conditions affecting its accomplishment, is rather a legislative than a judicial question. Every citizen is bound by the inherent conditions of citizenship to render some unpaid service to the state, reasonable in view of the exigencies which require such service. A law which simply defines and enforces this duty is valid. Its wisdom and expediency are questions for the Legislature. Whether a law apparently enacted for this purpose is void because in reality it takes private property for public use without compensation, or arbitrarily discriminates against certain citizens in distributing a public burden, is a judicial question. The law is not confiscation simply because the services required are unpaid, nor is it partial and arbitrary discrimination simply because the services required are incident to certain employments, or to the ownership of certain kinds of property. The two laws are distinct, and the distinction can ordinarily be more satisfactorily ascertained through the exercise of practical common sense than by any indulgence in theoretical subtleties.

The inhabitants of the city of Meriden form a corporate community, clothed with special privileges and endowed with special powers for their common welfare and profit. These powers and privileges relate to the inhabitants as owners and occupiers of the land within the prescribed limits of the city. The creation of such a community for such a purpose necessarily involves special limitations as to the action of individuals, the use of property, the incidents or powers and duties attached to the ownership of property, and is the occasion for the springing up of a variety of special duties which the inhabitants owe to each other and to the territorial corporation of which they are members. It is the province of the Legislature, in creating such a community, to define and enforce the limitations in the use of property, of the right of property or the incidents attaching to ownership, and of the duties, individual and corporate, involved in its creation. For this purpose it may intrust to the inhabitants the enforcement, through by-laws passed by

them, of the duties defined in the charter of the corporation. When a city is intrusted with exclusive power over the construction and maintenance of highways within its limits, its streets are something more than the "King's highway." While they serve as avenues of public travel, that travel is mainly incident to the use and enjoyment of the land within the city limits. They are the entrance to every piece of abutting land, without which the land would be comparatively valueless. Practically the owners and occupiers of land abutting on the city street are the inhabitants of the city. The relation between the land in a city's limits and the network of streets essential to the value and use of that land is a peculiar one, and naturally attaches to the ownership of city lots special privileges and duties. In constructing sidewalks it is more convenient to place them within the lines of the highway, and so, when laid, they form a part of the highway. But the power and duty of building and maintaining highways does not necessarily include the duty of building and maintaining sidewalks. The construction of a sidewalk, like the establishment of a building line, may well be independent of the construction of a street; and in most cities sidewalks, because they are more closely related to the adjoining land and serve more directly the use of that land, are made the subject of separate rules, and are constructed in pursuance of separate authority. A city covering a very few square miles of territory may readily have 500 miles of sidewalks. To keep these walks clean and safe will promote the public health and safety, and also contribute to the value of every abutting piece of land to which they form the necessary entrance, and whose owners and occupiers represent substantially the inhabitants of the city. A purely corporate oversight of these walks could not adequately meet all the emergencies affecting their cleanliness and safety—especially those emergencies of storm and cold which in this climate render constant oversight and immediate remedy imperative. The inhabitants of a city, being the owners and occupiers of abutting land, are the ones, and practically the only ones, in a situation to render the aid convenient, if not necessary, to effectually secure that cleanliness and safety which promote alike the general welfare and their personal interests. The rendition of this aid involves a slight burden, insignificant in comparison with the benefits secured. We think it clear that in requiring such aid the Legislature acts within its legitimate legislative province of defining and enforcing the duties arising under such conditions. A law which merely accomplishes this purpose is valid.

To say that it is possible for the Legislature, under cover of a law purporting to be of this kind, to accomplish actual confiscation of property, or the subjection of citizens

to partial and arbitrary discriminations, is to state a proposition which may be sound, but is not relevant to the facts of this case. To say that a law defining the duties of citizens in serving the state is necessarily a violation of the constitutional guaranties against the confiscation of property, and partial and arbitrary discriminations, because the service is unpaid, or is one that all citizens are not in a situation to render, is to state a proposition which is radically unsound. Such a theory of selfish immunity from all duties inherent in citizenship is supported by no principle of political ethics, and cannot safely be reduced to practice under any government.

The by-law upon which the information is founded is not void for the reasons assigned in the demurrer. The criminal court of common pleas is advised to overrule the demurrer and render judgment accordingly. The other Judges concurred.

(78 Conn. 113)

GOLDREYER v. CRONAN.

(Supreme Court of Errors of Connecticut. July 24, 1903.)

JUDGMENTS—JUDICIAL ERRORS—CORRECTION AT SUBSEQUENT TERM—JURISDICTION.

1. After a trial the judge filed a paper called "Memorandum on Which Judgment is Based," which, after reciting the substance of the evidence, stated that the court allowed an item of \$300 and disallowed other items, and closed with the words "Judgment for plaintiff to recover \$300"; and on the same day, the words "Judgment for plaintiff to recover \$300" were entered on the file of the case. No formal judgment was entered in accordance with the memorandum until at the succeeding term the court ordered judgment in favor of plaintiff for \$400.50, and entered a finding that the court, in entering the judgment, by oversight, inadvertence, and mistake, accidentally omitted to add thereto the interest from the time the debt fell due to the day of the rendition of the judgment. *Held*, that the mistake was judicial in character, and not clerical, and hence the court had no power to correct the same at the succeeding term.

Appeal from Court of Common Pleas, New Haven County; James Bishop, Judge.

Action by Sussman Goldreyer against Patrick J. Cronan. From a judgment in favor of plaintiff, defendant appeals. Reversed.

James P. Pigott, for appellant. Charles S. Hamilton, for appellee.

TORRANCE, C. J. The complaint in this case alleged that the defendant owed the plaintiff divers sums of money, one of the items being in amount \$300. The trial court allowed this item and disallowed the others. The case was tried at the November term of the court in 1902, and decided at the January term, 1903; the precise date of judgment being the 26th day of February, 1903. On

¶ 1. See Judgment, vol. 30, Cent. Dig. § 595.

that day the judge filed in court a paper called "Memorandum on Which Judgment is Based," which, after reciting the substance of the evidence in the case, stated that the court allowed the \$300 item and disallowed the others, and ended with these words: "Judgment for the plaintiff to recover \$300 and costs. J. Bishop, Judge." On that same day the following entry was made on the file in said case: "Judgment for the plaintiff to recover \$300. New Haven, February 26, 1903. J. Bishop, Judge." It does not appear that any formal judgment in accordance with said memoranda was ever entered up, but on the 11th of March, 1903, the court ordered judgment for \$400.50 in favor of the plaintiff to be formally entered up; and this was done under the following circumstances, as stated in the finding: "On March 2, 1903, the plaintiff and defendant appeared in court, and Judge Julius C. Cable, one of the judges of the court, directed the clerk to call in Judge Bishop to hold said court. Said court was duly opened by the sheriff, and thereupon the plaintiff orally moved that the judgment be corrected by adding interest. The defendant objected to such correction on the ground that the January term of said court had ended, and the March term begun; and further that if the court had jurisdiction the plaintiff was not, in law, entitled to such interest; and further that the plaintiff, by his failure to prosecute his suit with diligence, waived whatever right, if any, he had to interest on the judgment. On March 11, 1903, the court granted said motion of the plaintiff, and corrected said judgment, and added the interest, amounting to \$400.50." It will thus be seen that the judge, through said signed memoranda, announced, in effect, that he found the damages to be \$300, and that he rendered judgment for the plaintiff for that amount only, and costs of suit. After this the case was not continued to the next term, nor was it held for further consideration or advisement, nor was any further action of the court necessary to entitle the plaintiff to the entry of a formal judgment in his favor for \$300 damages and costs.

Assuming for the present that the entry of judgment thus made was a true entry of the judgment actually rendered, we must regard the judgment, for the purposes of this case, as one finally disposing of the case, until set aside or annulled by some competent court of review. "The memorandum * * * must be regarded as the final act of the judge—the act which exhausted the residuum of power over the cause after final adjournment." *Sturdevant v. Stanton*, 47 Conn. 579-581. The case was thus finally disposed of at the January term of the court, 1903. Under these circumstances, we think that what the trial court did in this case in March must be regarded as having been done at the March term of the court, 1903, which by law began on the 2d day of that

month, and not as done at, or as of, the preceding January term. The case, then, must be regarded as one in which a final judgment at one term was at a subsequent term set aside, and another judgment substituted therefor; and the ultimate, controlling question in the case is whether the court had the power to do this.

The plaintiff claims that on the 26th of February, 1903, the court did in fact render judgment for \$400.50, but that by a clerical mistake a different and a smaller amount was entered up. If the record sustains this claim, it may be conceded, for the purposes of this case, that the court had the power to correct the mistake at the succeeding term, or at least that a new trial would not be granted on account of its action in so doing. Mistakes merely clerical, by which the judgment as recorded fails to agree with the judgment in fact rendered, may be corrected at a term subsequent to that in which the judgment was rendered, upon proper notice to all concerned. Over its recorded judgments the court may exercise two powers: (1) The power to correct and amend the record so that it shall truly show what the judicial action in fact was; (2) the power to set aside, annul, and vacate such judgments. It is well settled that these powers may be exercised during the term in which the judgment is rendered, and, speaking generally, that the first can be exercised at any subsequent term, while, as a rule, the second cannot be so exercised, save under exceptional circumstances. *Tyler v. Aspinwall*, 73 Conn. 493, 47 Atl. 755, 54 L. R. A. 758; *Wilkie v. Hall*, 15 Conn. 32, 37; *Weed v. Weed*, 25 Conn. 337; *Hall v. Paine*, 47 Conn. 429; *Sturdevant v. Stanton*, 47 Conn. 579; *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 997; *Foster v. Redfield*, 50 Vt. 285; *Maryland Steel Co. v. Marney (Md.)*, 46 Atl. 1077; *Black on Judgments*, c. 9, §§ 153-158, and cases there cited. The case thus turns upon the question whether the claimed mistake was a judicial one, in failing to include interest in the judgment as rendered, or a clerical one, in failing to include interest in the judgment as recorded. If the mistake was of the former kind, the court, upon the facts found, had no power to correct the mistake at the March term. The claim that the mistake was a clerical one is based entirely upon the following part of the finding: Upon the facts found in the paper called "Memorandum on Which Judgment is Based," the court found the issues for the plaintiff, "and allowed the item of \$300, but in entering the judgment, by oversight, inadvertence, and mistake, accidentally omitted to add thereto the interest from the time it fell due to the date of the rendition of the judgment." This is the only finding upon this point, and, when read in the light of the other parts of the record, we do not think it supports the contention that the mistake was a mere clerical

one. What does the phrase "in entering the judgment," as used in this finding, mean? It can only mean the act of the judge in making the memoranda signed by him, for the record does not show that any other "entry" of the February judgment was ever made by anybody at the January term of court. It may be conceded that the fair inference from this finding is that the court intended to include interest in the judgment to be rendered, and to enter such judgment in said memoranda; but the question is, does the record show that the court did in fact render such judgment? The finding, as we have seen, is, in effect, that in making the signed memoranda the judge by mistake failed to include interest; but it does not say that judgment, as actually rendered, did in fact include interest, and the record nowhere explicitly states that important fact. A judgment, speaking generally, is the determination or sentence of the law, speaking through the court; and it does not exist, as a legal entity, until pronounced, expressed, or made known in some appropriate way. It may be expressed orally or in writing, or in both of these ways, in accordance with the customs and usages of the court in which the judgment is rendered. In the case at bar the February judgment was pronounced in writing only, in and by the signed memoranda of the judge. There is no finding that it was ever otherwise pronounced or made known. Before that entry was made, the judgment had no existence. When it was made, the judgment first came into being. The entry of it was thus the only expression of it, the only declaration of it, ever made by the judge. It was both pronounced and entered up, so to speak, in the same words and at the same moment. Of necessity, then, the judgment "entered up" was the same as the judgment actually pronounced. It thus clearly appears from the record, outside of the finding now under consideration, that the entry of the judgment made by the judge is a true record of the judgment actually rendered, and cannot, in the nature of things, be other than a true record; and we think there is nothing in that finding absolutely inconsistent with this conclusion. When read in the light of the other facts found, all that the finding can fairly be said to mean is that the court by mistake accidentally failed to include interest in its signed memoranda; and that is equivalent to saying that the court failed to include interest in its judgment, and also in its record of it. We think any other view of the finding is untenable, in view of the other facts set forth in the record. It follows that the court in March had no power to correct, amend, or change the February judgment.

There is error. The March judgment is set aside, and the cause is remanded, with directions that judgment be entered up as of February 26, 1903, for \$300 and costs. The other Judges concurred.

(76 Conn. 118)

Appeal of BEACH.

(Supreme Court of Errors of Connecticut. July 24, 1903.)

EXECUTORS AND ADMINISTRATORS—APPOINTMENT—NONRESIDENT DECEDENT—LOCATION OF PROPERTY—CLAIMS OF CREDITORS.

1. The purchase of land in Connecticut by the son of a nonresident during the year preceding, and the year subsequent to, the father's death, in the absence of any evidence that the father had any interest in such land, did not authorize the appointment of an administrator of the father's estate in Connecticut, on the application of a creditor, on the ground that the father died seised of property in Connecticut.

2. A claim by a creditor of a nonresident decedent that real estate in Connecticut purchased by decedent's son prior to and shortly after his death was purchased with money belonging to his father or his estate was not property in Connecticut, belonging to deceased, justifying the appointment of an administrator of his estate in that state.

Case Reserved from Superior Court, New Haven County; William T. Elmer, Judge.

Application by Mary E. Camp for the appointment of an administrator de bonis non of the estate of Moses S. Beach, deceased. From a judgment appointing one James E. Wheeler as such administrator, Charles Y. Beach appeals. Reversed.

The facts found by the trial court, upon an agreed statement of facts framed by the parties, so far as in any way material, are in substance these:

(1) Upon the death, on January 10, 1893, of Calvin B. Camp, father of Mary E. Camp, the applicant for administration in these proceedings, said Mary E. Camp became entitled to some \$7,000 by reason of the failure of her father to account, as guardian, for money which came into his possession in 1868; he owning a life estate in the same, and she owning the fee or corpus. Her brother and sister each became entitled to about the same sum on the same grounds. Camp died utterly insolvent, having misappropriated and lost his children's money. In 1868 Calvin B. Camp was appointed guardian of each of these three children by the proper court in New York, and gave a guardian's bond to each child, in the sum of \$10,000, for the faithful performance of his duty, with Moses S. Beach and one Merritt as sureties. The youngest of Camp's children became of age in 1876.

(2) Between 1888 and 1891 the three children were engaged in a litigation against their father, seeking by means of an accounting in a probate court in New York to secure possession of the money which came into his possession in 1868, which litigation failed because they were not entitled to possession of the corpus, or any part thereof, until their father's death. Moses S. Beach knew of this litigation.

(3) Moses S. Beach died July 25, 1892, domiciled in New York, leaving a widow and five children. He left personal property amount-

ing to about \$7,500, and real estate in Arkansas valued at about \$200,000. By reason of Beach being surety on the guardian bonds of 1868, his estate was liable to Camp's three children for the amounts due them upon their father's death. (This liability is assumed for the purposes of this case.)

(4) Moses S. Beach's estate was fully administered and settled in the New York court having jurisdiction thereof; the final account of the administrator being accepted and approved May 13, 1895. On April 28, 1893, and after the death of Camp, legal notice to the creditors of Beach's estate to present their claims was given. Camp's three children knew of Beach's death soon after it occurred, were then resident and domiciled in New York, and presented no claim against his estate.

(5) Upon Camp's death, in 1893, an accounting between his executor and his three children was commenced in the surrogate's court in New York, and decrees fixing the amount due each child were entered December 19, 1896, and these decrees were affirmed upon appeal February 15, 1901. Beach's administrator had knowledge of this litigation and of the claim against the bondsmen.

(6) Said Moses S. Beach had at all times in his own name, and owned and controlled by him, and left at his decease, property of a value more than equal to all his outstanding indebtedness and the amount of the claims based by the said three children of said Calvin B. Camp upon said bonds.

(7) Subsequent to February 15, 1901, Camp's children inquired of two daughters of Beach concerning the location of any property belonging to Beach at his death, without success. Said children did not have actual knowledge of the location of the Arkansas real estate until apprised thereof in these proceedings.

(8) In the years 1891 and 1892 the said Charles Y. Beach purchased large amounts of real estate both in New Haven and Bridgeport, prior to which said dates he had owned no real estate in either of said cities.

(9) At no time has there been any tangible real or personal estate standing in the name of Moses S. Beach, and situated in the probate district of New Haven or the state of Connecticut.

(10) On May 9, 1902, Mary E. Camp applied for administration as a creditor of said deceased; and on July 3, 1902, said court of probate of New Haven passed an order appointing an administrator, from which this appeal was taken by said Charles Y. Beach, now a resident of Massachusetts.

(11) Moses S. Beach at his decease left no property of any kind in this state, unless the claims advanced by the appellee upon the above facts, as hereinafter set forth, constitute such property.

(12) Upon the above facts the appellee claims as follows, to wit: (a) That said real

estate mentioned in paragraph 8 was purchased by the appellant with money belonging either to said Moses S. Beach in his lifetime or to his estate; (b) that said real estate belongs now to the estate of said Moses S. Beach, at least to the extent necessary to pay the judgment of said Mary E. Camp against the estate of C. B. Camp, and any other claims that may be duly presented against the estate of Moses S. Beach, and that therefore said claims and choses in action constitute property sufficient to give the court of probate jurisdiction under the statute; the sole purpose of the appointment of the administrator being to bring suit against Charles Y. Beach for a conveyance of said real estate to said administrator, or for its value in money, for the purpose of answering to said claims. The appellant claims that upon the above facts neither the court of probate for New Haven nor the superior court has jurisdiction to appoint an administrator.

A. Heaton Robertson and James E. Wheeler, for the applicant for administration. Goodwin Stoddard and Arthur M. Marsh, for Charles Y. Beach.

HAMERSLEY, J. (after stating the facts). This is an application to the court of probate for the appointment of an administrator on the intestate estate of Moses S. Beach, made by Mary E. Camp, claiming to be a creditor. Upon her application the court of probate passed an order appointing James E. Wheeler administrator. Charles Y. Beach—being a son of Moses S. Beach—appealed from this order to the superior court. The reasons of appeal are set forth in the appeal itself as follows: Moses S. Beach died on July 25, 1892, resident and domiciled in the state of New York. He left no property in the probate district of New Haven or in the state of Connecticut, and his estate was long since fully administered and settled in the courts of New York having jurisdiction thereof. Upon this appeal the superior court had full jurisdiction of the subject-matter, namely, the appointment of an administrator upon the estate of Moses S. Beach; and within the issues presented by the appeal the court tries the cause *de novo*.

The issues in this case are these: Was Moses S. Beach at the time of his death an inhabitant of this state? Did he leave property in this state? The appeal alleges that he was not an inhabitant, and did not leave property in this state. These allegations, by our practice, are taken as denied, in the absence of any further pleading. If the court finds that the intestate did not live in this state, and did not leave property here, the appellant is entitled to judgment, and the probate order must be set aside.

There appears to have been no actual trial, but the parties agreed upon a statement of facts, and these facts are found by the court, and the case reserved for the advice of this

court as to the judgment to be rendered on the facts thus found.

It is clear that the facts found by the court do not prove that Moses S. Beach at the time of his death left any property in this state. The purchase by his son of land in Bridgeport and New Haven during the year preceding his death and the year of his death furnishes no presumption that the father had any interest in the land so purchased, and the other facts found by the court in connection with this fact raise no such presumption. Moreover, the court expressly finds that at his death Moses S. Beach had no tangible property, real or personal, in this state, and had no property whatever in this state, unless the advancement of the claims of the appellee, upon the facts found, constitutes property, within the meaning of the statute. This question is the only material question of law arising in the cause as presented by the reservation, and its decision must determine the judgment the superior court shall render.

The administration of estates of deceased persons is within the general jurisdiction of the superior court, unless exclusive jurisdiction is committed to some other court. *Mack's Appeal*, 71 Conn. 132, 41 Atl. 242. By statute that jurisdiction is committed and its exercise in the first instance confined to the court of probate, which is an inferior court of limited jurisdiction. The death of the person whose estate is sought to be administered is a jurisdictional fact. Unless this fact exists, there is no jurisdiction of the subject-matter. The existence of property within the probate district belonging to the deceased at the time of his death is a fact necessary to the appointment of an administrator upon the estate of a nonresident by that court of probate, and is in a sense a jurisdictional fact. Whether it is a jurisdictional fact in the same sense as the fact of death and the nature of the difference are questions which need not be considered in this case. It is enough for present purposes that the existence of property within the limits of the district is a fact which must be established to the satisfaction of the court of probate before it can properly appoint an administrator; and that upon appeal this fact may be, as it is in this case, the material fact in issue before the superior court. This fact comprises two facts—the existence of property within the district, and the ownership of that property by the intestate at his death. "Property," as used in the statute, includes not only land and tangible personal property, but a chose in action. A thing which is the subject of legal ownership is property, whether that thing is in possession of the owner or in possession of another, and the owner has only a bare right to reduce the thing to possession by means of an action. 2 Blackstone's Comm. 389, 397. In the case of property in possession, its existence within the district is a fact which can ordinarily

be easily and certainly ascertained, but the fact of its ownership by the intestate at his death is one which may be doubtful and difficult to settle. If land stood in the name of the intestate or tangible personal property was in his actual possession at the time of his death, these insignia of ownership would ordinarily justify the court of probate in finding the fact, and it might not in such case be necessary or proper to determine a question of contested title. It has no power to try such a question, except as it is necessarily incident to its appointment of an administrator, and then its determination is not binding, beyond the necessities of the purpose for which it is made. It is therefore sufficient that the intestate was the apparent owner of the property. In the case of property in action, the same two facts must be proved; but here the two facts are more closely related, and are ordinarily proved by the same evidence. A promissory note is evidence that the payor has promised to deliver his money to the possession of the payee on the maturity of the note, and is also evidence that the payee is the owner of the property or chose in action thus proved to exist. And in general, proof of the existence of a chose in action also proves its ownership, and so in proving the existence and the ownership of property in action the same rule of evidence applies as in proving the ownership of property in possession. Questions of contested title cannot be finally settled by the court of probate, but may be considered and must be determined so far as is necessary to enable the court to exercise its jurisdiction in the appointment of an administrator. For that purpose it must find that property, either in possession or in action, owned by the non-resident intestate, existed within the district at his death. For that purpose it may be sufficient to find in the case of tangible property an apparent ownership in the intestate, or in the case of property in action an apparent liability to the intestate from some person under such circumstances that the situs of the property or chose in action is within the district. The law as thus stated has been firmly established by our decisions. *Hartford & N. H. R. Co. v. Andrews*, 36 Conn. 213; *Chamberlin's Appeal*, 70 Conn. 303, 39 Atl. 734, 47 L. R. A. 204; *Mack's Appeal*, 71 Conn. 122, 41 Atl. 242. How far a court of probate may properly consider the merits of a contested title in determining the fact of an apparent ownership is a matter immaterial to the present decision. In every case that fact must be passed upon; and if the court of probate, or superior court upon appeal, violates the principles of law in finding or refusing to find that fact, an error is committed.

It follows conclusively from this state of the law that the claims advanced by the appellee upon the facts found by the superior court do not constitute property. The distinction between an apparent liability from

Charles Y. Beach to his father at the time of his father's death, and a mere claim, advanced 10 years afterwards by an applicant for administration, that there was such a liability, is obvious. The former is property, within the meaning of the statute. The latter may or may not be evidence tending to prove, but certainly does not constitute property, within any meaning that word can be used to express. "Claim," in its primary meaning, is used to indicate the assertion of an existing right. In its secondary meaning it may be used to indicate the right itself. In our decisions on this subject, "claim" may have been used in its secondary meaning to indicate a chose in action, but such use of the word cannot justify the inference that, because the right is property, a mere pretension to the right is property; nor can it justify an interpolation of language not used in the statute, so that it shall read, "When a person living out of the state shall die intestate leaving property within the state (or when any person shall claim that a non-resident intestate left property within the state) administration may be granted," etc. Gen. St. (Revision 1902) § 318. It may be that the appellee intended to insist that the claim or assertion, by an applicant for administration, that the intestate owned property within the district, is conclusive evidence of that fact.

Allusion was made in argument to the practice of granting administration upon the mere assertion of the applicant. Undoubtedly our probate courts, in matters which are not contested, do find facts upon evidence which would have slight weight in case of a contest; but neither the court of probate nor the superior court upon a trial of the issue, did the intestate own property within the district at his death? can lawfully give controlling or even any weight to the mere assertions of the applicant of facts outside his knowledge and inconsistent with the facts found by the court.

We deem it clear that the claims advanced by the appellee upon the facts found by the court do not constitute property, within the meaning of the statute, and that the conclusion of the court that the intestate left no property in the district, if said claims advanced by appellee do not constitute property, is a proper and lawful conclusion from all the facts found.

The superior court is advised to render judgment for the appellant, setting aside the order of the court of probate. The other Judges concurred.

(76 Conn. 27)

WELLS et al. v. HARTFORD MANILLA CO.
(Supreme Court of Errors of Connecticut. July 24, 1903.)

RECEIVERS — REPUDIATION OF CONTRACT — CONTRACTS — ANTICIPATORY BREACH.

1. A contract for the sale of goods, shipments to be made as ordered, but in any event all to

be shipped before a certain date, means that orders for shipments shall be so given that they may be filled before the date of the expiration of the contract, but does not require the vendee to make his orders so that the shipments may be made at a uniform rate during the contract period.

2. A contract required one of the parties to furnish to the other a specified amount of pulp before a certain date, shipments to be made as ordered. For a considerable time during the term of the contract no shipments were ordered by the purchaser, and at length the purchaser telegraphed that no shipments be made. Letters from the purchaser were to the effect that all pulp purchased would be taken from the other party; that the purchaser hoped to have use for a large quantity of pulp, etc. Held, that there had been no anticipatory breach by the purchaser which would warrant the seller in rescinding the contract and suing for damages.

3. The receiver of a paper mill which was under contract to purchase a large quantity of pulp, the market price of which at the time of the receivership was below that called for by the contract, might, with the approval of the court, abandon the contract, without rendering the estate liable to the seller in damages, where the amount of the estate was not sufficient to pay creditors whose claims had accrued, and also any damages on the contract, and the loss to the seller was merely his prospective profits.

4. It is not to be presumed that a receiver, in abandoning a contract between the corporation for which he is receiver and another, acted without the approval of the court.

Appeal from Superior Court, Hartford County; Alberto T. Roraback, Judge.

Proceedings in the receivership of the Hartford Manilla Company. Appeal by W. S. Wells, receiver, from the allowance of a claim presented by the Burgess Sulphite Fibre Company. Reversed.

December 15, 1899, the Burgess Sulphite Fibre Company, manufacturer of paper pulp, and the Hartford Manilla Company, manufacturer of paper, entered into a written contract, known as "Contract A," by which the first-named company agreed to furnish, and the last-named company to receive, 1,300 tons of sulphite pulp, of a designated standard, at the price of \$2.25 per 100 pounds, f. o. b. Woodland Switch Station, Burnside, Conn., or National Paper Mill, Ballston, N. Y. The contract contained the following provision: "Shipments as ordered, but in any event all to be shipped before Jan. 1, 1901." The same day another contract, known as "Contract B," for 220 tons of bleached sulphite pulp, was made. The price agreed upon was \$3 per 100 air-dry pounds. The conditions as to delivery were identical with those contained in Contract A. Between the date of the contract and April 2, 1900, 278½ tons of pulp were ordered and delivered under Contract A. Some payments were made on account of these deliveries, but at the time of the appointment of the receiver for the manilla company \$4,178.13 was due and unpaid for such delivered pulp. After April 2, 1900, no shipments were made, by reason of the manilla company's orders to that effect, although the fibre company was willing and anxious to make them, and urged that

the necessary orders therefor be given. About March 1st a controversy arose between the parties as to the manilla company's obligations under the contract; the controversy being precipitated by the fact that the latter company was only ordering shipments at the rate of one car a week, while the contract amount averaged two cars a week, and the original expectation of the parties was that such should be the rate of shipment. A falling market for pulp and a diminishing and suspended business by the manilla company aggravated the situation. The fibre company conceded that its vendee had the right to order shipments at its pleasure, as long as a reasonable time was given to fill the entire order, but its correspondence urging increased shipments developed a claim on the part of the manilla company that by verbal agreement it was not to be held to order more pulp in the whole than its business needs required. Correspondence followed until April 3d, when the manilla company telegraphed that it was overcrowded with pulp, and directed shipments to stop. A letter which supplemented the telegram assigned as the reason for the cessation of shipments that the mill was shut down, and that seven car loads of pulp were already on hand, and added: "Do not ship us any more until we order it forward. We cannot take in another pound." The correspondence between the parties as to the vendee's right under a verbal agreement to limit the total of its orders to its needs continued. The fibre company admitted the manilla company's right to suspend orders for the time being, but insisted upon the latter's duty to receive the whole amount ordered, and to give its orders therefor in a reasonable time. The latter company contended for its right to limit its total orders as indicated, but at all times admitted its obligation to take from the fibre company all the pulp it (the manilla company) used, and repeatedly stated that it was so doing and intended to so do. May 16th the manilla company wrote that the situation at the mill was somewhat improved; that it was running practically half time, and working off the accumulated stock of material. Meanwhile the manilla company had fallen behind in its payments, and that matter also became the subject of correspondence. May 26th, in a letter urging prompt payment, the fibre company wrote as follows: "We note that we have made no shipments on your contract of December 15th since April 2d. We would appreciate your shipping orders in accordance with conditions of contract at an early date." May 31st the fibre company wrote a still more urgent letter, calling attention to the suspension of shipping orders, reciting what shipments had been made, and concluding as follows: "We would, therefore, repeat the request that we have made you several times, to favor us with shipping instructions at an early date, so that we may govern our shipments in ac-

cordance with your requirements so far as possible. We presume it would be much more satisfactory to you to have this go forward at regular intervals, instead of holding it for shipment during the last few months." June 6th the manilla company acknowledged this letter, and wrote: "We propose, however, to take all the sulphite which we use at contract price during the year 1900 of you." June 8th the fibre company replied, saying, among other things: "Your attitude in regard to taking the fibre which you agreed to take is inexplicable to us, and we trust, therefore, that we may have the pleasure of meeting you in New York, as suggested on ours of June 5th, so that we may talk matters over and see just where we are." June 19th the fibre company wrote again, urging payment of its account, and adding: "We want you to pay as you have agreed to pay, and to call on us for shipment at the rate you have agreed to take, and which we have bound ourselves to ship." June 23d the manilla company replied as follows: "Yours of the 19th inst. at hand. As we have already explained to you, that on account of the product of our mill having been taken by one concern, and that product having been shut off without notice, and being obliged to depend on an open market (a falling and dull market) for our orders, and with a large supply of raw material on hand, you can readily understand why we have not been able to order and consume more sulphite. We are having some orders, but are still running short time. We hope to be able to run full time very soon, and also hope to use a large quantity of sulphite. We have already stated to you that we are buying sulphite from you only, and shall continue to take all our supply from you. If you are inclined to treat us fairly, as you have expressed, we think this explanation of the case should be accepted and satisfactory to you." Subsequently two letters passed with relation to the unpaid account, when, on July 2d, the fibre company wrote, threatening suit if payment was not promptly made. In this letter was contained this sentence: "In the meantime you are taking no fibre whatever on your contracts as you agreed to take." July 17th the fibre company brought suit. July 31st a receiver was appointed for the manilla company upon the complaint of William Wells & Co., dated July 28th. No pulp was ordered by or delivered to either the manilla company or its receiver after April 2d. The receiver refused to receive the undelivered balance of said pulp, and closed out the business and sold the property of the company without doing so. None of the bleached pulp called for by Contract B was ever ordered or shipped. Prior to April 17th the fibre company were unable to furnish it. On that day it wrote the manilla company that the mill for its production had started, and asking for shipping orders. None were given. The court allowed as a

preferred claim the costs of said suit, to wit, \$66.20, and a general claim of \$9,144.13, in which was included said sum of \$4,178.13 and the sum of \$4,966, being the amount assessed as damages "by reason of the failure of the Hartford Manilla Company to receive the balance of 1,241½ tons of pulp" called for by the two contracts; said damages being assessed at \$4 per ton. The appeal was taken from the allowance of said \$4,966 only.

Edward D. Robbins, for appellant. Charles H. Briscoe and John R. Buck, for appellee.

PRENTICE, J. (after stating the facts). The allowance of that portion of the claim of the Burgess Sulphite Fibre Company appealed from is supported before us in argument upon two grounds, to wit: (1) That there was such a breach of the contracts before the appointment of the receiver that the claimant was then entitled to maintain an action thereon against the manilla company, and recover full damages, as for contract broken; and (2) that the refusal of the receiver to abide by the contracts after his qualification itself furnished a basis for the allowance.

The first contention assumes the existence of a matured claim prior to the receivership proceedings. If this assumption is correct, the right to an allowance of the claim follows. The claimant's brief makes the date of the breach April 3d, when the telegram stopping shipments was sent. "This refusal to receive any more goods," the brief says, "gave the fibre company the right to bring suit immediately for damage on the whole contract, and to recover whatever damages it might be able to show it had suffered by reason of not being permitted to deliver the goods under the contract down to January 1, 1901." This contention, we think, is not well founded, whether it be made as of April 3d, or any other subsequent date prior to the appointment of the receiver. The contracts called for no regularity in the vendee's demands for the pulp. It did not forbid suspensions of such demands. Shipments were, by the express provisions of the agreement, to be made as ordered; the only limitation being that the whole amount was to be shipped before January 1, 1901. This limitation naturally implied that the orders for shipments should be so given that they might be reasonably filled before January 1, 1901. It could imply no more. There could by no possibility be implied therefrom an agreement that the vendee should so make his orders that shipments might be made at a uniform rate during the term, or that there should be no periods within which shipments should be suspended. The parties may have anticipated a uniform demand, but they did not contract for it, and the contracts control. As 5 of the 18½ months covered by the agreements remained when the receiver was appointed, it is clear that the vendee had not at that date, by anything it had done, wheth-

er by way of delaying or suspending shipments, as distinguished from what it had said, acted in excess of its rights under the contracts, or in violation of their terms. Neither had it put itself in a position or created a situation for the parties which rendered performance of the contracts impossible. So much we understand the claimant to concede. If any conditions were created which authorized a suit by the fibre company as for contract broken, it was because of a renunciation of the contracts by the manilla company of such a character and under such circumstances as to amount in law to a breach by anticipation. This brings us to a consideration of the law upon that subject.

In *Hochster v. De La Tour*, 2 E. & B. 678, Lord Campbell promulgated the doctrine that a party to an executory contract might, before the time for its execution had arrived, break it by a renunciation of it communicated to the other party. Two years later the same judge, in passing upon the facts of a similar case, to which the same doctrine was sought to be applied, took occasion to intimate that the renunciation, to be effectual, must be an unequivocal one, and refused to treat the contract as a broken one, within the meaning of the rule laid down in *Hochster v. De La Tour*, for the reason that the promisee had, after the promisor's renunciation, continued to insist upon performance. *Avery v. Bowden*, 5 E. & B. 714. The doctrine thus enunciated by Lord Campbell has been the subject of much discussion, sometimes with approval, sometimes with disapproval, and sometimes in a noncommittal attitude. The result of this discussion has been that the later English cases and the decisions of the United States Supreme Court are in harmony in their approval of the principles thus laid down. This approval, however, has been accorded only in view of important limitations to be placed upon the general doctrine that there may be a breach by a refusal to perform in advance of the time of performance. The necessity for these limitations did not escape Lord Campbell's attention, as the case of *Avery v. Bowden*, supra, clearly shows; but their importance has since that case been more emphasized, and the unreason of the rule without them more clearly recognized. These limitations are that the renunciation must consist in "a distinct and unequivocal absolute refusal to perform the promise" and that "it must be treated and acted upon as such by the party to whom the promise was made." It is held that a mere assertion that the party will be unable or will refuse to perform his contract is not sufficient, and that, if the promisee afterwards continues to urge or demand a compliance with the contract, he has not put himself in a position to sue for a breach. *Smoot's Case*, 15 Wall. 36, 21 L. Ed. 107; *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984; *Roehm v. Horst*,

178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; *Johnstone v. Willing*, L. R. 16 Q. B. 460. In the case last cited, Lord Esher gives an interesting summary of the result of the English cases, and the theory which underlies them, as follows: "In these cases the doctrine relied on has been expressed in various terms, more or less accurately; but I think that in all of them the effect of the language used with regard to the doctrine of anticipatory breach of contract is that a renunciation of a contract, or, in other words, a total refusal to perform it, by one party, before the time for performance arrives, does not by itself amount to a breach of contract, but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract (that is, by anticipation refuses to perform it), he thereby, as far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not, of course, amount to a rescission of the contract, because one party to a contract cannot by himself rescind it; but by wrongfully making such renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he, too, treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end, except for the purposes of the action for such wrongful renunciation. If he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue."

These limitations contained in the rule prevent a party to a contract from occupying an equivocal position with respect to it. The contract remains a subsisting one until the parties have mutually elected to treat it otherwise, and given unmistakable evidence of such an election. A renunciation does not create a breach. There must be an adoption of the renunciation. The renunciation must be so distinct that its purpose is manifest, and so absolute that the intention to no longer abide by the terms of the contract is beyond question. The acquiescence therein must be as patent. There must be no opportunity left to the promisee to thereafter insist upon performance if that shall prove more advantageous, or sue for damages for a breach if events shall render that course the more promising.

So far as state jurisdictions are concerned, Lord Campbell's rule has been adopted, with more or less careful statement, in several. *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436; *Gray v. Green*, 9 Hun, 334; *Zuck & Henry v. McClure*, 98 Pa. 541; *Roebbling Sons' Co. v. Lock Stitch Fence Co.*, 130 Ill. 680, 22 N. E. 518; *Crabtree v. Messersmith*, 19 Iowa, 179; *Hume v. Conduitt*, 76 Ind. 598; *Platt v. Brand*, 26 Mich. 173; *Davis v. Grand Rapids School Furniture Co.*, 41 W. Va. 717, 24 S. E. 630. Dissenting views are expressed in *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384; *Stanford v. McGill*, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760. In this state the question is an open one. Although the principle adopted by the English and the United States Supreme Courts is not one of the clearest logic, nevertheless, when taken with its limitations, it has such support in practical considerations and in strong legal reasons and authority that we have no hesitation in adopting it as the law of this state. Without its limitations, we conceive that it has no basis in reason or otherwise.

It remains to apply the rule to the facts in the case at bar. In doing so, we are met at the outset with the inquiry as to whether the manilla company ever made "a distinct and unequivocal absolute refusal to perform" its agreement. On April 3d it telegraphed to stop shipments, assigning as a reason that it was overcrowded with pulp. This telegram was followed by a letter confirming it. This letter gave the added instructions not to ship more "until we order it forward. We cannot take in another pound." This action was, as we have seen, clearly within the company's rights under the contract, and there is nothing in either telegram or letter to suggest a refusal to abide by the contract. Clearly there was here no renunciation as claimed. The subsequent conduct of the fibre company plainly discloses that it had no such understanding, and as plainly that it had no disposition to treat the contract as broken. Three months pass, during which the manilla company send no shipping orders. This of itself was no breach of the contract. Covering the same period, however, there is an extended and instructive correspondence. From it, taken in connection with the failure to send shipping directions, it might well have been surmised that the 1,570 tons of ordered pulp would not be called for before January 1, 1901, but that remained a subject for surmise. It never became a certainty. The manilla company never refused to take any additional pulp. It never said it would refuse to take the whole amount. It was continually saying that it was proposing to take all that its business needs demanded. The most that it ever said was that it would refuse to take more than this amount. But who can say, or rather who could then say, that the needs of its business would not exhaust the whole order? We may strongly suspect the fibre company

may have had a suspicion amounting to a firm belief on its part that such would not prove to be the case, but suspicion and belief are not substitutes for certainties. The suspicion or belief that the manilla company would not call for its entire order could only furnish the foundation for the inference, more or less strong, that the statement of the company that it would not take more pulp than it could use would in the end result in a breach of the contract. To use this inference of a probable future breach as the equivalent of a present absolute, unequivocal renunciation of the contract, or refusal to abide by it, is plainly without justification. The trouble with the claimant's position in this regard is that it attempts to transform suspicion, belief, and inference into things distinct, certain, and absolute, and thus create an unequivocal and absolute renunciation of an agreement out of imaginings and conclusions. This both the letter and spirit of the rule forbid. The facts in the case of *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984, furnish a striking analogy to those in the present case; and the conclusion of the court in that case that there had not been a distinct and unequivocal renunciation, and the reasoning on which the conclusion is based, are peculiarly instructive.

These conclusions render it unnecessary to inquire whether the claimant ever treated or acted upon the contract as a broken one. It is clear that it never did so prior to the receiver's appointment, unless it was in the bringing of its suit on July 17th. In view of the scant information which the record contains concerning the character of that suit, it would be idle to discuss the possible questions which might be presented.

We have next to consider whether the conduct of the receiver in refusing to adopt the contract and carry out its provisions furnishes a justification for the judgment appealed from. With respect to this aspect of the case, it is to be observed at the outset that the court has expressly and most explicitly based its judgment of allowance upon a claim matured and existing at the time of the receiver's appointment. Both the memorandum of judgment and the judgment-file are careful to emphasize this fact. There has been no allowance of an after-accruing claim. Without noticing the possible consequences of this situation upon the claimant's contention now under review, let us consider it upon its merits. The claimant, upon the authority of adjudicated cases, admits that the receiver, after his appointment, was not bound to adopt the contract, but had the right, subject to the control of the court, to abandon it, if in his opinion it would be undesirable or unprofitable to adopt it. *United States Trust Co. v. Wabash Ry. Co.*, 150 U. S. 299, 14 Sup. Ct. 86, 37 L. Ed. 1085; *Dushane v. Beall*, 161 U. S. 516, 16 Sup. Ct. 637, 40 L. Ed. 791; *Central Trust*

Co. v. East Tennessee Land Co. (C. C.) 79 Fed. 19; *Commonwealth v. Franklin Ins. Co.*, 115 Mass. 278; *New Hampshire Trust Co. v. Taggart*, 68 N. H. 560, 44 Atl. 751; *Spencer v. Columbian Exposition Co.*, 163 Ill. 117, 45 N. E. 250; *Woodruff v. Erie Ry. Co.*, 93 N. Y. 609; *Scott v. Rainier Power & Ry. Co.*, 13 Wash. 108, 42 Pac. 531. It contends, however, that a receiver who thus elects to abandon an executory contract binds the estate in his hands to respond for any damages such abandonment may occasion to the other party. This is interpreted to mean that such party is entitled to the allowance of a general claim against the estate to the extent of his damage. This conclusion, if sound, would seem to reduce the privilege of election which a receiver admittedly enjoys to microscopic proportions in most cases. Save in those comparatively rare ones where specific performance would for equitable reasons be decreed, the privilege of a receiver would thus be hard to distinguish from that which the ordinary individual or corporation enjoys. Ordinarily a contracting party is privileged to break his contract and pay the resulting damage. The manilla company was privileged to do that with respect to this contract. Evidently the rights of receivers in this regard, which the courts have been so solicitous to preserve, are not of so shadowy a character. We do not, however, wish to be understood as saying that there may not be frequent cases where the act of a receiver in not adopting an executory contract would entail such injury upon the other party to the contract, by reason of what he had already done under it, and relying upon the faith that it would be carried out, that a claim against the estate would, upon the principles of equity and good conscience which underlie receivership proceedings, be recognized and allowed. There are, however, no such elements of damage in this case. The claim of the fibre company is based upon the loss of prospective profits. The loss was the loss of a good bargain. The damage claimed and allowed was the value of that bargain. The fibre company secured a contract with the manilla company for the sale of a quantity of pulp at a price several dollars a ton in excess of its market price when the receiver was appointed. The receiver naturally did not regard that as a contract profitable for his estate to adopt. His conduct in not adopting it deprived the vendor of an opportunity to sell 1,200 tons of pulp for something like \$5,000 more than it was then worth, and pocket the profit. No other element of damage appears in the case. In such a case the privilege of the receiver in acting for the best interest of the estate and its creditors not only extends to the right to elect what contracts he will adopt, but also to make the election without at least subjecting the fund required for the satisfaction of existing claims of creditors to a charge for damages. In other words, the

consequences of the election under such circumstances may not become the occasion for the allowance of a general claim entitling the claimant to share with other creditors the assets of the estate. Otherwise there might be danger that a portion of an estate which was needed to pay creditors whose claims were already fixed ones might thus be exhausted to their injury. If, however, the condition of an estate was such that the allowance of a claim of this character would not encroach upon the assets necessary to satisfy other creditors, and there was to remain in the hands of the receiver a balance after the expenses of settlement and claims were paid, quite a different situation would present itself, to which other considerations would apply. *Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1, 16 Sup. Ct. 439, 40 L. Ed. 595. The questions which such a situation would present are suggested in the last-cited case. That case decides that a right of action would exist against the contracting party, if it continued to have legal existence, and thereby any balance left after the receiver's settlement be held to answer to the claim. See, also, *National Pahquolque Bank v. Bethel Bank*, 86 Conn. 325, 4 Am. Rep. 80.

An equally more pertinent question is not decided, and that is whether a claim such as we have been considering could not be properly allowed, payable out of any balance left in the receiver's hands after the satisfaction of the general claims, and before such balance is paid over by the receiver to the contracting party. That such a course could and ought to be pursued in a case where there are difficulties in the way of a complete remedy by suit seems clear. Beyond this, the question calls for no consideration in this case.

The practical effect of these principles, it is plain to see, is that existing claims have a priority over after-accruing ones of the kind under discussion, arising from the permissible acts of a receiver in his efforts to safeguard the interests of the estate in his hands, and thereby protect the interests of creditors. The other party to a disavowed contract will not thus be deprived of his rights to compensation for any wrong done him, to be obtained in some manner, unless by the obtaining of them he would divert to himself that which by a higher right belongs to others. His rights are simply subordinated to those of others standing in a higher position. The equity of this is apparent. No one suffers unless the insufficiency of assets compels it. If such insufficiency exists, creditors holding claims, the liability for which is fixed when the receiver is appointed, are not obliged in any degree to yield to others who seek to secure to themselves profits which the future, by reason of a good bargain, might have in store for them.

The claimant's brief urges that the privilege of election which a receiver has is one

which he may exercise only by the authority or approval of the court, and that any not so authorized or approved would be ineffectual to protect the estate from its consequences. It is unnecessary to consider this claim further than to observe that there is nothing in the record to suggest that this receiver's action in the premises was either in excess of authority or unapproved, and that such a situation is not to be presumed.

There is error in the allowance of that portion of the claim appealed from, and the cause is remanded for a correction of the judgment in accordance with that conclusion. The other Judges concurred.

(76 Conn. 126)

NEW HAVEN MFG. CO. v. NEW HAVEN PULP & BOARD CO.

(Supreme Court of Errors of Connecticut. July 24, 1903.)

SALES—MACHINERY—SETTLEMENT—CONSIDERATION—EXECUTION OF NOTE—DEFENSES—INDORSEMENT—VALIDITY—INDORSEMENT FOR COLLECTION—CANCELLATION—PROTEST—ACTION—PLEADING.

1. Where a complaint in an action on a note by an indorsee alleged that the defendant, on a day stated, by its note, promised to pay to the order of the payee named a certain sum at a certain place and time, for value received, which allegation was admitted by the answer, such admission did not estop defendant from averring as a defense that the note was delivered conditionally, and was not in fact given for value received.

2. A compromise agreement between the buyer and seller of certain machinery, by which the buyer agreed to pay \$1,500 in cash, and execute a note for \$3,000, payable in two months, and the seller agreed to furnish certain new parts for the machinery, free of charge, in settlement of all accounts, etc., between the parties, was based on a sufficient consideration.

3. Certain machinery had been sold by the payee of a note sued on, to the maker, under a guaranty to work satisfactorily. The maker of the note was not satisfied with the machines, and it was subsequently agreed that he should pay \$1,500 in cash, and give the note sued on, for \$3,000, and that the seller should furnish certain new parts for the machinery, in settlement of all accounts between them. The check was delivered and the parts furnished as agreed, but the letter containing the note informed the payee that it was sent, according to the maker's understanding with the payee's representative, to complete the payment on the machine, but that before the note should become due the maker should have ample time to determine whether the machinery fulfilled the specifications and guaranty. The payee replied to the letter, acknowledging the receipt of the check and note "in settlement of our account, as per agreement had with the writer." Held, that the note was payable unconditionally, and that the breach of the collateral agreement by the payee that the machinery should work satisfactorily was not available as a defense to the note.

4. Where, in an action on a note by an indorsee, there was evidence that the note, when presented by plaintiff, bore the indorsement of the payee, purporting to have been made by the latter's agent, and that, while negotiating with the indorsee in behalf of the payee for the purchase of certain machinery, such agent left the note with plaintiff, to be credited to the payee, which was done, such evidence authorized as

inference that the note, when so accepted, was properly indorsed.

5. Where a note which had been indorsed by plaintiff before maturity to a bank, and deposited with it for collection, was protested and returned to plaintiff, plaintiff became the indorsee in possession, and was therefore authorized by Gen. St. 1902, § 4218, to cancel the indorsement to the bank.

6. Under Gen. St. 1902, § 4221, defining holders of commercial paper in due course, the mere possession of a negotiable note by an indorsee was sufficient evidence of ownership to support a suit thereon by it.

7. In an action on a negotiable note by an indorsee, the fact that the suit was brought by counsel retained by the payee, and at the latter's expense, without any intention on its part to look to the indorsee for reimbursement, was immaterial.

Appeal from Superior Court, New Haven County; John M. Thayer, Judge.

Action by the New Haven Manufacturing Company against the New Haven Pulp & Board Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

George D. Watrous and Henry H. Townshend, for appellant. John K. Beach, for appellee.

BALDWIN, J. The substantial defense set up to this action is that the note was delivered to the payee on an express condition that its payment should be contingent on the acceptance of certain engines which it had sold to the defendant with a warranty that they should work satisfactorily, and which proved unsatisfactory.

The complaint follows form 213 in the Practice Book (page 128), alleging in paragraph 1 that the defendant, on a day stated, by its note, promised to pay to the order of the Downingtown Manufacturing Company a certain sum, at a certain place and time, for value received. This paragraph was admitted by the answer, and it is contended that by this admission the defendant was precluded from setting up such a defense. The answer in this respect had no other effect than to admit the due execution and delivery of the note described. Its other paragraphs, in which the defendant averred that the note was delivered conditionally, and was not in fact given for value received, remained proper subjects of proof.

Three beater engines and a certain paper machine were furnished to the defendant by the Downingtown Manufacturing Company under contracts of purchase. The price of the engines was \$3,000, and they were "guaranteed" to "do the defendant's work satisfactorily." The defendant, upon trying them in its factory, was not satisfied with their working. Subsequently, at a time when the Downingtown Manufacturing Company claimed that about \$5,100 was due to it on the contracts, it was orally agreed by way of compromise between it, acting through a Mr. Miller, and the defendant, that the latter

should pay and the former would accept, in full settlement of all accounts, \$1,500 in cash, and \$3,000 payable by a two-months note drawn to the order of the Downingtown Manufacturing Company, and that certain new parts for the paper machine should also be furnished without further charge. The defendant thereupon sent by mail a letter, with a check for \$1,500, and another letter referring to the check as sent "as per our understanding with Mr. Miller, * * * to complete payment for paper machine." The second letter inclosed the note in suit, stating that it was "tendered in payment for beating engines, it being understood that before the note becomes due we will have had ample time to determine whether the beaters fill our requirements according to specifications and guaranty, which would mean that we could use them economically, or without a large daily loss to ourselves in consumption of power. We will work at this matter faithfully in our endeavor to overcome the present difficulty, and we hope that for our mutual interests we may succeed in so doing." The Downingtown Manufacturing Company replied by a letter acknowledging the receipt of "check for \$1,500 and note for \$3,000, in settlement of our account, as per agreement had with the writer." The terms of the note were in fact conformable to that agreement, and the new parts for the paper machine were subsequently furnished and accepted. Unless, then, the letter inclosing the note so far qualified its delivery that the Downingtown Manufacturing Company had no right to treat it as sent in pursuance of the previous agreement, that agreement was fully executed, and there was thus an accord and satisfaction of an unliquidated demand. A compromise agreement by which each party absolutely undertakes to do certain things for the benefit of the other is upon a valuable consideration. The promise of the defendant to pay \$1,500 and give the note was a valuable consideration for that of the Downingtown Manufacturing Company to furnish the new parts of the paper machine and accept the money and note in full settlement. It may be assumed to have been the intention of the parties that no settlement was to be effected, and that the original claim of the company would remain the same, until each company had performed its part of the agreement. But it nevertheless became the legal duty of each to make such performance. See *Goodrich v. Stanley*, 24 Conn. 613, 621.

The defendant endeavored, in its letter inclosing the note, to add new terms to this contract. If the tender had been made on the express condition that the note should be retained by the payee until its maturity, and should become void if before that time the maker determined that the engines were not such as the payee had bound itself to furnish, a different question would be presented. *Potter v. Douglass*, 44 Conn. 541.

† 6. See Bills and Notes, vol. 7, Cent. Dig. § 1826.

But the letter transmitting the note first made a direct tender of it "in payment for beater engines," and then sought to create a new "understanding" in addition to that previously reached with Mr. Miller. This was not put forward as a qualification of the tender, but of the manner in which the note was to be held or used. The tender remained unqualified and unconditioned. It was made to pay a debt, and, if it should be accepted, that debt would necessarily be extinguished. Whether the note itself should ever be paid or not was immaterial, as to the discharge of the original demand. In making such a tender the defendant was fulfilling a contract duty. The Downingtown Manufacturing Company therefore had a right to accept it, as it did, as made under the contract with Mr. Miller, without thereby assenting to any modification of that contract which would in effect vary the obligation expressed by the note. *C. & C. Electric Motor Co. v. D. Frisbie & Co.*, 66 Conn. 67, 95, 33 Atl. 604.

But were this not so, and could the company be considered as having, by accepting the note, assented to the proposed modification of the contract of settlement, the defense set up in the answer would have been unavailing, even if that company had been the plaintiff in the action. The answer avers that the note was delivered "upon the express condition that it should be applied, when due, in payment for three duplex beating engines," provided they were found before that time to work satisfactorily. This allegation was not supported by the proof. The letter inclosing the note tendered it expressly in payment for these engines. The "understanding" which it then proceeded to state, if agreed to by the Downingtown Manufacturing Company, would at most have created on its part a collateral obligation to respond in damages, or submit to a recoupment, should the engines prove to work badly. Such an obligation certainly would not have affected the note if indorsed to a holder in due course. It could not therefore be treated as part of the note itself. That would remain unconditional, and while, if sued on by the payee, it might be met by a counterclaim, it could be met by nothing else. In the case at bar nothing has been pleaded by way of counterclaim. The answer must stand or fall on the ground of a conditional delivery of the note in suit. As this defense would be untenable, were the Downingtown Manufacturing Company the plaintiff, it is unnecessary to inquire whether the circumstances attending the indorsement were such as to make the New Haven Manufacturing Company a holder in due course. The note being a negotiable one, *Gen. St. 1902, § 631*, does not apply, and the indorsee had at least the rights of the payee.

Exception is taken to the finding that the note was indorsed by the payee, as having been made without evidence. As to this, the

record shows that the note, when presented by the plaintiff, bore an indorsement of the name of the Downingtown Manufacturing Company, purporting to have been made by one Tutton in its behalf. There is a statement, marked "Proven," in the defendant's draft finding, that no evidence was offered as to the indorsement, or as to the authority of Mr. Tutton to indorse commercial paper in the name of the company. Obviously this statement was understood by the trial judge as referring to direct, positive testimony; for the evidence certified in support of the defendant's exception contains testimony to the effect that Mr. Tutton, while negotiating with the plaintiff in behalf of the Downingtown Manufacturing Company for the purchase of certain machinery, left the note with the plaintiff to be credited to the former company, and that it was so credited. A finding is to be favorably construed in support of the judgment. *Cunningham Lumber Co. v. Mayo*, 75 Conn. 335, 53 Atl. 580. It will not be presumed, therefore, that the trial judge, in accepting this statement in the draft finding as correct, meant more than that there was no positive testimony to this point. He might, nevertheless, well infer from this certified evidence that the note, when so accepted, was properly indorsed.

The note had been indorsed by the plaintiff before maturity to a bank, and deposited with it for collection. It was protested, and then returned to the plaintiff. When produced at the trial, it bore this indorsement to the bank, uncanceled. The defendant contends that upon these facts it appears that the bank has the legal title, and was the only proper party to sue. The bank received the title for the sole benefit of the plaintiff. When it returned the note protested, the plaintiff became an indorsee in possession, and invested with the rights belonging to all holders of commercial paper. *Gen. St. 1902, § 4170*. One of these was to cancel the indorsement which it had made. *Gen. St. 1902, § 4218*. Whether it exercised this right or not was immaterial. Its mere possession of the note was sufficient evidence of ownership to support the suit. *Gen. St. 1902, § 4221; Dugan v. United States*, 3 Wheat. 172, 4 L. Ed. 362.

It appeared upon the trial that the suit was brought by counsel retained by the Downingtown Manufacturing Company, and at its sole expense; there being no intention on its part to look to the plaintiff for reimbursement. This is immaterial. The plaintiff having put its note, for the purposes of the suit, into the hands of the counsel thus employed, and making no objection to the institution and maintenance of the action, they had a right to represent it in the proceeding.

There are other reasons of appeal, which need not be noticed, in view of the grounds on which our judgment is based.

There is no error. The other Judges concurred.

(76 Conn. 132)

WM. A. MILES & CO. v. ODD FELLOWS' MUT. AID ASS'N OF CONNECTICUT.

(Supreme Court of Errors of Connecticut. July 24, 1903.)

ATTACHMENT—EXEMPTIONS—BENEFIT SOCIETIES—BENEFITS.

1. Pub. Acts 1895, p. 595, c. 255, § 1, defines the term "secret and fraternal society" to include any corporation or voluntary association organized for the sole benefit of its members, not for profit, having a lodge system with a ritualistic form of work and a representative form of government, providing for the payment of benefits in case of death; and section 7 declares that all benefits accruing from such society are exempt from attachment. Section 11 declares that the act shall not apply to societies of Masons or Odd Fellows, nor associations composed of their respective members. By Pub. Acts 1899, p. 1050, c. 117, was added to section 11 of the prior act a provision that section 11 should apply to all "fraternal societies." *Held*, that a mutual aid association composed of Odd Fellows having a lodge system, but not shown to have a ritual of its own, was not within the statute, and hence benefits payable therefrom were not exempt from attachment.

Appeal from Court of Common Pleas, New Haven County; Julius C. Cable, Judge.

Foreign attachment by Wm. A. Miles & Co. against the Odd Fellows' Mutual Aid Association of Connecticut, garnishee. From an order sustaining a demurrer to an answer claiming that a certain benefit fund payable to the debtor as beneficiary under a policy was exempt, the garnishee appeals. Affirmed.

Cornelius J. Danaher, for appellant. E. P. Arvine and George E. Beers, for appellee.

BALDWIN, J. Process of foreign attachment was served upon the defendant in October, 1901, as debtor to one Ida Oefinger. Its answer states that it is "an association composed exclusively of members in good standing in any duly constituted lodge of Odd Fellows in the New England states, or of members in good standing in any lodge of the order who reside in the state of Connecticut, which association is organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit; having a lodge system and a representative form of government, having provisions for the payment of benefits in case of death or disability of its members, and having among its objects the creation of a fund from which shall be paid to such beneficiaries as its members may designate, and its board of directors approve, a sum not exceeding \$2,000. Said society of Odd Fellows is an association having a lodge system, with a ritual and a representative form of government." The defendant, when garnisheed, owed Ida Oefinger \$750, as a benefit which had accrued to her by the death of one of its members, as a duly designated beneficiary. The only question is whether this debt was by statute exempt from attachment. This depends on the law as it stood in Octo-

ber, 1901, when, if ever, the attachment was effected.

In 1895 "An act concerning secret or fraternal societies" (Pub. Acts 1895, p. 595, c. 255) was passed, the main purpose of which was to regulate the relations of such societies to the Insurance Department of the state. The term "secret or fraternal society," it was declared in section 1, was used as including among others any "corporation, society, or voluntary association organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, having a lodge system, with a ritualistic form of work and a representative form of government, and making provision for the payment of benefits in case of death." Provided certain papers were filed with the Insurance Commissioner (and in such case only), any such society was authorized to do business in the state, and by section 7 all benefits becoming due from a society so authorized were exempted from attachment. The act, by section 11, was not to apply "to the societies of Masons or Odd Fellows located in this state, nor to associations composed exclusively of their respective members." In 1899 (Pub. Acts 1899, p. 1050, c. 117), by an act entitled "An act concerning fraternal insurance societies," there was added to section 11 a proviso that section 7 should "apply to all fraternal societies legally doing business in this state." Pub. Acts 1895, p. 595, c. 255; Pub. Acts 1897, pp. 828, 830, 831, cc. 107, 112, 113; Pub. Acts 1899, p. 1050, c. 117. This act of 1899 began by declaring that the proviso should read, "provided, however, that section seven of this act [i. e., the act of 1895] shall apply to all fraternal beneficial societies legally doing business in this state"; adding, however, "so that said section as amended shall read as follows"; and in the amended section, as then recited, the word "beneficial" did not appear. The effect of the amendment having been thus explicitly stated, the act must be treated as if it applied to fraternal societies, whether properly described as "beneficial" or not. This leaves the meaning of the term "fraternal," under the act of 1895, to be settled by its other provisions. These define it precisely. It must, by section 1, have "a lodge system, with a ritualistic form of work." The answer alleges that the defendant has a lodge system, but does not aver that it has a ritualistic form of work. That its members are all Odd Fellows, and that the Odd Fellows constitute a society having a lodge system, with a ritual, is of no consequence. Connecticut societies of Odd Fellows were expressly excluded by section 11 from the operation of the act of 1895, as well as associations composed exclusively of the members of such societies. The defendant is not such an association, for it admits members of any lodge of Odd Fellows existing in New England; but it is excluded under section 1 of the act, on the broader ground of its fail-

ure to come within the statutory definition, for want of a ritual of its own. It would serve no useful purpose to inquire whether the Revision of 1902 has changed or preserved the law in this respect. If it has preserved it, the demurrer was properly sustained. If it changed it, the demurrer was also properly sustained, for the rights of the parties became unalterably fixed during the year preceding that when the revision took effect.

There is no error. The other Judges concurred.

(75 Vt. 300)

FLETCHER v. BRAINERD.

(Supreme Court of Vermont. Franklin. June 4, 1903.)

NOTES-INDORSEMENT OF PAYMENTS-ASSENT OF MAKER-MARRIED WOMAN'S LIABILITY FOR PAYMENT OF DEBTS.

1. A note was executed by a married woman for money furnished by the payee. The husband of the maker was the agent in the negotiations. Corporate stock was deposited as collateral, with power to sell on nonpayment of the note at maturity. Several years after the execution of the note, but while it was in force, the payee requested the husband to pay the note, and, on his failure so to do, informed him that he must then have the dividends on the stock deposited as collateral; and for about 15 years thereafter the dividends were paid to the payee, and the amounts thereof indorsed on the note. *Held* sufficient to show that the indorsements were made with the assent of the maker, making the dividends voluntary payments, so as to prevent the running of limitations.

2. One furnishing money to a married woman for her benefit, and which is in fact used for the benefit of her estate, is entitled to an equitable lien on her estate therefor.

Appeal from Chancery Court, Franklin County.

Bill in chancery by John B. Fletcher against Anna M. Brainerd. From a decree dismissing the bill, the orator appeals. Reversed.

Argued before TYLER, START, WATSON, STAFFORD, and HASELTON, JJ.

Wm. P. Dillingham, Fuller C. Smith, and Alfred A. Hall, for orator. O. W. Witters, for defendant.

TYLER, J. This bill is brought to enforce an equitable lien upon the defendant's dwelling house by reason of the orator having furnished her \$2,000 with which to make repairs thereon. The defendant contends that the statute of limitations has run upon the claim, and that it is a stale demand. The master finds that in the year 1880 the defendant, Anna M. Brainerd, and her husband, occupied a house and lot situated in St. Albans, owned by Mrs. Brainerd as her separate estate; that they desired to make extensive repairs upon the house, and found it necessary to borrow money for the purpose; that Mr.

Brainerd applied to the orator for a loan of \$2,000, explaining to him the purpose for which the money was required, and that the house was Mrs. Brainerd's, and offered the orator her note for the amount, saying that he would sign it as surety, and also turn over to the orator National Car Company stock as security. The negotiations resulted in the orator making a loan of \$2,000, and taking a note therefor, dated April 1880, payable 14 days after demand, with interest, signed by Anna M. Brainerd, and by her husband as surety. It bore the following indorsement: "I have deposited with J. B. Fletcher as collateral for the payment of this note when due, twenty-seven shares of National Car Company stock, with full power to sell the same without notice, in case of nonpayment of this note at its maturity. [Signed] A. M. B." No question was made at the trial but that this stock was Mrs. Brainerd's property. It is found that in negotiating the loan Mr. Brainerd acted for his wife and for himself, and that the orator so understood the transaction, but he had no conversation with Mrs. Brainerd upon the subject. As the homestead was in her name, and the stock was then valued at par, he considered that the loan was well secured. The master, in effect, finds that the \$2,000 was used by the defendant in repairing her house; that the orator has held the note ever since it was given as his own property, and the car company stock as collateral security for its payment; that he never made any demand upon the defendant personally for payment until March 12, 1900, when he made a formal demand in writing. The following payments were made by Mr. Brainerd: \$200 August 15, 1883; \$100 November 26, 1883; \$138 May 8, 1884; and, beginning January 1, 1885, the quarter-yearly dividends upon the stock down to April 1, 1901, were paid to the orator by Mr. Stranahan, as treasurer of the company, and by him indorsed upon the note at the orator's request. In 1884 and 1885 the orator several times requested Mr. Brainerd to pay the note, which requests not being complied with, the orator told him he must have the dividends on the stock, and they were paid to him, as above stated.

The master submits the question to the court, whether, upon the evidence which he recites, Mr. Brainerd was the agent of his wife in the transaction about the loan. The evidence clearly shows that fact. Indeed, the defendant's brief and argument proceed upon the ground that Mrs. Brainerd, in allowing her husband to negotiate the loan, receive the money, deliver the note to the orator, and control the dividends on the stock, the certificates for which she had given him to deliver to the orator, held her husband out to the orator as her agent, and that the orator recognized him as such. It is said in the defendant's brief that during the entire 20 years Mr. Fletcher acted upon the presumption that Herbert Brainerd was the defendant's agent;

¹ 2. See *Husband and Wife*, vol. 26, Cent. Dig. § 905.

that whatever demand was made upon him for payment upon this note, which was given, as claimed, for money to use in the improvement of the defendant's property, was a demand upon the defendant; that, when the orator notified Brainerd that he should thereafter take the dividends on the car stock, it was notice to the defendant. This is in accordance with the master's findings, though not expressly so stated by him. The defendant cites the general rule that notice to an agent, while acting within the scope of his authority, and in reference to a matter over which his authority extends, is notice to the principal. The defendant concedes that, upon the master's findings, a demand made upon Mr. Brainerd was a demand upon her; but she insists that the payment of the car-stock dividends was made by the treasurer of the company to the orator, and not by the defendant nor by her agent. We think, however, that the master's report must be construed to mean that when Mr. Brainerd, as agent of his wife, ceased making payments upon the note, and the orator said, "I will have to require the dividends upon the stock," the agent assented to it. There is nothing in the report of the master, nor in the testimony that he submits, to indicate that the application of the dividends was not in accordance with both Mr. and Mrs. Brainerd's wishes. It is found that Mr. Stranahan was the defendant's brother-in-law, her warm friend and adviser, and that in business matters he advised with her and her husband. He was treasurer of the company, and the orator was its superintendent, and they occupied the same office-room. Mr. Stranahan knew that the orator had some money to invest, and suggested to him to make a loan to the Brainerds, to enable them to make repairs upon their house. Therefore Stranahan's handing the dividend checks to the orator was the natural sequence of the orator's requiring the payment of the dividends to himself. The master expressly finds that the payment of dividends to the orator was in consequence of his insisting that they should be so paid.

In this state of the case, the defendant contends that the indorsements were not voluntary, and that the statute of limitations had run upon the note before this bill was brought. It is the general rule that part payment is an implied acknowledgment of the existence of the claim upon which the payment is made, from which the law implies a promise to pay the balance. *Corliss v. Grow*, 58 Vt. 702, 2 Atl. 388. As the court said in *Campbell v. Baldwin*, 180 Mass. 199: "The ground upon which a part payment is held to take a case out of the statute is that such payment is a voluntary admission by the debtor that the debt is then due, which raises a new promise by implication to pay it or the balance. To have this effect, it must be such an acknowledgment as reasonably leads to the inference that the debt-

or intended to renew his promise of payment." In accordance with this rule it is held that where the debtor's property is sold on legal process, and the proceeds applied upon the debt, it is not a voluntary payment, and will not prevent the running of the statute. Any enforced part payment will not stay the statute. *Benton v. Holland*, 58 Vt. 533, 3 Atl. 322, and cases cited in the opinion. For the same reason, it is said that the weight of authority favors the rule that the creditor's application of the proceeds of security foreclosed by him, in payment pro tanto of the note or debt, does not operate as a payment by the debtor at that time, so as to start the statute anew, because there is no voluntary affirmative act by the debtor implying a promise to pay the balance of the debt. 19 Am. & Eng. Ency. 328. But the debtor's request to have payments applied or indorsements made upon his note need not be proved. It may be proved that he assented to the act after it was done, and his assent may be implied from his conduct and the circumstances attending the transaction. The fact that these indorsements were made is some, but not sufficient, evidence of a voluntary application of the dividends in payment of the note, and it has more weight because the first indorsement was made before the statute had run. *Bailey v. Danforth*, 53 Vt. 504; *Lawrence v. Graves' Estate*, 60 Vt. 657, 15 Atl. 342. That these dividends were received by the orator and indorsed quarterly for 15 years, pursuant to the notice given by the orator to the defendant's agent, and without objection, are facts from which it may be inferred that the payments were voluntary. In this view it is immaterial that the 27 shares of stock were not available until the maturity of the note, for the dividends thereon were voluntary payments made with the defendant's assent, and prevented the orator's demand from becoming stale. If the orator's case depended upon a contract existing between the defendant and himself, evidenced by the note, his demand of payment in 1884 and 1885 would have put the statute in motion, and it would have run upon the note in 6 years and 14 days after such demand, except for the application of the stock dividends. But the case does not rest in contract. The defendant was under the disability of coverture when she signed the note, and could not, under the law as it then existed, create a lien upon her separate property. This the orator concedes, but bases his claim upon the fact that the loan was made and used to benefit the defendant's property, and contends that in equity the property is chargeable with the amount of the loan. The rule generally adopted in this country is stated in *Yale v. Dederer*, 18 N. Y. 265, 72 Am. Dec. 503, and quoted with approval in the opinion in *Dale v. Robinson*, 51 Vt. 20, 31 Am. Rep. 669, that "equity recognizes a married woman's debt, and

charges it upon her separate estate, not on the ground that the contracting of it is of itself an appointment or charge, but because, when contracted on the credit of the separate estate, or for its benefit or that of the woman, it is just that the estate should answer. * * * The same rule is declared in *Willard v. Eastham*, 15 Gray, 328, 79 Am. Dec. 366, and cited in *Dale v. Robinson*. The question is not whether the application of the dividends upon the note saved it from the statute, so that an action at law could be maintained upon it, but whether these payments, made, as it must be assumed, with the knowledge and consent of Mr. Brainerd, who acted for his wife in all these transactions, were in recognition of the orator's equitable rights, so as to bring the case within the rule in *Dale v. Robinson*, 51 Vt. 20, 31 Am. Rep. 669, and *Sargeant v. French*, 54 Vt. 384. We think the case shows that the orator forebore the enforcement of his claim during all the time the dividends were received by him, and that the defendant, through her agent, assented to the application of the dividends upon the note in recognition of such claim.

In this view, the statute of limitations does not apply to the case. We hold that, upon the facts found, the demand is not stale, and that the orator is entitled to have the amount due upon his note paid from the estate which was benefited by the money for which the note was given, and that he have an equitable lien upon said estate therefor. Decree reversed and cause remanded to the court of chancery, with mandate to that court to enter a decree for the orator according to the prayer of the bill.

(75 Vt. 295)

STATE v. ROSENTHAL.

(Supreme Court of Vermont. Rutland. May 30, 1903.)

MUNICIPAL CORPORATIONS—ORDINANCES—CARRYING WEAPONS—VALIDITY.

1. Const. c. 1, art. 16, declares that the people have a right to bear arms for the defense of themselves and the state. V. S. 4922, prohibits any person from carrying a dangerous weapon, openly or concealed, with the intent of injuring another. Section 4923 prohibits a person, while a member of and in attendance on a school, from having in his possession any dangerous weapon. *Held*, that a city ordinance prohibiting a person from carrying within the city any brass knuckles, pistol, slung shot, or weapon of similar character, or any weapon concealed on his person, without permission of the mayor or chief of police, so far as it relates to the carrying of a pistol under any circumstances without such consent, is repugnant to the Constitution, and to that extent void.

Exceptions from City Court of Rutland; *Howe*, Judge.

Andrew Rosenthal was convicted of a violation of an ordinance of the city of Rutland, and appeals. Reversed.

Argued before TYLER, MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

W. H. Preston, State's Atty., for the State.
Joel C. Baker, for respondent.

WATSON, J. Section 10 of the ordinances of the city of Rutland provides that no person shall carry within the city any steel or brass knuckles, pistol, slung shot, stiletto, or weapon of similar character, nor carry any weapon concealed on his person, without permission of the mayor or chief of police, in writing, and for violation thereof a penalty is provided by a subsequent section. A complaint was filed against the respondent in the city court for carrying within the city, in violation of said ordinance, a pistol loaded with powder and bullets, concealed on his person, without such permission. On demurrer to the complaint, the respondent contends, among other things, that said ordinance is illegal, for that, so far as it forbids the carrying of a pistol, it is repugnant to and inconsistent with the Constitution and the laws of this state.

Section 24 of the city charter gives the city council power to make, establish, alter, amend, or repeal ordinances, regulations, and by-laws, not inconsistent with the charter or with the Constitution or laws of the United States or of this state, for the purposes enumerated, and to inflict as a penalty for a violation thereof a fine not exceeding \$50. After the special designations is the general clause, "And said city council may make and establish, and the same alter, amend or repeal, any other by-laws, rules and ordinances which they deem necessary for the well being of said city and not repugnant to the Constitution or laws of this state." Power to make the ordinance in question was not expressly given the council, and they had no power to make it, beyond what is given under the general clause above quoted. The people of the state have a right to bear arms for the defense of themselves and the state. Const. c. 1, art. 16. But by V. S. 4922, a person is prohibited from carrying a dangerous or deadly weapon, openly or concealed, with the intent or avowed purpose of injuring a fellow man; and by section 4923, no person can carry or have in his possession any firearm, dirk knife, bowie knife, dagger, or other dangerous or deadly weapon, while a member of and in attendance upon a school. Section 4924 provides a penalty for intentionally, without malice, pointing a firearm toward another person, and for discharging such firearm so pointed, without injury to another person; and by section 4925 a punishment is inflicted where another person is maimed or injured by the discharge of such firearm. But section 4926 provides that the two preceding sections shall not apply where firearms are used in self-defense or in the discharge of official duty, or in the case of justifiable homicide. Under the general laws, therefore, a person not a member of a school may carry a dangerous or deadly weapon, openly or concealed, unless he does

it with the intent or avowed purpose of injuring another; and a person who is a member of a school, but not in attendance upon it, is at liberty, in a similar way, to carry such weapons. In *State v. Carlton*, 48 Vt. 636, it was held that the owner of land, having the right to use reasonable force in expelling a trespasser therefrom, had a right to go prepared to defend himself against any assault that the trespasser might make upon him while in the exercise of that right, and that if he only intended to use a pistol in such an emergency in defending his own life, or against the infliction of great bodily harm, the carrying of the pistol for such purpose would be lawful. By the ordinance in question, no person can carry such weapon concealed on his person within the city of Rutland in any circumstances, nor for any purpose, without the permission of the mayor or chief of police in writing. Therein neither the intent nor purpose of carrying them enters into the essential elements of the offense. Simply to carry them concealed without such permission constitutes a violation of the ordinance. But if a permission is procured from either of those officials there is no violation of the ordinance, even though the carrying of the weapon be with the intent or avowed purpose of injuring another person; and that a person is a member of a school, and in attendance upon it, forms no exception. Consequently, unless a special permission is granted by the mayor or chief of police for that purpose, a person is prohibited from carrying such weapons in circumstances where the same is lawful by the Constitution and the general laws of the state; and there is nothing in the ordinance to prevent the granting of such permission, notwithstanding it be in circumstances to constitute a crime under the general laws. The result is that Ordinance No. 10, so far as it relates to the carrying of a pistol, is inconsistent with and repugnant to the Constitution and the laws of the state, and it is therefore to that extent, void. Whether this renders the whole ordinance illegal, or whether it contains any other invalid provisions, are questions not now before the court.

Judgment reversed and sentence set aside, demurrer sustained, complaint adjudged insufficient and quashed, and the respondent discharged and let go without day.

(75 Vt. 308)

STATE v. DONOVAN.

(Supreme Court of Vermont. Washington.
June 4, 1903.)

FORGERY—NOTES—INDICTMENT—VARIANCES—AMENDMENTS—TRIAL—EXHIBITION OF NOTE TO JURY—EVIDENCE—WITNESSES—CROSS-EXAMINATION—HARMLESS ERROR.

1. Where a note recited that no salesman was authorized to make "any promise or agreement at variance with the terms of the note," contained a stipulation that "a contract once completed cannot be amended," and contained the word "to" before defendant's name in the

clause, "on demand I promise to pay to J. P. Donovan," the letters and figures "N. L. /134," and the abbreviation "inh." for inches, on the back of the paper, variances in an indictment for forging the same, consisting in the use of the words "any promise or agreement" for "promises and agreements," omitting the provision relating to the amendment of the contract and the word "to" before defendant's name, using the figure "2" for "L," and the letters "in." for "inh.," were immaterial.

2. Where, in a prosecution for forging a note, it was alleged that the forgery consisted in changing the figures "4½" to "5½" in a contract indorsed on the note, authorizing payment in clapboards 4½ inches wide, and acceptance of the above "offer," signed by defendant, a variance in the indictment, consisting in the use of the words "five and one-half" and "four and one-half" instead of figures, and in substituting the word "order" for "offer," in defendant's acceptance, were material.

3. Under V. S. § 1912, authorizing the court, in its discretion, to permit the state's attorney to amend an indictment during the trial, the court was entitled to permit the amendment of an indictment for forgery, after the testimony was closed, so as to cure variances not prejudicial to accused's defense on the merits.

4. Under V. S. § 1912, authorizing the court to permit the amendment of an indictment wherein variances occur on such terms, as to postponement of the trial, as the court thinks reasonable, it was proper for the court, in the exercise of its discretion, to refuse a postponement of the trial on allowing the amendment of an indictment for forgery to cure variances not prejudicial to accused's defense on the merits.

5. Where a note given in payment of an organ sold by the payee to the maker contained a stipulation, indorsed thereon at the same time, authorizing payment of the note in clapboards, such stipulation was a part of the note, and hence a subject of forgery.

6. In a prosecution for forging a note payable in 4½-inch clapboards by changing the figures "4½" to "5½" evidence that defendant claimed a shortage in the amount of timber received from the maker, and that a suit followed, which was settled by the maker giving defendant a note for \$30, payable in 6½-inch clapboards, was immaterial.

7. Where certain letters written by the payee to the maker of a note were produced by the state in a prosecution of the payee for forging the note, and defendant had the full benefit thereof, it was not error for the court to refuse to compel the state's attorney to deliver such letters to defendant's counsel during his cross-examination of the maker of the note as a witness.

8. Refusal of the court, in a prosecution for forgery, to permit respondent's counsel to exhibit the note to the jury during the examination of a particular witness, was harmless, where defendant had ample opportunity to present the note to the jury while other evidence was being introduced and during the arguments.

9. Where, in a prosecution for forging a note, the state's evidence tended to show that defendant's witness was where he could not have seen the transaction inquired about, and the witness testified that the note at the time of its execution was in no one's hands but defendant's and the maker's while he was signing it, and that he did not see defendant do anything with the note but hold it in his hands, the exclusion of a question as to whether witness saw defendant hand the note to the maker while witness was present was not error.

10. Where, in a prosecution for forging a note payable in lumber, the maker testified that at the time of executing the note there was no conversation as to the price of the lumber, it was not error for the court to refuse to permit a question as to whether or not the maker did

not guaranty that the lumber to be delivered was worth \$5 per thousand.

11. Where, in a prosecution for forging a note payable in lumber by changing the specification of the width from $4\frac{1}{2}$ inches to $5\frac{1}{2}$ inches, the maker of the note testified as to the differences in value between lumber of such different widths, it was proper to show by him, on cross-examination, the value of the lumber delivered.

12. In a prosecution for forging a note payable in lumber, given for the price of an organ, by changing the provision specifying the width of the lumber to be delivered, it was competent for defendant to show the usual price of the kind of organ sold, as bearing on the probability that defendant would have sold the same for the lumber contracted for, of the width claimed by prosecutor.

Exceptions from Washington County Court; Watson, Judge.

J. P. Donovan was convicted of forgery, and brings exceptions. Reversed.

Argued before TYLER, MUNSON, START, STAFFORD, and HASELTON, JJ.

Richard A. Hoar, State's Atty., for the State. John W. Gordon and Truman R. Gordon, for respondent.

TYLER, J. This is a prosecution for forgery. The indictment charges that the respondent had in his possession October 22, 1897, a certain promissory note, for the sum of \$100, payable to himself or bearer, on demand, with interest, which note then and there was of the tenor following:

No salesman is authorized to make any promise or agreement at variance with terms of the following note and agreement.

J. P. Donovan } \$100.00
 dealer in Planos, } Montpelier, Vt., Oct. 22, 1897.
 Organs, Sewing } On demand, I promise to pay J.
 Machines, etc., } P. Donovan, or bearer, one hun-
 Montpelier, Vt. } dred dollars at the First National
 Bank, Montpelier, Vt., with interest, value received
 for one Packard organ, style chapel 441, No. 55257,
 to remain the property of J. P. Donovan, or bearer,
 until the note is paid in full.
 Conditions are to pay \$..... on the day of
 and \$..... on the day of each month
 thereafter until the note is paid in full.

Alonzo A. Parsons.

Witness.

No specified time for goods to be delivered.
 Union Card Co., Printers, Montpelier, Vt.

And on the back of said note there was then and there written the following words and figures:

N 2/134 Alonzo A. Parsons, Warren, Vt. 1273/N.
 I will deliver to Montpelier, Vt., 20 thousand ft. of
 $4\frac{1}{2}$ in. cottage clapboards, in payment of this note
 by Dec. 30, 1897.

[Signed]

Alonzo A. Parsons.

Accepted the above offer, J. P. Donovan.

The indictment further charges that afterwards, on the same day, the respondent, " * * * with force and arms, wittingly * * * and feloniously, did alter the said promissory note, and the writing on the back of said promissory note as aforesaid, by then and there wittingly * * * and feloniously making, forging and changing the figures $4\frac{1}{2}$ then and there written on the back of said promissory note by the said J. P. Donovan, to the figures five and one-half, and the said figures four and one-half so being on the back of said promissory note were so changed and written, and were falsely made, for-

ged and added as aforesaid, did become, import and signify five and one-half, which altered promissory note, and the said writing on the back of said note, which was then and there a material part of said note, is now in the words and figures as altered as aforesaid, are 'I will deliver to Montpelier, Vt., 20 thousand ft. of $5\frac{1}{2}$ in. cottage clapboards in payment of this note by Dec. 30, 1897. Alonzo A. Parsons. Accepted the above offer, J. P. Donovan.' With the intent," etc.

To the indictment the respondent filed a general demurrer and assigned several causes. The demurrer was overruled by the trial court, and the respondent excepted. The questions raised on the demurrer, on exceptions to the rulings during the trial, and to the charge of the court, are presented in the respondent's brief.

It appeared that the respondent sold to Alonzo A. Parsons a Packard organ, and received from him a certain writing. The state claimed that the respondent changed the figure "4" to the figure "5," after he received the paper, so as to require payment in $5\frac{1}{2}$ -inch, instead of $4\frac{1}{2}$ -inch, boards; the former being of more value than the latter. The alleged change of "4" to "5" was the forgery charged.

When the paper was offered in evidence, the respondent objected to it on the ground that there were several variances between it and the paper set out in the indictment. The principal variances alleged are: (1) The two lines at the head of the paper contain the words "promiser" and "agreements," whereas the indictment, before its amendment, used those words in the singular number. (2) The words on the right-hand side of the paper, "A contract once completed cannot be amended," are omitted in the indictment. (3) The indictment omits the word "to" before "Donovan" in the clause, "On demand I promise to pay J. P. Donovan," etc. (4) The writing contains upon its face the words "Until this note is paid in full." The indictment uses the word "the" instead of "this." (5) The respondent claims that the characters and figures on the back of the paper are "N. L./134," whereas the indictment recites them as "N. 2/134." (6) In the indictment the word "Signed," before the signature of Alonzo A. Parsons, is set forth, while the original paper shows that the word had been crossed off and was not a part of the paper. (7) On the back of the paper, after the " $5\frac{1}{2}$ " are the letters "inh.," which the indictment sets out as "in." (8) The indictment charges that the respondent changed the figures " $4\frac{1}{2}$ " to "five and one-half," thus describing the change in words instead of figures. (9) In the acceptance on the back of the paper, the word is "offer," which the indictment recites as "order." (10) The agreement on the back of the paper is dated "Dec. 30, '97," which is recited in the indictment as "Dec. 30, 1897."

The trial court held all the variances im-

material, overruled the objections to the paper, and admitted it in evidence, to which the respondent excepted.

The respondent relies upon the rule laid down in 1 Bish. Cr. Pro. § 488: "If the indictment professes to set out a writing by its tenor, whether in the particular case this exactness of averment is necessary or not, the proof must conform thereto with almost the minutest precision." Some of these variances are immaterial under the strict rule above cited. For instance, the lines at the head of the writing contain an instruction to the respondent's salesman, and the words "any promise or agreement" necessarily mean the same as "any promises or agreements." These lines and the words, "A contract once completed cannot be amended," are only important as descriptive of and identifying the paper. The omission in the indictment of the word "to" before the respondent's name, the use of "2" for "L," and "in." for "inh." on the back of the paper, are immaterial. Under the rule in Bishop, the use of the words "five and one-half" and "four and one-half" was not a material variance, for there was in fact no change of words; the change, if made, being of the figure "4" to the figure "5." The same is true in the substitution of "order" for "offer," for there was no "order" of Parsons to accept boards for the \$100.

But it is unnecessary to discuss these variances seriatim, for, by virtue of V. S. 1912, it was within the discretion of the trial court to permit the state's attorney to amend the indictment and set out the instrument accurately, although this was done after the testimony was closed. It is inconceivable that the respondent could have been prejudiced thereby in his defense upon the merits. It did not vary the proof necessary to be made either by the state or the respondent. It was within the exercise of a reasonable discretion by that court, in view of the character of the amendments, to refuse a postponement of the trial. V. S. 1912.

But the respondent contends that the indictment as amended did not describe an instrument that is the subject of forgery, under V. S. 4977, and excepted to the admission in evidence of the paper described. The instrument was upon its face a promissory note for \$100 given by Parsons to the respondent for an organ, and payable on demand. The writing on the back was made at the same time, was a part of the note, and is to be treated as if it had been inserted in the body of the note for the purpose of fixing the time and manner of payment of the \$100. It was long since decided in this state that a memorandum on the back or margin of a note, made at the time of its execution, forms a part of it, although it contains an important qualification of the contract. *Henry v. Colman*, 5 Vt. 402; *Fletcher v. Blodget*, 16 Vt. 28, 42 Am. Dec. 487; *Denison v. Tyson*, 17 Vt. 549; *Read v.*

Sturtevant, 40 Vt. 521. *Roberts v. Smith*, 58 Vt. 492, 4 Atl. 709, 56 Am. Rep. 567, is not in point, for there the promise was to pay J. S. King, or bearer, one ounce of gold, which was held to be a simple contract. It was not in form a promissory note, and, as the court said, it was not even the promise to pay a given sum in specific articles. Where the contract is to deliver specific articles, it is not a promissory note; but, where the contract is to pay a specified sum in specific articles, it is a promissory note. *Robt. Dig.* 92, pl. 13, 14, 15.

The respondent claimed a shortage in the amount of lumber received, and wrote Parsons two letters upon the subject; one making a claim of shortage, and the other demanding damages therefor. A suit followed, which was settled by Parsons giving the respondent a note for \$30. The respondent offered to show that this note was payable in 5½-inch clapboards, as tending to show that the original note was payable in that width, which offer was properly excluded as immaterial. In the absence of evidence that Donovan especially wished for that width, the evidence had no tendency to establish the fact claimed.

There was no error in the court's refusal to order the state's attorney to deliver these letters to the respondent's counsel during his cross-examination of Parsons. Without now considering what the general right of a respondent may be as to having papers delivered to him for the purpose of cross-examination, in this case the letters were afterwards produced by the state, and the respondent had the full benefit of them, though they do not seem to have had any weight as evidence.

The respondent had ample opportunity to show the note to the jury while the evidence was being introduced and during the arguments, and he was not harmed by the court's refusal to allow him to exhibit it to them during the examination of a particular witness. When it should be shown to the jury was a matter in the discretion of the court.

The direct question put by the respondent to his witness Dearborn: "Did you see Mr. Donovan hand this Exhibit A to Mr. Parsons while you were there?" was properly excluded. It was not asked to meet any testimony given by Parsons. The state's evidence tended to show that Dearborn was where he could not have seen the transaction inquired about. Besides, after this exception was taken, Dearborn testified fully and without objection in whose hands he saw the paper—that it was in no one's hands but Donovan's, and Alonzo Parsons' while he was signing it. Dearborn also testified that he did not see Donovan do anything with the note but hold it in his hand.

The respondent was not restricted in his cross-examination of Parsons upon the question whether the latter did not guaranty that the lumber to be delivered was worth

\$5 per thousand, for he had repeatedly answered that there was no conversation about the price.

The trial court gave the respondent full opportunity to make proof relative to the respective values of the two widths of boards, and no restriction was placed upon his cross-examination of Parsons upon this point. The witness had repeatedly answered that there was no conversation about the prices of the two grades; that their conversation related solely to the number of thousand feet of 4½-inch lumber that the witness would give and the respondent receive for the organ.

Parsons was an important witness for the state. He had testified about the transaction between himself and the respondent, and that the 4½-inch boards were the only ones mentioned. The respondent testified that 5½-inch boards were agreed upon. The court correctly said that the real question was which width was offered and accepted, and, bearing upon the probability of one or the other party being in the right, held it competent to show the respective prices or values. Parsons testified upon this subject, and we think it was proper cross-examination to show by him that the lumber that he delivered to the respondent under the agreement was only of the value of \$3 per thousand at the place of delivery. In the exclusion of this line of inquiry there was error, for it grew out of Parsons' direct testimony, and it bore directly upon the probability of the respondent having agreed to accept lumber of this value. There being no evidence tending to show a different value, it was reasonable to presume that the lumber shipped by Parsons was of the average quality and value of that width of boards. The exclusion of the offer of evidence in defense to show that the boards delivered at Montpeller were worth only \$3 per thousand feet was error. The value of the boards delivered tended to establish the value of all boards of that width that the parties considered. Parsons had testified that the value of the wider boards was \$1.50 to \$2 per thousand more than the others.

The respondent testified that several grades of boards were discussed during the negotiations; that he was indifferent as to which grade he should receive, but that he demanded 25,000 feet of 4½ inch, while Parsons would offer only 20,000 feet. Parsons testified that no grade was mentioned, other than the 4½ inch, and that prices and values were not spoken of. So it was a vital question which width was agreed upon. If 5½ inch, those figures should appear in the offer.

For the same reason that it is competent, as the court held, to show the values of the two kinds of boards, it was competent to show the usual price of this kind of organ, although the price was agreed upon. If the usual price had been considerably more than

\$100, it was less likely that Donovan would have sold this one for a quantity of lumber worth only from \$60 to \$80, than that he would have sold it for the same quantity, the market value of which was \$100.

The rule respecting the admissibility of evidence in such cases is well stated in *Kimball v. Locke*, 31 Vt. 686: " * * * On the question whether a person did a particular thing or not, the character of the subject-matter, and the circumstances affecting the relation of the parties to that subject-matter, affect the probability of the thing in question having been done as claimed." It was error to exclude the evidence tending to show that the usual price of that kind of organ was from \$110 to \$115. It was just as competent to show the usual price of the organ, as bearing upon the probability of a certain act having been done, as it was to show the prices of the two grades of lumber, as bearing upon that probability.

No other exceptions to the rulings are sustained. There was no error in the charge.

Judgment reversed, verdict set aside, and new trial granted.

(97 Md. 499)

COURTNEY et al. v. WILLIAM KNABE & CO. MFG. CO. OF BALTIMORE.

(Court of Appeals of Maryland. June 30, 1903.)

SALES—CONTRACT—CORRESPONDENCE—RES JUDICATA—ISSUES DECIDED—FRAUD—FALSE REPRESENTATIONS.

1. Where, in an action for the contract price of certain lumber, plaintiffs introduced a letter from them to defendant stating that plaintiffs begged "to confirm sale" to defendant of the lumber in question, and a letter from defendant to plaintiffs confirming the order given one of plaintiffs' agents, the letters showed on their face that they did not constitute a contract, and hence oral evidence was admissible to show the terms of the contract.

2. The term "parties," as used in the statement of the rule that a judgment operates as an estoppel between the parties, includes those who are directly interested in the suit, know of its pendency, and have a right to control and direct or defend it.

3. The sellers of lumber which had been sold by the vendee brought replevin for the lumber on the ground of fraudulent representations made to induce the sale from plaintiffs. The record of such cause showed that two pleas were interposed—non cepit, and that property was in the one to whom plaintiffs' vendee had sold—while the replication was, property in plaintiffs and not in defendant's vendee; that two prayers were granted, one of which placed defendant's right to a verdict on whether the lumber was in defendant's possession when the action was instituted, and the other that there was no evidence entitling plaintiffs to recover. The proof introduced in the case covered the title of defendant and that of plaintiffs, and whether the lumber was in the possession of defendant's vendee. Judgment was for the defendant, but the court did not order a return of the property. Held that, as it was impossible to determine what issue was decided, the judgment was not res judicata as to title.

4. On an issue whether a merchant had made fraudulent statements to a commercial agency

in order to obtain goods, a witness testified that the merchant told witness that his condition was all right, and the same as on a certain previous occasion when witness had examined the merchant's books, which statement witness reported, and the statement was given out by his commercial agency. *Held*, that such report was sufficiently authenticated to be admissible in evidence.

5. A false statement by a merchant to a commercial agency may be offered in evidence, in connection with other representations, to show fraud in the purchase of merchandise.

6. Where in an action for the price of goods there is evidence that the purchaser refused the goods because not of satisfactory quality, and had merely permitted them to be put in his yard for convenience, it was error to instruct the jury to find an acceptance, without stating what would amount to an acceptance.

Appeal from Superior Court of Baltimore City; Daniel Glraud Wright, Judge.

Action by George W. Courtney and others, as trustees of H. Clay Tunis, against the William Knabe & Co. Manufacturing Company of Baltimore. From a judgment for defendant, plaintiffs appeal. Affirmed.

Argued before McSHEBBY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Arthur George Brown and Thomas U. Weeks, for appellants. Randolph Barton and James M. Ambler, for appellee.

PAGE, J. This suit was brought by the appellants, trustees of H. Clay Tunis, to recover the price of certain mahogany-lumber alleged to have been sold by Tunis to the appellee. The narr. contains two money counts and a special count. The defendant pleaded the general issue. The judgment being for the appellee, the appellants have appealed.

Five exceptions were taken at the trial—the first four to the admissions of evidence; the fifth, to the ruling of the court on the prayers.

The first and third exceptions raise the same questions, and will be considered together.

To maintain the issues on their part the plaintiffs offered the following letters, viz.:

"Baltimore, July 2nd, 1900. Messrs. William Knabe & Co., City—Dear Sir: I beg to confirm sale to you of the following mahogany mentioned upon my list, a copy of which I enclose, namely all the 5-8, all the 4-4 No. 1 & 2 & 4-4 select, common 10 to 16 feet long, all of the 5-4 & 6-4, & 8-4, except the common & culls, and end lengths from 4-4 No. 1 & 2 & select common 8 to 9 & 3 to 7 feet long, as you may be able to use to advantage being the amount furnished up to 100 M ft. Price on the 5-8 to be six cents per foot, and on the balance eleven cents per foot, delivered in your yard, delivery to be made this month. Terms: Four equal payments to be made on November 10th, 1900, January 10th, 1901, February 10th, 1901, and March 10th, 1901. Yours truly, H. Clay Tunis."

"Baltimore, July 6th, 1900. Mr. H. Clay

Tunis, City—Dear Sir: Referring to your favor of the 2nd inst., confirming order given to your Mr. Welch, for mahogany, beg to say, that the same is correct, as to quantities, terms, etc., as specified. Kindly advise us two or three days before you have the lumber brought to the city, as we will have to make some preparations for receiving it into our yards. Yours truly, William Knabe & Co. I. N. H."

A witness then testified that he had made the sale referred to in the letter of Knabe & Co. on behalf of Tunis, and on cross-examination said that the Knabes "were to judge whether the lumber suited their purposes, by the approval and inspection of it upon its arrival in Baltimore," whereupon the counsel for the defendant asked him if the agreement contained in the letters was "the original contract," and was it [the lumber] to be subject to their [Knabes] approval and inspection? In the third exception the witness was further questioned as to the making and substance of the verbal contract through the agency of the witness. These questions and the answers were objected to upon the grounds that the letters contained the contract, and that parol evidence could not be admitted to add to or vary it; but the court overruled the objection, and held the letters did not contain the original contract, and the defendant had "a right to go into what the original contract" was. The question presented by these exceptions, therefore, is whether the letters contained, or were intended by the parties to contain, the contract, or whether they were intended merely to refer to a contract that had already been made, and to confirm it. It is too plain for argument that if it was intended to reduce the contract to a writing, which should be the expression of what the parties had done or intended to do, all previous stipulations, negotiations, and terms are supposed to be embodied in the writing, and parol evidence is not admissible to add to or vary it. *Artz v. Grove*, 21 Md. 456. And it is equally plain that if an offer is communicated by letter, and an acceptance is made, the offer becomes a contract between the parties. *Stockham v. Stockham*, 32 Md. 207; *Hand v. Evans Marble Co.*, 88 Md. 231, 40 Atl. 899; *Wills v. Carpenter*, 75 Md. 84, 25 Atl. 415.

Is this case within any of the principles set forth in the cases cited above? It seems to us clear that the letter of Tunis was not intended to, and did not, import more than a confirmation of a transaction that had been theretofore made by Welch, the agent of Tunis. Tunis' letter specially so states—"I beg to confirm sale to you," etc.; and what follows this assumes that a sale had already been made of the lumber mentioned, to be delivered and paid for as stated. Knabe & Co.'s reply shows that they so regarded it. They say, "Your favor of the 2nd inst. confirming order given to your Mr. Welch," etc.

The letter of Tunis does not admit of a construction that would amount to an offer to sell. It refers exclusively to a prior transaction, and only "confirms" a sale that had already been made by Welch, who, as it appears from the evidence, was his "hardwood salesman." Nor does Tunis, in his letter, undertake to state the contract of sale, except as to "quantities, terms, etc." As to all other conditions, if any, no reference at all is made. As we have already said, it also seems to be clear that the Knabes so construed the letter, for in their reply they do not accept an offer, but only acknowledge the receipt of the Tunis letter, which they say confirms "order given to your Mr. Welch"; and then they add that the terms of the order as contained in the letter are "correct as to quantities, terms, etc., as specified." If no order had been given to Welch as agent of Tunis, then there would be no evidence of a contract of sale in the case; and, if there was such an order, that was the thing the parties by their letters confirmed. What was the "order" thus confirmed? Evidence was admissible to show what it was. So far as stated in Tunis' letter, and admitted to be correct in Knabe's letter, no evidence was required, because to that extent both parties had admitted its terms; but these admissions went no farther than stated, and if there were other features, not stated in the letters, that had been agreed to by both parties, it was competent for either party to show what features of the order had been omitted from the letters. It was the whole order as given to Welch, and not a part of it, that Tunis "confirmed." It was therefore the order in its entirety that constituted the contract of sale between the parties. We find no error in these rulings.

The plaintiffs, further to maintain the issues on their part, then offered in evidence the docket entries in the case of Uptegrove & Co. v. Tunis; being an action in replevin brought by the former against the latter to recover from the latter the lumber which is the subject of this suit. After the introduction of these, and also the original papers, as well as the testimony taken therein, and also the instructions granted and refused by the court, the appellee offered evidence tending to prove that Tunis had fraudulently purchased the lumber from Uptegrove & Bros., and therefore had fraudulently obtained possession of it. The appellants objected to the reception of this evidence. The court, however, overruled these objections, as well as a motion to strike out and exclude such evidence as had already gone to the jury subject to the appellants' objections; and these rulings constitute the second exception. The ground of the appellants' objection to this evidence was and is that the title to the lumber had been finally adjudicated in the replevin suit, and therefore in the present case the title was no longer an open question. It is well established that a

former judgment upon the same subject-matter operates as an estoppel between the same parties, provided that it appears by the record or other proof that the matter in issue was decided in the former suit (*Whitehurst v. Rogers*, 38 Md. 512); and the term "parties" includes those who are directly interested in the subject-matter of the suit, knew of its pendency and had the right to control and direct, or defend it (*McKinzie v. B. & O. R. Co.*, 28 Md. 175). It is shown by the evidence, and not contradicted, that Knabe & Co. had full knowledge of the former suit. Mr. Ernest Knabe testified that he "had an understanding and agreement with Uptegrove at the time he laid the replevin to get possession of the lumber that he [Knabe] would aid him, provided Uptegrove would aid him." Whatsoever, therefore, was decided in the replevin suit as to title, is now *res adjudicata* in the present case. Now, what was decided in the former suit, as appears by the record or other proof? Two pleas were there interposed: First, non cepit; and, second, property in William Knabe & Co. The replication was, property in the plaintiff, Uptegrove, and not in Knabe & Co. The verdict and judgment were for the defendant, but the court, in the judgment, did not order a return of the property. Unexplained, the judgment and verdict could have been rendered either upon a finding that the property was not in the possession of the defendant (*Herzberg v. Sachse*, 60 Md. 433), or that the plaintiff had not title or right of possession as against the defendant (*Seldner v. Smith*, 40 Md. 612), or that the title and right of possession was in Knabe & Co. It is impossible to determine, however, from the form of the verdict, upon which of these grounds the decision of the court, who sat as judge and jury, was placed. Nor do the instructions granted by the court throw any light upon this difficulty. There were only two prayers granted—one, upon the court's own motion, wherein the pivotal fact upon which the defendant's right to a verdict depended was whether or not the goods were in the "possession of the defendant at the time of the institution of the proceedings." If there had been no other instruction than this, it might seem that the question as to the right of possession of or title to the property was not decided at all, but only that the defendant did not take or was not in the possession of the property. The other prayer granted was that there was no other evidence offered legally sufficient to entitle the plaintiff to recover. This covered all the possible grounds upon which the plaintiff could recover under the issues in the case. The proof adduced in the case, as appears by the record, covered all the possible defenses under the evidence that was offered, viz., as to the title of Tunis, as well as that of Uptegrove, and whether the lumber at the time of the bringing of the suit had been or then was in the possession

of the Knabes. It therefore appears that several distinct matters were in issue under the pleadings and proof, upon any one of which the verdict and judgment could have been rendered, and no extrinsic evidence was adduced in this case from which it can be determined upon which of them the judgment was rendered. If the judgment had been for the plaintiff, the same difficulties would not have been presented, for, if such had been the case, the effect of the judgment would have been, at most, to decide that the right to the possession was in the plaintiff, and upon this hypothesis this case would then be within the rulings in *McKinzie v. B. & O. R. Co.*, 28 Md. 174; and in that case, the pleas being non cepit and property in another, it was held that the pleas imposed upon McKinzie to prove title in himself, and as he had done so successfully, the judgment in his favor operated as an estoppel between the same parties. The court in its opinion in this case noted a distinction between the facts before them and those presented in *Warfield & Mactier v. Walter*, 11 Gill & J. 83, where, the pleas being the same, the verdict and judgment were against the plaintiff. The court, referring to that case, said: "Had the verdict and judgment been for the plaintiffs, the judgment would have been conclusive, and operated as an estoppel, because the title of the plaintiffs was the matter in issue. But being adverse to the plaintiffs, the verdict only went to the extent of declaring that the title was not in them, and could not be regarded as declaring title in any one else." In the case at bar, however, where there was evidence of the actual possession of the property of Knabe & Co. at the time of the suit, the verdict and judgment might have been made upon the finding of the nonpossession of the defendant at the time of the bringing of the suit. The judgment therefore could not operate as an estoppel in this suit, whereby the parties are prevented from showing that there was no title in the defendant, Tunis. In *Whitehurst v. Rogers*, 38 Md. 518, this court announced the same doctrine. It was then said: "It is not necessary to the conclusiveness of the former judgment that issue should have been taken on the precise point which is controverted in the second trial. It is sufficient if that point was essential to the former verdict." We have seen that in the former case the determination of the title was not essential to the finding of the judgment and verdict that were rendered, and, not being conclusive, evidence tending to prove that Tunis had obtained the possession of the lumber by fraud was properly admitted.

The fourth exception is to the admissibility in evidence of certain reports by the Dun and Bradstreet Mercantile Agencies. Evidence had gone to the jury, showing that the lumber in dispute had belonged to William E. Uptegrove & Bros., a corporation; that

this company had agreed to sell it to Tunis, and thereafter, before the purchase money had been paid, Tunis sold a large part of it to William Knabe & Co.; that after Tunis began its delivery the Knabes refused to accept on the ground that it did not come up to the requirements of their contract with Tunis, but agreed to permit the balance to be stored in their yard, for their mutual convenience; and that Tunis having made default in his payment to Uptegrove, the latter, upon inquiry, found that Tunis had imposed upon him by false representations, and therefore elected to rescind the sale and resume the possession of that part of the lumber which had not been sent to the yard of the Knabes. For the purpose of showing some of the false representations by which Uptegrove & Co. had been induced to sell to Tunis, the defendant offered in evidence certain statements of Tunis made to Uptegrove by himself, or through his agent, Welch, and that Uptegrove himself prior to the sale had examined the reports of these mercantile agencies, and that the representations contained in these reports, as to the financial condition of Tunis, together with the false statements made by Tunis, by himself or through his agents, constitute the inducement which led Uptegrove to extend credit to Tunis, who at that time was hopelessly insolvent, with no expectations of paying his creditors. The offer and report of the mercantile agency was made, and admitted by the court, "subject to the proof of its authenticity"; and subsequently, by the granting of the fourth prayer of the defendant, the jury were directed "to exclude from their consideration all of the reports furnished by R. G. Dun & Co. to Uptegrove, outside of the matters testified to by said Robert W. Brown, as stated to him by said Tunis, or obtained from the books of said Tunis by his deduction." The witness Brown, who made the statements contained in the reports, testified that in May, 1900, he called on Tunis for a statement of his financial condition, and was told by him "that it was as good as it was when he made the previous statement [that is, the statement of July, 1899], and that the figures in that would practically be good." The witness reported this, and the statement was given out by the agency. In the spring of 1900 he had made a statement of his affairs as of 1899 (July 1st) from the books shown to the witness by Tunis in response to a request to be informed as to his condition. It therefore appears that the reports as to Tunis' affairs came directly from him. The admissibility of these reports was especially excepted to for the following reasons: Because (1) they had not been sufficiently authenticated; (2) there was no evidence that they were correct at the time of the purchase of the lumber by Tunis, about June, 1900; (3) no evidence that Uptegrove & Co. relied on the truth of said reports; (4) no evidence that such reports were made by

Tunis with designs of imposing and cheating Uptegrove or the public generally in respect to the sale of said lumber. After what has already been said, the first of these reasons requires no further attention. The fourth reason raises the question as to the motives of Tunis in issuing the statements that may reasonably be imputed to him in the absence of any express proof on the subject. In *Blum's Case*, 94 Md. 388, 51 Atl. 26, 58 L. R. A. 322, where the defendants were indicted for obtaining goods on false pretenses, representations, etc., exception was taken to the admission of the testimony of an expert accountant, to testify as to the details of a statement of the financial condition of the traverser made by one of the firm of Blum Bros. & Harris to a reporter of R. G. Dun & Co., and by him reduced to writing, and examined by the accountant in connection with the books. The court ruled this evidence out, because it had not been so clearly established that the statements to the agency were made with the fraudulent purpose to use such agency as an instrument in accomplishing a fraud upon his vendor or some other dealer as to justify the court "in saying that a fraud was perpetrated through the medium of the agency of a character sufficient to justify criminal prosecution therefor." To support this view the case of *Dieckenhoff v. Brown*, 64 Md. xiii, 2 Atl. 723, is cited, wherein the rule laid down in *Victor v. Renlien*, 33 Hun, 549, is approved—that, "when the only representations made are those furnished to sellers by these agencies, it must be clearly shown that the accused buyer made the statements to the agency with the fraudulent intent to use such agency as an instrument in accomplishing a fraud upon his vendor or some other dealer." In the case at bar there were other representations, alleged to be false, made by Tunis, which, it is contended, contributed to induce Uptegrove to buy the lumber and extend a credit to Tunis. So that the question here is not whether, standing alone, false representations to such agencies are sufficient to establish a fraud of a criminal character, but whether such reports can be offered for the purpose of showing, in connection with other representations, fraud and deceit in the purchase of merchandise on the part of the buyer, of such a character that the seller may avoid the transaction. Now, for the sake of argument, assuming that the reports were false, and were known to be so by Tunis, they must have been made to the agency that they might be communicated to others and be believed by them. They were made to a concern whose business, it is well known, is to disseminate among business men the character and standing of all other men of business with whom they may have transactions that require credit and capital. A statement to them, to be disseminated broadcast, if known to be false at the time it was made, could only be made for the purpose of se-

curing a larger credit than would have been possible if only the strict truth had been given. This view, which is apparently reasonable, has been adopted by most of the courts of the country. In the case of *Eaton, Cole & Burnham Co. v. Avery*, 83 N. Y. 33, 38 Am. Rep. 389 (a leading case), the court said: "It is not essential that a representation should be addressed directly to the party who seeks the remedy for having been deceived and defrauded by means thereof.

* * * A person furnishing information to such an agency can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it for their guidance in giving credit to the parties; and if a merchant furnishes to such an agency a willfully false statement of his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows he is not justly entitled, and thus to defraud whoever may resort to the agency, and, in reliance upon the false information there booked, extend a credit to him, there is no reason why his liability to any party defrauded by this means should not be the same as if he had made the false representation directly to the party injured." Of similar import are the following cases: *Soper Lumber Co. v. Halsted & Harmount Co.*, 73 Conn. 547, 48 Atl. 425; *Genesee Co. Savings Bank v. Barge Co.*, 52 Mich. 164, 17 N. W. 790, 18 N. W. 206; *In re Epstein* (D. C.) 109 Fed. 874; *P. Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 402; *Nicholls v. McShane* (Colo.) 64 Pac. 375.

The appellants offered seven prayers, all of which were rejected, and the appellee six, all of which were granted. The first and second prayers of the appellants instructed the jury that the letter of Tunis and the reply of Knabe & Co. constituted the contract for the sale of the lumber, and was therefore bad, for reasons already stated. The second prayer is open to the additional objection that it ignores all the evidence respecting the manner in which the Knabes became possessed of the lumber, and Uptegrove's relation to it. The third, seventh, and fifth prayers were defective, in that the jury is told that the suit in replevin established conclusively that the title to the lumber was not in Uptegrove. The fourth prayer was properly rejected. There was evidence in the cause tending to show that Knabe had refused to accept the lumber because it was not of satisfactory quality, and had merely permitted the lumber to be put in his yard for the mutual convenience of the parties; and, in view of this, it became and was a matter of law, upon all the testimony in the case, whether there had been an acceptance by the Knabes. To instruct the jury, therefore, to find an acceptance, without informing them what facts amounted to an acceptance, was calculated to mislead them, and therefore was faulty. The prayer practically denies that Knabe &

Co. had the power to reject all or any part of the lumber, if, when part of it had been delivered, it was found it did not measure up to the standard fixed by the contract. The jury should have been told explicitly what the legal effect would be if they found that Knabe had rejected or attempted to reject the lumber after part of it had been received. The sixth prayer is open to the same objection, and in addition, that it instructed the jury there was no evidence that the purchase of the lumber was fraudulent on the part of Tunis. The modification added by the court to the eighth prayer was proper.

We find no error in the granting of the defendant's prayers. Without going over these prayers in detail, we may say that they put the case fairly before the jury. By the first the jury were told that the plaintiffs could not recover on the special count, which set up a contract by letter, if they found the contract was "not in writing"; thus leaving open the question of their right of recovery upon the common counts. The second, fourth, and fifth (marked sixth in the record), as granted, were in accordance with the views already here expressed. The third prayer is in accordance with instructions approved in *Peters v. Hilles*, 48 Md. 507, and other cases in this court.

Finding no error, the judgment will be affirmed. Judgment affirmed.

(97 Md. 534)

NORRIS v. BAUMGARDNER.

(Court of Appeals of Maryland. June 30, 1903.)

GUARDIAN—ORDER MAKING APPOINTMENT—CONCLUSIVENESS—COLLECTION BY GUARDIAN OF WARD'S ESTATE—EVIDENCE—SUFFICIENCY.

1. A decree of the circuit court affirming the appointment of a particular person as guardian of an infant, and dismissing the petition of a third person praying for the vacation of the appointment, was a final decree, and conclusive as against the third person, who failed to exercise the right of appeal, in a suit by the guardian to compel the third person to pay money collected as guardian.

2. In a suit by a guardian, duly appointed, to compel defendant to pay to him money alleged to have been collected as guardian, it appeared that a mutual benefit society had paid to defendant, as guardian of the infant, a certain sum, which was due the infant as beneficiary of a deceased brother. The money was paid by check, which was deposited in a bank to the credit of defendant, "guardian of" the infant. *Held* to justify a decree directing defendant to pay to the guardian the fund so received.

Appeal from Circuit Court, Frederick County, in Equity; John C. Motter, Judge.

Suit by Charles Baumgardner, as guardian of Charles H. Norris, an infant, against Mollie L. Norris, to compel defendant to pay to plaintiff, as guardian, a sum collected by her as guardian of the infant. From a decree in favor of plaintiff, defendant appeals. Affirmed.

Argued before FOWLER, BRISCOE, BOYD, PAGE, and SCHMUCKER, JJ.

Jacob Rohrback and J. E. R. Wood, for appellant. J. F. R. Heagey and Albert S. Brown, for appellee.

BRISCOE, J. This is an appeal from an order of the Circuit Court of Frederick county, sitting in equity, passed on the 3d day of November, 1902, directing the appellant to bring into court the sum of \$462.40, to be paid unto the appellee, Charles Baumgardner, guardian to Charles H. Norris, of Frederick county. The facts out of which the controversy arose, briefly stated, are these: On the 17th of May, 1900, the appellee, Charles Baumgardner, the grandfather of the infant Norris, filed an *ex parte* petition in the circuit court for Frederick county, sitting in equity, asking his appointment as guardian, and on the same day an order was passed making the appointment. The order directed that the guardian file an approved bond in the penalty of \$1,000; that he receive and collect all money due the infant until he arrives at age, and deposit the same in the Citizens' National Bank of Frederick, and to apply the interest to the support, education, and maintenance of the infant, and to pay the principal sum to him when he attained his majority. It appears that on June 4, 1900, the appellant filed a petition in the circuit court for Frederick county, wherein it is stated that since the appointment of the appellee she has been appointed guardian to said infant by the orphans' court of Frederick county, and on the 28th of May, 1900, filed an approved bond; and the petition prayed that the court pass an order rescinding and vacating the previous order appointing the appellee. On June 6, 1900, the appellee answered the petition, and upon a hearing on petition, answer, and exhibits, the circuit court of Frederick county on the 16th day of July, 1900, passed an order dismissing this petition, and affirming the appointment of the appellee as guardian. There was no appeal from this last-named order, nor from the original order of the 17th of May, 1900, appointing the appellee. Subsequently, on the 25th of July, 1900, the appellee filed a petition in the same cause, alleging, in substance, that the appellant had collected from the Junior Order of United Mechanics of the City of Washington the sum of \$500, as the guardian of the infant Norris, and retains and refuses to pay to him the fund so collected, and asking that she be required to appear and show cause why the money should not be paid as set out and claimed in the petition. In answer to this petition the appellant, amongst other things, relies upon the following defense: That the Thomas Jefferson Council paid the sum of \$25 to her as the mother of said deceased, as provided by the by-laws of said order. That the said council, through its representative, Joseph E. Toone, has paid the following

items (being amounts due for the last sickness and death of said deceased, Howard L. Norris, namely): To F. Schroeder, the sum of \$125; to Charles Hermann, the sum of \$7.45; to Mt. Olivet Cemetery, the sum of \$52.25; to B. Rosenour & Sons, the sum of \$16; to E. Sponseller, the sum of \$30—in addition to which the said council, through its representatives, has designated that it desires the payment of the sum of \$52, due to Dr. S. S. Maynard for medical attention to said deceased during his last illness. That the said Mollie Norris has paid out the sum of \$12, prior to the time of the death of said Howard L. Norris, to keep his dues payable to said council, and which payments alone preserved said fund of \$500, and that the said Mollie L. Norris has incurred in the orphans' court for Frederick county, Md., the costs to this date, in amount \$39.35, and that the balance in amount, \$231.70, subject to her payment of said orphans' court costs and the account of Dr. S. S. Maynard, she has in her hands; the same having been paid into her hands as mother of the said Howard L. Norris by said Thomas Jefferson Council; the same not having been paid to her as the guardian of said infant. The case was heard upon petition, answer, and proof; and from a decree of the circuit court of Frederick county, dated on the 3d day of November, 1902, directing that the appellant bring into court the sum of \$462.40, to be paid over to Charles Baumgardner, guardian, this appeal has been taken.

As the decree of the 16th of July, 1900, of the circuit court for Frederick county, appointing the appellee guardian, was a final decree, and the appellant, who was a party to the cause wherein the decree was passed, had a right to appeal, and failed to exercise this right, the matters adjudicated thereby must be considered as conclusively settled, and are not before us for examination on this appeal. In *Strike v. McDonald et al.*, 2 H. & G. 216, it is said: "There is no principle in relation to the administration of justice which it is more important to preserve or more necessary to adhere to than there must somewhere be an end to litigation. A matter which has been once solemnly decided ought not, nor cannot, be reheard and re-adjudicated." Controversy must have an end, or society could have no peace. Errors of an inferior tribunal may be corrected by a superior, and even the same court, under certain circumstances, will correct its own mistake, by motion, petition, or bill of review. Hence whatever has been heretofore determined in this cause must now be considered as finally settled, and in every respect unalterable, except by bill of review, appeal, or in the regular course of law.

The sole question, then, to be considered by the court, is the correctness of the court's order, passed on the 3d day of November, 1902, directing the appellant to pay over to the appellee the sum of \$462.40, as the prop-

erty of the infant Norris. There can be but one answer to this question, and that is the fund in controversy was the property of the infant. It is perfectly obvious from the testimony in the case that the sum of \$500 was paid by Thomas Jefferson Council No. 12, Junior Order of American Mechanics, to the appellant, as guardian; being a fund due the infant as beneficiary of a deceased brother. According to the uncontradicted testimony in the case, the money was paid to her by check, and was deposited in the Farmers' & Mechanics' Bank of Frederick to the credit of "Mollie L. Norris, Guardian of George Howard Norris."

There was no error in the order of court directing this fund to be paid to the appellee, and, for the reasons given, the order of November 3, 1902, will be affirmed. Order affirmed, with costs.

(97 Md. 396)

RICE v. DONALD et al.

(Court of Appeals of Maryland. June 30, 1903.)

PARTITION—DECREE—ENROLLMENT—MODIFICATION—INTERVENING PETITION—DEMURRER—LACHES.

1. Where complainant was a party to a partition suit in which it was determined that the property sought to be partitioned was the property of complainant's mother, and it was directed that the same should be sold, and the proceeds divided, under the court's direction, among the mother's heirs, complainant, after enrollment of such decree, containing no reservation of equities, could not contest the same by exceptions to the auditor's account or by petition, on the ground that the property in fact belonged to his deceased father, and that he was entitled to the same as his father's only heir.

2. In a suit for partition of land alleged to belong to petitioner's mother, the petitioner was not entitled to intervene and claim the land as administrator of his father's estate, on the ground that his mother had converted his father's real and personal property to her own use, and ultimately invested a portion thereof in the land sought to be partitioned; such issues not being within the scope of the bill.

3. In a suit for partition of land alleged to belong to petitioner's mother, petitioner, who held no lien on the land, was not entitled to intervene and claim the land as a general creditor of his mother.

4. Where, in a suit for partition of land claimed to belong to petitioner's mother, petitioner intervened and claimed the land as a part of the proceeds of his father's estate, but the petition did not describe or identify the real or personal property owned by petitioner's father at his death, or state the times, amounts, or circumstances of the investments by which it charged that a portion of the proceeds of the property was finally converted by petitioner's mother and applied to the purchase of the land sold, but merely alleged that the widow wrongfully sold her husband's real and personal estate after his death, and converted the same to her own use, it was demurrable for indefiniteness.

5. Where, in a suit for partition of land alleged to belong to petitioner's mother, petitioner first discovered during the taking of the testimony that the land in fact was purchased with money belonging to his father's estate, but

thereafter petitioner made no attempt to assert his rights as his father's sole heir until after the decree had been passed and enrolled, he was barred by laches from subsequently maintaining an intervening petition claiming the land as his father's heir.

Appeal from Circuit Court, Frederick County, in Equity; John C. Motter, Judge.

Action by James B. Rice, as administrator, etc., against Margaret Donald and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PHAROE, SCHMUCKER, and JONES, JJ.

S. A. Lewis, P. F. Pampel, and A. S. Brown, for appellant. Arthur D. Willard and D. Princeton Buckey, for appellees.

SCHMUCKER, J. The appeal in this case is from an order of the circuit court for Frederick county, in equity, sustaining a demurrer to and dismissing a petition of the appellant, which sought, in effect, to revise a final decree of the court after its enrollment. The bill was filed by several of the heirs at law of the late Margaret Donald against the remainder of her heirs for a sale of a certain tract of land of which she died seised, for purposes of partition. The Fredericktown Savings Institution, which held a mortgage on the property, was also made a defendant to the suit. The bill alleged that Margaret Donald had acquired the land in question by a conveyance to her from one Edward Duval in 1879, and held it until March 26, 1899, when she died intestate, seised and possessed of it; that at the time of her death her heirs at law consisted of James Rice, who was an adult son by her former husband, Stephen Rice, and the other persons, except the bank, who were made parties to the suit, and were grouped in the bill according to their respective stocks of descent; and that the bank held a mortgage for \$3,500 on the land. The bill also alleged that the land was not susceptible of division in kind, and that it would be to the interest and advantage of all parties concerned to have it sold and the proceeds divided. The defendants answered the bill, James Rice admitting in his answer the allegations of the bill, and consenting to the passage of a decree as therein prayed, reserving such rights against the proceeds of sale as he then had in the land. There was some controversy between the husband, James Donald, and the heirs at law, over their respective interests in the property, the particulars of which do not appear in the record; but on January 18, 1902, a final decree was passed, directing a sale of the land, and a distribution of the proceeds under the direction of the court. After the land had been sold under the decree, and the sale ratified, the auditor, on July 29, 1902, returned an account distributing the net balance of the proceeds of sale, after deducting the costs of suit and the amount of the mortgage, among the surviving

husband and heirs at law of the intestate. James Rice, sometimes called James B. Rice in the proceedings, the adult son of the intestate, filed exceptions in his own right, and as administrator of the estate of his father, Stephen Rice, to the distribution of the net balance made by the auditor; stating as the ground of his exception that the funds in court, arising from the sale of land alleged to be the property of his mother, Margaret Donald, were in fact part of the property of which his father, Stephen Rice, died seised and possessed, and should have been audited to him as the sole heir at law of his father. No testimony was taken in support of these exceptions. On August 18, 1902, six months after the enrollment of the decree, James B. Rice also filed a petition in the case in his capacity of administrator, alleging that his father, Stephen Rice, had died intestate in 1864, seised and possessed of real and personal property, and leaving surviving him his widow, Margaret, and the petitioner, as his only child and heir at law; that no letters of administration were taken out on his estate, but that his widow, Margaret (afterwards Margaret Donald), without warrant or authority, sold and disposed of his entire estate, and converted it into money, and applied it to her own use, without ever making any return or report of it to any court; that she "invested part of the said estate in a house and lot of ground on North Eutaw street, in Baltimore City, and after her marriage with James Donald proceeded, by loans and mesne conveyances, to sell and reinvest a part of said estate in Baltimore county, * * * and that a part or portion thereof she invested in several houses and lots of ground on Mount street, in said city of Baltimore, which said property was, by an exchange and sale, sold, and the proceeds of such sale invested in the real estate mentioned and described in these proceedings," and sold under the decree, and the proceeds brought into court for distribution; that the petitioner was quite young at the death of his father, and, reposing trust and confidence in his mother, he never knew until the taking of testimony in the present case that his father left any property; that as soon as practicable after discovering these facts he took out letters of administration on his father's estate; and that he is, as such administrator, entitled to have distributed to him the entire net proceeds of the land sold under the decree in this case. The prayer of the petition is that the petitioner may be made a party to the cause as administrator, and that the trustees may be directed to pay to him the net proceeds of sale, or such part thereof as the court may find him entitled to, and for further relief. Certain of the parties to the suit demurred to this petition, and on December 16, 1902, the court below passed the order appealed from, overruling the exceptions, sustaining the demurrer, and dismissing the petition.

James B. Rice, in the exceptions filed in his individual capacity, claims the entire net proceeds of sale in his own right, as the only child and heir of his father, while in the petition and exceptions filed by him as administrator of his father's estate he claims the same fund as assets of that estate; but, as he nowhere suggests that his father left any creditors, the result is that the claim in both forms must, in equity, be regarded as made in the petitioner's own interest. We will, however, consider his attitude to the case in both capacities in which he appears upon the record. His rights under the exceptions filed in his individual capacity must be tested from the standpoint of an original party to the suit after the passage and enrollment of the final decree for the sale of the land for the purpose of partition. That decree, construed, as it should be, with reference to the issues presented by the pleadings, determined, as between the parties to the suit, that Margaret Donald died intestate, seised of the land described in the bill, and that her heirs at law were the persons named as such in the bill, and that their relationship to each other was as therein stated, and that the land should be sold, and the proceeds divided, under the court's direction, among the persons thus ascertained to be her heirs at law, according to their respective interests therein. *Pfeltz v. Pfeltz*, 1 Md. Ch. 455; *Brown v. Thomas*, 46 Md. 640. After the decree was enrolled, no party to the case could, by exceptions to the auditor's account, or by petition, or any similar proceeding, vary or alter its effect. "After a decree has been enrolled the court will not entertain any application to vary it, except upon consent of all parties, or in respect of matters which are of course." *Lovejoy v. Irelan*, 19 Md. 57. It is then, as a general rule, no longer subject to be called in question by mere petition. "Being enrolled it must be allowed to stand for what it purports to be on its face, until revised or reversed in a more solemn and formal manner than can be done on petition." *Burch v. Scott*, 1 Gill & J. 393; *Pfeltz v. Pfeltz*, 1 Md. Ch. 455. The only proper mode recognized by law for reversing or annulling a decree or decretal order after enrollment, in the absence of surprise or irregularity in obtaining it, are by bill of review for errors apparent on the face of the proceedings, or for some new matter discovered since the order or decree passed, or by original bill for fraud. *Tomlinson v. McKaig*, 5 Gill, 256; *Thruston v. Devecmon*, 30 Md. 217; *Downes v. Friel*, 57 Md. 535; *Brown v. Thomas*, 46 Md. 640. In *Pfeltz v. Pfeltz*, supra, after a decree for the sale of land for the purposes of partition among heirs at law had been passed and enrolled, and the land sold, one of the defendants filed a petition in the case setting up an exclusive right in himself and his children to the whole proceeds of sale, upon the ground that his father

had in his lifetime conveyed the land in trust for the petitioner and his children. The court held that the decree could not be vacated in that manner, and dismissed the petition; saying in the opinion: "It may be said, however, that this is not an application to vacate the decree, but to give the fruits of it a different direction from that which, upon the proceedings as they stood at the time when it was passed, they would take; that is, instead of distributing the proceeds of sale among the parties according to their rights and interests as displayed upon the face of the proceedings, the whole amount shall be given to one of those parties for life, with remainder to persons who were not parties to the decree. But the decree contained no reservation of equities or for further directions, and was, of course, final upon the rights of the parties; and the court therefore in this way had no more power to change the rights thus settled than it would have to open the enrollment and vacate the decree.

Nor do the allegations of the petition show that the petitioner, in his capacity of administrator of his father's estate, had any such interest in the land sold, or the proceeds of its sale, as would entitle him to intervene in this litigation. He does not claim under any of the parties to the suit, nor does he show himself entitled to a lien upon the land sold. On the contrary, he sets up and relies upon distinct matters not within the scope of the bill, but hostile to, and destructive of its title of, all parties to the proceeding. Assuming the truth of the indefinite allegations of his petition, charging his mother with having converted his father's real and personal property to her own use after his death, and with having ultimately invested a portion thereof in the purchase of the land sold under the decree in this case, the result, at most, would be that he would have been entitled to maintain an action against her for the conversion of such portion of her husband's estate as consisted of personalty, or, if he could definitely trace the proceeds of any such personalty into the purchase of the land in question, he might, if not debarred by laches, have filed an original bill asking to have the land while still in her possession charged with a resulting trust in his favor to the extent of the proceeds of the converted personalty entering into its purchase. But for the reasons which we have already mentioned, no such claim could be asserted by a mere petition filed in the present case after final decree. As a general creditor of his mother, without a lien upon the land, it is clearly settled that he has no standing to intervene in this case. *Postal Tel. Co. v. Snowden*, 68 Md. 118, 123, 12 Atl. 549.

Furthermore, the appellant's petition is demurrable because of the vague and indefinite character of its substantial allegations. It does not describe or identify the real or per-

sonal property which it avers that the petitioner's father owned at the time of his death, nor state the times, amounts, or circumstances of the supposed transmigrations of investment by which it charges that a portion of the proceeds of said property was finally applied by the widow to the purchase of the land sold under the decree in this case. The allegation that the widow wrongfully sold her husband's real and personal estate after his death, and converted the proceeds to her own use, is self-contradictory, because she could not have given any title to his real estate or to his personal estate other than those articles, if any thereof, the title to which passed by delivery. This court has repeatedly held that allegations of transactions as fraudulent in their character as those by means of which it is charged that the widow acquired title to the land sold under this decree cannot be made in a general or indefinite way, but must be specific in their character, as courts of equity derive their jurisdiction from the facts alleged in the bill, and not from the terms used in setting out the facts. *Grove v. Rentch*, 26 Md. 377; *Townshend v. Duncan*, 2 Bland, 45; *Wenstrom Co. v. Purnell*, 75 Md. 113, 120, 23 Atl. 134.

We also think that the allegations of the petition show the appellant to have been guilty of laches in asserting his claim. He alleges that his father, Stephen Rice, died in 1864—almost 40 years ago—and does not allege that he ever made any inquiry or investigation since his father's death to discover what estate, if any, he owned at the time of his death. He avers that he was but 2 years old when his father died, and that he reposed trust and confidence in his mother, and did not know until the taking of the testimony in the present case that his father died possessed of any property. He does not, however, assert that his mother concealed from him the fact of the ownership of property by his father; nor does he aver at what time or times she sold his father's property, or made the alleged conversion of the proceeds to her own use, or what was his age at the times of such alleged sales and conversions. Admitting that he first discovered the facts during the taking of the testimony in the present case, he remained silent and inactive until after the decree had been passed and become enrolled, although he must have been aware of the progress of the case, as he had been a party to it in his own right from its first institution, and was entitled, under the terms of the decree, to share in the proceeds of the sale made in pursuance thereof. He has not shown such diligence in asserting his rights as to entitle him to the favorable consideration of a court of equity, even if he had otherwise shown himself entitled to relief.

For the several reasons which we have mentioned, the order appealed from must be affirmed. Order affirmed, with costs.

(97 Md. 319)

E. J. CODD CO. v. PARKER.

(Court of Appeals of Maryland. June 29, 1903.)

BILL OF EXCEPTIONS—PLEADING—AFFIDAVIT OF DEFENSE—AGENCY—SALE TO AGENT—UNDISCLOSED PRINCIPAL—ACTION AGAINST PRINCIPAL—RES JUDICATA.

1. Where a bill of exceptions is not signed within 30 days from rendition of the verdict, the questions thereby presented cannot be reviewed on appeal.

2. Baltimore City Charter, § 312, provides that, unless the plea contains a good defense, and unless some one in defendant's behalf shall verify under oath each plea, and the amount of plaintiff's demand admitted to be due, and the amount disputed, etc., the plaintiff shall be entitled to judgment. *Held*, that where an affidavit stated that every plea was true, and all of plaintiff's claim disputed, it was sufficient, though it did not state what was due, and also omitted to say that defendant would be able to produce evidence to sustain the part disputed.

3. Where a seller of goods, after discovering the purchaser's principal, elects to sue the principal, and does so to final judgment, he cannot thereafter sue the agent.

4. Where, in an action for goods sold, defendant relies as a defense on the adjudication in a suit by plaintiff against the defendant's principal for the price of the same goods, such defense must be specially pleaded.

Appeal from Superior Court of Baltimore City; Charles E. Phelps, Judge.

Action by the E. J. Codd Company of Baltimore City against Walter W. Parker. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, and SCHMUCKER, JJ.

W. Irvine Cross, John L. G. Lee, and F. B. Smith, for appellant. Madison Marine and Parker & Staum, for appellee.

FOWLER, J. This is a suit by the E. J. Codd Company, of Baltimore City, on an open account against Walter W. Parker. The narr. contains the common counts, and to it was annexed the affidavit required by the practice act of Baltimore City (New Charter, § 313). The defendant pleaded the general issue pleas, and after the demurrer to his third, which was a special plea, was sustained, he filed an additional plea to the effect that he acted as agent of the Modified & Sanitary Milk Company in purchasing the goods sued for, and that the plaintiff had elected to sue that company for said goods, and had recovered judgment against it therefor. This plea was also demurred to, but the demurrer was overruled. Upon the general issue pleas, therefore, and upon this additional plea, the case was tried.

It appears that on the 26th March, 1902, a motion made by the plaintiff for judgment by default for want of sufficient affidavit to the pleas was overruled. There was a judgment in favor of the defendant, and this is the plaintiff's appeal.

§ 3. See Principal and Agent, vol. 48, Cent. Dig. § 701.

At the trial below, the plaintiff offered one prayer, and the defendant two. The defendant's second was the only prayer granted. To this ruling the plaintiff excepted. But, inasmuch as the bill of exceptions was not signed within 30 days from the rendition of the verdict, the questions thereby presented cannot be considered on this appeal. This result, however, is of no importance, because the questions presented by the exception are before us on the demurrer to the additional plea. The two questions, therefore, which we are to consider are, first, was there error in overruling the plaintiff's motion for judgment on the ground that the affidavit to his pleas was defective? and, second, was there any reversible error committed in overruling the demurrer to the additional plea?

1. If the first question can be said to be properly before us, we think there can be no difficulty in its solution. In the first place, what is the language of the affidavit attached to the pleas? It is "that every plea so pleaded by the defendant is true, and all of the plaintiff's alleged claim is disputed, and that the affiant believes the defendant will be able at the trial to produce sufficient evidence to support the said pleas, and that he is advised by counsel to file the said pleas." Following this affidavit, is a certificate by counsel that he so advised the defendant making the oath. The objection of the plaintiff to this affidavit is that, although it alleges that the pleas are true, it fails to state not only what is due and owing, but it also omits to say that the defendant will be able at the trial to produce sufficient evidence to sustain the part disputed. It is difficult, however, to understand how the defendant could make and swear to such statements when he disputes the whole of the plaintiff's claim. The case of *Adler v. Crook*, 68 Md. 495, 13 Atl. 153, is conclusive upon this question, if any authority is needed. In that case this court was considering and construing the same provision which is now embodied in section 312 of the new charter of Baltimore City (Acts 1898, p. 392, c. 123), namely, section 171 of the old charter, as amended by Acts 1886, p. 308, c. 184. It provides that although the defendant may have pleaded, unless such plea contains a good defense, and unless the defendant, or some one in his behalf, shall under oath state that every plea so pleaded by the defendant is true, and shall further state the amount of the plaintiff's demand, if anything, admitted to be due or owing, and the amount disputed, etc., the plaintiff shall be entitled to judgment. This section, as now contained in the charter, is an amendment of the act of 1864, and the principal addition it makes to that act is the provision that the defendant "shall further state the amount of the plaintiff's demand, if anything, admitted to be due, and the amount disputed." Judge Stone, speaking for the court, says, in the case just cited, that the effect of this amend-

ment is that, "if the whole claim sworn to by the plaintiff is disputed, then it must be distinctly stated in his affidavit that it is disputed." This is precisely what the affidavit in this case does, and hence there was no error in overruling the motion of the defendant. The other question arises upon the demurrer to the additional plea.

2. The question is whether, having sued the principal and recovered judgment, the plaintiff can now sue the defendant, who was the agent. It was said in *Henderson v. Mayhew*, 2 Gill, 408, 41 Am. Dec. 434, that, if the principal be not known at the time of sale, when he is discovered either he or the agent may be sued, at the election of the vendor. *Mayhew v. Graham*, 4 Gill, 363. And the general principle appears to be established that where an agent contracts in his own name, without disclosing his interest, though in fact for the exclusive benefit of another person, who is afterwards discovered, the creditor may sue either, but after he has elected whom to sue, and has sued either the agent or principal to final judgment, he cannot after that sue the other, whether the first suit has been successful or not. *Poe*, Pl. § 378; *Priestly v. Fernie*, 3 Hurlstone & C. 977; *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Fowler v. Bowery Sav. Bk.*, 113 N. Y. 450, 21 N. E. 172, 4 L. R. A. 145, 10 Am. St. Rep. 478; *Lage v. Weinstein*, 35 Misc. Rep. 298, 71 N. Y. Supp. 744. There are exceptions to this general rule, but the facts here involved do not require us to consider them.

It was also suggested that the plea is bad because it sets up an estoppel which cannot be specially pleaded, but evidence of which must be adduced under the general issue plea. While this may be said of estoppel in pais (*Poe*, Pl. § 696; *Alexander v. Walter*, 8 Gill, 247, 50 Am. Dec. 688), yet it is equally true that, "where one party pleads a matter which he is estopped from setting up as against his opponent by reason of some adjudication, * * * the opponent, without traversing such allegation, and without confessing and avoiding it, may state the special facts constituting the estoppel, and plead that by reason of such estoppel the opponent ought not to be permitted to set up the matter relied on in his pleading." Section 696, *Poe*, Pl.

Thus in this case the plaintiff has in his narr. based his action on a sale of goods to the defendant, and the latter relies as a defense on the adjudication in the suit brought by the plaintiff against the defendant's principal for the same goods now sued for. This, according to the section of *Poe*, Pl., just cited, should be specially pleaded. In addition to this, the adjudication pleaded is an estoppel in record. But, apart from this view, it seems to us that the special plea here demurred to was entirely proper, for the reason that, even admitting that the facts it sets up as a defense may have been

given in evidence under the general issue, yet, inasmuch as the plea, in effect, admits the sale of the goods on which the plaintiff relies in his narr., but sets up the judgment recovered against his principal as a defense, it must be held good as a special plea. It confesses and avoids. *Keedy v. Long*, 71 Md. 383, 18 Atl. 704, 5 L. R. A. 759.

It follows the judgment must be affirmed. Judgment affirmed.

(97 Md. 317)

BOOTH v. CALLAHAN et al.

(Court of Appeals of Maryland. June 29, 1903.)

ATTACHMENT—VOUCHER—AMENDMENT—JUDICIAL DISCRETION—APPEAL.

1. In an attachment suit it was proper to permit plaintiffs to amend the voucher by adding thereto the certificate of letters testamentary granted to them, and by amending the title of the account as originally filed so as to read C. to D. and F., executors of the estate of P., instead of C. to the estate of P., deceased; Acts 1898, p. 127, c. 44, providing that the voucher in attachment may be amended the same as proceedings in other suits.

2. The allowance of the amendment, being within the discretion of the trial court, was not subject to review on appeal.

3. The order allowing the amendment was not one from which an appeal would lie; Code Pub. Gen. Laws, art. 5, § 2, providing for an appeal from any judgment or determination in an action.

Appeal from Circuit Court, Baltimore County; David Fowler, Judge.

Action by Daniel P. Callahan and others, as executors of Patrick Callahan, against David T. Callahan. From an order allowing an amendment by plaintiff of the voucher annexed to a writ of attachment, Tillie Booth, claimant to an interest in the attached property, appeals. Dismissed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, and SCHMUOKER, JJ.

John L. G. Lee, for appellant. David G. McIntosh, for appellees.

BRISCOE, J. The complaint in this case is that the circuit court of Baltimore county committed an error in allowing an amendment to certain nonresident attachment proceedings. The attachment suit was instituted in the circuit court for Harford county, but was afterwards removed for trial to the circuit court for Baltimore county. On the 17th of January, 1903, Tillie Booth, the appellant here, and the alleged claimant of an interest in the property attached, filed a motion to quash the attachment, for the reason, among others, that the voucher annexed thereto was not a sufficient cause of action. On the 2d day of March, 1903, the plaintiffs filed a petition asking leave "to amend the voucher by adding thereto the certificate of letters testamentary granted to them, and by amending the title of the account as

originally filed, so as to read David T. Callahan, to Daniel P. Callahan and Joseph F. Callahan, executors of the estate of Patrick Callahan, instead of David T. Callahan, to the estate of Patrick Callahan, deceased." And, from an order of the circuit court of Baltimore county allowing the amendment to be made as prayed, this appeal has been taken.

The sole inquiry then in the case relates to the propriety of the amendment as allowed by the court, and this, we think, is entirely free from difficulty. Now, if it be conceded that any amendment at all was necessary to perfect the proceedings in this case, there can be no question, since the act of 1898, p. 127, c. 44, that this amendment was one which could be properly allowed by the court. The act of 1898, p. 127, c. 44, provides that the affidavit, short note, declaration, voucher, pleadings, etc., and all other papers in attachment proceedings may be amended in the same manner and to the same extent as the proceedings in other suits or actions at law, so that all attachment cases may be tried on their real merits, and the purposes of justice subserved; nor shall any attachment proceedings be quashed or set aside for any defect in mere matter of form.

The amendment allowed by the court in this case, as stated, was simply to attach to the affidavit, as filed, a certificate that letters testamentary had been granted by the orphans' court of Harford county to Daniel Callahan and Joseph Callahan on the estate of Patrick Callahan, and making the account read, David T. Callahan to Daniel P. Callahan and Joseph F. Callahan, executors of the estate of Patrick Callahan, deceased, instead of to the estate of Patrick Callahan, deceased. There was no error in allowing this amendment. But, apart from this, it is quite clear that the appeal in this case is prematurely taken, and will have to be dismissed, first, because the allowance of an amendment such as the one in this case is within the discretion of the trial court, and is not the subject of review on appeal by this court (*Hearn v. Quillen*, 94 Md. 42, 50 Atl. 402); secondly, because the order or leave of court from which the appeal was taken is not a final order or determination of the court, from which an appeal will lie. Code Pub. Gen. Laws, art. 5, § 2. For these reasons the appeal will be dismissed.

Appeal dismissed, with costs.

(97 Md. 326)

BOWIE v. SMITH.

(Court of Appeals of Maryland. June 29, 1903.)

INJUNCTION—PETITION—VERIFICATION—SUFFICIENCY—HEARSAY—DISMISSAL OF BILL.

1. Where an injunction affidavit shows on its face that it is not made by a party to the cause, but by one who could not know the facts except by hearsay, unless his means of knowledge is disclosed the affidavit is insufficient.

§ 2. See Appeal and Error, vol. 2, Cent. Dig. § 706.

2. Where an injunction affidavit was insufficient because it did not appear on its face that the knowledge of affiant was not hearsay, an affidavit to a petition to amend the bill, which referred merely to the things "stated in the petition," could not cure the defect in the original affidavit.

3. A bill for an injunction to compel defendant to restore to plaintiff's land a building erected thereon by defendant and removed by him, which fails to show in what manner the building was annexed to the land, is demurrable.

4. Where a suit for an injunction is heard upon bill and exhibits, and is submitted after argument, if the bill does not present a proper case for an injunction it is proper to refuse the application and dismiss the bill.

Appeal from Circuit Court, Prince George's County, in Equity; Geo. O. Merrick, Judge.

Suit by Margaret A. Bowie against Julius K. Smith for an injunction to compel defendant to restore to plaintiff's premises a certain building moved therefrom by him. From an order refusing an injunction and dismissing the bill, complainant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, SCHMUCKER, and BOYD, JJ.

Charles H. Stanley, Joseph K. Roberts, and Alan Bowie, for appellant. Wilson & Claggett, for appellee.

BRISCOE, J. This is a bill filed on the 23th of September, 1901, by the appellant against the appellee, in the circuit court for Prince George's county, for a mandatory injunction to compel the latter to restore and remove to the premises of the former a certain building which, it is alleged, he had illegally removed therefrom. It appears that the case was heard on the bill alone, and submitted to the court below after argument by counsel of the parties, and from an order of court passed on the 4th of February, 1903, refusing the injunction and dismissing the bill, this appeal has been taken.

The bill avers that the plaintiff and a brother, Charles S. Early, and the children of a deceased brother, James A. Early, were selsed as tenants in common of a small lot of land situate in Brandywine district, in Prince George's county, the legal title to which was derived from one William H. Early, the father of the appellant; that Charles S. Early, in or about the year 1900, by a parol agreement undertook to sell the real estate here in controversy to the defendant, Julius K. Smith, who by virtue of such sale entered into possession of the land and erected thereon a frame building known as "Smith's Restaurant," and occupied the same until some time shortly before the proceedings in this case. The bill further states that on the — day of October, 1901, the appellant, by an action of ejectment in the circuit court for Prince George's county, recovered a judgment in ejectment against the defendant, Smith, for the land in question, to the extent of a one-third interest therein; that

shortly after the filing of this bill, and before the hearing of the action in ejectment, the defendant removed the building or house, by means of blocks and rollers, from the land whereon it had been erected, to the land of another, adjacent to the plaintiff's land; that the defendant, Smith, is totally insolvent, and the plaintiff is unable to have full and adequate relief without the aid of a court of equity.

The question, then, to be considered, is whether the bill and exhibits present a proper case for the relief asked. The affidavit to the bill is made by Mr. Alan Bowie, who, it appears from the brief, is one of the attorneys of record in this court for the appellant. He made oath "that the matters and things set forth in the above petition are true, to the best of his knowledge and belief." It appears from the record that Messrs. Stanley and Roberts were the attorneys who filed the original bill on behalf of the plaintiff, but, even if it be assumed that Mr. Bowie was an attorney of record in the case below at the time of the filing of the original bill, there can be no question that the bill was defective for the want of a proper affidavit.

In the case of *Fowble v. Kemp*, 92 Md. 640, 48 Atl. 379, this court held, in reviewing the rule as to the verification of bills of complaint filed in equity for injunctions, that when the affidavit on its face shows, as this one does, that it is made, not by a party to the cause, but by a person who could not know the facts except by hearsay, unless his means of knowing them in such a way as to authorize him to testify be disclosed, a court has no right to assume that his knowledge is personal rather than hearsay, if it may be either the one or the other. If it be hearsay, it is not sufficient to verify a bill for an injunction. If his knowledge be personal, it ought to appear that it is. In the recent case of *Moffat v. The County Commissioners of Calvert County* (decided at the January term of this court) 96 Md. —, 54 Atl. 960, where the affidavit to a bill of complaint was made by an agent and attorney in fact, and where the affidavit was in the identical language as the one here, it was held to be insufficient to support the allegations of the bill. Nor would the affidavit made by Mr. Bowie, as one of the attorneys for the plaintiff, to the petition to amend the original bill of complaint filed on the 25th of April, 1902, alter or cure the defective affidavit to the original bill, even should we concede this to be a valid affidavit. It was only the matters and things "stated in the petition to amend" that were embraced in that affidavit, and they sufficiently appeared from a certified copy of the docket entries of the judgment in ejectment in the circuit court for Prince George's county. It is well settled that "the verification of the bill must extend to all the material facts upon which a right to the injunction rests, and must be direct and

positive." While the granting or refusing of an injunction is always a matter within the sound discretion of the court, yet it will never be granted when it will operate unjustly. It is well established that the jurisdiction to interfere is purely equitable, and it must be governed by equitable principles.

The bill in this case fails to disclose whether the building in question was so annexed to the land, at the time of its erection, as to become a fixture or part of the real estate, or whether it was distinct from the land. There are modes by which a structure may rest upon land which would preclude the inference that it was intended to be a part of the real estate. The bill simply states that the appellee entered into possession of the land and erected upon it a frame building known as "Smith's Restaurant," and removed the building by blocks and rollers.

The case of *Dorsey v. Hagerstown Bank*, 17 Md. 408, relied upon by the appellant, is entirely unlike this. In that case the cause was heard upon a motion to dissolve an injunction upon bill and answer, and it was held that, as the case was not set down for final hearing, but simply on a motion to dissolve the injunction, it was irregular to dismiss the bill, which ought to have been retained, and the complainants allowed to proceed with the cause to final hearing. The case at bar was heard upon bill and exhibits upon an application for an injunction, and was submitted to the court after argument by counsel for the respective parties. An opportunity was given the parties to be heard and the injunction refused and the bill dismissed.

If the bill of complaint did not present a proper case for an injunction, the court was clearly right in refusing the application and dismissing the bill. *Barnum v. Gordon*, 28 Md. 97; *Bonaparte v. Balto. Hampden & Lake Roland R. Co.*, 75 Md. 340, 23 Atl. 784; *Chesapeake & P. Telephone Co. v. Balto. City*, 89 Md. 708, 43 Atl. 784, 44 Atl. 1033.

For the reasons given, the order refusing the injunction and dismissing the bill will be affirmed. Order affirmed, with costs.

(97 Md. 483)

NORTHERN CENT. RY. CO. v. McMAHON.

(Court of Appeals of Maryland. June 30, 1903.)

RAILROADS—NEGLIGENCE—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

1. Where a person about to cross a railroad track with his team could see along the track in a southerly direction for a distance of 500 feet from the time that he was within 19 feet of the track, but, in an action for injuries owing to his team having been run into by a locomotive coming from a southerly direction, he testified that he did not see the engine until his horses' fore feet were on the track, he was guilty of contributory negligence.

2. In an action against a railroad for injuries sustained by one guilty of contributory negli-

gence at a railroad crossing, a question as to defendant's negligence cannot be submitted to the jury, where there is no evidence that those in charge of the locomotive saw plaintiff in time to avoid the accident.

Appeal from Circuit Court, Harford County; James D. Watters, Judge.

Action by George McMahon against the Northern Central Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, and SCHMUCKER, JJ.

Charles H. Carter, for appellant. John S. Enson and S. A. Williams, for appellee.

PAGE, J. At the trial of this cause, the appellant offered four prayers, of which two were granted, and two rejected. The only questions arising upon this record are those presented by the rulings of the court in rejecting the third and fourth. By the third prayer the court was asked to instruct the jury that there was no evidence from which they could find that any of the employes of the defendant saw the plaintiff in time to avoid the collision, and, by the fourth, that from the uncontradicted evidence in the cause the plaintiff directly contributed, by his own negligence, to the injuries complained of.

The facts of the case are substantially as follows: The accident happened on the defendant's road, at the crossing of the Ruxton road (a public road) over the tracks of the defendant at Rockland Station. The plaintiff, a young man of 25 years of age, and familiar with the railroad at that point, started on that morning with a horse and cart from his father's house to Mr. Fisher's, at Ruxton. To reach that point, his route took him along the Falls road until he reached the Ruxton road, thence along that road about 40 or 50 feet to the track. The railroad at the crossing of that road runs nearly north and south, the direction of Baltimore being to the south. A siding, starting 398 feet southerly from the crossing, runs nearly parallel to the main track, between it and the Falls road. The whistling post is 1,200 feet from the crossing. In approaching the track from the Falls road, along and over the Ruxton road, at the point of intersection of these two roads, the plaintiff had an unobstructed view southerly along the track for more than 400 feet; as he came nearer to the track his view was intercepted by a freight car that stood upon the siding; after passing that there was a space of 12 feet between the car and the station house, where he could see down the track for about 400 feet. Then the station house obstructed his vision until he came within 19 feet of the track, and from that point until he reached the track there was nothing to obstruct his view for a distance of about 500 feet. The day was cold and clear, the wind was high

¶ 1. See *Railroads*, vol. 41, Cent. Dig. § 1044.

and made some noise, and his cart "made a racket"—it had no washers. He walked on the left or near side of his horse, but was tall enough to see over it. In giving his account of the accident, he said that after turning into the Ruxton road he "walked along carefully," he "took a careful look," he saw no engine, and heard no signal. He controlled his horse by the lines in his hands. "As I drew close I came almost to a standstill. I did not stop, but held my horse up, and couldn't see no train approaching, and then urged my horse along. As I drew to the track, and my horse had his front feet over the first rail, I seen this train approaching, and there was no stopping, and the only thing to do was to go ahead. I then clucked to my horse and struck him with the line. In the meantime the horse made a sudden jump and cleared his hind feet and me from the track, and by that time the car about struck the cart and demolished it clean up the track."

From this statement it is clear the train must have reached the crossing in an exceedingly short period of time after the feet of the horse were over the rail, and it had then been in full view of a person within 19 feet of the track, for 500 feet. If the speed of the train were much more rapid than that testified to by any witness in the case, it must also have been within the vision of the plaintiff all the time after he had passed the station house until his horse reached the track. Why did he not become aware of its approach and stop before he reached a place of danger? He could not have looked, and he certainly did not stop, until, to use his own words, he "drew to the track." He testified, "The horse and I both looked when we approached the track"; and on being asked, "When you looked, your horse was just on the first rail with his front feet?" he replied, "Maybe a little over, but very close to the rail." There is evidence that between the car and the station he "took a careful look." The plaintiff testified to this, though the witness Pierce in his testimony states that it was in making the turn from the Falls road into the Ruxton road that the plaintiff "came almost to a standstill and looked over his horse towards Baltimore." The witness also stated that he "judged his position was 18 or 20 feet from the track," "the station being nearer." The point, therefore, where he looked was definitely fixed by the witness as being at the Falls road, and at a place not as near to the track as the station; that is, not at a point after he had passed the station, and therefore not within 20 feet of the track, as the witness judged it was. This is the substance of all the evidence on this point, and it does not leave it open to question that the plaintiff, after he had passed the station and reached a position of perfect safety, from whence his view down the track was unobstructed for 500 feet, did not look until his horse was

actually on the track. That he failed to observe the approach of the train was due solely to his want of proper care. If he had looked, he could have seen the engine in ample time to avoid the accident. This case is therefore within the principle laid down in Helm's Case, 94 Md. 525, where it was held that, where the "circumstances are such that one with normal sight and hearing could see and hear, then his duty requires him to use his senses to guard against injury by the negligence of others." There is no evidence that he looked after he passed the station house, except after it was too late to avoid the accident; but, if there had been such evidence that he did so look but saw nothing, it would have been, in view of all the circumstances of the case, "unworthy of consideration, and should not have been submitted to the jury." Medairy's Case, 86 Md. 174, 37 Atl. 797.

But it is also contended that the appellant failed to use due care to avoid the accident, and that there was evidence legally sufficient to enable the jury to so find. In Kehoe's Case, 83 Md. 452, 35 Atl. 90, it was held that, to sustain an instruction of that kind, it was necessary that there shall be evidence tending to show, first, that the company's agents had knowledge of the plaintiff's peril, and, second, in time to arrest the injury, and third, that they failed to exert due care after acquiring such knowledge. In this case there is an entire absence of such evidence. There is no proof that the company's agents saw the plaintiff on the track, or, if that can be presumed from other circumstances, that they saw him in time to avert the accident. There is nothing from which the jury could infer that the engineman, if he saw the plaintiff before the horse reached the track, ought to have anticipated that the plaintiff would leave his place of safety and drive his horse in front of his engine. And, even if there was, there is no evidence that the engineman could then have stopped his train or so check its speed that the collision would have been averted. McNab's Case, 94 Md. 729, 51 Atl. 421; Neubur's Case, 62 Md. 401. For these reasons it was error to reject the defendant's third and fourth prayers. The judgment will be reversed, and, inasmuch as there can be no recovery for the plaintiff on the facts stated in the record, a new trial will not be awarded.

Judgment reversed.

(65 N. J. R. 194)

MOORE et al. v. GALUPO.

(Court of Chancery of New Jersey. July 18, 1903.)

SPECIFIC PERFORMANCE—CONTRACT—INDEFINITENESS.

1. An agreement in writing for the sale of lands for a total price of \$54,000 provided that \$250 should be paid on the date of the agreement, \$250 on the 3d day of June, and \$9,500 on the delivery of the deed on or before the

1st day of the next April; "the remaining sum of \$44,000 to be secured by mortgage or mortgages on said premises, bearing six per cent. per annum interest." The proposed vendee paid the first two cash installments of the contract price, and refused to go further with the transaction. The proposed vendor filed a bill to compel the specific performance of the agreement. *Held*, the written contract shows that the parties intended \$10,000 part of the contract price should be paid in cash on or before the delivery of the deed, and that the remaining \$14,000 should be secured upon some unexpressed term of credit by mortgage or mortgages upon the premises bearing interest at 6 per cent. per annum. It does not show that the parties had come to any agreement as to how many mortgages should be given, nor what should be the time or times of payment of the mortgage money, nor to whom the mortgage or mortgages should be made, nor (if more than one mortgage should be made) whether they should be concurrent or successive liens, or, if successive, in what order of precedence. *Held*, further, the written agreement is so uncertain and inconclusive as to essential incidents of the contract that no decree for specific performance can be made.

(Syllabus by the Court.)

Bill by Samuel W. Moore and others against Joseph Galupo. Decree for defendant.

This bill is filed by the complainant vendors to compel the specific performance by the defendant vendee of an agreement for the purchase of a tract of land lying at the southwest corner of Atlantic and Presbyterian avenues in Atlantic City. The bill is based upon a written contract in the words and figures following:

"Articles of Agreement, made this twentieth day of May, in the year of our Lord, nineteen hundred and one, between Samuel W. Moore, and C. May Moore, his wife, Enoch H. Moore, and Henry S. Moore, of Atlantic City, N. J., and Joseph Galupo, of the same place,

"Witnesseth, that the said parties of the first part, for and in consideration of the sum of fifty four thousand dollars, to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, do agree to and with the said party of the second part, that they the said parties of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by deed of general warranty, free from all encumbrances except as hereinafter stated, on or before the first day of April, A. D. 1902, all that lot, tract or parcel of land and premises hereinafter particularly described, situate lying and being in the city of Atlantic City, in the County of Atlantic and state of New Jersey,

"Beginning at a point in the southwest corner of Atlantic and Presbyterian Avenue, and runs thence along Atlantic Avenue in its southerly line, sixty feet; thence (2) southerly parallel with Presbyterian Avenue one hundred feet; thence (3) easterly parallel with Atlantic Avenue sixty feet; thence

(4) northerly along the westerly line of Presbyterian Avenue one hundred feet to the place of Beginning.

"And the said Joseph Galupo, for himself, his heirs, executors and administrators, does covenant, promise and agree to and with the said parties of the first part, their heirs, executors, administrators and assigns, that he the said party of the second part, will pay and satisfy, or cause to be paid and satisfied unto the said parties of the first part, the said sum of fifty four thousand dollars, as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say, two hundred and fifty dollars on the date hereof; two hundred and fifty on June third, next; nine thousand and five hundred dollars on delivery of deed to party of second part, on or before the first day of April next, and the remaining sum of forty four thousand dollars to be secured by mortgage or mortgages on said premises bearing six per cent. per annum interest. Title to the said premises is to be insured by the West Jersey Title and Guaranty Co., the expenses of which is to be paid by party of the second part. Expenses of the said premises are to be adjusted as of the date of settlement.

"And it is further agreed by the parties to these presents, that the said party of the second part, his heirs, and assigns, may enter into and upon the said land and premises on the delivery of deed, and from thence take the rents, issues and profits to his and their use. And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators, and they hereby agree to pay, upon failure to perform the same, the sum of five hundred dollars, which they hereby fix and settle as liquidated damages therefor.

"In witness whereof, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

"Samuel W. Moore. [Seal.]

"C. May Moore. [Seal.]

"Enoch H. Moore. [Seal.]

"Henry S. Moore. [Seal.]

"Joseph Galupo. [Seal.]

"Signed, sealed and delivered in the presence of

"H. W. Lewis."

The bill alleges that upon the making of the agreement Galupo, the defendant, paid to the complainants \$250 as an installment of the contract price, and that on June 3, 1901, the defendant paid a second installment of \$250 on account of that price; that on the 1st day of April, 1902, the complainants presented to the defendant a deed for the premises, invited him to take possession of the land, and demanded of him that he should pay the sum of \$9,500, adjust the expenses of the premises up to the last-named date, and secure the remaining sum

of \$44,000 by mortgage or mortgages upon the premises agreed to be conveyed, bearing 6 per cent. per annum interest, which invitations the bill alleges the defendant refused to accept. The prayer of the bill is that the defendant be decreed specifically to perform his agreement, and to pay to the complainants the said sum of \$9,500, with interest from April 1, 1902, and to secure by mortgage or mortgages upon the premises, bearing interest at 6 per cent., the remaining sum of \$44,000, and to adjust and settle with the complainants to the last-named date the expenses of the complainants.

The defendant, answering the bill, denies that at the time the contract was made, or since, the complainants were well entitled in fee simple to the lands described in the bill. He admits the making of the agreement, a copy of which is set forth in the bill, and the payment of the two installments of the contract price; denies the complainants' tender of the deed and invitation to the defendant specifically to perform the contract, averring that by the terms of the contract the complainants agreed to convey the premises clear of all incumbrances, except as stated in the agreement; and that at the time of the alleged tender of the deed the premises had been incumbered by an additional mortgage for \$30,000, placed thereon without the knowledge or consent of the defendant. The answer of the defendant expressly avers that the agreement is so indefinite and uncertain in its prescription of the manner in which the defendant should pay and satisfy the purchase price of the land as to be entirely incapable of performance. The answer recites that clause of the agreement which provides that \$44,000 of the purchase price should "be secured by mortgage or mortgages on the premises bearing six per cent. per annum interest," and insists that the agreement "wholly fails to provide for how long such mortgage or mortgages are to be drawn, what are to be the terms and conditions thereof, or when and how payable," or in fact anything to disclose with certainty what is required to be done on the part of the defendant to constitute a compliance with the terms of said agreement. The defendant prays that he may have the same benefit as if he had demurred to the complainants' bill.

At the hearing, the bill was amended by inserting an allegation that on March 20, 1901, the defendant informed the complainants that he would not carry out the agreement at the time named, giving as his reason for the refusal that he had not the money to do so. The defendant amended his answer, denying this allegation. The cause came to hearing on these pleadings.

U. G. Styron, Wm. I. Garrison, and Jos. H. Gaskill, for complainants. C. C. Babcock and C. L. Cole, for defendant.

GREY, V. C. (after stating the facts). The argument of this cause presents but two points. The first is whether the placing of the \$30,000 mortgage upon the premises by the complainants, the proposed vendors, after the agreement for sale had been made, but before the time had come for its performance, should deprive the complainants of the right to a decree for specific performance, in view of the fact that the agreement calls for a conveyance of a title free from all incumbrance, except as stated in the agreement. The practice in cases seeking specific performance seems to have established the rule that it is sufficient if the party contracting to sell has a good title at the time the decree is to be carried into effect, the direction being to ascertain whether the vendor can make a title under the decree, not whether he could make a title at the time of executing the agreement. *Langford v. Pitt*, 2 Peere Williams, 630 (affirmed on appeal). In that case the decree directed a master to inquire whether the plaintiff (vendor) can make a title, and, if he can, the purchase money to be paid by defendants. The same course of procedure was observed in *Braybrooke v. Inskip*, 8 Ves. 417, in which the litigation turned upon exceptions taken to the master's report, upon such a reference. In *Coffin v. Cooper*, 14 Ves. 205, this method was recognized. It was claimed by the party resisting performance that the rule was that, if the vendor could not make title at the date of the master's report, the purchaser has a right to be discharged. Lord Eldon declared there was no such rule, saying, if it appeared that the vendor, upon getting in a term or procuring an administration, would have a title, the court would put him upon terms to do speedily the thing required to perfect the title. This practice has received the approval of the Court of Appeals of this state in *Oakey v. Cook*, 41 N. J. Eq. 350, 7 Atl. 495, where it declared that the existence of mortgages on the vendor's property was not a violation of the covenant to convey a good title, so as to deprive him of the right to specific performance; that he was only required to remove the incumbrances when the deeds should be delivered. The whole case shows that the defendant's refusal to perform was in no degree based upon the existence of the mortgage lien placed upon the premises by the complainants. If those mortgages were presently tendered to the defendant canceled, his hostility to performance upon other grounds would remain, and from every indication in the cause would be just as strenuously maintained. It is, therefore, of no significance that when a deed was tendered the defendant this mortgage was a lien on the title. He was invited to perform the contract. If he had told the complainants that he was willing to accept the deed upon the cancellation of the mortgage, and the complainants had refused to obtain it to be

canceled, the circumstances would have presented a different aspect. It clearly appears that the defendant was, at all events, determined not to perform the contract, and that he made known this determination to the complainants. Under such circumstances there was no need of a formal tender of a deed. *Maxwell, Adm'r of Pittenger, v. Pittenger*, 3 N. J. Eq. 156; *Oakey v. Cook*, 41 N. J. Eq. 363, 7 Atl. 495.

The second contention of the defendant, resisting specific performance of this contract, is that the agreement itself is so uncertain and indefinite in its terms that this court cannot be assured of what the parties intended and agreed to do, and is, therefore, unable to make a decree for specific performance. This objection is based on the clause which declares the manner in which payment of the purchase price shall be made. The agreement is dated May 29, 1901. By it the whole purchase money is declared to be \$54,000, which it is provided shall be paid by the defendant in the following manner: \$250 on the day of the date of the agreement, May 29, 1901; \$250 on June 3d (then) next; \$9,500 on the delivery of the deed to the defendant on or before April 1st (then) next; and "the remaining sum of \$44,000 to be secured by mortgage or mortgages on said premises bearing six per cent. per annum interest." The defendant insists that this contract is lacking in certainty and definiteness in respect to the terms of the purchase price, which is one of the essential features of the contract; that the terms of the contract make it plainly manifest that the parties intended only part of the purchase money to be paid in cash, and do not show in what mode the residue should be paid. In the case of *McKibbin v. Brown*, 14 N. J. Eq. 17, Chancellor Green said that no specific performance of a contract can be decreed in equity unless it be actually concluded and be certain in all its parts. If the matter still rests in treaty, or if the agreement in any particular be uncertain or undefined, equity will not interfere. The learned chancellor declares that this doctrine is uniformly recognized in all the cases, English and American. On appeal to the Court of Errors and Appeals, the decree of the chancellor in that case was affirmed. 15 N. J. Eq. 498. In *Brown v. Brown*, 33 N. J. Eq. 651, the Court of Appeals declared that specific performance would not be decreed unless the existence and terms of the contract be clearly proved. If it be reasonably doubtful whether the alleged contract was finally closed, equity will not interfere. The principle stated appears to be elementary. No decisions question it. The cases submitted to judicial determination present only questions whether the particular agreement sought to be enforced is in its terms so definite and conclusive that the rule does not apply.

An examination of the decisions in this state which have applied or distinguished

the application of the rule will aid in the solution of the present dispute. In the *McKibbin* Case the contract in terms declared that the complainant should have the privilege of re-leasing the premises for a named sum, "and that the times or credits to be given by the defendant [the lessor] to the complainant [the lessee] should be the subject of arrangement between the parties." Chancellor Green held that the credits to be given were of the essence of the contract; that this term was not certain or defined by the agreement, and that this court had no power to decree that the defendant should re-lease the property for such credits of payment as this court should deem reasonable and just; that in such case this court would both make the contract and compel its performance; and he refused to aid the complainant because of the uncertainty as to this phase of the transaction. His ruling was affirmed on appeal. In that case the contract by actual expression declared that credits were to be given, and that they were to be the subject of future negotiations between the parties. But the rule under discussion is not limited to contracts, which in express terms declare that credit to be given shall be settled by further bargaining. It has been applied in all cases where, by either expression or fair inference from the words used, it appears the parties have not settled the question of credit given by fixing upon a definite time for payment. In *Potts v. Whitehead*, 20 N. J. Eq. 55, the alleged contract was a written agreement that the complainant should for 80 days have the refusal of certain lands which the defendant agreed to convey to him for \$20 per acre; the terms to be \$500 on execution of the deed, and the balance on mortgage upon the land, with interest at 6 per cent. The complainant claimed that he had sent the defendant a letter (copy of which was produced), saying he had twice attempted the tender of the first payment upon the agreement made between them, and would meet the defendant (at named hours and places), "when I shall be ready to make tender of the money and execute the proper agreement thereupon." Chancellor Zabriske held that, if this referred to executing an agreement yet necessary to be made as to the time of payment of the bond and mortgage for the balance of the purchase money, it showed that an important part of the essence of the agreement—the time for payment of that balance—was not yet agreed upon (page 53); that, although this question arising from the want of designation of any time when the great bulk of the consideration was to be paid was not raised on the argument, it was too prominent to be passed without notice; that the situation left a substantial and material part of the contract yet open for negotiation; that it was a settled principle that equity will not enforce a contract, any material part of which has to be settled by negotiations be-

tween the parties. On appeal this judgment was affirmed by the Court of Appeals, without, however, expressing any opinion on this point. 23 N. J. Eq. 515. In the case of *Nichols v. Williams*, 22 N. J. Eq. 63, the alleged contract was in writing, and the complainant thereby agreed with the defendant to convey certain lands for the price of \$150,000; the defendant agreeing to pay that sum by conveying certain specified tracts of land, valued at \$90,500, and "by executing two mortgages upon the property conveyed to him—one for \$50,000 and one for \$9,500." It was not stated when these mortgages were to be payable, or whether with or without interest, or at what rate of interest, nor to whom they were to be made. Chancellor Zabriskie held that it was evident that some time was to be given for the payment of the mortgages; that it was a material incident of the contract, left to be ascertained by subsequent negotiations; that a mortgage for \$50,000, payable on demand, or one day after date, or a mortgage conditioned to pay that sum 10 years after date, would each comply with the terms of the credit stated in the bill, and be sustained on demurrer to the bill which sought to enforce the contract. In each of the last two cases the lack of certainty in the alleged contract in fixing the time when a credit to be given should terminate by payment of the purchase price was held to be fatal to the claim for its enforcement by specific performance. In *Green v. Richards*, 23 N. J. Eq. 32, the agreement was to sell a house and lot for \$2,500, and, "when there is \$500 paid and the back rent, I will give the deed and take a mortgage for \$2,000." Chancellor Zabriskie recognized the force of the general rule that, when credit is to be given, and the contract omits to fix a time of payment, the contract is too uncertain to be specifically enforced. He differentiated this case from the preceding cases of *McKibbin v. Brown*, *Potts v. Whitehead*, and *Nichols v. Williams*, *supra*, declaring that in those cases it appeared to be the intention of the parties that the time of payment should be postponed; that in the case before him there was no agreement that the purchaser should have any credit; that in such case the mortgage should be made payable on demand.

Counsel for the complainants contends that the rule refusing specific performance where the contract gives a credit without fixing a definite time for payment is only applicable to agreements which contain a clause expressly declaring that the terms of the credit to be given shall be the subject of future dealings between the parties, as in the *McKibbin* Case. He claims that in all other cases this court should follow the declaration of Chancellor Zabriskie in *Green v. Richards*, 23 N. J. Eq. 35, and prevent the defeat of a fair contract by a technical objection by presuming that it was the intention of the parties to give no credit. In that case the learned chancellor considered the effect of

the words of the contract before him, and declared that there was no agreement for time, and that the purchaser was not entitled to credit. Having thus ascertained that the agreement as framed by the parties gave no credit, there was no occasion for any presumption ascribing to them an intention not to give credit. The learned chancellor had himself decided that to be the legal effect of the face of the contract. This dictum of Chancellor Zabriskie does not seem to accord with the view expressed by the Court of Appeals in affirming *Richards v. Green*, 23 N. J. Eq. 540, where, on the point in question, that court declared that, "where nothing is said about the credit to be given, and there are no circumstances from which an inference can be made that it was the intention of the parties that the time of payment should be postponed, the money is payable immediately." Here is a clear declaration by the unanimous voice of the Court of Appeals upon a point directly in issue that the circumstances of each case are to be considered to ascertain (if necessary, by inference) whether it was the intention of the parties that the time of payment should be postponed. In the case now under consideration the clause in the contract which deals with the purchase money is divided into different portions. It is, I think, quite evident that the parties had in mind one thing to be done with reference to the several installments (amounting to \$10,000) that came due prior to or on the day of the delivering the deed, which were to be paid, and quite another thing regarding the residue (\$44,000), which was "to be secured by mortgage or mortgages." The portion of the purchase money which it was provided should be paid was obviously intended to be paid in cash. The residue was just as obviously not intended to be paid in cash, but to be secured by mortgage for some unsettled, unagreed term of credit. This view is supported by the provision that the mortgage or mortgages should bear 6 per cent. per annum interest. If it had been intended that the mortgage or mortgages should be instantly payable, why provide that they should bear interest? A mortgage instantly payable would draw interest by operation of law, but a mortgage payable at a future time would draw interest only from the time the money came to be due, unless express provision therefor be made in the mortgage. The insertion of such an interest clause supports the inference that a credit was intended, and that this provision was necessary to entitle the complainants to interest on that part of the purchase money which was to be secured by mortgage. This inference is also supported by the fact that, if it was intended that all the purchase money should be instantly payable on the delivery of the deed, there was no occasion for any provision for a mortgage. In such case there would have been no "remaining sum to be secured."

But the omissions of the complainants' contract to fix a time of payment is not the only element of uncertainty which prevents its specific performance. That contract provides that the sum of \$44,000 should be secured by a mortgage or mortgages. This phrasing leaves it uncertain whether one mortgage should be made, or what number of mortgages more than one. It does not prescribe whether, if more than one mortgage should be given, they were to be concurrent or successive liens, nor whether or not they should precede all other mortgages, nor what should be their precedence between themselves. It is plainly to be seen that these omitted matters were intended to be arranged between the parties when the mortgage or mortgages were to be given.

These elements of uncertainty affect incidents of the contract which are of the essence of its obligation. This appears at once that it is attempted to formulate a decree for its specific performance. Counsel for complainants, in his argument, proffers himself ready to accept a decree "made in the terms of the agreement for a mortgage at the rate of interest provided and for the sum stipulated, without saying on the face of the mortgage whether it is on demand, or for a year, or for any other stated period," etc. Counsel for the defendant at once replies that this proposition assumes that there is no difference between an agreement to pay money at a named time and an agreement to secure it by mortgage, for such a mortgage as the complainants propose would, in legal effect, be payable at once, precisely as were the cash installments of the purchase price, thus making the agreement an undertaking by the defendant to pay at once the whole purchase price, \$54,000, which the terms of their contract show was not intended by the parties. It may, I think, be well asked why, as the contract was to secure the remaining \$44,000 by mortgage or mortgages, the defendant should be obliged to give a single mortgage for the whole of the residue? The contract in express terms declares that the remaining purchase money shall be secured by one or more mortgages, but it fails to reserve to either party the right to decide which it shall be, one mortgage or two, ten or forty-four. Both parties must come to one mind as to this incident before the contract can be enforced. As they have not done so, it is apparent that the court cannot settle this incident by its decree for specific performance. To do this would impose upon one party or the other the acceptance of a term which was not finally agreed upon in their dealings, and not expressed in their agreement. In short, the complainants ask the court both to make a contract and decree its enforcement. The agreement is, in the essential particulars named, so uncertain and inconclusive that no decree for its specific performance can be made.

This determination has been arrived at

irrespective of the verbal testimony which was admitted as to the meaning of the parties in using the phrase in the contract, "the remaining sum of \$44,000 to be secured by mortgage or mortgages on said premises bearing six per cent. per annum interest." That testimony was admitted over objection on the ground that the phrase used in the written contract was a latent ambiguity, such as might be explained by parol proof. The explanations given in the testimony of the complainant Moore, if they are to be considered, do not aid the complainant's cause as to the certainty of the agreement, for he declares that the defendant, the other party to the written contract, knew that he was to give a mortgage, not for \$44,000, as stated in the written contract which they signed, but for some uncertain sum, to be afterwards ascertained, being such portion of the \$44,000 as the complainants might be unable to place on the premises on first mortgage. In one place he testified that the mortgages were to run for as short a period as he could get them; in another that the second mortgage to be taken from the defendant was to run for one year. In one place he says this was not put in the agreement because he did not know how much the second mortgage would be; in another place he says he does not know why it was not put there. The written contract shows no such agreement. The defendant, in his parol testimony, testifies that the complainants, when they were discussing the time at which the balance of the purchase price over the \$10,000 should be paid, said: "We will let this stay open; we will agree upon it later"—on that question—so that the contract was made without time being mentioned whatever; that no time was fixed; that the complainant said, "Might give a first mortgage and might have to take a second mortgage." The certainty of those terms of the agreement which is here in question is in no way established by the oral proofs.

I have much doubt whether the written contract shows in the clause under consideration such an ambiguity in its meaning that parol proof ought to have been admitted. The testimony offered does not explain or make clear the supposed ambiguous phrase, but goes to show that upon that particular term of the contract the parties never did come to a final understanding, and left it open for subsequent conference and adjustment. Whether the parol proof be considered or ignored, the whole effect of the testimony goes to show that the parties have not concluded their agreement regarding either the number of the mortgage or mortgages to be given for the \$44,000 residue of the purchase money, or the time when it or they were to be payable, or the party to whom they were to be made, or indeed, upon any of the several other matters above discussed, which would have to be determined definitely before the specific performance of

the agreement could be decreed. The complainants must seek their remedy at law.

I will advise a decree that the complainants' bill be dismissed, with costs.

(59 N. J. L. 571)

QUINN v. BOARD OF POLICE COM'RS OF JERSEY CITY.

(Supreme Court of New Jersey. July 23, 1903.)
POLICE COMMISSIONERS—TRIAL OF OFFICERS—EVIDENCE.

1. The return of the finding and judgment of a board of police commissioners upon the trial of an officer upon a charge of neglect of duty cannot be contradicted by evidence taken under a general rule to take testimony.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of John Quinn, to the board of police commissioners of Jersey City. Judgment affirmed.

Argued June Term, 1903, before GARRISON and GARRETSON, JJ.

William H. Speer, for prosecutor. John Q. Queen, for defendant.

GARRETSON, J. The certiorari brings up the trial conviction and sentence of the prosecutor, a police sergeant of Jersey City, by the board of police commissioners of that city, upon a charge of neglect of duty. The return contains the evidence presented to the commissioners upon the trial, and, while it is properly no part of the return, an examination of it shows to our satisfaction that the police commissioners might, from a consideration of the evidence, have reached the conclusion that the defendant was guilty of the charge. The prosecutor, however, attacks the finding and sentence of the commissioners upon the ground that the judgment and sentence as returned are not the true judgment and sentence of the commissioners, and he does it in this way: Upon an ordinary rule to take testimony, the prosecutor took the evidence of witnesses to show that at the meeting at which the prosecutor was tried and sentenced the president of the commissioners stated that their conclusions were different from those shown by the return. The return of the judgment must, in the first instance, be regarded as conclusive. If the prosecutor thinks it is not true, his course is to apply to the court alleging a diminution of the record, and procure an order upon the person in whose custody the record is to certify whether the record is not as the prosecutor claims, and, if it is certified that the record is as originally returned, then it implies absolute verity, and cannot be contradicted by evidence taken on rule to take testimony. As to the proper practice, see *South Brunswick v. Cranbury*, 52 N. J. Law, 298, 19 Atl. 787. See, also, *Scott v. Beatty*, 23 N. J. Law, 259; *Parsell v. State*, 30 N. J. Law, 530; *Wahrman v. Horan*, 46 N. J. Law, 465.

The judgment below is affirmed, with costs.

(55 N. J. E. 207)

DU BOIS v. BORMANN et al.

(Court of Chancery of New Jersey. July 26, 1903.)

SPECIFIC PERFORMANCE—SALE OF PERSONALTY—DEFECT OF TITLE.

1. An alleged contract was made under the belief of the proposers that they owned and had power to sell the subject-matter of the contract. The acceptor of the proposal received and accepted it under that belief. In actual fact the proposers had neither title to the subject-matter of the sale nor power to sell it. *Held*, the parties were incapable of making an agreement for sale. No decree can be made to enforce the specific performance of such an attempted agreement.

(Syllabus by the Court.)

Bill by Josiah S. Du Bois against Herman Bormann and others, executors of Annie Malsch. Dismissed.

Spencer Simpson, for complainant. G. Dore Cogswell, for defendant Industrial Mfg. Co. Matthew Jefferson and John W. Westcott, for defendants Herman Bormann and Philip C. Adams, executors.

GREY, V. C. (orally). I can dispose of this matter now. The case has been elaborately tried, and the principles which must control in the disposition of it, I think, are quite apparent. The bill is filed by Josiah S. Du Bois against Herman Bormann and Philip C. Adams, executors of the last will of Annie Malsch, and also against the Industrial Manufacturing Company, a defendant who makes no substantial defense, and appears to be a defendant solely for the purpose of preventing the transfer of some of its own stock. The purpose of the bill is to compel the defendants to transfer to the complainant two certificates, Nos. 1 and 30, of the capital stock of the Industrial Manufacturing Company (one certificate is for 110 shares, and the other for 40 shares), and also all the right and interest of Frank Malsch, deceased, in and to certain royalties for the use of patents. There is a restraint on maintaining the status quo until the disposition of the case by the court. The shares of stock in question are claimed by the bill of complaint to be the subject-matter of the contract sought to be enforced in this suit. This contract is evidenced by two letters set out in words and figures on the face of the bill. The first letter is dated April 22, 1902, addressed "Mr. J. S. Du Bois," and tenders to Mr. Du Bois the interest, shares, and royalties belonging to the Malsch estate, to be conveyed to him for \$1,000 within one year. "We as executors are willing to give you this option, and you can secure the shares &c. by paying cash. We are very truly, Herman Bormann, Philip C. Adams, Executors." This letter was received and replied to by another dated April 28, 1902, signed by the complainant, Mr. Du Bois, addressed "Messrs. Herman Bormann and Philip C. Adams, executors of the estate of Frank Malsch, deceased." This letter of

Mr. Du Bois acknowledges the receipt of the above letter of April 22d, and, without suggesting any variance from the terms of the sale offered by that letter, accepts them.

Judge Wescott: Your honor reads the letters as addressed to the executors of Frank Malsch.

THE VICE CHANCELLOR: That is correct. I have examined the original letter. It is addressed "Messrs. Herman Bormann and Philip C. Adams, executors of the estate of Frank Malsch, deceased." The copy set out on the face of the bill is a correct copy.

The defendants are stated in the bill to be executors of the last will of Annie Malsch, deceased. The bill prays that specific performance of the agreement set forth in the two letters may be decreed against the defendants Herman Bormann and Philip C. Adams, executors, as aforesaid, directing the defendants to convey the stock and the right to the royalties to the complainant, and prays that the defendants in the meanwhile be enjoined from disposing of these shares of stock, etc. The defendants Bormann and Adams answer the bill, admit they are the executors of the last will of Annie Malsch, and that part of the assets claimed by the executors as belonging to the estate of Annie Malsch were the 150 shares of stock. They also admit the writing of the letters quoted above in the complainant's bill, but they deny that the effect of those letters was to make a contract, and assert that they simply gave an option to the complainant. They say no consideration was paid, and that the two letters imposed no contractual obligations upon the defendants. They also admit that the complainant tendered the money referred to in the letters as the purchase price. Their answer then alleges that false representations were made by complainant as to the financial condition of the Industrial Manufacturing Company, whose stock was the subject-matter of the sale, and the intimation is that the option was secured by these false representations. This portion of the answer is a very meager presentation of facts upon which to base a defense on the ground of fraud; but, taking the whole case, and the fair intendments which may be made from the pleading, I think it may be taken to be a challenge of the alleged contract (claimed by the two letters) on the ground that it was obtained by false and fraudulent representations.

On this case so made the parties have come to a hearing, and the first question is whether or not the two letters amount to a contract. There is proof that after the two letters were written—that is, after the proposition had been made by Messrs. Bormann and Adams to Mr. Du Bois by their letter of April 22d, and after Mr. Du Bois, by his letter of April 28th, had accepted it—the defendants, at a somewhat later period, made an effort to rescind the option, as they claim-

ed it to be. The point the defendants make as to the legal effect of the two letters is a question of law as to the construction of the two writings, which clearly show their meaning on the face of the papers. For this reason I refused to hear any parol evidence upon this point of the case to define the meaning of these letters. It is admitted by the pleadings that they were written, sent, and received. There is no ambiguity about their meaning. No parol proof as to contemporaneous dealings regarding this contract can be received. On this phase of the case I am of the opinion that the writing of the letter of proposition, and the accepting it exactly in the terms in which it was addressed, constituted, after the acceptance, a contract. It then remained only for the party accepting to pay or tender the purchase money at any time within a year from April 10, 1902, the period named for its payment. It did not lie at the choice of the defendants to rescind their contract at their mere choice by giving notice. The agreement did not impose upon the complainant an obligation to pay any money at the time of entering into the contract. By the two letters which made the contract the complainant was allowed one year to make the payment of the purchase price. A tender of that price was made within the year. This is admitted by the defendants' answer. The contract, so far as tender of the price was concerned, thus became finally obligatory upon the defendants.

The other defense is put upon the ground that the contract and letters were obtained from the defendants by fraudulent representations. The defendants claim that the complainant misled the defendants at the time they wrote their letter of April 22, 1902, offering to sell the stock, etc., by false statements to the effect that the financial capacity of the Industrial Manufacturing Company, whose stock was the subject-matter of the sale, was so greatly impaired that it was on the verge of insolvency. The representations shown to have been made were to a very considerable extent matters of opinion and judgment as to the future prospects of the company. It has been shown that the company was, in and about April, 1902, in actual fact threatened with such serious losses, and was by pending suits attacked in such a way that it was in a very doubtful financial situation. The weight of the testimony goes to show that the consideration of the contract evidenced by the two letters was a general settlement of outstanding claims which the parties had, as they thought, against each other, and which they sought to adjust by entering into the general settlement indicated by the two letters. Fraud is neither sufficiently alleged nor proved.

This disposes of the issues which were raised by the pleadings, and all that were raised by the evidence except one. That one, however, is absolutely vital and controlling. The original contract or proposition was

plainly made under a mistake—a mistake as to the legal status of the parties. It was also accepted under a mistake. This cause is not being tried for the correction of any mistake. The present question is limited to the claim to enforce specifically a contract. But the mistake made is irremediable because of lack of power in the parties to correct it. The mistake happened in this way: The contract in this case is based upon the two letters above recited. The first letter is addressed to "Mr. J. S. Du Bois." The writers in the body say "we as executors," but they do not say of what they were executors. They sign themselves "Herman Bormann, Philip C. Adams, Executors." In point of fact the proof is undisputed that they were the executors of the last will and testament of Annie Malsch. There is no pretense of proof that they were the executors of anything else. The acceptance letter is addressed "Messrs. Herman Bormann and Philip C. Adams, executors of the estate of Frank Malsch, deceased," and is signed "Josiah S. Du Bois." There is nothing to show that there was any fraud or misrepresentation as to the capacity in which the defendants acted. The testimony is clear that these parties each of them supposed that at the time of the writing of these letters the defendants Bormann and Adams had authority to dispose of the property with which they dealt. But it plainly appears on the face of the letters themselves that the defendants Bormann and Adams were executors of the will of Annie Malsch. The proof is also undisputed that the stock and royalties belong to the yet unadministered estate of Frank Malsch, deceased. Mr. Du Bois addressed Messrs. Bormann and Adams in his letter of acceptance as "executors of the estate of Frank Malsch." In actual fact the defendants were not executors of Frank Malsch's estate, and had no estate in or control over its assets. Du Bois believed they could and did act for that estate. The result was that the minds of the parties to the supposed contract never in fact met in any agreement. The two letters entirely failed to make any contract at all. The ownership of these two certificates of stock, which is the substantial subject-matter in litigation, was in the unadministered estate of Frank Malsch. The certificates on their face show that they were issued to him. There is no indorsement or other disposition of those certificates which indicates that they were in any manner transferred or held capable of transfer from Frank Malsch or from his representatives. He died possessed of these certificates, and the ownership of them, as part of personal property of his estate.

The law is entirely clear that title to the goods and chattels of a decedent who dies intestate go first to the administrator, or, if the decedent dies testate, to the executor, for the payment of his debts. They remain in the custody and ownership of the admin-

istrator (although the distributees may be entitled to them ultimately), but they cannot go to the distributees (unless possibly through specific gift by will) until the decedent's debts are paid and distribution is made. The property of Frank Malsch in these certificates and in the royalties came to Mrs. Annie Malsch when she took out letters of administration on the estate of Frank Malsch. She was, as administratrix, entitled to have and to take and dispose of those shares; but that function has to be exercised during her life. She died about six months after she had undertaken the administration, and before she had done any act which affected the title or ownership of these shares or royalties, etc., now the subject-matter of litigation. When she died the whole administration of the estate of Frank Malsch appears to have been entirely unsettled. There was an undertaking to administer it, but no performance. On her death the unadministered assets of Frank Malsch's estate should have gone to an administrator de bonis non of his estate, who should have been appointed to succeed Mrs. Malsch. This was not done. There is nothing to show whether Frank Malsch's estate is solvent or insolvent. There is no sufficient proof showing whether he died either with kindred or without kindred. Some testimony has been offered by the complainant to show that he died without kin, and on this to predicate a claim that his widow became, under the act of May 11, 1897 (Laws 1897, p. 362), entitled to all his estate. The proof upon that point is quite insufficient. Mr. Bormann was the only witness who testified on the point. He is not proven to have been so related to Frank Malsch that his testimony is conclusive. As given, it does not negative the probability that Frank Malsch did leave some next of kin. Mr. Bormann affirmatively proved that Frank Malsch had a brother. He says the brother disappeared many years ago. But no proof is given of the brother's death, or that he left no issue. There has been no attempt to exhaust the situation as to possible next of kin of Frank Malsch. The statute of 1897, which gives the property of a decedent who dies without kindred to his surviving widow, only operates when it appears that there are no next of kin, no matter how remote, of the decedent. So, also, the portion given to the widow by that statute is what remains after the payment of the decedent's debts; that is, the surplusage of his estate. It has never yet been ascertained that there was any surplusage of Frank Malsch's estate. He may have owed debts which would take the whole of this property. Nothing, in such case, would come to the surviving wife. There is no claim that the complainant accepted any proposition of the executors of Mrs. Malsch to sell the interest which, as Frank Malsch's widow, she might have in the surplusage of his estate. What the complainant accepted

was, as he thought, a proposition from the representatives of Frank Malsch's estate to sell the stock, etc., of which he died seised.

The complainant asks that this court shall assume that Frank Malsch's estate has been settled, his debts paid, and the surplusage of his estate distributed, and that in that distribution the stock here in question and the right to the royalties were given to the surviving wife, becoming part of her estate, and that her executors dealt with that stock, etc., the letters were claimed to make a contract for sale. This is impossible. The parties themselves did not at the time they acted so deal with each other. The complainant, as stated, mistakenly supposed he was dealing with executors of Frank Malsch's estate. The executors of Annie Malsch's will mistakenly believed they could dispose of the stock, etc., when they had in fact no power to deal with it. Each acted under a fatal mistake. Nothing can be done in this suit to aid the parties.

The bill must be dismissed, and, inasmuch as the defendants, by objections in the nature of a demurrer *ore tenus*, challenged the complainant's right, it should be with costs.

(25 R. I. 239)

SPENCER et al. v. SPENCER et al.

(Supreme Court of Rhode Island. June 13, 1903.)

WILLS—CONTRACT TO DEVISE PROPERTY—
VALIDITY—CONSIDERATION—SUFFICIENCY—
ATTACKING PROBATE—SUIT IN EQUITY—
WAIVER.

1. One may make a valid agreement to dispose of his property in a particular way by will.

2. A contract by one to dispose of his property in a particular way by will may be enforced in equity, after his decease, against his heirs, devisees, or personal representatives.

3. Where plaintiff left his business and traveled across the continent, taking with him his father to see the latter's brother, and examined the business of the brother, at an expense of time and money, in consideration of an agreement by the brother to devise plaintiff his property, the consideration was sufficient to support the promise.

4. Performance of the acts constituting the consideration for another's agreement to devise property to the one doing the acts is sufficient to remove the transaction from the statute of frauds.

5. An appeal from the probate of a will of one who had agreed with appellant to devise him all testator's property, and which agreement had been violated by the will, did not bar appellant from bringing a suit in equity to have the devisees and legatees under the will declared trustees for his benefit.

Bill in equity by Lincoln D. Spencer and others against Edward P. Spencer and others to have the legatees and devisees under the will of Obadiah Brown Spencer declared trustees for complainant. Demurrer overruled.

Argued before STINESS, C. J., and TIL-
LINGHAST and DOUGLAS, JJ.

¶ 4. See *Frauds*, Statute of, vol. 22, Cent. Dig. §§ 291, 302, 312, 314.

William M. P. Bowen and G. Ward Kemp, for complainants. William B. W. Hallett, for respondents.

STINESS, C. J. The substantial allegations of the bill to be considered on demurrer are that Lincoln Dyer Spencer and his uncle Obadiah Brown Spencer made a contract in writing in 1894, in consideration of the promise of Lincoln that he would keep the property of said Obadiah in the Spencer name as long as possible, that said Obadiah would make his will, and leave all his estate, except a legacy of \$200, to said Lincoln; that Lincoln was informed by Obadiah in 1894 that he had made his will as stated, according to said promise; that the complainant Rhodes Vaughn Spencer was born later, in the year 1894, and in 1898 said Lincoln and Obadiah again contracted in writing, in consideration that Lincoln would leave his business in Seattle, Wash., go to East Greenwich, taking his father (a brother of Obadiah) to visit the latter, and for Lincoln to see how Obadiah conducted his business, and whether said Lincoln would be content to leave the West and to settle down to said Obadiah's business and run it, said business being a 50-year contract for teaming for the East Greenwich Bleachery; that said Obadiah had made his will, giving all but \$200 to said Lincoln for life, and after his death to said Rhodes; that subsequently, pursuant to said contract, Lincoln left his business at Seattle, and brought his father, then living in Nebraska, to East Greenwich, that said Obadiah might see them, and that Lincoln might learn about said business, expending thereby about \$1,000; that Lincoln then informed Obadiah that he was content to leave the West on Obadiah's decease, and to take his business. Obadiah died January 12, 1902, leaving a will dated March 19, 1901, giving all his estate, after certain legacies, to his daughter Mary Lena Spencer, which will has been duly proved. The bill asks that the legatees and devisees under the will may be declared to be trustees for the complainants of the estate left by said Obadiah, and that they convey the same to the complainants.

To the case of *Whiton v. Whiton*, 4 Prob. Rep. Ann. 522, is added, on page 542, a comprehensive note covering the question raised by this demurrer. It is there stated that the weight of authority is in favor of the position that a man may make a valid agreement to dispose of his property in a particular way by will, and that such contract may be enforced in equity, after his decease, against his heirs, devisees, or personal representatives. *Dicken v. McKinley*, 168 Ill. 522, 45 N. E. 134, 54 Am. St. Rep. 471; *Newton v. Newton*, 46 Minn. 35, 48 N. W. 450; *Gall v. Gall*, 64 Hun, 600, 19 N. Y. Supp. 332; *Shakespeare v. Markham*, 72 N. Y. 400; *Carmichael v. Carmichael*, 72 Mich. 85, 40 N. W. 173, 1 L. R. A. 596, 16 Am. St. Rep. 528. In *Beach's Mod. Eq. Juris.* § 602, it is said: "It

is well settled that equity has jurisdiction to decree specific performance of a contract to make a will." The theory on which courts proceed is to construe the contract to bind the property so far as to fasten a trust on it in favor of the promisee, and to enforce it against heirs and representatives, or others charged with notice of the trust. There can be no difference in principle between contracts to be performed in life or at death. While it is true that contracts of the latter class may afford opportunity for fraud, one party being dead, and that courts will therefore require strict proof both of contract and consideration, on the other hand one may secure advantages in life under a contract, with little care as to a breach at his death. The obligations of a contract, however, are the same in either case.

Like all other contracts, one of the kind before us must be supported by legal consideration. The bill alleges that the complainant left his business, came across the continent, brought his father to see his brother, the deceased, and examined the business, at an expense of much time and money, by the request of said Obadiah, and as a condition to the contract. In *Wellington v. Apthorp*, 145 Mass. 69, 13 N. E. 10, a trip to California, at request of testatrix, was held to be consideration for an agreement to leave a legacy of \$5,000.

The next question is whether the contract is void under the statute of frauds. Clearly, not on demurrer, because the bill alleges a contract in writing. But even without that, the general rule applies that, when there has been part or full performance on one side, the statute does not apply. *Van Dyne v. Vreeland*, 11 N. J. Eq. 370; *Van Dyne v. Same*, 12 N. J. Eq. 142; *Davison v. Davison*, 13 N. J. Eq. 246; *Pflugar v. Pultz*, 43 N. J. Eq. 440, 11 Atl. 123; *Mauck v. Melton*, 64 Ind. 414; *Kofka v. Rosicky*, 41 Neb. 328, 59 N. W. 788, 25 L. R. A. 207, 43 Am. St. Rep. 685; *Gupton v. Gupton*, 47 Mo. 37; *Korminsky v. Korminsky* (Super. N. Y.) 21 N. Y. Supp. 611; *Roehl v. Haumesser* (Ind. Sup.) 15 N. E. 345. Cases are numerous which support the right to enforce such a contract by bill for specific performance or for a trust against heirs or devisees. In addition to those already cited are the following: *Colby v. Colby* (Sup.) 30 N. Y. Supp. 677; *Sutton v. Hayden*, 62 Mo. 101; *Whiton v. Whiton*, 179 Ill. 32, 53 N. E. 722; *Fogle v. St. Michael*, 48 S. C. 86, 26 S. E. 99; *Schutt v. The Missionary Society*, 41 N. J. Eq. 115, 3 Atl. 398; *Newton v. Newton* (Minn.) 48 N. W. 450; *McKinnon v. McKinnon*, 56 Fed. 409, 5 C. C. A. 530; *Duval v. Duval* (N. J. Ch.) 35 Atl. 750; *Ransdel v. Moore*, 153 Ind. 393, 53 N. E. 767, 53 L. R. A. 753, citing numerous cases.

The respondents claim that the complainants have elected their remedy at law by taking an appeal from the probate of the will of Obadiah Spencer. We see no force in

this objection. The complainants might well claim that the will was invalid, for undue influence or for other reasons, without prejudicing their standing under this bill. The two matters are quite distinct, and an appeal from the probate of a will is not inconsistent with the relief sought by this bill.

Demurrer to the bill overruled.

(25 R. I. 222)

KING v. McELROY.

(Supreme Court of Rhode Island. June 5, 1903.)

GARNISHMENT—NAME OF GARNISHEE—SUFFICIENCY OF WRIT—AMENDMENT—PRIORITY OF ALLOWANCE.

1. An attachment of funds in the hands of the "John Hancock Life Insurance Company," served on the insurance commissioner, is ineffectual to hold funds in the hands of the "John Hancock Mutual Life Insurance Company," a foreign corporation, to whose treasurer the commissioner sends the copy served on him.

2. Since an amendment to the name of a garnishee as it appears in the writ of attachment would, in the absence of consent, necessitate further service of process, and the same result is attainable under Gen. Laws 1896, c. 252, § 17, by issuing the writ of mesne process therein authorized, leave for such amendment is properly denied.

Exceptions from District Court.

Action by Patrick King against Agnes McElroy, in which the John Hancock Mutual Life Insurance Company was served as garnishee. On exceptions to refusal to permit plaintiff's amendment of writ of attachment. Exceptions overruled.

A writ of attachment was sued out of a district court, with direction to attach certain funds in the hands of the John Hancock Life Insurance Company. This writ was served on the insurance commissioner, who in turn served a copy of the writ he received on the treasurer of the John Hancock Mutual Life Insurance Company, a foreign corporation. This corporation returned an affidavit in which it denied that the funds in its possession were attached, but that it held funds belonging to the defendant, and asked the court to determine whether or not it was chargeable as garnishee. After the case was entered in court, the plaintiff petitioned the court below to amend the name of the garnishee by inserting the word "Mutual"; thus changing the name of the garnishee named in the writ at the time it was served, which was the John Hancock Life Insurance Company, to that of the John Hancock Mutual Life Insurance Company. The plaintiff's petition to amend was denied by the court below, and exceptions were duly taken.

Argued before STINESS, C. J., and DOUGLAS and BLODGETT, JJ.

Peter C. Cannon, for plaintiff. John F. Conaty, for defendant.

PER CURIAM. The court is of the opinion that the service of the writ in this case upon the insurance commissioner of Rhode Island was not a legal attachment of money in the hands of the John Hancock Mutual Life Insurance Company of Boston, Mass. See *Sheffield v. Barber*, 14 R. I. 263.

The amendment asked for, in the absence of consent of parties, would necessitate further service of process, and the same result was attainable by the plaintiff by the issuing of a writ of meane process, under Gen. Laws 1896, c. 252, § 17. The motion to amend was therefore properly denied by the district court.

Exceptions overruled, and case remanded to the district court of the Sixth Judicial District.

(25 R. I. 220)

SLATTERY v. COLGATE et al.

(Supreme Court of Rhode Island. June 4, 1903.)

NEGLIGENCE — DEFECT IN MANUFACTURED ARTICLE—LIABILITY OF MANUFACTURER — CONTRIBUTORY NEGLIGENCE.

1. The manufacturer of soap is not liable for injuries caused by an excess of alkali therein unless he knows of the excess.

2. Where a declaration against a manufacturer of soap, for negligence in the manufacture thereof, alleged that when used by plaintiff in his business as a barber, and applied to the faces of a large number of his customers, it poisoned them, and caused loss of trade, the declaration showed plaintiff negligent in continuing to use the soap on "a large number" of customers.

Action by Timothy E. Slattery against Richard M. Colgate and others. Demurrer to the declaration sustained.

Argued before STINNESS, C. J., and DOUGLAS and BLODGETT, JJ.

James J. Nolan, Jr., and Patrick J. McCarthy, for plaintiff. A. S. Johnson, for defendant.

PER CURIAM. The case comes before us upon demurrer to the declaration, which alleges that the plaintiff, who is a barber in the city of Providence, on the 5th day of September, 1902, bought of a firm of dealers in barbers' supplies certain packages of soap made by the defendants, and called "Colgate & Company's Shaving Soap," which were placed by the defendants upon the market, and intended to be used in shaving by barbers and others; that the defendants were careless and negligent in manufacturing this soap, so that when they placed it upon the market it contained an excess of alkali (a poisonous substance), and when used by the plaintiff in his business, and applied to the faces of his customers, it burned, poisoned, and disfigured their faces, and in consequence thereof the plaintiff lost their custom and the custom of others. The defend-

ants assign as grounds of demurrer that the facts as stated show no duty towards the plaintiff imposed by law upon the defendants, and no cause of action by the plaintiff against the defendants.

The whole subject of the responsibility of a manufacturer to persons using his products, on account of defects therein, has been recently fully discussed by this court in *McCaffrey v. Mossberg & Granville Mfg. Co.*, 23 R. I. 381, 50 Atl. 651. We think the case can only be sustained if it can be brought within the second class referred to there—the article involved not being an inherently dangerous one, but one which may have become so by the acts or neglect of the manufacturer—in which case he is not liable unless he knows of the defect, and practices deceit in exposing the defective product for sale. Alkali of some kind is a necessary ingredient of soap, and it is no deceit to include it in the manufacture of the article for the market. It is only the excess of alkali that can render the compound hurtful to the human skin. Unless the defendants knew of this excess, they cannot be held liable. It is not alleged that they had this knowledge—only that they were negligent.

The declaration also shows that the plaintiff was negligent in continuing the use of the article upon "a large number" of customers, and thus contributed to the loss of trade which is the burden of his action.

The demurrer must be sustained.

HASKINS v. GLEZEN.

(Supreme Court of Rhode Island. March 23, 1903.)

PARTITION—AMENDMENT OF BILL—DEPARTURE.

1. Where the bill in a suit for partition alleged complainant's ownership in fee in one-third of the land, it could not be amended after the sufficiency of a plea had been sustained so as to set up an equitable title and pray judgment for an accounting.

Action by William T. Haskins against Edward K. Glezen, as trustee, for partition. On motion for amendment of bill. Motion denied.

Franklin P. Owen, for petitioner. Willard B. Tanner and Jas. C. Collins, Jr., for respondent.

PER CURIAM. This bill, as filed, was for partition of a tract of land in which the complainant claimed a one-third share. The respondent filed a plea setting up that Glezen brought an action against Haskins in trespass and ejectment June 21, 1900, in which he recovered judgment against said Haskins, and was put in possession of the land by the sheriff. The court sustained the sufficiency of the plea, and now the complainant moves to amend his bill by setting up that the defendant was trustee for John H. Row-

¶ 1. See *Negligence*, vol. 37, Cent. Dig. § 26.

¶ 1. See *Pleading*, vol. 39, Cent. Dig. § 632.

ley as to a third of the estate, and that on March 29, 1900, Rowley conveyed his interest in said land to this complainant. The bill set up an ownership in fee in one-third of the land, and asked for partition. The amended bill sets up an equitable title, and prays for an account. In *National Bank v. Smith*, 17 R. I. 263, 21 Atl. 959, the court held that amendments to a bill which abandon the case originally made and substitute a new one are not permissible, especially when not proposed until after the case originally made has been heard.

The motion to amend is denied.

(25 R. I. 216)

CLARK v. MAKSOODIAN.

(Supreme Court of Rhode Island. June 4, 1903.)

DEMURRERS—FORMAL AND SUBSTANTIAL—ORDER OF CONSIDERATION—PLEA OF ABATEMENT.

1. Where demurrers, formal and substantial, both appear in the same case, and defendant's plea in abatement sets up allegations of facts, the trial of which may result in a decision of the case, all matters of mere form should be first settled in the common pleas division, leaving to be certified to the appellate division only substantial questions of law.

Action by John S. Clark, Jr., against Moos-eak Maksoodian. Certified on plaintiff's demurrers to defendant's pleas. Ordered remitted to common pleas division for further proceedings.

Argued before STINESS, C. J., and DOUGLAS, JJ.

John W. Hogan and Philip S. Knauer, for plaintiff. Wilson & Jenckes, for defendant.

PER CURIAM. The action is covenant upon a contract to build ovens. This case is certified to us on plaintiff's substantial demurrer to defendant's plea of general performance, and on plaintiff's substantial demurrer to defendant's third plea. The declaration charges that the defendant has broken his covenant, in that he has not paid the sum agreed to be paid on the completion of the work. Preceding the pleadings which are certified to us is a plea in abatement, to which the plaintiff has demurred for alleged formal defects. The defendant has filed a fourth plea, also, to which the plaintiff has filed a formal demurrer. While the statutes relating to the decision of demurrers, formal and substantial, are not quite clear in directing in what order these pleadings are to be considered and passed upon, when they both appear in the same case, it seems most in accord with the spirit of the judiciary act that all matters of mere form should be first settled in the common pleas division, leaving to be certified to this division only substantial questions of law. This order of procedure is especially proper when, as in this case, the plea in abatement sets up allegations of fact, the trial of which may result in

a decision of the case. *Vide* 2 Greenl. Ev. § 27.

The case will be remitted to the common pleas division for further proceedings.

(25 R. I. 236)

MUNICIPAL COURT OF CITY OF PROVIDENCE v. LE VALLEY et al.

(Supreme Court of Rhode Island. June 5, 1903.)

GUARDIAN AND WARD—CLAIMS AGAINST WARD—ACTION AGAINST GUARDIAN—EFFECT—RIGHT OF CREDITOR TO INQUIRE INTO CONDUCT OF GUARDIAN.

1. The debts of a ward are not recoverable by an action against the guardian, described as guardian of the ward; the description being mere surplusage, making the action merely a personal one against the guardian.

2. Under Gen. Laws 1898, p. 640, c. 196, § 26, providing that when a guardian neglects to pay the debts of the ward a creditor may maintain an action against him and his surety, and section 29, providing that no action shall be sustained against one under guardianship within 12 months after the appointment of the guardian unless the claim presented is rejected by the guardian, in which case the creditor may sue forthwith, a judgment creditor of a guardian under a judgment describing him as guardian of the ward was not a creditor of the ward, so as to be entitled to inquire into the conduct of the guardian with respect to his trust.

Action by the Callender, McAuslan & Troup Company, in the name of the municipal court of the city of Providence, against Henry E. Le Valley and others, guardian of Grace I. Plummer. Heard on demurrer to declaration. Demurrer sustained.

Argued before STINESS, C. J., and DOUGLAS and DUBOIS, JJ.

Edward D. Bassett, for plaintiff. Andrew B. Patton, Stephen A. Cooke, and Edward W. Blodgett, for defendants.

DUBOIS, J. This is an action of debt upon a guardian's bond, brought by Callender, McAuslan & Troup Company, as a creditor, in the name of the municipal court of the city of Providence, against Henry E. Le Valley, guardian of Grace I. Plummer, a minor, as principal, and against the personal representatives of the deceased sureties in said bond. The bond is dated April 2, 1889, with condition as follows: "The condition of this obligation is such, that if the above-bounden Henry E. Le Valley, who has been duly appointed guardian of the person and estate of Grace I. Plummer, a minor under the age of fourteen years, doth within three months after the date hereof, exhibit under oath to the municipal court of the city of Providence, an inventory in writing of all the real and personal estate of his said ward which shall come to his possession or knowledge, and shall faithfully and duly discharge the trust of guardian as aforesaid, according to law, and shall render a just and true account of his dealings therein to said court annually, or whenever he shall be by said court thereunto required, or to his said ward whenever

she shall arrive at the age of twenty-one years, or whenever said guardianship shall be removed; then the above-written obligation to be void and of none effect; or else to be and remain in full force and virtue." The plaintiff, in its declaration, after setting out said bond and conditions thereof, alleges four breaches of the same, to the effect that said guardian did not discharge his trust according to law; that he did not render a just and true account annually; that he unfaithfully and unduly took and used for himself large sums of money belonging to the estate of his ward which had come to his hands as her guardian; that April 2, 1899, he presented to said court an inventory, approved and allowed by said court, of the personal estate of his said ward in his hands, amounting to \$5,275, which sum still remains in his possession; and that said plaintiff company obtained judgment against said guardian in this court for \$778.55 debt or damages and costs of suit, which sum is still due and owing to the plaintiff, but said guardian has not paid the same, or any part thereof, but has refused to pay the same, though the personal estate of his ward in his hands is more than sufficient to pay said sum, by reason of which said bond became forfeited. To this declaration the defendant guardian has filed his demurrer upon the following grounds: That the facts assigned by the plaintiff in his declaration do not, in law, constitute a breach of said bond, and that the plaintiff is not a party interested in the bond, and cannot inquire therein as to whether or not the principal named therein has committed a breach thereof.

Under Gen. Laws 1896, p. 640, c. 196, § 26, "if any guardian shall neglect to exhibit a true inventory of his ward's estate or a list of the claims presented against his ward as above required, or shall neglect to apply the real and personal estate of his ward as aforesaid to the payment of his debts as aforesaid, it shall be deemed a forfeiture of his bond given as aforesaid, and his sureties or surety shall be liable to an action thereon by any creditor or person interested or at the instance of any person interested, and judgment shall be entered in such action and execution shall issue and recovery shall be had, to such use and with like powers in and privileges to the court of probate, as, in like cases, on administration bonds sued."

Unless the plaintiff as a creditor of Grace I. Plummer, the ward, this action cannot be maintained, for it is not claimed that it is interested except as a creditor. The plaintiff has seen fit to sue and become the judgment creditor of Henry E. Le Valley, guardian of Grace I. Plummer. The effect is the same as if it had sued Henry E. Le Valley without describing him as guardian of the estate of Grace I. Plummer. The judgment binds him personally, and the description has no legal effect. It may be disregarded as surplusage. *Arnold v. Angell*, 1 R. I. 291; *Willard v.*

Fairbanks, 8 R. I. 7; *Rollins v. Morse*, 128 Mass. 116. Guardians of minors, spendthrifts, or insane persons do not become owners of the property which is placed under their charge. The title thereto remains in the wards. The guardians have only a naked power, not coupled with an interest. The debts of the ward remain his debts, and can be recovered by suit against him, not by suit against the guardian. *Rollins v. Morse*, supra. Under said chapter 196, § 29, "no action shall be sustained against any person under guardianship within twelve months after the appointment of his guardian and notice thereof, unless the claim presented is wholly or in part rejected by the guardian, in which case the creditor may bring his suit forthwith, and shall be entitled to the whole or a dividend, if the estate should prove insolvent, upon such claims as he may recover in such suit. The party bringing such suit, besides the service of the original writ, shall cause a true copy thereof to be served upon the guardian"; and, under a portion of section 22 of said chapter, "every debt from the estate of the ward, allowed by the guardian, or found due by judgment or suit brought under the provisions of section twenty-nine of this chapter, shall be a lien upon the real estate of such ward during his minority and for one year thereafter." To become a creditor of the ward, it was necessary for the Callender, McAuslan & Troup Company to have had its account allowed by the guardian, or, if rejected by the guardian, to have brought suit under the provisions of section 29. As it did neither, it cannot inquire into the conduct of the guardian respecting the discharge of his trust.

Demurrer sustained.

(% N. J. R. 214)

ZANE v. WEINTZ.

(Court of Chancery of New Jersey. July 29, 1903.)

SPECIFIC PERFORMANCE—SALE OF REALTY—DEFECTIVE TITLE.

1. On a bill filed by the vendor to compel specific performance by a vendee of a contract to buy land, if the vendor's title or power to convey be so doubtful that the court is of opinion that her capacity to convey a fee simple is fairly debatable, the vendee will not be compelled to accept the title and perform the contract of sale.

2. Where the doubt arises touching the legal effect of some inartificial and ill-expressed instrument, the contract will not be specifically enforced.

(Syllabus by the Court.)

Bill by Lovina S. Zane against William Weintz. Dismissed.

The bill in this case is filed by Lovina S. Zane, the widow of Horatio G. Zane, who claims that under the last will of her mother, Rachel Ward, she either has title in fee to a lot of land situate at the northeast corner of William and Line streets, Camden, N. J., or

has a power to sell and convey an estate in fee simple in that lot. The bill seeks to compel the defendant, William Weintz, who has contracted to purchase the lot, specifically to perform his agreement, accept the complainant's deed, pay the purchase money, etc.

The will of Rachel Ward, under which the complainant claims power to convey the lot, is dated the 21st day of June, 1881, and was proven in the year 1885. The three clauses which are claimed to confer a fee-simple estate in the lot upon the complainant, or to authorize her to sell it, are as follows:

"Item: I give and bequeath to my daughter Lovina Zane the wife of Horatio Zane, my house and lot situate in Camden, New Jersey, on the northeast corner of William and Line streets, for and during her natural life; and after her decease, to such person or persons as would by law inherit the same, if she had an estate therein in fee simple, with the understanding that my said daughter and her said husband shall keep the said property in good repair and pay all lawful taxes, that are assessed against said house and lot.

"Item: I give to my relative and friend John V. Beckett in trust a certain mortgage given to me by Horatio G. Zane, for three thousand dollars, and any other money in my possession, or papers calling for money at my decease, and all moneys due on said mortgage or other papers calling for money, and the said John V. Beckett, is to collect the interest due and to grow due on said mortgage, or other papers that I may have, and out of the first interest so received shall pay for a set of tombstones to be erected at my grave to be selected by my daughter and to be similar to those now standing at my husband's grave, and after paying for said tombstones, and all taxes against said mortgage, or other papers, and other expenses attending the settling of my estate, shall pay over the balance to my daughter, Lovina Zane, each and every year during her natural life, and at her death the said Beckett shall pay over all moneys in his hands to the heirs of my said daughter, share and share alike. In case my daughter should leave no heir or heirs then to my niece Rachel Beckett and to her heirs.

"Item: If my daughter Lovina Zane should survive her husband Horatio G. Zane, then the said Lovina Zane can have control of all moneys, property in her own keeping, to sell or dispose if she see fit, but subject to the above devise and bequeathment."

The defendant, Weintz, admits the making of the agreement to purchase the lot, and substantially all the facts stated in the bill, but denies that the complainant has any title to the lot in question, or any power to convey the same in fee simple. He declares that he is ready to carry out and perform his agreement, and would do so if the complainant were able to make him an efficient deed conveying an estate in fee simple. It was

admitted at the hearing that Lovina Zane has a child.

George J. Bergen, for complainant. William Early, for defendant.

GREY, V. C. (after stating the facts). There is but a single question in this case: Has the complainant such title to or power over the lot in question that she is able to convey an estate in fee simple in it? If she has, the defendant admits his obligation to accept a deed and pay the purchase money. If she has title, it is admitted she acquired it only by the effect of the above clauses of the will of her mother, Rachel Ward. At the common law a very interesting question might have arisen under the phrasing of this will. The estate devised to Lovina gives to her, in express words, a freehold life estate. In the same instrument is a gift over after her death "to such person or persons as would by law inherit the same, if she had an estate therein in fee simple." The devise in remainder is not in express terms to the "heirs" of the first taker, the phrasing which most usually occurs in devises which called for the application of the rule in *Shelley's Case*, but the words used are substantially of the same import. In *Adams v. Ross*, 30 N. J. Law, 512, 82 Am. Dec. 237, Chief Justice Whelpley declared, speaking as to the construction of deeds, that the use of the word "heirs" was required to bring the rule into operation, and held that, no matter what appeared to be in intent of the grantor, a deed to A. and her children conveyed only a life estate to A. The learned Chief Justice conceded that in construing wills a different rule prevails. In *Goodtitle v. Herring*, 1 East, 265, a testator used the words, "heirs male of the body of A," which had a perfectly ascertained technical meaning in the law, as words of limitation and not of purchase. Subsequent words in the will indicated that the testator intended the words "heirs male," etc., to be words of purchase, and not of limitation. The judges of the King's Bench enforced the intent of the testator as expressed by the qualifying words, holding "heirs male of the body," etc., as used in that will, to be words of purchase. The cases on the point may be found collated in a note appended to the report of *Shelley's Case*, 1 Coke 93 (106), London Edition of 1826.

The words used by the testatrix, Mrs. Ward, in the present case, in defining the persons who are to take in remainder, are precisely equivalent to the word "heirs." The devise is to all those persons who would inherit from the first taker if she were seised in fee. Not children or issue of the first taker, but her inheritors general, whether lineal descendants or collateral relatives.

If the words of the will indicated that the testatrix intended the remaindermen to take as descendants from Lovina, then the rule in *Shelley's Case* would at common law have

applied, and the devise would be held to have vested a fee-simple estate in Lovina. If, in defining the qualifications of the remaindermen, the testatrix intended to describe and point out the persons who were to take by direct gift from herself, then the rule would not apply, and Lovina would at common law be held to take only a life estate. *Martling v. Martling*, 55 N. J. Eq. 787, 39 Atl. 203, citing from the opinion of Mr. Justice Blackstone in *Perrin v. Blake*, as reported in *Hargraves' Law Tracts*, 575.

The question is, however, of little practical importance in the present condition of our law, for the tenth section of our statute of descents (Gen. St. p. 1195) has abolished the rule in *Shelley's Case* in devises where the first taker has lineal descendants. *Lippincott v. Davis*, 59 N. J. Law, 241, 28 Atl. 587.

Under the operation of this devise as controlled by that section, the highest estate that Lovina took was a life estate. That is the estate expressed to be given her by the words of the will, irrespective of the common-law application of the rule in *Shelley's Case*, as to the limitation over. So far as she claims to be entitled to hold a fee-simple estate, under the unaided devise to her, the effect of the devise is adverse to her contention. There is no occasion in this cause to consider the nature of the estate limited over to succeed Lovina's life estate.

It is also said that the gift to Lovina in the last clause of a power, "to sell and dispose if she see fit," etc., enlarges her life estate into a fee simple. This claim is refuted by the decisions in *Downey v. Borden*, 36 N. J. Law, 460, and *Wooster v. Cooper*, 56 N. J. Eq. 685, 33 Atl. 1050 (both in the Court of Errors and Appeals), to the effect that a gift in express words for life only, although annexed to it there may be an absolute power of disposal; passes to the devisee only a life estate. It seems to be clear that the complainant cannot rely upon her holding of a title in fee simple to the lands in question to put her in a position to demand specific performance of her contract to convey.

She contends also that under the last clause of her mother's will, granting her the power to sell, she is enabled to convey to the defendant a fee-simple estate. This power provides that, if the complainant survive her husband, "she can have control of all moneys, property in her own keeping, to sell and dispose if she see fit, but subject to the above devise and bequeathment." Does this clause so clearly give to the complainant a power to convey a fee-simple estate that a person to whom she has contracted to convey such an estate should be compelled to accept her deed and pay for the lands conveyed solely by virtue of this power? The phrasing of the clause is clumsy and imperfect, but it may fairly be held to express the intention of the testatrix that, in case Lovina survived Horatio, she should have the keeping and control of the moneys

and property theretofore dealt with in the will, and power to sell and dispose of that property if she saw fit. But the testatrix does not stop here. She declares that Lovina's disposition shall be "subject to the above devise and bequeathment." The counsel for complainant insists that it is a necessary inference that the testatrix intended by this power to enable her daughter Lovina to do something more than that which she was enabled to do under the preceding clauses of this will; that Lovina, as owner of her own life estate, had authority to sell the property (i. e., the lot of land in question), without the power given in this last clause, but her sale of it would only have been of an estate during her own life; that this added power must be construed to authorize Lovina to convey a fee-simple estate; that the words, "subject to above devise and bequeathment," if they have any meaning, must refer to the preceding requirement that Lovina and her husband keep the property in repair and pay the taxes, and must mean that if Lovina sold under the power she must still continue to keep the property in repair and pay the taxes; that the performance of this obligation by Lovina is beneficial and not injurious to the title sold under the power, and no ground of objection on the part of the proposed vendee, who would, by accepting the conveyance of a title which obliged the vendor, after sale, to keep the property in repair and pay the taxes, be greatly advantaged.

The clause "subject," etc., was certainly intended to put some limitation upon the estate which Lovina might convey under it. The words used in defining the limitation are the "above devise and bequeathment." It is almost an absurdity to attempt to find the intention of this testatrix from the meaning of the words of the will, for its whole expression indicates that its words are used with very little knowledge of their real meaning; yet these words are our only guide in seeking to find out what the testatrix intended.

It seems to me impossible to hold that the words "devise and bequeathment" refer to the preceding obligation put upon Lovina and her husband to repair the property and pay the taxes. The will puts this obligation upon both husband and wife, without mentioning that the wife should continue to perform it after his death. The power to sell was only to be exercised after the husband's death. Where is there anything which indicates that the testatrix intended that the wife should alone repair and pay taxes, and continue to do so after her life estate had been determined by her death? If such a duty is imposed by this will, when does it end? Who is to perform it for Lovina after she is dead?

The obligation to repair, etc., could not have been referred to by the testatrix when she uses the words "devise and be-

queathment." That obligation was neither a devise nor a bequest. Moreover, the will does contain a preceding devise of the lot in question to the persons who may be the heirs of Lovina, and a preceding bequest, in case Lovina leaves no heir or heirs, of the trust money to the testatrix's niece Rachel Beckett, and her heirs. If any meaning is to be ascribed to the testatrix's use of these words, they might much more plausibly be held to refer to that preceding devise and bequest. If they do, they limit the estate which Lovina may pass in the lot in question by the exercise of the power, so that it will be subject to the devise over, and therefore it could not be a fee simple.

This will is so inartistically drawn that it is difficult to put any construction upon it which will not leave the vendee, if he is decreed to perform his agreement and take title under it, in danger of losing the property conveyed at the suit of some future claimant. The decree in this suit, even if favorable to the complainant, would, of course, afford no protection to the defendant against the attack of any claimant of the lands in dispute who is not a party to this suit.

The doubt as to the complainant's power to convey the lands, if it is not resolved against her, must at least be admitted to be so forceful that her right is fairly debatable. This is sufficient to defeat her attempt to compel specific performance. *Vreeland v. Blauvelt*, 23 N. J. Eq. 483; *Lippincott v. Wikoff*, 54 N. J. Eq. 120, 83 Atl. 305. The declaration of Lord Justice James in *Alexander v. Mills*, 6 Ch. App. 131, to the effect that specific performance will not be decreed where the doubt of the vendor's power to convey a good title arises in ascertaining the true construction of some ill-expressed instrument, is also applicable in this case. *Richards v. Knight*, 64 N. J. Eq. 196, 53 Atl. 452.

The complainant's bill should be dismissed, with costs.

(69 N. J. L. 590)

STATE v. DE MAIO.

STATE v. MIGNOGNA.

(Supreme Court of New Jersey. July 23, 1903.)
CRIMINAL LAW—PREJUDICE OF JUDGE—EVIDENCE—WITNESSES—JUDGE OF COURT—
—REVIEW—CERTIORARI.

1. The mere allegation to a judge sitting in the trial of defendants, charged with being disorderly persons, that he was biased and prejudiced, by way of challenge, and the judge's refusal to appoint triors, without any rule to take testimony or evidence of such bias, is insufficient to establish the same or authorize consideration of such objection on review of convictions on certiorari.

2. Where a court is held by a single judge, a party cannot call the judge as a witness, and thus destroy the court.

Certiorari by Alfred De Maio and another to review relator's summary conviction as disorderly persons. Convictions affirmed.

Argued June term, 1903, before GARRISON and GARRETSON, JJ.

John W. Wescott and Louis H. Miller, for prosecutors. Joseph H. Powell and J. Hampton Fithian, for the State.

GARRETSON, J. The writs of certiorari in these cases bring up the conviction of the defendants as disorderly persons. The returns to the writs contain the affidavits, warrants, recognizances, challenges to the court upon grounds set forth, the filing and overruling of the same, the evidence taken upon the hearings, and the conviction and judgments; also a copy of the docket of the justice; and in the case of De Maio there appears in the printed book what seems to be some testimony taken before the justice as to the order of proceedings before him. This cannot be considered as any part of the return. The reasons for reversal are the same in both cases, and are as follows: (1) The court had no jurisdiction to hear and determine the cause. (2) The justice was disqualified to sit, inasmuch as he had prejudged the cause, and was the agent of the complainant to convict the defendant. (3) The court refused to lawfully try a challenge to the jurisdiction of the justice, duly presented and filed. (4) The justice rejected legal evidence offered by defendant, and admitted illegal evidence offered by the state over defendant's objection. (5) There was no legal conviction of defendant. (6) Because the proceedings were in divers other respects illegal, erroneous, and contrary to law. No rule to take testimony to be used upon the hearing of these writs was made, nor was any testimony taken. The argument of the cases for the prosecutors is based almost entirely upon the challenges to the justice as contained in the return, and which allege bias or prejudice. It is not necessary in these cases to determine whether the justice was holding a court of record, or whether such a judge, in such a court, could be challenged for bias or prejudice. There is nothing before this court to show that the justice was so affected. The mere allegation to him of such bias or prejudice by way of challenge, and his refusal to appoint triors do not prove the existence of the bias or prejudice. If the judgment is tainted by the action of such a judge, it may well be that it ought not to be allowed to stand; but before it is set aside this court should be satisfied by legal evidence of the facts showing the existence of such bias or prejudice. There are no such facts in these cases. They could be presented to the court in testimony taken upon a rule granted for that purpose by this court. One claim is that the justice was called as a witness, and refused to be sworn. A party cannot call a judge as a witness in a cause where the court is held by a single judge, and thus destroy the court.

We find no foundation for any of the other reasons, and the convictions will be affirmed, with costs.

(89 N. J. L. 509)

HIRSCH et al. v. C. W. LEATHERBEE LUMBER CO.

(Supreme Court of New Jersey. June 8, 1903.)

CONVERSION OF PERSONALTY—ELECTION OF REMEDIES—SALE—BONA FIDE PURCHASER—NOTICE—CONDITIONAL SALE—SECONDARY EVIDENCE—RECORDING CONTRACT.

1. Where one has wrongfully converted the personal property of another to his own use, the injured party may at his option waive the tort, treat the tortfeasor as having purchased the goods in question without stipulation as to their price, and recover the market value of the goods upon the implied promise to pay so much as they were reasonably worth at the time of the conversion.

2. Where an unexecuted agreement has been made for the sale of goods, and the goods remain in possession of the vendor, one who buys from the vendee with notice that he has not paid his vendor for the goods is put upon inquiry to ascertain whether the first vendee is entitled to the goods without payment on delivery.

3. A sale for cash is a conditional sale; as between the parties no title vests thereunder by delivery without payment, unless the delivery be made under such circumstances as to evince a waiver of the condition.

4. The recipient of a letter having been a nonresident of this state, and having died before the trial of the action, production of the original letter by the sender is excused, and secondary evidence of its contents is admissible if the original would have been admissible.

5. Our statute requiring conditional contracts of sale to be recorded (Gen. St. p. 891, § 191) does not apply to a contract made between non-residents concerning personal property situate out of this state, the contract not contemplating the removal of the property into this state.

6. The Georgia statute for the recording of conditional contracts of sale held not to apply to a sale on condition of payment of the price in cash on delivery.

(Syllabus by the Court.)

Error to Circuit Court, Hudson County.

Action by Charles S. Hirsch and others against the C. W. Leatherbee Lumber Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

James A. Gordon, for plaintiff in error. James B. Vredenburg, for defendants in error.

PITNEY, J. This is an action upon contract, in the nature of an action of assumpsit, brought to recover the market value of 8,435 railroad ties. Plaintiffs had judgment below. Reversal is sought for alleged trial errors.

Plaintiffs were wholesale lumber dealers, having their principal office in New York City. Defendant was in the same business, with headquarters at Boston. Both parties

conducted a part of their business in Brunswick, Ga., where they severally had wharves for the receipt, shipment, and storage of ties and other lumber. One Allen was the plaintiffs' agent in Brunswick. The defendant's business there was in charge of a man named Johnson and an assistant named Hill.

The transaction that gave rise to the present controversy took place in December, 1900, and the following January. In the former month the plaintiffs had on hand at their wharf in Brunswick about 40,000 ties, among which were those in question. The latter were known as 6x9 ties, 8 feet long; some were sawn, some hewn.

During the month of December certain correspondence took place between the plaintiffs in New York and a man named Danforth, then residing and doing business in Brunswick, resulting in an agreement for the sale of the 8,435 ties in question at the price of 36 cents each, terms net cash on delivery; the ties to be taken on or before January 10th, and to be paid for on that date whether taken or not. There was some evidence tending to show a subsequent modification of the terms to this extent: that the plaintiffs were to be content with payment of 80 per cent. of the purchase price on January 10th, if the ties were not taken on that date. Danforth agreed to purchase on these terms, but in the correspondence held himself out as acting for other parties not named. The arrangement was that the ties were to be loaded on board vessel from the plaintiffs' wharf. All these details were concluded by correspondence on or before December 24th. Nothing further of importance transpired until January 10th, the ties meanwhile remaining upon the plaintiffs' wharf. On the date just mentioned Danforth wires them, saying: "It makes great difference to us on account of insurance to pay to-day for ties. We feel confident that vessel arrives few days. Can you delay a short time on account this fact. Ties for Leatherbee." On the same day Danforth wrote to the plaintiffs confirming this telegram, adding: "The C. W. Leatherbee Lumber Co.'s agent here, for whom I secured the ties, is willing and anxious to make payment whenever required, but has investigated the matter of insurance and I have wired you as above. It is only a matter of a few days to you, as the sale is a bona fide one, and the insurance question is the only stumbling block." On the 11th the plaintiffs answered Danforth's telegram by wire and letter, stating, in effect, that the ties were covered by a policy held by plaintiffs, under which Danforth could collect in case of loss, and requesting him to pay the Brunswick office for the ties. According to the testimony of the plaintiffs' agent, Allen, who was called as a witness in their behalf, a conversation took place in Brunswick on January 12th between him and Johnson, the defendant's agent, in which Allen mentioned that he had been advised by Danforth, and had

§ 1. See Action, vol. 1, Cent. Dig. § 198; Assumpsit, Action of, vol. 5, Cent. Dig. § 54.

gathered from what Danforth had written to the New York office, that Danforth was negotiating for the ties for the Leatherbee Lumber Company, and that the ties were to be theirs. Allen therefore called upon Johnson for 80 per cent. of the value of the ties, the terms of the sale being (as he said) net cash on delivery, or 80 per cent. of the value of the ties on January 10th if not delivered. Allen also testified that Johnson told him he would give him a check in the name of the C. W. Leatherbee Lumber Company; that an estimate was made between them as to the amount to be thus paid, but that the check was not given because of the absence of Danforth, whose presence at the settlement both agents seem to have considered essential by reason of his interest in the transaction. The payment in question was therefore deferred, and was not at any time made.

On January 13th the vessel on which it was intended to ship the ties arrived off the plaintiffs' wharf. Allen testified that he and Johnson boarded her together on that day, and endeavored to make an arrangement about giving her a berth at the dock, but by reason of some difficulty in doing this the captain took his vessel to the wharf used by the defendants. An arrangement was subsequently made between Allen and Johnson for the transfer of the ties by rail from the plaintiffs' wharf to that of the defendant, and this was done between the 18th and the 23d, the ties being at the same time loaded upon the vessel.

Allen testified that on the 24th, at defendant's wharf, he requested Johnson to make payment for the ties, and that Johnson refused to settle, in the absence of Danforth. At the same time Allen left with Johnson a bill made out in the name of the plaintiffs against Danforth for the 8,435 ties, at 36 cents each, amounting to \$3,036.60. At this interview, as Allen testifies, Johnson told him that he himself expected to be away from home, and that his assistant, Hill, was authorized to make payment for the ties in his absence. Allen says that on the 26th he called again at defendant's office and found Hill there, Johnson being absent; that he asked Hill if he had paid Danforth for the ties, and Hill said he had not, but expected to do so later in the day; and that he (Allen) thereupon notified Hill not to pay Danforth, saying, in substance, that the ties were not to pass out of plaintiffs' possession until paid for, and that they remained the property of the plaintiffs even though the vessel had gone to sea. He testifies that the vessel went to sea late in the afternoon of the 24th or early in the morning of the 25th.

The correspondence between the plaintiffs and Danforth was not introduced by the plaintiffs as a part of their principal case. They rested after introducing Allen's testimony to the effect that the ties were the property of the plaintiffs; that they were

delivered to the defendant under the circumstances just recounted, and that they were sent to sea in a vessel controlled by the defendant; together with evidence of the market value of the ties at the time of delivery. Defendant moved for a nonsuit, on the theory that the evidence did not show a conversion, and that by rendering a bill made out in the name of Danforth after the ties had been delivered to the defendant the plaintiffs had waived their rights as against the defendant. This motion was properly refused, even as the case then stood. There was evidence from which the jury would have been justified in finding either that the ties were sold and delivered by the plaintiffs to the defendant (Danforth's purchase not having as yet clearly appeared), or that the ties had been wrongfully converted by the defendant. Upon the theory of conversion, the plaintiffs were entitled to waive the tort, and recover the market value of the property in an action of assumpsit. If one who has rightfully converted the personal property of another to his own use is held bound by an implied promise to pay to the owner its reasonable value, certainly he who has wrongfully converted such property must be held to the same implied undertaking. To permit him to deny the promise would enable him to take advantage of his own wrong. The tortfeasor, in such circumstances, may, at the option of the party injured, be treated as having purchased the goods in question without stipulation as to their price, and be held liable in assumpsit for their market value. *Moore v. Richardson* (N. J. Err. & App.) 53 Atl. 1032.

Shipment of the ties upon a vessel bound to sea was sufficient evidence to go to the jury upon the question of conversion.

The making out of a bill in the name of Danforth was not a conclusive circumstance, and, at most, raised a question for the jury as to its effect under the other circumstances of the case.

The defendant introduced evidence tending to show that Danforth in purchasing the ties from plaintiffs was not acting as agent for defendant, but that defendant had purchased the ties from Danforth at some time between December 15th and January 1st, and that its agent, Johnson, paid Danforth for them, in full, on the 26th of January, after the sailing of the vessel. Both Johnson and Hill were called as witnesses. Johnson asserted that the ties were delivered to the defendant by Danforth, but this was a mere assertion of a conclusion unsupported by fact, for he confirmed the plaintiffs' evidence to the effect that the property was in plaintiffs' possession at the time he purchased them from Danforth; that the delivery was made directly from plaintiffs' wharf to that of the defendant through the instrumentality of Allen; and that prior to this delivery he (Johnson) had arranged to make an advance to the plaintiffs on account

of the ties. He testified that at the time this arrangement was made he believed the ties were insured in the name of the plaintiffs, and that he knew the plaintiffs had not been paid for them. He denied that he had promised to pay to the plaintiffs the purchase price for the ties in full. Hill's testimony was confirmatory upon the question of the proposed advance. He denied that Allen notified him not to pay Danforth. Defendant also introduced in evidence certain of the letters written by the plaintiffs to Danforth, tending to show a purchase of the ties by the latter from the plaintiffs. In rebuttal the plaintiffs introduced the remainder of the correspondence already mentioned.

Upon the close of the whole case, these facts remained proven beyond dispute: First, that the plaintiffs were owners and in possession at least until the ties were placed upon defendant's wharf; secondly, that Danforth's only title was expressly subject to payment of the price in cash upon delivery; thirdly, that defendant claimed title by purchase from Danforth, who at no time had possession, the defendant having full notice that Danforth claimed by purchase from the plaintiffs, and that he had not paid the purchase price. The only material point open to controversy, under the evidence, was whether the ties were delivered to defendant's wharf under such circumstances as to evidence a waiver by the plaintiffs of the payment of cash on delivery.

In this state of the proofs it is obvious that the defendant's motion for direction of a verdict was properly refused. There was still remaining, we think, a fair question for the jury to determine, whether the sale as carried out was not in fact a sale made by the plaintiffs to the defendant through Danforth as a middleman. Viewing the transaction in this light, the question whether payment on delivery was waived was of course immaterial; for the present action is the appropriate mode of recovering the price of the goods. Treating the sale (as the trial judge treated it) as made by the plaintiffs to Danforth for his own account, and the delivery as made to the defendant as his nominee, the question whether the delivery was unconditional was in dispute.

A sale for cash is a conditional sale. As between the parties no title vests thereunder by delivery without payment, unless the delivery be made under such circumstances as to evince a waiver of the condition. *Cole v. Berry*, 42 N. J. Law, 308, 310, 36 Am. Rep. 511. In the cases of *Heller v. Elliott*, 45 N. J. Law, 564; *Marvin Safe Co. v. Norton*, 48 N. J. Law, 410, 7 Atl. 418, 57 Am. Rep. 566; *Leatherbury v. Connor*, 54 N. J. Law, 172, 23 Atl. 684, 33 Am. St. Rep. 672; and *Campbell Mfg. Co. v. Rockaway Pub. Co.*, 56 N. J. Law, 676, 29 Atl. 681, 44 Am. St. Rep. 410—delivery had been made to the original vendees. The controversies related to the rights of third parties purchas-

ing from a vendee in possession. The reasoning of those cases is applicable here only so far as it relates to the rights of the original parties.

Danforth not having been invested with possession or other indicia of title, and the defendant having notice of facts sufficient to at least put it upon inquiry as to plaintiffs' rights, the evidence did not present the case of a third party purchasing goods from one to whom delivery has been made under a conditional contract of sale. Unless the delivery to defendant as his nominee was made in such manner as to show a waiver of the condition, the defendant was in the position of a mere assignee of a chose in action, and simply succeeded to Danforth's right to have the goods on performance of the condition. The claim that cash payment was waived by the delivery of the ties at defendant's wharf rests upon a very slender foundation. Defendant's witness Johnson himself testified (and there was no evidence to the contrary) that by the custom of the trade a sale of ties for "cash on delivery" meant that payment could not be exacted until the ties had been loaded on vessel or cars and a bill of lading issued. Upon the whole case, the utmost that defendant was entitled to was to have the question of waiver submitted to the jury, and this was done.

It remains to discuss the exceptions taken to rulings on matters of evidence and to the instructions of the trial judge to the jury.

The judge admitted in evidence, over defendant's objection, a letterpress copy of a letter from the plaintiffs to Danforth, dated December 12th, forming a part of the correspondence already mentioned. The objection was that there was no evidence to show that any such letter was received by Danforth, and that secondary evidence was not admissible. Danforth had lived in Georgia. He died some time before the trial. This was sufficient to excuse production of the original letter. The writing of the letter of December 12th was proved, but its mailing was not clearly proved. It was testified, however, by one of the plaintiffs that a letter had been received from Danforth, acknowledging receipt of the letter of December 12th. The letter of acknowledgment is not in evidence, but no objection was made to the secondary evidence of its contents. Accepting the fact that Danforth acknowledged receipt of the letter of December 12th by letter, it was fair to assume that the acknowledgment was written in the course of the correspondence that resulted in the sale of the ties to Danforth. As defendant claimed title under Danforth, this rendered the fact of his acknowledgment evidential against the defendant, and rendered admissible the letter of the 12th when proven. The letterpress copy was therefore properly admitted. Even were there error in admitting it, the error was quite harmless, as the letter in ques-

tion was not at all essential to the plaintiffs' case. It related solely to the terms of Danforth's proposed purchase, which were clearly proved by other documentary evidence to which no exception was taken, and the terms of the purchase were not disputed.

The trial judge admitted in evidence, over objection, a letter written December 13th by the plaintiffs to their agent, Allen, advising him of the terms of their sale to Danforth, which at that time they supposed to be finally closed as the result of certain telegrams that passed between them and Danforth on that day, after considerable previous correspondence that rendered the references easily intelligible by the parties. They wired him saying, "Cannot sell the hewn ties without the sawn." He replied, "All sawn and hewn accepted per your offer." They answered, "Will instruct Allen to deliver ties terms strictly net cash." The letter to Allen was sent in pursuance of this telegram.

If Danforth had made his purchase from Allen as plaintiffs' agent acting under general authority, there would be force in defendant's insistence that this letter was "hearsay and immaterial." But as Danforth's purchase was made directly from the plaintiffs, under circumstances that necessitated instructions to their agent respecting the terms of delivery, and as their telegram notified Danforth that Allen's authority to make delivery would be specially communicated to him, the authority of Allen arose out of those instructions, and not out of his usual employment. The letter of authority was therefore admissible as a part of the evidence of Danforth's title, and also as throwing light upon the fact of delivery as distinguished from the fact of purchase. In any aspect, its admission did no harm to the defendant, as the letter was only cumulative evidence upon points that otherwise appeared in evidence beyond dispute.

Exception was taken to the ruling of the trial judge in permitting Allen to testify that the notice not to pay Danforth, which he said he gave to Hill on January 28th, was given by advice of an attorney at law. The objection, that this was hearsay, was apparently well taken. But it is impossible to see how this evidence can have done any harm. The fact of giving the notice was material; but it was of no sort of consequence by whose advice it was given, and the jury cannot have been misled by the hearsay evidence.

Three exceptions relate to passages in the judge's charge, to the effect that a sale for cash is a conditional sale, and that the property will not pass until the condition be fulfilled, even though the goods may have actually been delivered into the possession of the buyer. The objection is not to this statement of the law, but to the omission of the judge to qualify it by expounding the law as to the rights of innocent third parties becoming interested after the delivery.

There was no request for specific instructions upon this point, doubtless because it could not be pretended, in view of all the circumstances, that the defendant was an innocent purchaser from Danforth as a party in possession. There being no evidence that Danforth ever had possession, the trial judge is certainly not to be blamed for omitting to theorize upon the rights of bona fide purchasers.

Two exceptions relate to the instructions of the trial judge to the jury with respect to the measure of damages. One of these exceptions is so broad as to be valueless; for it includes the indubitable proposition (charged pursuant to defendant's request) that the value of the goods at the time in question should be the measure of damages, as well as a certain allusion to the testimony, of which complaint is now made. The limitation of the recovery to the market value of the ties was favorable to the defendant, and perhaps was necessary under the evidence; for while there was some evidence tending to show a sale by plaintiffs to defendant, either through Danforth's agency or that of Allen, there was no clear evidence that defendant had agreed to pay the plaintiffs a fixed price. Therefore whether on the theory of a sale by plaintiffs to defendant, or on the theory apparently adopted by the parties at the trial and certainly adopted by the judge, that a recovery must be rested upon a conversion of the ties by the defendant, in either case market value was the proper measure of damages. Moreover, that basis was adopted at defendant's request.

Mere comments by the trial judge upon testimony are not assignable for error. *Bruch v. Carter*, 82 N. J. Law, 554; *Castner v. Sliker*, 33 N. J. Law, 95; *Id.*, 507; *Del. Lack. & W. R. R. Co. v. Toffey*, 38 N. J. Law, 525, 530; *Engle v. State*, 50 N. J. Law, 272, 13 Atl. 604.

But complaint is made concerning another portion of the charge, in which the judge said: "You will take the testimony, the sale by the one party and the sale by the other party, and get at the value of these ties." The reference is to the price of 36 cents each, as agreed upon between the plaintiffs and Danforth, and the lesser price at which Danforth agreed to sell them to the defendant. If it be objected that neither sale was consummated according to the evidence, and so neither contract was evidential upon the question of market value, the answer is that the allusion in any aspect was harmless. Aside from these so-called sales, the only evidence of market value was the testimony of Allen and that of Johnson. The former testified to a value that agreed with the price Danforth agreed to pay to the plaintiffs, while Johnson swore that the market value was the same as the price fixed in defendant's contract with Danforth. The judge, therefore, in referring to the two

sales, in effect directed the minds of the jury to the evidence on both sides concerning actual market value. The charge is distinguishable from that given in *Moore v. Richardson* (N. J. Err. & App.) 53 Atl. 1082.

Exception was taken to this portion of the charge: "If the defendant had knowledge that Danforth had not paid for the ties, it was put upon notice to inquire what were the terms of the contract of sale between Danforth and the plaintiffs; if it did not so inquire, upon it must fall the loss." Blackstone says (2 Bl. Com. 447): "It is no sale without payment, unless the contrary be expressly agreed." In 1 Benj. on Sales (Corbin's Ed. p. 338) it is said: "It must not be inferred that, in the absence of any condition in the contract of sale, the buyer can take the property vested in him without payment." In 2 Kent's Com. (13th Ed.) p. 497, it is said: "Where no time is agreed on for payment, it is understood to be a cash sale, and the payment and the delivery are immediate concurrent acts, and the vendor may refuse to deliver without payment, and if payment be not immediately made the contract becomes void." See, also, 21 Am. & Eng. Encyc. Law (1st Ed.) tit. "Sales," p. 565, and cases cited.

It results that where an unexecuted agreement has been made for the sale of goods (as, in this instance, between the plaintiffs and Danforth), and the goods remain in the possession of the vendor, one who buys from the vendee with knowledge that he has not paid his vendor for the goods is put upon inquiry to ascertain whether the first vendee is, by the terms of his purchase, entitled to the goods without payment on delivery. As already remarked, the second purchaser in such a situation acquires but a chose in action, and merely succeeds to the rights to which his assignor was entitled. In view of the undisputed facts of this case, that portion of the charge just referred to was fully justified.

The final exception is to the refusal of the trial judge to charge four propositions requested by the defendant. Only one of these propositions has been defended in the argument. Even if the generality of the exception be not sufficient to defeat it, the exception will be considered as waived except with respect to the single proposition that has been discussed (*Hopwood v. Benjamin Atha & Illingworth Co.* [N. J. Err. & App.] 54 Atl. 435), which is this: "That, if the sale by the plaintiffs to Danforth was a conditional sale, the contract, not having been recorded, is void as to bona fide purchasers."

The property not having been within this state, all the parties having been resident elsewhere, and the contract not having contemplated the removal of the property to this state, our statute (Gen. St. p. 891, § 191), of course, does not apply. *Knowles Loom Works v. Vacher*, 57 N. J. Law, 490, 31 Atl.

306, 33 L. R. A. 305; *Woolley v. Geneva Wagon Co.*, 59 N. J. Law, 278, 35 Atl. 789.

We are referred to a Georgia statute, which, however, was not proved in evidence. Assuming it to be as reported in *Cohen v. Chandler*, 79 Ga. 423, 7 S. E. 160, and *Mann v. Thompson*, 86 Ga. 347, 12 S. E. 746, the law is as follows: "Whenever personal property is sold and delivered, with the condition affixed to the sale that the title thereto is to remain in the vendor of such property until the purchase price thereof shall have been paid, every such conditional sale, in order for the reservation of title to be valid as against third parties, shall be evidenced in writing, and not otherwise. And the written contract of every such conditional sale shall be executed, attested, and recorded in the same manner as mortgages on personal property. Conditional sales not so recorded are valid between the parties, but operate as absolute sales as against all other liens created or obtained or purchases made prior to the record."

The mere recital of this statute shows the absurdity of attempting to construe it as applicable to a sale upon condition of payment of the purchase price in cash upon delivery. It refers only to contracts that contemplate a continued possession by the vendee subject to a reservation of title by the vendor.

No prejudicial error appearing in the record, the judgment under review should be affirmed.

(99 N. J. L. 600)

ROWE v. COMMISSIONERS OF ASSESSMENTS OF EAST ORANGE.

(Supreme Court of New Jersey. Aug. 8, 1903.)
MUNICIPAL CORPORATIONS—STREET OPENING—STATUTES—COMMISSIONERS OF ASSESSMENT—ELIGIBILITY—OBJECTIONS—ESTOPPEL.

1. Act March 24, 1899, p. 283, c. 135, as amended by Act March 20, 1901, p. 145, c. 70, § 59, providing for the improvement of streets and assessment of benefits, authorized the opening of a proposed street to constitute an extension of another street in the city of East Orange.

2. That one of the commissioners appointed to open a proposed extension of a city street and assess benefits was a brother-in-law of a person whose property was not assessed, and another commissioner had had transactions with or for a certain interested railroad company, and that they held official positions, did not disqualify them from acting, on the ground of interest.

3. Where prosecutor appeared by attorney in street-opening proceedings, and made and argued his objections, he was estopped to subsequently object that his petition for the improvement was informal and not sufficiently definite, or that the notice provided for by statute was insufficient.

Certiorari by Francis Rowe against the commissioners of assessments of East Orange. Writ dismissed.

Argued November term, 1902, before GARBRISON and GARRETSON, JJ.

Geo. E. Clymer, for prosecutor. Philemon Woodruff, for defendant.

PER CURIAM. The prosecutor seeks to set aside an assessment for benefit for the opening of a proposed street in East Orange known as the extension of Hollywood avenue. We think that the act of March 24, 1899, p. 283, c. 135, as amended by the act of March 20, 1901, p. 142, c. 70, afforded a constitutional authority for the action that was taken under the act as amended.

That one of the commissioners was a brother-in-law of a person whose property was not assessed, and that another commissioner had as a real estate agent had transactions with or for the Delaware, Lackawanna & Western Railway Company, do not disqualify either of them upon the ground of interest.

The prosecutor cannot now be heard to object that his own petition for this improvement was informal or lacking in due particularity; neither can he successfully resist his assessment because of the precariousness of the kind of notice provided for by the statute, in view of the fact that he got notice and appeared in person and made his objections and had them argued by legal counsel.

The objections to the commissioners upon the ground that they hold official positions, and to their allowances and expenses as being unwarranted and unnecessary, are without merit.

The prosecutor's claims that he is assessed for too great an amount, and that others are assessed for too little or not at all, and that an erroneous and illegal method of assessment was pursued by the commissioners, all fall because unsupported by the facts as we find them from the testimony taken under a rule in this proceeding.

Finding no valid reason for disturbing the assessment against the prosecutor's property, the same is affirmed, with costs.

SCHRECK v. JERSEY CITY, H. & P. ST. RY. CO.

(Supreme Court of New Jersey. July 27, 1903.)
INJURIES—DAMAGES—ELEMENTS—EXCLUSION.

1. Plaintiff, who was injured by defendant's negligence, was confined to the house for 14 weeks after the accident. His place of business adjoined his residence, and, beginning about five weeks after the occurrence, he was able to attend to the most important part of his business without going outdoors. He employed an extra man for four days each week during a period of a year or longer, but admitted that during such time plaintiff was actively engaged in the business of his firm, and was not devoting as much attention as he had previously done to his outside work. *Held*, that such facts justified the jury in excluding loss of earnings and the wages of plaintiff's employé so hired in ascertaining plaintiff's damages.

Action by Carl Schreck against the Jersey City, Hoboken & Paterson Street Railway

Company. On rule to show cause why a new trial should not be granted. Rule discharged.

Argued February term, 1903, before FORT and PITNEY, JJ.

George J. McEwan, for plaintiff. Bedie, Edwards & Lawrence, for defendant.

PER CURIAM. Plaintiff was injured in a collision with a street car of the defendant company, and recovered a verdict for \$750 damages. He applies for a new trial on the ground that the amount thus awarded is grossly inadequate to compensate him.

The motion is rested chiefly on two points:

First, that the plaintiff was confined to the house for 14 weeks after the accident, during which time he should have been allowed for loss of earnings. But the case shows that his place of business adjoins his residence, and that, beginning about five weeks after the occurrence, he was able to attend to the most important part of his business without going out of doors.

Secondly, he claims that by reason of his disability arising from the collision he was obliged to employ an extra man about four days per week, at \$3.50 per day, during a period of a year or longer. Upon his direct examination he testified, in substance, to this effect; but on cross-examination he admitted that during the time the extra man was employed he (the plaintiff) was actively engaged in the business of his firm, although not devoting as much attention as theretofore to outside work.

Upon both these points the jury had a right to find, and undoubtedly did find, that the plaintiff's claim for compensation was inflated, and that in the respects indicated he sustained little, if any, pecuniary injury as a result of the collision. Reducing these two portions of the plaintiff's claim to such extent as the jury was justified in reducing them, and taking due account of the other grounds upon which compensation was asked, we are not able to say that the verdict was clearly inadequate.

The rule to show cause will therefore be discharged.

NATTER v. TURNER.

(Court of Chancery of New Jersey. July 22, 1903.)

MORTGAGES—PURCHASE OF LAND AS SECURITY—ADVANCEMENTS—INTEREST—ACCOUNT—METHOD OF STATEMENT.

1. Where, on an accounting between an owner of land and a purchaser thereof under execution, to be held by the latter as security for advancements made to the owner, together with the purchase price, it appeared that the purchaser took possession, and was compelled, in order to maintain his security, to pay a mortgage indebtedness on the property, he was entitled to recover interest on the amount so paid from the time of the payment to the date of the accounting.

¶ 1. See Execution, vol. 21, Cent. Dig. § 853.

2. Where defendant took possession of land purchased at judicial sale under an agreement with the owner to hold the same as security for the price and his advancements, an account should be stated between the parties by crediting defendant with the purchase price, with interest from the date of payment to the time when any rents and profits were received, which should be applied as of the date they were received, in satisfaction, first, of the interest, and then of the principal, of the amount due, and defendant should also be credited with payments made in satisfaction of mortgages on the premises necessary to prevent foreclosure, with interest from the dates of such payments, and, if at any time the rents and profits more than sufficed to discharge the credits, interest was chargeable in favor of complainant on the balance.

Action by Jacob Natter against Alfred Turner. On exceptions to a master's report. Exceptions sustained. See 52 Atl. 1105.

Frederick A. Rex, for exceptant. John J. Crandall, for respondent.

GREY, V. C. (orally). The exceptions which challenge this report may, I think, be considered and decided without further delay. Some suggestion is made that the exceptions do not specify with sufficient certainty the matter which is criticised. While exceptions to a master's report must point out the particulars wherein the master is alleged to have erred; it is not necessary that the exceptant shall make up a new and correct report, and ask this court to accept it in the place of that made by the master. It is enough when the exceptions indicate with reasonable certainty the errors which it is claimed the master has made. That sufficiently appears on the face of these exceptions.

By the decree in this case it was found, in substance, that the defendant holds the property in question for the complainant as security for moneys expended at his request by the defendant, in accordance with the agreement set forth in the bill of complaint. The decree ordered that the defendant account before the master for the moneys received as rents, issues, and profits, that he be credited with \$500 expended by him for the complainant as of the 8th day of June, 1895, and also with all moneys laid out by him upon the premises in question for repairs, taxes, assessments, water rents, and insurance. The master was further ordered to take testimony and report the specific facts and figures concerning the payment of any mortgage liens upon the premises which defendant has discharged, and, if there have been losses by fire, that the master state the amount of insurance, by whom paid, and the costs thereof, and the amount of the losses and cost of rebuilding, and all further equity was reserved until the coming in of the master's report. The master's report and schedules of accounts find that the defendant in January, 1896, paid out \$4,200.38 to satisfy the principal and interest of mortgages upon

the premises, and proceed with the accounting, allowing various items of debit and credit, resulting in a finding that there is due to the defendant from the complainant a balance of \$2,611.66.

The defendant excepts to the master's report by three separate exceptions, all of them, however, directed to the same criticism. The findings of fact are substantially unchallenged, but the master has refused to allow interest upon the amount paid by the defendant in satisfaction of preceding mortgages upon the premises. He puts this refusal upon the ground that the court has decreed that the defendant was holding the premises against the complainant in his own wrong; the defendant should not in such a case be allowed interest on the amount advanced by him in payment of the mortgages. This element in the master's report is the subject of the criticism of the defendant's exceptions.

An inspection of the court's decree will show that it did not determine that the defendant was holding the property in his own wrong against the complainant, nor did it direct that the master should pass upon the rightfulness of the defendant's payment of the mortgages, nor whether interest should be allowed or refused for moneys expended in that payment. The master in this particular was directed to report the facts and figures. He has not only reported the facts and figures, but also a finding as to the equity of the defendant to have interest upon his expenditure in paying the mortgage. This is the only portion of the master's report which is in any way challenged, and all the equities reserved may, I think, be effectually determined on this hearing, as the counsel have now presented all the questions in issue.

It appeared, when this cause was on hearing on the pleadings and proofs, that the defendant received conveyance of the title to the whole of the property in question by purchase at a sheriff's sale. The purchase was made at the invitation and by the procurement of the complainant (who was the defendant in the sheriff's writ), upon an agreement between the defendant and the complainant that the defendant should pay the amount of the complainant's execution debt, take the title to the premises, and hold them as security for the repayment of his advances. In this manner the defendant took title to all and came into actual possession of part of the premises. The complainant himself retained possession of the residue, which was a considerable part of the premises. It was nowhere shown that the complainant had come to any adjustment of accounts with the defendant and demanded a reconveyance of the premises. However the balances between the parties might have been found, if adjusted, they never were actually so settled that the defendant was

called upon to make a reconveyance. While the defendant so held the title, the prior mortgages came to be due, and were by the defendant, either with or without pressure on the part of the holders, paid off and satisfied. Under these circumstances, the payment of these mortgages, precedent liens upon the premises, was an act preserving not only that part of the premises in the possession of the defendant, but also the portion retained and in the possession of the complainant. The defendant rightfully paid those mortgages with his own money, and should be allowed interest on the amount so paid from the date of the payment. The defendant's exception to that part of the master's report refusing him an allowance of interest on account of his expenditures in satisfaction of the mortgage debt is therefore justified.

An examination of the master's report and schedules shows that the mode of computation and statement of the account does not operate fairly in ascertaining the balance which may be due. The first credit allowed the defendant should be the sum of \$500, the net sum of the original purchase price ascertained by the decree to be due the defendant as of the 8th day of June, 1895. This sum should carry interest from that date, which should be computed up to the time when any rents or profits of the premises were received by the defendant, and these should be applied (as of the date on which they were received) in satisfaction, first, of the interest, and next of the principal, of the amount due the defendant. The payments made by the defendant in satisfaction of the mortgages should be credited to him, with interest from the dates of the several payments, and there should be charged against that credit the several sums of rents and profits as they were respectively received, and so on through the account, crediting the various items of expenditure and receipt. If at any time the amount of the rents and profits more than sufficed to discharge the amount due the defendant, interest may be charged in favor of the complainant on his balance. This mode of computation deals with the defendant as one in the possession of premises in the preservation of which he may rightfully expend moneys, but regarding the profits of which he must fully account. This is the status in which the defendant has been adjudged to stand.

The testimony and the master's findings of fact enable the respective parties (if they choose to do so) to restate the account by agreement in accordance with the views herein expressed. If counsel take this course, there will be no need to send the report back to the master. I will delay the signing of a decree to ascertain whether counsel can so agree. The only question open is the allowance of interest and the mode of stating the account.

SAUNDERS v. SUTTON et al.

(Supreme Court of New Jersey. July 21, 1903.)
BOUNDARIES—ACTIONS—NEW TRIAL—VERDICT
CONTRARY TO EVIDENCE.

1. Where, in an action involving a disputed boundary line, the jury, by its verdict for plaintiff, gave little or no heed to evidence of an ancient fence, which the facts strongly tended to prove was a boundary line fence between the land of the parties, and for this reason missed the point of much of the evidence in the case, a new trial would be granted on the ground that the verdict was against the weight of the evidence.

Action by Archie L. Saunders against Lorenzo D. Sutton and others. On rule to show cause why a verdict in favor of plaintiff could not be set aside, and a new trial granted. Rule absolute.

Argued February term, 1903, before
FORT, HENDRICKSON, and PITNEY, JJ.

Willard W. Cutler, for plaintiff. Elmer King and H. B. Herr, for defendants.

PER CURIAM. This is an action of tort for the cutting of timber upon lands claimed to be owned by the plaintiff. The defendants pleaded the general issue and certain special pleas justifying the alleged trespass on the ground that the locus in quo was the property of one Catharine E. Pickel, under whose command the entry and cutting of timber were committed. The evidence disclosed that Saunders and Pickel owned adjoining farms, and the question in dispute was the location of the boundary line between them. Pickel's land lay to the east of that of Saunders, the locus in quo being disputed territory. Along the westerly side of the locus, and running in a general northerly and southerly direction, was an ancient fence, of such a character as to render it reasonably clear that it had been constructed and maintained as a boundary fence between the two properties. If it was a boundary fence, that fact was highly significant in three aspects: First, as evidence of a practical location of the boundary; secondly, as a monument governing the survey, in view of the difficulty that existed in locating the boundary according to the courses and distances given in the title deeds; and, thirdly, it had an important bearing upon the evidence respecting acts of possession done upon the locus in quo by the respective parties and those under whom they claimed. The jury rendered a verdict in favor of the plaintiff for substantial damages, which can only be justified on the theory that the true location of the boundary line between the respective properties lay well to the eastward of the ancient fence. An examination of the evidence renders it clear that the jury gave little or no heed to the fence, and for this reason missed the point of much of the evidence in the case.

The verdict seems clearly against the weight of the evidence, and a new trial should therefore be granted.

(60 N. J. L. 597)

HOPEWELL et al. v. BOARD OF TRUSTEES OF VILLAGE OF FLEMINGTON.

(Supreme Court of New Jersey. July 23, 1903.)

MUNICIPAL CORPORATIONS — STREETS — ESTABLISHMENT OF GRADE—ORDINANCES—VALIDITY—REVIEW—CERTIORARI—LACHES.

1. Where the grades and side lines of a street were established by an ordinance passed in 1896, and property of several owners fronting thereon had been made to conform to the grade so fixed, and intersecting streets had been improved and a sewer system established with reference to such lines and grades, property owners were barred by laches from maintaining certiorari, not begun until August, 1901, to have such ordinance declared invalid.

Certiorari by John B. Hopewell and others against the board of trustees of the village of Flemington. Writ dismissed.

Argued June term, 1903, before GARRISON and GARRETSON, JJ.

Willard C. Parker and H. B. Herr, for prosecutors. O. Van Syckel and George H. Large, for defendant.

PER CURIAM. On the 6th of July, 1896, an ordinance was passed by the board of trustees fixing and establishing the side lines and grades for Main street in the village of Flemington. By its terms the ordinance took effect July 20, 1896. No other municipal action under this ordinance affecting the property of the prosecutor appears by the return to have been since taken. It appears from the evidence that the properties of several owners fronting on Main street have been made to conform to the grade fixed by this ordinance. Intersecting streets have also been improved with reference to the lines and grades fixed by the ordinance, and a sewerage system has been constructed at a large expense with reference to these same grades. On the 24th of August, 1901—more than five years after the ordinance became effective—the prosecutors, alleging that their properties were injured by the ordinance, procured the allowance of this writ of certiorari, and now ask that the ordinance be set aside for various reasons, all of which existed when the ordinance was passed. Under the decisions of this court the prosecutors have been guilty of such laches as disentitle them to the relief asked for.

The writ of certiorari will be dismissed, with costs.

MEANY v. STANDARD OIL CO.

(Supreme Court of New Jersey. July 21, 1903.)

MASTER AND SERVANT—INJURIES TO SERVANT—OIL DISTILLERY—GASES—EVIDENCE—VERDICT.

1. Defendant's process of distillation of oil evolved two different gases—one known as an acid gas, produced in the earlier stages of distillation from sulphuric acid which was mixed with the oil; the other a gas produced from the oil itself by the heat of distillation. The

acid gas was dangerous to workmen, but the oil gas was comparatively harmless. Defendant had not exercised reasonable care to dispose of the acid gas so as to render the stillhouse reasonably safe for workmen, and plaintiff, who was employed therein, was injured by inhaling such gas. The presence of the oil gas in the stillhouse was persistent and obvious, but the acid gas was only occasionally present, and the risk therefrom was not obvious to plaintiff, he not having had any previous experience therewith. *Held* sufficient to sustain a verdict for plaintiff.

Action by Michael Meany against the Standard Oil Company. On rule to show cause why a new trial should not be granted after verdict in favor of plaintiff. Rule discharged.

Argued February term, 1903, before GUMMERE, C. J., and FORT, HENDRICKSON, and PITNEY, JJ.

Thomas F. Noonan, for plaintiff. Charles W. Fuller, for defendant.

PER CURIAM. This is an action to recover damages for personal injuries sustained by the plaintiff in consequence of inhaling noxious gases in a stillhouse of the defendant while the plaintiff, as its employé, was attending to his duties there. The case has been twice tried, both verdicts being in favor of the plaintiff. The first verdict was set aside (*Meany v. Standard Oil Co.* [N. J. Sup.] 47 Atl. 803) on the ground that the evidence disclosed that the presence of gases in the stillhouse was apparent, and the danger from them was obvious, and on the ground that the defendant had used due care to keep the stillhouse as free as possible from the gases. The evidence at the second trial renders the case somewhat more clear upon both points. It now appears that in the process of distillation two different kinds of gas were evolved, one known as "acid gas," which was produced from sulphuric acid that was mixed with the oil. This gas was produced in the earlier stages of the distillation. The other kind was known as "oil gas," and was produced from the oil itself by the heat of distillation. The acid gas was dangerous to the workmen; the oil gas was comparatively harmless. The evidence upon the second trial was such as to justify the jury in finding, first, that the defendant had not exercised reasonable care to so dispose of the acid gas as to render the stillhouse reasonably safe for the workmen; and, secondly, that, while the presence of oil gas in the stillhouse was persistent and obvious, the dangerous gas known as acid gas was only occasionally present, and that the risk arising from it was not obvious to the plaintiff, he having had no previous experience therewith.

A second verdict having been rendered in favor of the plaintiff upon evidence that supports his case more clearly than that given at the first trial, the rule to show cause should be discharged.

(76 Vt. 333)

STATE v. CUNNINGHAM.

(Supreme Court of Vermont. June 9, 1903.)

AUCTIONS—LICENSE—COMPLAINT—ALLEGATIONS—RESIDENCE.

1. Acts 1900, p. 67, No. 95, relating to the licensing of auctioneers, provides that the statute shall not apply to sales made by one in the county where he resides. A complaint under the statute for sales at the city of B. alleged defendant as "temporarily of the city of B." *Held*, that the complaint was insufficient, since the word "temporarily" did not show defendant not "a resident."

Exceptions from City Court of Barre; Fay, Judge.

Fred Cunningham was convicted of selling goods at auction without a license, and he brings exceptions. Reversed.

Argued before TYLER, MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

Richard A. Hoar, State's Atty., for the State. F. S. Williams, for respondent.

HASELTON, J. No. 95, Acts of 1900, p. 67, provides for the licensing of auctioneers, and then proceeds as follows: "If a person, not so licensed, sells or offers for sale at auction in any town or city in the state, goods, chattels or other property, he shall be fined not more than one hundred dollars and not less than ten dollars; but this section shall not apply to sales at auction * * * made by any person in the county where he resides." This was a complaint, under the statute referred to, setting up the respondent as temporarily of the city of Barre. In other respects the complaint charged in appropriate terms the commission by the respondent at said city of Barre of an offense under the statute. The respondent demurred. The demurrer was overruled, and the complaint adjudged sufficient. Exceptions were allowed and ordered to lie pending a trial on the merits of the case. On the trial, which was before the city court of Barre, the respondent was adjudged guilty, and the minimum fine provided by statute was imposed. The question before this court is as to the sufficiency of the complaint.

According to usual and approved forms of pleading, the phrase in the complaint describing the respondent as "of the city of Barre" sets him up as a resident of said city, unless it is prevented from having this effect by the use of the word "temporarily"; and we do not think it is so prevented. One may have a place of abode—such a place of abode as constitutes his residence—and yet such abode and residence may be of a temporary character. In *Jamaica v. Townsend*, 19 Vt. 267, the question was as to the residence of a person during a period of 29 days. In discussing the matter of one's residence in such a case, the court say: "The question is, where does he, for the time, dwell? Is he now at home? Where does he reside for the time being?" The expressions "for the time"

and "for the time being" are equivalent to the word "temporarily." Each constitutes a good definition of that word. Cases in accord with the *Jamaica* Case are *Middlebury v. Waltham*, 6 Vt. 200, and *Jericho v. Burlington*, 66 Vt. 529, 29 Atl. 801. It is to be observed that "residence" and "domicile" are not, strictly speaking, synonymous; that one may be domiciled in one place, and at the same time have a temporary residence in another. 2 Kent, Com. 431, note. The respondent being, under the allegations of the declaration, temporarily a resident of the city of Barre, he had, by the express terms of the statute, the right there to do the acts complained of.

The constitutionality of the statute under which the complaint was brought was discussed in argument, but the conclusion above reached makes it unnecessary that the constitutional question should be decided.

Judgment and sentence reversed, demurrer sustained, complaint adjudged insufficient and quashed, and respondent let go without day.

(76 Vt. 350)

GODFREY v. BENNINGTON WATER CO.

(Supreme Court of Vermont. Bennington.

Aug. 1, 1903.)

TAXATION—WATER COMPANY—PUBLIC USE—EXEMPTION—LISTING OF REAL ESTATE—DUE PROCESS OF LAW—CURATIVE STATUTE.

1. The furnishing of water to a town by a water company under the provisions of its charter does not constitute a public use, and its property is not exempt from taxation under V. S. 362, subd. 7, exempting from taxation property employed for public use.

2. Laws 1880, p. 79, No. 78, § 15, relative to town taxation, required the listers to lodge in the town clerk's office the "personal lists" of all taxpayers. Act 1882, p. 17, No. 2, § 20, changed the law so as to require an abstract of the "individual list," which act was amended by Laws 1890, p. 36, No. 13, by adding thereto that the listers of all towns of less than 2,000 inhabitants might make the abstract by entering in the blank books furnished by the state for the grand lists for the town for that year the polls, real estate, and appraisals of the same, and that the listers should subsequently complete the book as the grand list of the town. V. S. 427. While the general appraisal of real estate is made only once in four years, Laws 1896, p. 11, No. 13, requires that, if additional buildings have been erected, the listers shall make such additions to the general appraisal of such real estate as they deem just, and make deductions for depreciation, and by V. S. 419, taxable real estate omitted from the last quadrennial appraisal shall be appraised and set on the list, and, if there has been a change in the ownership, the real estate must be set to the last owner April 1st. *Held*, that the failure of the listers to lodge in the town clerk's office an abstract of the individual list invalidated the grand list as to real estate, since the act of 1890 showed that it was the legislative intent that the real estate as well as personal property should be included, and the general purpose of the tax law could not be preserved otherwise.

3. V. S. 428, provides that a taxpayer aggrieved by the abstract of the individual list may have a hearing, and by section 429 he may appeal and be heard by the board of civil authority. *Held* that, where the individual list is not

sied, the taxpayer is deprived of his property without due process of law.

4. The right of a taxpayer to be so heard being constitutional, the Legislature could not, in the first instance, nor by any curative statute, deprive a taxpayer of it.

Exceptions from Bennington County Court; Munson, Judge.

Action by Frederick Godfrey, as collector of taxes for the town of Bennington, against the Bennington Water Company. Judgment for the defendant entered on the report of the referee, and plaintiff brings exceptions. Affirmed.

Argued before TYLER, START, WATSON, STAFFORD, and HASELTON, JJ.

Batchelder & Bates, for plaintiff. Barber & Darling, for defendant.

WATSON, J. The defendant is a private corporation organized under the Laws of 1886, p. 134, No. 172, and amendments thereto, "for the purpose of furnishing the inhabitants of the town and village of Bennington with water for domestic and other purposes." The property taxed consists of the defendant's waterworks, constructed under its charter, and used for the purpose named therein. The taxes here sought to be collected were assessed under the vote of the town in the years 1898 and 1899. It is contended by the defendant that in granting it the right to construct a water system for the purposes stated in its charter the Legislature created in the defendant a public trust, and that the power therein delegated to it is a right granted to construct a system dedicated exclusively to a public use. By reason whereof the defendant contends that its plant is exempt from taxation under subdivision 7, § 362, of the Vermont Statutes, which provides that "real and personal estate granted, sequestered, or used for public, pious, or charitable uses," shall be exempt from taxation. Upon this question our attention has been called to many decisions of courts in other jurisdictions, but we have given them no consideration, for the reason that practically the same question has recently been before this court in *Stiles v. Village of Newport*, 56 Atl. —, where it received full and careful consideration. There the village of Newport was authorized to provide a supply of water for fire, domestic, and other purposes, and to sell and furnish water for domestic and other purposes to persons or corporations within or without the municipal limits. A part of its water system, including reservoir and aqueduct, was in the town of Derby. The village used its water for municipal purposes, and to supply its inhabitants for domestic use. It supplied the village of West Derby, a manufacturing establishment there located, and two properties in that town outside the village limits, with water for protection against fire, and the inhabitants with water for domestic purposes. For all the water thus supplied the village

of Newport received a compensation. That part of the system located in Derby was set in the grand list of that town, and the suit was brought to collect the tax assessed thereon. It was contended, as in the case at bar, that it was property used for public purposes, and therefore exempt from taxation under V. S. 362, subd. 7, above quoted. It was held that the furnishing of water by a municipality to its inhabitants for domestic purposes, as well as the furnishing of it for protection against fire and for sanitary purposes, within its own territorial limits, was a public use, within the meaning of the law; but that, when water was supplied for such purposes outside the municipal limits, the same rules of law did not apply, because the duty of a municipality regarding the maintenance of mains and hydrants and the municipal relation entering into the question of domestic supply are confined to its own territorial limits. It was further held that, as the village of Newport had no interest in the village of West Derby, and owed no municipal duty to its inhabitants, the sale of water there, even for such purposes, was solely for revenue, and that the sale was not a public use within the meaning of the law; and that its property, to the extent that it was so put to private use in Derby, was there taxable. Under this holding, a municipality, when outside its own limits furnishing water to another municipality and its inhabitants for revenue, becomes as an individual or a private corporation carrying on the business in the same way, and therein it is governed by the same rules of law. The law there laid down is decisive of the case before us that the furnishing of water by the defendant under the provisions of its charter does not constitute a public use, and that its property is, therefore, not exempt from taxation.

It is found that in neither of the years in which the taxes in question were assessed did the listers lodge in the town clerk's office an abstract of the "individual list" of all the taxpayers of the town, as required by V. S. 427. The plaintiff contends (1) that only the personal estate is required to be included in such abstract, and hence the omission to lodge the abstract in the town clerk's office does not affect the grand list as to real estate; and (2) that, if real estate is to be included, the defect in the year of 1898 was validated by the curative act of that year (Laws 1898, p. 391, No. 233). That the property taxed is real estate, no question is made. But the defendant contends that the abstract of the individual lists must contain the real estate as well as the personal property of the taxpayers, to be a compliance with the law. By the Laws of 1880, p. 79, No. 78, § 15, the listers were required to arrange in alphabetical order, and lodge in the town clerk's office on or before the 25th day of April of each year, the "personal lists" of all taxpayers for their inspection. That act, in this respect, was said in *Bartlett v.*

Wilson, 59 Vt. 23, 8 Atl. 321, to have reference to the personal estate. By Act 1882, No. 2, p. 17, § 20, the law was so changed as to require an abstract of the "individual list" of the taxpayers thus to be lodged in the town clerk's office, instead of the "personal lists," as before. This act was amended by Laws 1890, p. 36, No. 13, by adding thereto that the listers of a town of less than 2,000 inhabitants may make up such abstract by entering in the blank books furnished by the state for the grand lists of such town for that year under the proper headings the polls, the real estate, and the appraisals of the same, and the appraisal of the personal estate, as required by law to be set in the list; and that after the first Tuesday in May, when all questions of persons aggrieved have been heard and determined, the listers shall complete said book as the grand list of the town. The act of 1882, thus amended, became section 427 of Vermont Statutes. If it could be said that any doubt existed whether the law of 1882 required real estate to be included in such abstract, certainly the act of 1890 shows clearly that the intent of the Legislature was to include it. Furthermore, the purpose of the law could not be subverted without including it. It is true that a general appraisal of real estate is made only once in four years; yet, if additional buildings have been erected, or extensive repairs made, the listers shall make such addition to the general appraisal of such real estate as they deem just; and in like manner they shall make deductions for large depreciations in value by reason of fire, flood, or other accident, or by cutting or removing timber therefrom; and, if there has been any great change in the value of quarries where stone is quarried, they shall change the appraisal thereof accordingly. Laws 1896, p. 11, No. 13. Also, if any taxable real estate was omitted from the last quadrennial appraisal, the listers shall appraise the same, and set it in the list. V. S. 419. And, if there has been a change of ownership, the real estate must be set to the last owner on the 1st day of April. With such duties devolving on the listers every year, the importance of the provision requiring the abstract to include both the real and personal property is apparent. When taxes are levied on property according to its value to be fixed by the listers, in estimating the value the listers act judicially, and the taxpayers must have an opportunity to be heard. When the abstract of the individual lists is lodged in the town clerk's office for the inspection of the taxpayers, as required, it is legal notice to them of the determination of the listers respecting the list of every individual taxpayer in town, and any person feeling himself aggrieved thereby, and desiring to be heard by them, may have such hearing under the provisions of V. S. 428. A person may appeal from the decision of the listers, and be heard by the board of civil authority. *Id.*

429. When these different provisions of the statutes are complied with, a taxpayer is not deprived of his property without due process of law. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Hagar v. Reclamation District*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569. In the case at bar, since there was no abstract of the individual lists lodged in the town clerk's office, the defendant was given no opportunity to be heard, and to hold the taxes assessed against him valid would be taking property without due process of law. *Cooley, Tax'n*, 264-268; *Bartlett v. Wilson*, 59 Vt. 23, 8 Atl. 321; *Heth v. Radford*, 96 Va. 272, 31 S. E. 8. The right of an opportunity to be heard being constitutional, the Legislature could not, in the first instance, nor by a curative statute, deprive a taxpayer of it. *Bartlett v. Wilson*, *supra*; *Grout v. Johnson*, 73 Vt. 268, 50 Atl. 1059.

Judgment affirmed.

(76 Vt. 335)

PAYNE v. SHEETS.

(Supreme Court of Vermont. Franklin. June 27, 1903.)

GAME-HUNTING RIGHTS-POACHING-STATUTES-TRESPASS-PENAL STATUTE.

1. V. S. 4626, provides that one willfully entering on land, on which notices are posted that shooting, etc., is prohibited, without the permission of the owner, for the purpose of shooting, etc., shall forfeit \$10, to be recovered by the owner in an action for trespass. *Held*, that an allegation in a complaint under the statute that plaintiff was the "owner" for the purpose of shooting was to be construed as meaning that he was the owner of a right to shoot, but not of the fee.

2. One not the owner of land, who has a right to shoot game, fish thereon, etc., such right not being enjoyed by reason of his holding any other estate, and not having been granted in favor of any dominant tenement, has not a mere easement, but an interest in the soil.

3. V. S. 4626, provides that one willfully entering on land, on which notices are posted that shooting, etc., is prohibited, without the permission of the owner, for the purpose of shooting, etc., shall forfeit \$10 and damages to the owner, to be recovered in an action for trespass. *Held*, that one who has the right to shoot, etc., on certain land, may maintain an action under the statute, though not the owner of the fee.

4. Such construction of the statute is not unwarranted on the theory that the statute is penal, and should be strictly construed, since no new cause of action is created; but the forfeiture is cumulative damages.

5. The fact that the "forfeiture" imposed by a statute is so denominated, and is a specified sum, is not controlling in determining whether the statute is penal.

Exceptions from Franklin County Court; Munson, Judge.

Action by W. G. Payne against William Sheets. Judgment overruling a demurrer to the complaint, and defendant brings exceptions. Affirmed.

Argued before TYLER, START, WATSON, STAFFORD, and HASELTON, JJ.

Henry A. Burt and Alfred A. Hall, for plaintiff. D. G. Furman and Willard Farrington, for defendant.

WATSON, J. This action is trespass *quare clausum fregit*, brought against the defendant under V. S. 4626, for willfully entering upon the land described without permission of the owner or occupant, for the purpose of shooting thereon, and the case is here on demurrer to the second count in the amended declaration. The sole contention of the defendant is that said count has no such allegation of ownership of the locus in quo in the plaintiff as enables him to maintain this action.

The allegation in this behalf is that before, and at the time when, and so forth, the plaintiff "was, and now is, the owner and occupant of said land and premises for the purpose of shooting, trapping, and fishing, and that the same was then and there, and now are, inclosed," etc. This allegation, construed most strongly against the pleader, shows that the plaintiff then was, and now is, the owner of the right to shoot, trap, and fish on the lands described, but not that he is the owner of the absolute fee. Inferentially, the land itself, except such interest therein, if any, as may be within the plaintiff's said right, is owned by some one other than the plaintiff; and in the consideration of the case we shall treat it in this respect as counsel on both sides have treated it in their briefs, namely, that such right in the plaintiff, whatever may be its nature in law, is absolute and exclusive.

The statute provides a forfeiture of \$10 by a person who willfully enters upon such lands without the permission of the owner or occupant for the purpose of fishing, trapping, or shooting thereon, "to be recovered by the owner thereof in an action of trespass, in addition to the damages sustained thereby." It is urged by the defendant that the words "owner thereof" have reference to the person who owns the legal title to the land, the one who would be entitled to recover the damages sustained by such entry to the property itself, and not to a person having an ownership for a particular purpose, such as the plaintiff has, which the defendant contends is but an easement or a specific right that he may exercise on the land. Has the plaintiff an easement merely, or has he an interest partaking of the reality? The determination of this question is of much importance in the solution of the main question, and therefore it requires careful consideration. By the common law of England, animals *feræ naturæ* are not the subject of absolute property while at liberty in their wild state, but the owner of land is considered as having a qualified or special right of property in such animals which are fit for the food of man so long as they remain on his territory, and when killed or captured by the owner of the land they become his abso-

lute property. *Stutton v. Moody*, 1 Lord Raym. 250; 2 Stephen's Com. 4-6; *Ewart v. Graham*, 7 H. L. Cas. 381; *Blades v. Higgs*, 11 H. L. Cas. 621, 3 Eng. Rul. Cas. 76. The English authorities upon the question of such right of property do not seem to be exactly in harmony, but if we keep in mind the legal meaning of the word "property" when thus used the want of harmony largely disappears. It should be borne in mind also that noxious animals may not be within this rule. The case of *Blades v. Higgs* was carefully considered by the House of Lords, and is much in point. Therein Lord Chancellor Westbury says that when it is said by the writers on the common law of England that there is a qualified or special right of property in game—that is, in animals *feræ naturæ* which are fit for the food of man—whilst they continue in their wild state, he apprehends that the word "property" can mean no more than the exclusive right to catch, kill, and appropriate such animals, which is sometimes called in law a "reduction of them into possession"; and that this right is said in law to exist *ratione soli* or *ratione privilegi*. His lordship continues: "Property *ratione soli* is the common-law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and as soon as this right is exercised the animal so killed or caught becomes the absolute property of the owner of the soil. Property *ratione privilegi* is the right which, by a peculiar franchise anciently granted by the crown by virtue of its prerogative, one man had of killing and taking animals *feræ naturæ* on the land of another, and in like manner the game, when killed or taken by virtue of the privilege, becomes the absolute property of the owner of the franchise, just as in the other case it becomes the absolute property of the owner of the soil." And Lord Coke says (4 Inst. 304) "that, seeing the wild beasts do belong to the purlieu man *ratione soli*, so long as they remain in his grounds he may kill them; for the property *ratione soli* is in him." See, also, 4 Bac. Abr. (Bouvier's Ed.) 435. It is said in 2 Black. Com. 419, that if a man starts game on the private grounds of another, and kills it there, the property belongs to him in whose ground it was killed, because it was started there, and the property arises *ratione soli*. Bees are considered as *feræ naturæ*, and the same principles of law governing the right of property therein are applicable. Again, Blackstone says: "But it hath also been said that with us the only ownership in bees is *ratione soli*; and the charter of the forest, which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine that a qualified property may be had in bees, in consideration of the property in the soil whereon they are found." 2 Black. Com. 393. So it was held in *Gillet v. Mason*, 7 Johns.

16, where the question of such right of property was presented between the finder and a tenant in common in the land. And in *Goff v. Kilts*, 15 Wend. 550, it is said that a swarm of bees unreclaimed from their natural liberty while in the tree, like birds or other game, belong to the owner of the soil *ratione soli*. And the same doctrine is laid down in *Rexroth v. Coon*, 15 R. I. 35, 23 Atl. 37, 2 Am. St. Rep. 863, wherein it is said that, excepting game laws and statutory regulations, the law in this country with regard to property in animals *feræ naturæ* is substantially in accord with that of England. The law touching the right of several fishery is the same. In *Beckman v. Creamer*, 43 Ill. 447, 92 Am. Dec. 146, it is said: "By the common law a right to take fish belongs so essentially to the right of soil in streams or bodies of water where the tide does not ebb or flow that, if the riparian proprietor owns upon both sides of such stream, no one but himself may come upon the limits of his land and take fish there. * * * Within these limits, by the common law, his right of fishing is sole and exclusive, unless restricted by some local law or well-established usage of the state where the premises may be situate. This right to take fish within the limits of one's land bounding upon and including a stream not navigable is so far a subject of distinct property or ownership that it may be granted, and will pass by a general grant of the land itself, unless expressly reserved; or it may be granted as a separate and distinct property from the freehold of the land; or the land may be granted while the grantor reserves the fishery to himself." See, also, *Bingham v. Salene*, 15 Or. 208, 14 Pac. 523, 3 Am. St. Rep. 152.

We have thus referred to many authorities upon the question of such right of property as an incident to the ownership of the soil, because of the decisions in this country at first view apparently to the contrary, among which is one made by this court in the case of *State v. Theriault*, 70 Vt. 617, 41 Atl. 1030, 43 L. R. A. 290, 67 Am. St. Rep. 695. But upon a careful examination of that case and of the cases similar in principle we do not think they are in conflict with the law here laid down. The sole question in *State v. Theriault* was, as considered, the constitutionality of the law regulating the right of the owner of land to fish on his own premises. The law was upheld as a proper exercise of the police power, under the provisions of the Constitution. Therein it is said that fish are *feræ naturæ*, and the common property of the public or the state, in this country. And a quotation is given from Blackstone to the effect that the generality of those animals which are said to be *feræ naturæ*, or of a wild and untamable disposition, are among those things which, notwithstanding the introduction and continuance of property, must remain common, which

things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if they escape, or he abandons them, they return to the common stock, and any one else has an equal right to seize and enjoy them, as in them only a usufructuary property is capable of being had. But this principle, when applied to the concrete case involving the rights of the owner of the soil on which such animals are found and taken against a trespasser who there takes them, must be construed in connection with the law that such owner has the exclusive right of hunting and fishing upon his own private grounds, and the right of property in the animals arises therefrom; in which case the latter principle governs. To state it otherwise, the general ownership is in the people in their united sovereignty, but when such animals go upon private grounds, then the qualified or special right of property in the owner of the soil attaches by virtue of his exclusive right to hunt, kill, or capture them while there; and this upon the principle that property which a person has a special right to acquire to the exclusion of others is private property. Indeed, qualified property in chattels is an exception to the general right, and means a temporary or special interest, liable to be totally devested on the happening of some particular event. 2 Kent's Com. 427. And so seems to be the law as laid down by Mr. Serjeant Stephens, for, after stating that, if a man start any animal on his own ground, and follow it into other's, and kills it there, the property remains in himself; but if (being a trespasser) he starts it on another's land, and kills it there, the property belongs to him in whose grounds it was killed; and again, if it be started by a stranger in one man's chase or free warren, and hunted into another liberty, the property is said to continue in the owner of the chase or warren—he says: "These distinctions seem to show that in general the property is acquired by the seizure or occupancy, though that cannot prevail against the better claim of him in whose grounds the animal is both killed and started, and who, therefore, may be said to be entitled *ratione soli*; or of him who has already a qualified property in it *ratione privilegii*." 2 Steph. Com. 20, 21. Nor was it differently understood in that case, for the exclusive right in the owner of the soil over which a brook flows to catch fish therein, under regulations made and provided by the General Assembly, is recognized; and, further referring to Blackstone, it is said that the same writer more fully treats of this class of common property and the rights of individuals therein in chapter 25 of the same book, and there lays down the principle that an individual may acquire or have a qualified property in such animals, among other ways, "on account of his special right or privilege of capturing and killing them in exclusion of other persons," which special right "does not

exist in this country except as limited by ownership of the place from which they are taken and the right to exclude others therefrom." Again, in support of the doctrine there laid down a quotation is given from the case of *Peters v. State*, 96 Tenn. 682, 36 S. W. 399, 33 L. R. A. 114, in which this qualified right of property incident to the sole and exclusive right of fishing is stated.

An important case, having some bearing upon this question, was recently before the Supreme Court of the United States. In *Geer v. State of Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, the case was in error to the Supreme Court of Errors of the state of Connecticut to review a judgment of that court affirming the judgment of a lower court convicting the plaintiff in error of unlawfully receiving and having in his possession with intent to transport beyond the state certain woodcock, grouse, and quail killed within the state. By the statutes of Connecticut the open season for game birds mentioned therein was from the 1st day of October to the 1st day of January, and the birds which the plaintiff in error was charged with unlawfully having in his possession for the purpose of unlawful transportation were alleged to have been killed during the open season. The court, speaking through Mr. Justice White, reviewed the civil and the common law touching the ownership of animals *feræ naturæ*, the nature of property in game, and the authority which the state had lawfully to exercise in relation thereto. In sustaining the constitutionality of the law as within the police power, the court said that from the earliest traditions the right to reduce animals *feræ naturæ* to possession had been subject to the control of the lawgiving power. It was held that for the purpose of exercising this power or control the state represents its people, and the ownership is that of the people in their united sovereignty. But the qualified right of property is recognized by both the civil and the common law. After quoting from the civil law, it is said: "No restriction, it would hence seem, was placed by the Roman law upon the power of the individual to reduce game, of which he was the owner in common with other citizens, to possession, although the Institutes of Justinian recognize the right of an owner of land to forbid another from killing game on his property, as, indeed, this right was impliedly admitted by the Digest in the passage just cited." It is further said that: "Blackstone, whilst pointing out the distinction between things private and those which are common, rests the right of an individual to reduce a part of this common property to possession, and thus acquire a qualified ownership in it, on no other or different principle from that upon which the civilians based their rights." And, quoting from Blackstone, it is said: "A man may lastly have a qualified property in animals *feræ naturæ* propter privilegium; that is, he may have

the privilege of hunting, taking, and killing them in exclusion of other persons. Here he has a transient property in these animals usually called game so long as they continue within his liberty, and he may restrain any stranger from taking them therein; but the instant they depart into another liberty, this qualified property ceases." Nor is such qualified or special right of property without reason. Animals *feræ naturæ* are of chattels classed in law as things personal which partake of the quality of things real, and are ranked as parcel of the freehold, because necessary to the well-being of the inheritance; and if the owner die intestate seised of an estate of inheritance in the land, the property rights in such animals at liberty thereon, as a general rule, descend with the inheritance to the heir, instead of belonging to the personal representative of the deceased. Co. Litt. 8a; Case of Swans, 7 Rep. 175; 2 Stephen's Com. 6. And in *Blades v. Higgs*, before cited, it is said by Lord Cranworth that wild animals are not the subject of larceny; but that they partake, while living, of the quality of the soil, and are, as growing fruit is, considered as part of the realty. This clearly shows that the right owned by the plaintiff of shooting, trapping, and fishing on the locus in quo constitutes in law a profit à prendre, which consists of a right to take a part of the soil or produce of the land in which there is a supposable value. 2 Washb. Real Prop. 25.

In *Wickham v. Hawker*, 7 Ex. Ch. 62, Baron Parke, delivering the opinion, said that the liberty to hawk, hunt, fish, and fowl, granted to one, his heirs and assigns, were interests, or profits à prendre. And in *Ewart v. Graham*, before cited, where such a right was under consideration and upheld under a reservation in a deed given by the owner of the soil, Lord Chancellor Campbell, referring to *Wickham v. Hawker* as a case wherein the nature of the right in question was exceedingly well explained, and from which it appeared to be an interest in the realty which is well known to the law, said: "The property in animals *feræ naturæ* while they are on the soil belongs to the owner of the soil, and he may grant a right to others to come and take them by a grant of hunting, shooting, fowling, and so forth. That right may be granted by the owner of the fee simple, and such a grant is a license of a profit à prendre." But usually there is a difference between an interest or profit to be taken or had in another's soil and an easement in another's soil. One of the distinguishing features of an easement is the absence of all right to participate in the profits of the soil charged with it; and another that there must be two distinct tenements—the dominant, to which the right belongs, and the servient, upon which the obligation rests; while the right to profits, termed "profit à prendre," consists of a right to take a part of the soil or produce of the land, in which

there is a supposable value. Gateward's Case, 6 Co. Rep. 59, 10 Eng. Rul. Cas. 245; *Pierce v. Keator*, 70 N. Y. 419, 26 Am. Rep. 612. Mr. Washburn, however, lays down the rule that "this right of profit à prendre, if enjoyed by reason of holding certain other estate, is regarded in the light of an easement appurtenant to an estate; whereas, if it belongs to an individual, distinct from any ownership of other lands, it takes the character of an interest or estate in the land itself, rather than that of a proper easement in or out of the same." Washb. Easem. And in *Post v. Pearsall*, 22 Wend. 425, it is said that "a profit à prendre in the land of another, when not granted in favor of some dominant tenement, cannot properly be said to be an easement, but an interest or estate in the land itself." There being nothing in the case at bar indicating that the plaintiff's right was granted in favor of any dominant tenement, or enjoyed by reason of holding any other estate, we think it clear that the plaintiff's right is not an easement merely, but that it is a right of profit in the land of another, and therefore an interest in the land itself. And so it was held in the next two cases cited, where practically the same contention was made as is made in the case at bar. In *Webber v. Lee*, 9 Q. B., the action was brought to recover damages for breach of a verbal contract professing to give a right to go on certain grounds and exercise the right of sporting over them and to carry away a definite portion of all the game killed. The question was whether it was an agreement to grant a right over-coupled with an interest in the land, or only an agreement for a license to go on the lands. It was held that the right to kill and take away game is a profit à prendre, and an agreement for the enjoyment of it is a contract for an interest in land, and therefore within section 4 of the statute of frauds. In *Bingham v. Salene*, before cited, the plaintiffs held a grant to them, their heirs and assigns, forever, from the defendants, of "the sole and exclusive right, privilege, and easement to shoot, take, and kill any and all wild ducks and other wild fowl upon and in any and all lakes and sloughs and waters situate, lying, or upon" the defendants' lands, etc. This suit was brought to enjoin the defendants from interfering with the alleged exclusive right and privilege, and to restrain them from inviting or allowing any other person or persons on said lands for the same purpose. The defendants contended that the grant to the plaintiffs created nothing but a license. It was held that the right in the plaintiffs was exclusive, and that the grant created not a mere license, but an interest in the land itself. The right of fishing in nontidal waters is of the same nature in law. This was discussed to some extent by this court in *New England Trout and Salmon Club v. Mather*, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569. In stating the common law

of England, it is said that "the right of fishing in nontidal waters by one not the owner of the soil thereunder is not an easement, but a right of profit in the land of another." See, also, to the same effect, *Cobb v. Davenport*, 32 N. J. Law, 369; *Id.*, 33 N. J. Law, 223, 97 Am. Dec. 718; *Sterling v. Jackson*, 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405.

Although the common law touching some of the questions here discussed is somewhat modified by the provisions of the Constitution, c. 2, § 40, as seen by the cases before cited of *N. E. Trout & Salmon Club v. Mather*, and *State v. Theriault*, and by *Payne v. Gould*, 74 Vt. 208, 52 Atl. 421, yet the questions before the court are so little affected by such modifications that it is unnecessary further to notice them here. It follows that, although the plaintiff is not the owner of the land, yet he has a separate and exclusive interest in the soil for a special purpose. It is not necessary, however, in the view we take of the statute, to consider whether this brings the plaintiff within the principle that, where a person has a separate interest in the soil for a special purpose, even though the right to the land is not in him, yet, if he be injured in the enjoyment of the particular use, he may maintain trespass *quare clausum fregit*. 2 Wat. Tresp. 135; *Crosby v. Wadsworth*, 6 East, 602; *Dolloff v. Danforth*, 43 N. H. 219; *Holforth v. Bailey*, 12 Q. B. 426, 66 Eng. C. L. 425.

V. S. 4626 is a part of the laws of this state enacted for the preservation of fish and game. The law of that section was designed not so much to punish trespassers upon land merely for the trespass committed as to protect the owner of lands within the state in his exclusive right of catching fish, and of trapping, hunting, and killing game upon his own premises, provided he complies with the conditions therein prescribed. The spirit of the law requires that it be so construed as to give the same protection to any one having such exclusive right, whether he be the owner of the soil, or, as in this instance, the owner of the right, exclusive of the soil except such interest therein as is within the right. It is to be presumed that the makers of the law knew that the ownership of the soil and the ownership of such a right might legally be in different persons; and we think the intended scope of the law is sufficient to cover either. The word "owner" does not always import an absolute owner, as the owner in fee simple of real property. Its meaning is often varied according to the connection in which it is used, and it is to be understood according to the subject-matter to which it relates. *McFeters v. Pierson*, 15 Colo. 201, 24 Pac. 1076, 22 Am. St. Rep. 388.

Nor does the fact that the forfeiture named in the statute is to be recovered in addition to the damages sustained by the entry upon the land show the law inapplicable to any "owner" other than the owner of the prop-

erty upon which the entry is made. Under the law the land must be inclosed by a fence, or something equivalent thereto, and have notices posted upon it. The owner of the right to fish, trap, and hunt by so inclosing it may be the owner of the fence. The notices required may have been posted on the land at his expense, and owned by him. He may have traps, decoys, hides, and other suitable and proper conveniences upon the land for use in the legitimate exercise of his right. In such circumstances, can it be said that he may not sustain actual damages by a person's willfully entering upon the land for the purpose of fishing, trapping, or shooting thereon? Furthermore, suppose the owner of the freehold willfully enters upon the land without license for the same purpose. If the defendant's contention is sound, such owner could not be subject to prosecution under the statute in question, for the sole reason, if for no other, that he could not be both plaintiff and defendant in the same suit. Such a construction might defeat the object of the law, rather than effectuate it.

But it is urged that the statute is penal, and therefore it should receive a strict construction. No new cause of action is created by the statute. In the same circumstances the plaintiff has a right of action at common law. Under the statute the forfeiture is given to the party aggrieved not as a penalty, but as cumulative damages for his injuries suffered. The fact that the sum named is denominated a forfeiture, and is a specified sum, is not controlling in determining the nature of the statute. The law as laid down in *Burnett v. Ward*, 42 Vt. 80, *Newman v. Waite*, 43 Vt. 587, and *Spaulding v. Cook*, 48 Vt. 145, seems conclusive that the statute is remedial and not penal.

Holding, as we do, that the plaintiff is the "owner" within the meaning of the statute in question, it is not necessary to decide what kind of action would be his proper remedy under the rules of the common law, for the right to bring an action of trespass is given him by statute. *Parmenter v. Caswell*, 53 Vt. 6.

Judgment affirmed, and cause remanded.

(75 Vt. 329)

IN RE ROGERS.

(Supreme Court of Vermont. Washington.
June 4, 1903.)

DRUNKENNESS — PUNISHMENT — STATUTES —
CONSTRUCTION — MITTIMUS — DESCRIPTION OF
OFFENSE — DEFECTIVE MITTIMUS — RELEASE
OF PRISONER.

1. Acts 1902, p. 112, No. 90, § 97, provides that a person found intoxicated shall for each conviction after the first be fined or imprisoned in the county jail 30 days. V. S. 5206, requires that when a court sentences a man over 16 years of age to pay a fine, or a fine and costs, the alternative sentence shall be imprisonment in the house of correction for thrice the number of days there are dollars of fine. *Held*, that the statute was not repealed by the act of 1902, and an alternative sentence of confine-

ment in the house of correction for as many days as thrice, etc., instead of confinement in the county jail for 30 days, was proper.

2. Acts 1902, p. 112, No. 90, § 97, provides that a person who is found intoxicated shall, upon conviction of a first offense, pay a fine, "with costs," or be imprisoned, and for each subsequent conviction shall be fined or imprisoned. V. S. 1864, gives trial courts discretionary power to impose fines either with or without costs. *Held*, that a conviction for a second offense was not unlawful because it imposed costs.

3. A mittimus reciting that the prisoner had been "duly convicted of the crime of a second offense of intoxication" was defective, it being an essential element of the offense that the person complained of was "found" intoxicated.

4. A prisoner is not entitled to a release because of a defective mittimus, but a good mittimus may be substituted, even after habeas corpus.

Petition by Andrew Rogers for habeas corpus. Writ denied.

Argued before TYLER, MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

Heaton & Thomas, for relator. Frank A. Bailey, State's Atty., and Burton E. Bailey, for the State.

TYLER, J. This is a petition for a writ of habeas corpus, alleging that the relator is unlawfully imprisoned and restrained of his liberty in the county jail in the city of Montpelier by the city sheriff by virtue of a certain mittimus that was issued by the city court. The relator bases his petition upon three grounds: (1) That the alternative sentence should have been confinement in the county jail for 30 days, whereas the sentence was confinement in the house of correction for as many days as thrice the number of dollars to be paid by the sentence; (2) that the sentence was unlawful in imposing the payment of costs in addition to the fine of \$15, as fixed by the statute; (3) that the mittimus was defective in not describing the crime for which the respondent was committed.

1. Section 97, No. 90, p. 112, Acts 1902, reads: "A person who is found intoxicated shall, upon conviction of a first offence, pay a fine of five dollars with costs of prosecution, with an alternative sentence of imprisonment in the county jail for not less than ten nor more than twenty days, and for each subsequent conviction, he shall be fined fifteen dollars or be imprisoned in the county jail thirty days, or both." Section 5206, V. S., requires that when a court sentences a person over 16 years of age, if a man, or over 15, if a woman, to pay a fine, or a fine and costs, it shall further order that, if the sentence is not complied with within 24 hours, he shall be imprisoned in the house of correction for the term above stated. This section was not repealed by the act of 1902, and, being in force, the alternative sentence imposed in this case was correct.

¶ 4. See Habeas Corpus, vol. 25, Cent. Dig. § 25.

2. There is no conceivable reason why the Legislature should have intended that every person convicted of a first offense under section 97 should pay a fine and costs, and that costs should in no case be imposed upon a conviction of a second offense. Therefore we must either read into the section the words "with costs of prosecution" after "fifteen dollars," or conclude that the Legislature intended to leave the imposition of costs to the trial court, under V. S. 1864, which gives those courts discretionary power, in all criminal cases tried by them, to impose fines, either with or without costs. The latter must be adopted as the more reasonable view, and in accordance with it the sentence of the city court was warranted.

3. We hold that the mittimus is defective in not describing a criminal offense. It merely recites that the respondent had been "duly convicted of the crime of a second offense of intoxication." It is an essential element of this offense that the person complained of was "found" intoxicated. A complaint that alleged that a person "became and was intoxicated" was held bad on demurrer. *State v. Austin*, 62 Vt. 291, 19 Atl. 117.

But the relator is not entitled to a release because the mittimus was defective. It is the right and the duty of the city court to issue a new mittimus to carry the alternative sentence into effect. The judgment and all the proceedings being regular, the ends of justice ought not to be defeated by reason of a defect in the mittimus. It was held in *Re William Thayer*, 69 Vt. 314, 37 Atl. 1042, that a good mittimus may be substituted at any time in place of a defective one, even after the issue of a writ of habeas corpus.

Judgment that the relator is not unlawfully restrained of his liberty, that he be remanded to the former custody so that a new mittimus may issue, and that the petition be dismissed.

(75 Vt. 320)

WILSON v. UNION MUT. FIRE INS. CO.
(Supreme Court of Vermont. Orleans. June 4, 1903.)

FIRE INSURANCE—POLICY—CONSTRUCTION—CONDITIONS—FARM ENGINES—USE—PLEADING—EVIDENCE—SPECIAL PLEA—NECESSITY.

1. An upright portable engine originally purchased to draw logs from a river, and for several years used alternately in drawing logs and to furnish power for cutting ensilage and filling silos, and which was adapted to all farm purposes where only a small amount of power was required, was "a steam farm engine," within a provision of a policy declaring that it should be void if insured used such engine within 100 feet of any building insured without the company's consent, in the absence of proof that there was a class or kind of engines known as "steam farm engines," or that other engines than the one in question had superior qualities for the work demanded.

2. A clause in a policy insuring plaintiff in the sum of \$50 on engines, shafting, and belting, which included two engines and a boiler located in a boiler room within 100 feet of other buildings insured, applied to the engine so described,

and did not include a portable engine, not insured, used for cutting ensilage, nor authorize its use within 100 feet of such buildings, in violation of a provision prohibiting the use of a steam farm engine within 100 feet of the buildings insured.

3. Insured borrowed a portable steam engine eight days before his buildings were destroyed by fire, and used it three days in filling his silo; then moved it to another farm, where he used it about the same length of time for the same purpose. It thereafter remained idle four or five days, when it was moved back to its first position to complete filling the first silo. *Held*, that the use of the engine was as permanent as the work of filling the silo required, and constituted a breach of plaintiff's policy prohibiting the using of a steam farm engine within 100 feet of the buildings insured.

4. In an action on a fire policy a defense of breach of condition against use of a steam farm engine within 100 feet of the buildings insured was properly made under the general issue and notice alleging breach of such a condition, without a special plea alleging a violation of the contract.

Exceptions from Orleans County Court; Haselton, Judge.

Action by Isaac S. Wilson against the Union Mutual Fire Insurance Company. From a judgment in favor of plaintiff, defendant brings exceptions. Reversed.

Argued before TYLER, MUNSON, START, WATSON, and STAFFORD, JJ.

J. W. Redmond, for plaintiff. Young & Young, for defendant.

TYLER, J. This action is brought upon an insurance policy to recover for the loss of the plaintiff's farm buildings and the personal property therein, that were insured by defendant company, which property was afterwards destroyed by fire. Plea, the general issue and notice of special matters in defense. The notice alleges that the policy contained the condition, among others, that using "a steam farm engine" within 100 feet of any building insured should render the policy void, unless the consent of the company in writing, duly certified by the secretary, was given; that prior to the fire the plaintiff placed within 100 feet of the buildings insured a steam farm engine with boiler and fire box attached, and built fires in the fire box, and operated the engine within that distance of the buildings insured, and continued to operate and use it there until the time of the fire, without the defendant's consent, and in violation of the contract, and that the policy was thereby rendered void. On the trial in the court below the parties agreed that the question whether the fire was communicated from the engine to the buildings destroyed need not be submitted to the jury, and the court instructed the jury that under the by-laws of the company it was immaterial whether the fire was so communicated or not. The plaintiff concedes in his brief that he placed and used the engine in question within the prohibited distance,

¶ 4. See Insurance, vol. 22, Cent. Dig. § 1639.

but contends that it was not a steam farm engine as described in the policy. Both parties admitted in argument that there was no class or kind of engines known as "steam farm engines," and that the by-law referred to prohibited the use of no other steam engines within the distance prescribed. The defendant introduced no evidence tending to show what a steam farm engine was, but claimed that any engine that was adapted to general use for farm purposes answered the description in the policy. The undisputed evidence was that this was an upright, portable engine; that it was originally purchased to draw logs from the river and for use about a mill, but for several years had been used alternately in drawing logs and to furnish power for cutting ensilage and filling silos, and had been used upon several farms for the latter purpose. An engineer called by the defendant as a witness testified that he had run the engine, and that it was adapted to all farm purposes where only a small amount of power was required; such as running a threshing machine, a circular saw for sawing wood, and a separator in a creamery. The plaintiff did not controvert this testimony further than to claim that the engine was not well adapted to threshing grain, because it could not be set near enough to a barn to be used with safety. For anything that appeared in the evidence, this was true of any fire engine. Any engine would need to be placed a safe distance from the barn, and sufficient belting used to operate the machine. This engine was stationed about 70 feet from the barn when it was operating the ensilage cutter at the time of the fire. The plaintiff testified that he did not consider this a steam farm engine; that he had one that was insured in this policy that he called such an engine; but he did not point out any superior qualities that this engine possessed over the one in question. We infer that some other engine was better adapted to use in the creamery than was this, but the fact that another engine was more suitable than this for some purposes is not determinative that this was not a steam farm engine; nor, on the other hand, would the fact that this engine could be used for all farm purposes, but was unsuitable and could be used only at a disadvantage, bring it within the terms of the policy. But this is the true rule: Both parties to the contract of insurance must have had in mind some kind of a steam engine, the use of which within 100 feet of the buildings was prohibited, because such use exposed the buildings to fire. The exposure to fire was the obvious reason of the prohibition. It is conceded that there was no such class or kind of engines as the one named in the policy. There was no evidence tending to show that there was any engine better adapted than this to general use upon a farm. It appeared that this was a "general purpose" engine for a farm, as one witness described it without contra-

diction. There was no claim made that it did not furnish sufficient power for all purposes, so the most that could be said upon the evidence in support of the plaintiff's contention was that another kind of engine was more convenient than this for certain uses. So we think that the one in controversy may reasonably be considered as within the contemplation of the parties when the contract was made, and within the meaning of the term employed.

Upon the undisputed facts, it was error in the trial court to submit the case to the jury. This holding is not at variance with any case decided by this court. In *Carrigan v. Ins. Co.*, 53 Vt. 418, 38 Am. Rep. 687, upon which the plaintiff relies, it was held that the question whether benzine was a drug should have been submitted to the jury, the court saying that according to Webster's Dictionary a drug included any mineral substance used in chemical operations; that the trial court could not say as matter of law that benzine was not included in that term, and that the question should have gone to the jury. In *Mosley v. Ins. Co.*, 55 Vt. 142, it was properly held that the question whether gin and turpentine fell within the denomination of inflammable liquids, as used in an insurance policy, was for the jury to determine, and that the court could not take judicial notice of the fact that they were inflammable. In the present case the trial court was not required to take judicial notice of any fact in relation to the engine. It appeared that it was a portable steam engine of $4\frac{1}{2}$ horse power, and the undisputed evidence showed it to be adapted to all purposes for which a steam engine could be employed upon a farm. If there had been evidence tending to show that another kind of engine was better adapted to general farm purposes than this one, nevertheless this was a steam farm engine; but there was no such evidence. As the term "steam farm engine" is not the name of any pattern or style of engine, the words must be understood in their ordinary sense as descriptive of any engine adapted to farm purposes. Courts will take notice of the meaning of English words and terms of art according to their ordinary acceptance. 1 Chit. Pl. 223. And words are to be given their common and ordinary meaning, unless it appears from the context that their meaning should be limited or enlarged. It was held in *Wead v. Marsh*, 14 Vt. 80, that the trial court correctly held that the term "fulled cloth" was understood in common parlance to mean "woollen fulled cloth." In *State v. Abbott*, 20 Vt. 537, an indictment alleging the wounding and maiming of a "red three year steer" was held sufficient under a statute against maiming or wounding cattle. Several cases are cited by the defendant where holdings of trial courts that certain articles were or were not "tools" had been sustained under statutes exempting certain personal property from attach-

ment. Among them is *Allen v. Thompson*, 45 Vt. 472, where the holding was sustained that a barber's chair and foot rest were "tools" within the meaning of the statute. *State v. Bowman*, 6 Vt. 594, was an indictment for having a crucible in the respondent's possession for the purpose of counterfeiting. The question upon the demurrer was whether the crucible described in the indictment was included in the statute which makes it a penal offense for a person to have in his possession any die, stamp, or other instrument or tool for the purpose of forging or counterfeiting. There is no intimation by court or counsel that the question was not one for the court, rather than the jury, to decide.

A printed schedule is attached to the policy, which includes most of the property insured, but several items are in writing, and among them is "\$50 on engines, shafting, and belting." It appears by the diagram that the boiler room in which the boiler that propelled these two engines was placed was within 100 feet of the buildings insured, and the plaintiff contends that the defendant must have contemplated in the contract of insurance that these engines would be used for ordinary farm purposes, and that the written part of the contract must be construed to control the printed prohibition, within the rule in *Mascott v. Ins. Co.*, 69 Vt. 118, 37 Atl. 255. There the insurance covered a building "occupied for a storehouse and paint shop," a clause in the policy declaring that it should be void if benzine was "kept, used, or allowed upon the premises." The fire was caused by the use of benzine mixed with asphaltum in the paint shop, and it appeared that benzine was an article necessarily used in a paint shop. Held, that it must be presumed that when the defendant made the contract of insurance upon the building and authorized its use as a paint shop it was acquainted with the business usually carried on there and the materials used, and that the written portion of the policy in this respect was intended to control the printed portion.

If the question in the present case was in respect to the use of the engines insured, the contract would be construed to mean that their use was contemplated by the defendant, in view of their situation and the safeguards around them and the boiler for protection against fire from their use. But the engine in controversy was not insured, was not upon the premises when the contract was made, and when used it had not the protection of a boiler house, but was placed, with its boiler attached, upon trucks in the open field. Therefore *Mascott v. Ins. Co.* does not control the present case. The written words in the policy insuring "engines, shafting, and belting" related to the engines then upon the premises, and presumably guarded in a manner that the defendant's agents could see and understand, and that was sat-

isfactory to them when they made the contract.

The plaintiff contends that he was not "using" the engine within the meaning of the term as employed in the by-laws; that the word means habitual use. Several cases are cited in which questions are discussed and decided whether certain alterations in or uses of buildings insured invalidated the contract, and whether the keeping of certain commodities in buildings insured rendered the policy void. But each case must be determined upon its own particular facts, and assuming, though not deciding, that the general rule is as the plaintiff claims, the facts in this case do not support his contention that the use was not permanent, for it appeared that he borrowed the engine eight or ten days before the fire; that he used it two and a half to three days in filling his silo, and then moved it to another farm of his, and used it there about the same length of time for the same purpose; that it was idle four or five days, when he moved it back to substantially the same place where it first stood, to complete the filling of the first silo, which would require two and a half or three hours' time. Applying a liberal rule of construction to the word "using," as employed in the restrictive clause, we think the use of the engine was in violation of the contract. Its use was as permanent as the work of filling the silo required, and the use evidently was dangerous.

The defense was properly made under the general issue and notice without a special plea alleging a violation of the contract. *V. S. 1149. Holdridge v. Holdridge's Estate*, 53 Vt. 546; *Worthen v. Dickey*, 54 Vt. 277.

Judgment reversed and cause remanded.

(78 Conn. 11)

MERSICK v. HARTFORD & W. H. HORSE R. CO.

(Supreme Court of Errors of Connecticut. July 24, 1903.)

STREET RAILROADS—MORTGAGES—FORECLOSURE—DISTRIBUTION OF PROCEEDS—SUPPLY CREDITORS—EXPENSES OF TRUSTEE.

1. Persons furnishing to a street railway company supplies essential to operation of its road, and money to pay wages of employes and other pressing claims, after default in payment of interest on the bonds secured by mortgage on all its property, which default, under the mortgage, authorized the trustee to take possession of and operate the road, but before he did so, are not entitled to preference over the bondholders in the distribution of the proceeds of the sale of the mortgaged property; there having been no diversion of income for the benefit of the bondholders, but the income being inadequate to meet current expenses.

2. Under a mortgage of a street railway company's property to secure its bonds, authorizing the trustee on default to take possession and operate the business of the company, and providing that he shall be entitled to be reimbursed for all outlays to be incurred in the trust, and that his disbursements shall constitute a first lien on the mortgaged property, a claim for money advanced by a third person

at the request of the trustee, and paid for wages of employes while the trustee was in possession and to striking employes for wages earned during the three months before the trustee took possession (it being practically impossible to resume the operation of the road without first paying such striking employes the wages then due), and a claim for rent accruing after the trustee took possession of a road operated by him in connection with and for the benefit of the mortgaged property, under a contract to pay such rent, are entitled to priority as expenses properly incurred by the trustee.

3. One who at the request of a street railway company pays taxes on its mortgaged property does not have a lien on the property superior to the mortgage, though the company agrees he shall have.

Appeal from Superior Court, Hartford County; William S. Case, Judge.

Action by Charles S. Mersick, trustee, against the Hartford & West Hartford Horse Railroad Company, to foreclose a mortgage given to secure bonds of defendant, and for appointment of a receiver. Receiver appointed, and judgment of foreclosure by sale of mortgaged property rendered. Plaintiff and intervening parties appeal from the judgment giving priority to certain claims in the distribution of the proceeds of the sale. Reversed.

The defendant company was organized under the laws of this state, with power to equip and operate by electricity a street railroad between certain points in Hartford and West Hartford. On the 1st of August, 1894, said company mortgaged all its property and franchises to the plaintiff, State Treasurer, as trustee, to secure the payment of its bonds of the par value of \$315,000. On the 1st of August, 1897, the railroad company made default of payment of interest on said bonds, and no interest has since been paid thereon. On the 4th of February, 1899, the plaintiff trustee, at the request of certain of the bondholders, and in accordance with the terms of the mortgage, assumed the possession and management of the road, and placed James T. Patterson, one of the bondholders, in control, as his (the plaintiff's) agent. On the 4th of March, 1899, the plaintiff trustee commenced an action for the foreclosure of the mortgage and the appointment of a receiver, and on that day said Patterson was appointed temporary receiver, and on the 9th of June, 1899, permanent receiver, of the property described in the mortgage. On the 16th of June, 1899, the superior court rendered judgment that unless the defendant company should on or before the 5th of July, 1899, pay the receiver the sum of \$345,628.53, with interest and costs, said property should be sold as an entirety at public auction on the 1st of August, 1899. On the 1st of August the receiver, in accordance with said judgment, sold said property for \$20,000 in cash to Samuel D. Coykendall, Henry C. Soop, and Edward S. Greeley, and the superior court on the 6th of October, 1899, passed an order accepting and approving the receiver's report of the sale and confirming the sale. After

the purchase of said property the said Coykendall, Soop, and Greeley organized the Farmington Street Railway Company, and conveyed to it the property so purchased at the foreclosure sale; and said Farmington Street Railway Company, upon its application, showing that it had become the owner of all the bonds described in the complaint, was permitted to join as a party plaintiff in this action.

The said James T. Patterson and other claimants to the avails of said sale were, upon their several applications, permitted to intervene as parties; and upon the facts hereinafter stated, found by the commissioners appointed by the court, the following claims were allowed, and, by the judgment ordering the distribution of said fund, directed to be paid in the following order:

1. Of the State Treasurer for taxes for the year 1898.....	\$ 1,038 87
2. Of railroad commissioners for salaries	11 46
3. Claims for expenses of receiver-ship and of State Treasurer while in possession of property.....	980 00
4. Of W. J. Carroll, assignee, for labor performed within three mos. from appointment of receiver....	56 64
	<hr/>
	\$ 2,086 97
5. Of certain named intervening supply creditors, as a class, for supplies essential to the operation of the road, furnished by them to the defendant company after January 1, 1898, and prior to February 4, 1899, amounting to.....	4,196 47
6. Of the plaintiff Mersick, trustee consisting of these items:	4,804 04
(1) \$2,855.96 paid for wages of employes from November 12, 1898, to February 4, 1899.	
(2) \$1,448.08 paid for wages of employes and running expenses while trustee was in possession.	
7. Of James T. Patterson.....	16,303 53
consisting of these items:	
(1) \$3,956.52 advanced to pay taxes April 14, 1898.	
(2) \$11,031.65 advanced in April, 1898, to pay employes, and other pressing claims against the company.	
(3) \$138.46, rent of Plainville line from February 4 to March 4, 1899.	
(4) \$1,176.92, rent of Plainville line from June 18, 1898, to February 4, 1899.	

Total claims ordered paid..... \$26,891 03

That the first four claims above named, amounting to \$2,086.97, are entitled to priority of payment over the bondholders, is not questioned.

As to the first item of the Mersick claim (\$2,855.96), it is found that when he took possession of the railroad there had been a strike of the employes because their wages had not been paid, and that it was practically impossible for the trustee to resume the operation of the road without first paying these employes their wages then due to said amount, for the period named in said item, and that at the request of the trustee that

amount was advanced by Patterson, and paid to the employes entitled to the same.

The amount named in the second item of the Mersick claim (\$1,448.08) was, at the request of the trustee, advanced by Patterson, and used for the purposes stated in that item.

As to the first item of the Patterson claim (\$3,956.52), it is found he paid said sum to the State Treasurer for taxes due April 15, 1898, upon an understanding with the railroad company that he might hold the same as a preferred claim against the company, to the same extent that the State Treasurer would have held it, had the amount not been paid.

As to the second item of the Patterson claim (\$11,031.65), it appears that in April, 1898, Patterson advanced said sum to the railroad company to pay the employes of the company, and also certain pressing claims, some of which had been sued upon, and upon others of which suits were threatened, under an arrangement with the company that he should receive assignments of the claims and of the wages to be paid by the money so advanced by him. Under said arrangement he received—

Certain assignments of wages, dated from December 11, 1897, to April 12, 1898, amounting to.....	\$3,389 16
Assignments of wages by pay rolls dated from September 3 to November 5, 1898, amounting to.....	2,803 72
And assignments of accounts dated April 21 to May 19, 1898, amounting to	473 53
	<u>\$6,666 41.</u>

Concerning the third item of said claim (\$138.46), it is found that Patterson owned a line of street railway from Farmington to Plainville, built upon the right of way of the defendant company, under a contract by which the railroad company was to pay him \$1,800 a year rent, and that said sum is for the rent due under said contract from February 4 to March 4, 1899.

The fourth item (\$1,176.92) is for rent due under said contract from June 18, 1898, to February 4, 1899.

It is stated in the judgment file that the value of the property sold by order of court as above stated was, at the time of such sale, in excess of \$150,000. It appears that there was no evidence or admission of parties that said property was worth more than \$20,000, excepting that the petition of one of the intervening parties, containing such an allegation, was demurred to by the Farmington Street Railway Company, and said demurrer was sustained.

From the judgment directing the distribution and payment of the proceeds of the sale of the mortgaged property, the Farmington Street Railway Company appeals, upon the grounds, in substance, that the trial court erred in giving preference to said claims of the intervening supply creditors and to said

claims of Mersick and Patterson, over the claims of said Farmington Street Railway Company, as the owner of all the bonds secured by the mortgage, and that the court also erred in basing its judgment in any part upon the fact stated in the judgment that the value of the mortgaged property at the time of the sale was in excess of \$150,000.

The plaintiff, Mersick, trustee, appeals upon the grounds that his claim should have been directed to be paid in the same order of preference as the charge of \$980 for expenses of the receiver and the trustee, and, if not ordered to be so paid, it should have been directed to be paid in the same order of preference as said class of supply claims.

James T. Patterson appeals upon the grounds that his claims for \$3,956.52 for money advanced to pay taxes should have been given the same rank in order of payment as the state taxes named in the judgment, and that the remainder of his claim should have been directed to be paid in full after payment of the expenses of the receivership and the state taxes and the preferred claims for labor, and that, if not ordered to be so paid, it should have been directed to be paid in the same order of preference as said class of supply claims.

Edward D. Robbins, for Farmington St. Ry. Co. Howard H. Knapp, for Charles S. Mersick and James T. Patterson. Henry G. Newton and Harrison Hewitt, for the Atlantic Refining Co. and others. Joseph P. Tuttle, for John S. Parsons & Co. and others.

HALL, J. (after stating the facts). The mortgage to the plaintiff trustee was executed and recorded in accordance with the laws of this state permitting a street railway company to so mortgage all its property, including its franchise, to secure the payment of its bonds, and providing for the foreclosure of such mortgage in the same manner as ordinary mortgages of real estate. Gen. St. 1902, § 3848; *Whittlesey v. Hartford, P. & F. R. Co.*, 23 Conn. 421-435. The funds in the hands of the receiver represent the corpus of the property thus mortgaged. They are the proceeds of a sale of the mortgaged property under a judgment in an action instituted by the trustee of the bondholders after, as their authorized representative, he had taken possession of the same in accordance with the provisions of the mortgage, in which action he asked for the appointment of a receiver and for a foreclosure by sale. By the judgment of the superior court distributing these funds, the mortgagees of the railroad company receive no part of the proceeds of such sale made by the receiver by order of court, and approved and confirmed by the court; but the entire avails of the sale, after the payment of the expenses of the receiver and trustee, and certain unquestioned claims, are applied to

the payment of the unsecured claims of the intervening supply creditors, and of Mersick and Patterson, before described, all of which were contracted since the execution of the mortgage, and before possession was taken for the bondholders.

It is the claim of the Farmington Street Railway Company, one of the appellants, and made a coplaintiff in the foreclosure suit since the commencement of that action, and now the owner of all the bonds secured by the mortgage, that neither the said supply creditors nor Mersick nor Patterson are entitled to payment of their claims from the proceeds of the sale of the mortgaged property until after payment of the mortgage debt; while said intervening supply creditors and Mersick and Patterson insist that their claims should take precedence, in order of payment, over the claims of the bondholders. As supporting this claim of the supply creditors and of Mersick and Patterson, and as sustaining the judgment of distribution in so far as it gives priority to the supply claims and to certain items of the claims of Mersick and of Patterson, the leading case of *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, and numerous other cases which are said to follow the rule laid down in that case, are cited.

Assuming that the doctrine of *Fosdick v. Schall* regarding the respective rights of the mortgagees and of the unsecured creditors of a railroad company, as to priority of payment from the mortgaged property, or the proceeds of its sale, at the time the trustee for the bondholders or a receiver takes possession of the railroad, is the law of this state, it becomes important to ascertain, first, just what was decided in that case; and, second, whether the rule as there laid down is applicable to the facts of the present case. *Fosdick v. Schall* was decided in 1878. In the opinion by Chief Justice Waite it is said: "The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipments, and useful improvements. Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If, for the convenience of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it is certainly not inequitable for the court, when asked by mortgagees to take possession of the future income and hold it for their benefit, to require, as a condition of such order, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts, before anything derived from that source goes to the mort-

gagees. * * * This not because the creditors to whom such debts are due have, in law, a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and, if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. * * * While ordinarily this power is confined to the appropriation of the income of the receivership, and proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that in the course of the administration of the cause the court is called upon to take income, which would otherwise be applied to the payment of old debts, for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not infrequently materially increased. * * * Under such circumstances, it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund, in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. * * * Whatever is done, therefore, must be done with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that, if there has been in reality no diversion, there can be no restoration, and that the amount of the restoration should be made to depend upon the amount of the diversion." In *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596, decided in 1884, it was held that a debt for current expenses, and payable from current earnings, the mortgage interest being then in arrear, was a charge in equity on the continuing income—"as well that which came into the hands of the court after the receiver was appointed as that before"—and that a diversion of the current income for the improvement of the mortgaged property by the trustee in possession or by the receiver created in equity a charge on the property for its restoration in favor of the current debt creditor. The opinion concludes with the statement that it was only intended to decide what was decided in *Fosdick v. Schall*—"that, if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."

In *St. Louis, etc., R. Co. v. Cleveland, etc., Ry. Co.*, 125 U. S. 658-673, 8 Sup. Ct. 1011, 1017, 81 L. Ed. 832, decided in 1888, the court, speaking by Justice Matthews, said: "But here there is no question in respect to current income. The fund in court is the proceeds of the sale of the property, and represents its corpus; and it cannot be claimed that ordinarily the unsecured debts of an insolvent railroad company can take precedence in the distribution of the proceeds of a sale of the property itself, over those creditors who are secured by prior and express liens." After stating that there are cases where, owing to special circumstances, unsecured creditors may be entitled to priority of payment, even from the proceeds of a sale of body of the property, citing *Fosdick v. Schall*, *Burnham v. Bowen*, and other decisions of the Supreme Court, the court says: "The rule governing in all these cases was stated by Chief Justice Waite in *Burnham v. Bowen*" as follows; quoting the concluding words of the opinion in that case as above stated, and adding: "There has been no departure from this rule in any of the cases cited. It has been adhered to and reaffirmed in them all." In *Kneeland v. American L. & T. Co.*, 136 U. S. 89-97, 10 Sup. Ct. 950, 953, 34 L. Ed. 379, decided in 1890, it is said: "The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. * * * One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. * * * No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced." In *V. & A. Coal Co. v. Central Railroad, etc., Co.*, 170 U. S. 355-368, 18 Sup. Ct. 657, 661, 662, 42 L. Ed. 1068, decided in 1898, it was said that where the claim for supplies furnished to continue a railroad as a going concern was, as between the party furnishing them and the holders of bonds secured by a mortgage, a charge in equity on the continuing income, it was immaterial, "in determining the right to be compensated out of the surplus earnings of the receivership, whether or not, during the operation of the railroad by the company, there had been a diversion of income for the benefit of the mortgage bondholders," and, further, that "the dominant feature of the doctrine as applied in *Burnham v. Bowen* is that where expenditures have been made which were essentially necessary to enable the road to be operated as a continuing busi-

ness, and it was the expectation of the creditors that the indebtedness created would be paid out of the current earnings of the company, a superior equity arises in favor of the materialman, as against the mortgage bonds, in the income arising, both before and after the appointment of a receiver, from the operation of the property."

The cases above cited, and others upon the same subject, are reviewed in the recent cases of *Lackawanna, etc., Coal Co. v. Farmers' L., etc., Co.*, 176 U. S. 298-313, 20 Sup. Ct. 363, 44 L. Ed. 475, and *Southern Ry. v. Carnegie Steel Co.*, 176 U. S. 257-285, 20 Sup. Ct. 347, 358, 44 L. Ed. 458, decided in 1900, in the latter of which the court, in the opinion by Justice Harlan, says: "It may be safely affirmed, upon the authority of former decisions, that a railroad mortgagee, when accepting his security, impliedly agrees that the current debts of a railroad company, contracted in the ordinary course of its business, shall be paid out of current receipts before he has any claim upon such income. * * * and that, when current earnings are used for the benefit of the mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of any funds thus improperly diverted from their primary use." Debts contracted not in the ordinary course of the operation of a railroad, but for the purposes of construction, are not entitled to priority of payment over the mortgage debt, under the rule in *Fosdick v. Schall*. *Wood v. Guarantee Trust Co.*, 128 U. S. 416, 9 Sup. Ct. 131, 32 L. Ed. 472; *Lackawanna, etc., Coal Co. v. Farmers' L., etc., Co.*, *supra*.

From the language quoted from the cases above cited, it would appear that the foundation principle of the rule of *Fosdick v. Schall*, and the other cases referred to, by which a certain preference is given a particular class of unsecured creditors over the mortgagees of a railroad, is an agreement upon the part of such mortgagees, in accepting such security for the payment of the bonds, that current debts, contracted in the ordinary course of the business of the railroad company, shall be paid from the current earnings of the railroad before such mortgagees shall have any claim upon such income. It is by virtue of this implied agreement that the current debts, as between the supply creditors and the mortgagees, become a charge in equity upon the continuing income both before and after the appointment of a receiver, and whether or not there has been a previous diversion of the income for the benefit of the mortgagee. But the superior equity springing from such implied agreement, in favor of the current-debt creditors, is in the current income derived from the mortgaged property, and not in the body of the mortgaged property itself. None of the cases above referred to go so far as to imply an agreement upon the part of the

mortgagees, in accepting their security, that the body of the mortgaged property may be used to pay the current expenses of operating the railroad. The power of a court of equity to apply the corpus of mortgaged property to the payment of such unsecured claims against the railroad company is always made to rest upon the fact that in some manner the mortgagees have received the benefit of those earnings, which, by their implied agreement, should have been applied to the payment of current expenses.

We are not prepared to accept as law the rule which seems to have been adopted in some of the cases cited by counsel—that those who have rendered services or furnished supplies to keep a railroad in operation, even after the mortgage interest is in arrear, and the bondholders have the right to take possession under their mortgage, are entitled to priority of payment over the mortgagees from the corpus of the mortgaged property, or the proceeds of the sale thereof, when there has been no diversion of the earnings of the railroad to the benefit of the bondholders.

Assuming, without deciding, that the doctrine of *Fosdick v. Schall* is applicable to a street railroad like that of the defendants, how does it affect the rights of these intervening creditors? They are not asking that income in the hands of the receiver be used to pay their claims. There are no earnings of the railroad in his hands. The expense of operating the road during the receivership has exceeded the receipts. To entitle the interveners to payment from the proceeds of the sale of the mortgaged property, it must therefore be shown that there has in some manner been a diversion of the current income for the benefit of the mortgagees. But it does not appear that the mortgagees have received any part of the income of the road which should have been diverted to the payment of these claims, or that the action of the bondholders in taking possession of the road has prevented the payment of these claims from the earnings of the railroad. On the contrary, it appears that no interest has been paid on the bonds from the earnings of the railroad since August 1, 1896, and that since that time the receipts from the road have been inadequate for the payment of the ordinary operating expenses, and that large sums have been borrowed by the company to enable it to meet its current obligations. There has been no diversion, and there can be no restoration. The claims of the supply creditors and the principal part of the Patterson claim are not debts of the bondholders, but of the railroad company, contracted either upon the credit of the company itself, or upon the credit of its earnings. As there has been no diversion of such earnings for the benefit of the bondholders, there can be no payment of such claims, under the doctrine of *Fosdick v. Schall*, from the mortgaged property, or the money de-

rived from its sale, until the mortgage debt is satisfied.

The claims described in the above statement of facts are entitled to priority of payment from the proceeds of the sale, over the bonds, only as below stated:

The first four claims named, amounting to \$2,086.97, are, as we understand, conceded to be privileged. As the last of these four unquestioned claims is the only one allowed by the trial court as a preferred labor claim, under section 1051 of the General Statutes of 1902, it is unnecessary to decide whether under that statute such a labor claim would be entitled to priority of payment from the proceeds of the sale of the mortgaged property, over the mortgage debt.

For the reason already stated—that there has been no diversion of income—none of the claims of said class of supply creditors, amounting to \$4,196.47, are entitled to preference over the mortgage bonds.

The entire claim of Mersick, trustee, amounting to \$4,804.04, is entitled to priority over the bonds, and should be paid as expenses properly incurred by the trustee while in possession of the mortgaged property for the benefit of the bondholders, and should stand in the same rank as to preference as the item of \$980, expenses of receiver and trustee.

It appears from the record that the second item of said claim of Mersick (\$1,448.08) was money paid by the trustee for wages of employes while the trustee was in possession, at the request of the bondholders, and under the mortgage, which expressly empowered him to "operate and conduct the business of said railroad company." No question is made as to the reasonableness of the amount so paid.

The first item of Mersick's claim (\$2,855.96) was money paid employes for wages, covering a period of about three months before the trustee took possession.

It is said that these claims of Mersick are made for the benefit of Patterson. The finding is that both these sums were advanced by Patterson at the request of Mersick. We must therefore treat them as money paid out by Mersick.

The mortgage deed under which Mersick, as trustee, took possession, expressly provides that "the trustee shall be entitled to be reimbursed for all outlays of whatever sort or nature to be incurred in this trust," and that his "compensation and disbursements shall constitute a first lien upon the mortgaged property." That this outlay for wages due employes before the trustee took possession was a reasonable outlay, and incurred in the trust, we must regard as determined by the finding that "it was practically impossible to resume the operation of said railroad" without first paying said "striking employes the wages then due them."

Of the claim of James T. Patterson, only

the third item (\$138.46), for rent of the Plainville line during the period the trustee was in possession, is entitled to priority of payment over the mortgage debt. That was a debt properly incurred by the trustee. As we read the finding, the trustee, while in possession through his agent, Patterson, operated the Plainville line in connection with and for the benefit of the mortgaged property, and under a contract to pay the above sum as rent. Upon the facts, this item of \$138.46 must be regarded as an expense properly incurred by the trustee while in possession for the bondholders, and should rank in order of payment with the other expenses of the trustee and receiver.

The first item of the Patterson claim, \$3,956.52, money advanced April 14, 1898, to the railroad company to pay taxes, is not a preferred claim over the mortgage bonds. Patterson was under no obligation to pay these taxes, and it does not appear that he was either requested or authorized to do so by the bondholders. It was the duty of the railroad company to pay the taxes, and Patterson, at the request of the company, paid its debt. The railroad company could not, by their agreement with Patterson, give him a lien or claim upon the body of the mortgaged property which would take precedence over that of the bondholders. The transaction was a loan by Patterson to the company, and he did not thereby acquire such a lien upon the mortgaged property as the state may have had. *Sperry v. Butler*, 75 Conn. 369-372, 53 Atl. 899.

For the reasons already given, neither the second item of the Patterson claim (\$11,031.65), money advanced by him to the company in April, 1898, to pay wages of employés, and other pressing claims against the company, nor the fourth item of said claim (\$1,176.92), for rent of Plainville line prior to the time the trustee took possession, are privileged claims over those of the bondholders.

After payment to the receiver of the sums which may be allowed for his services and expenses, and to the plaintiff trustee of the costs and proper expenses of this appeal, and of the claims as above directed, the remainder of the fund should be paid to said Farmington Street Railway Company.

Apparently, the finding in the judgment file that the value of the mortgaged property at the time of the sale exceeded \$150,000 is not sustained by the record, from which it appears that no evidence was offered upon that subject, and that the demurrer to the pleading containing such an allegation was sustained.

There is error in the judgment distributing the proceeds of the sale of the mortgaged property, and said judgment is set aside, and the cause remanded for the entry of a judgment distributing said funds in accordance with the law as above stated. The other Judges concurred.

(76 Conn. 44)

WHEELER v. YOUNG et al.

(Supreme Court of Errors of Connecticut. July 24, 1903.)

DEEDS—DELIVERY—EVIDENCE—RECORDING—PRIORITY—SUBSEQUENTLY ACQUIRED TITLE.

1. The conclusion that a deed was not delivered to the grantee before he gave a mortgage on the property for a loan—the deed and mortgage being delivered on the same day, and recorded on the day of delivery, and the mortgage reciting ownership by the mortgagor—is not justified by the fact that the mortgage was recorded four minutes before the deed, no one being deceived to his injury thereby.

2. The title acquired by one a year after giving a warranty deed without title in fact or of record does not, under the doctrine of estoppel, inure to the grantee of the warranty deed, who negligently failed to examine the record, as against one who took a mortgage from such grantor after he acquired title, without knowledge of the mortgagor's deed, and after an examination of the records; the mortgagee not being charged with notice of the record of the deed of the mortgagor, given when the record showed he had no title.

Appeal from Superior Court, Fairfield County; George W. Wheeler, Judge.

Action by Wilmot C. Wheeler against Harry S. Young and others to foreclose a mortgage, and for other equitable relief. From a judgment for defendant Young on his cross-complaint, plaintiff appeals. Reversed.

John C. Chamberlain, for appellant. John Cullinan, Jr., for appellee.

HALL, J. The plaintiff asks for a judgment of foreclosure under a mortgage which on the 13th of December, 1900, was assigned to him by Burr & Knapp, real estate and mortgage brokers of Bridgeport. Burr & Knapp, as mortgagees, received the mortgage from Charles B. and Edward H. Marsh, builders in Bridgeport, under the firm name of Marsh Bros., on the 26th of October, 1900, to secure the payment of a loan of \$3,500 made by them on that day to Marsh Bros. The mortgage was recorded on said 26th of October at 3:01 p. m. Burr & Knapp took no other security for said loan, and Marsh Bros. are insolvent. Both Burr & Knapp and the plaintiff took said mortgage in good faith, for value, in reliance upon the certificate of an attorney that the premises were free and clear of all incumbrance, and that the legal title at the time said mortgage was given was in Marsh Bros., and without knowledge of any prior conveyance by Marsh Bros. to the grantor of the defendant Young, or of any incumbrance upon said property prior to their mortgage of October 26th. Marsh Bros. obtained title to the premises described in the mortgage by a quitclaim deed from Orange Merwin, of Bridgeport, which was executed on the 1st of May, 1900, but not delivered until the 26th of October, 1900, when it was recorded at 3:05 p. m. On the same day Marsh Bros. paid to Merwin the purchase price for said property. Appar-

ently there was no evidence presented at the trial, other than the facts herein stated, showing the precise time on the 26th of October when either the deed from Merwin to Marsh Bros., or the mortgage from Marsh Bros. to Burr & Knapp, was actually delivered, or showing whether or not they were delivered at the same time, and together given to the town clerk to be recorded. Orange Merwin acquired title from Marsh Bros. by deed executed and recorded September 8, 1899. The defendant Harry S. Young, who is now in possession of the mortgaged premises, claims under a deed from Alfred Young dated January 2, 1901. Alfred Young claimed title under a warranty deed from Marsh Bros. dated April 30, 1900, delivered and recorded on the 7th of July, 1900. Marsh Bros. had on the 21st of April, 1900, agreed with said Alfred Young to sell him the lot described in the mortgage, and which was then owned by Merwin, and to erect a house thereon for \$4,600, for which Alfred Young was to transfer to Marsh Bros. a cottage valued at \$3,800, on which there was a mortgage of \$2,800, and was to give a mortgage back, upon the premises purchased, for the remainder of the \$4,600. In accordance with such agreement, Alfred Young conveyed the cottage, and on April 30, 1900, gave to Charles B. Marsh a mortgage upon the lot in question for \$3,500, upon Marsh's promise not to use it until the house was completed, which mortgage Marsh on the same day assigned to one Mary E. Beardsley, one of the defendants. Alfred Young caused no search to be made of the land records to ascertain the true state of the title to said land before receiving said deed from Marsh Bros., but relied upon the statement of Charles B. Marsh that they had acquired title to said land. Young was in the employ of Marsh Bros., and did as Charles B. Marsh directed, intending no fraud toward any one. Marsh Bros. commenced the erection of a house upon said lot in May, 1900, which was apparently completed on the 26th of October, 1900; and Merwin on said day gave his said deed to Marsh Bros. as aforesaid to enable them to carry out their said agreement with Alfred Young, which was known to Merwin, and on his business records Merwin treated the sale as a sale to Young. The plaintiff has purchased for \$1,750 the mortgage so assigned by Marsh Bros. to Mary E. Beardsley. Upon these facts the defendant Young claims title to the premises in question, and by his cross-complaint asks that the mortgage of October 26th, sought to be foreclosed, be declared void.

No question is made, and none can be made, upon the facts before us, but that the mortgage deed to Burr & Knapp, and the Merwin deed to Marsh Bros., both of which were delivered on the 26th of October, as above stated, and were received for record by 3:05 p. m. of the same day, were left for

record within a reasonable time after they were delivered. The mere fact that the deed of Merwin to Marsh Bros. appears to have been received for record four minutes later than the mortgage of the latter to Burr & Knapp would not justify a conclusion, especially under the circumstances of this case, that Marsh Bros. had not received their deed from Merwin at the time of the delivery of the mortgage to Burr & Knapp, and that for that reason Burr & Knapp took nothing by their mortgage. Deeds recorded within a reasonable time take effect according to the time they were actually delivered. *Hartford B. & L. Ass'n v. Goldreyer*, 71 Conn. 95-100, 41 Atl. 659; *Goodsell v. Sullivan*, 40 Conn. 83-85; *Beers v. Hawley*, 2 Conn. 467-469. The deed and mortgage were delivered on the same day. The mortgage recites the ownership by the mortgagor at the time of its delivery of the same property described in the deed. Looking at the record of the two deeds, the mortgage, therefore, indicates upon its face that it was delivered after or at the same time with the Merwin deed. The Merwin deed, confessedly, not having been recorded when the mortgage was delivered, Burr & Knapp would be presumed to have ascertained that it had been delivered before they made the loan of \$3,500, and the information which they received to that effect does not appear to have been false. As between the parties to this case, and in the absence of any evidence to the contrary, excepting as the slight difference in the time the two deeds were received for record can properly be regarded as conflicting evidence, the Merwin deed must, under the circumstances, be regarded as having been delivered either before or at the same time with the mortgage, and especially since no one appears to have been deceived to his injury by the fact that the Merwin deed, which bore an earlier date than the mortgage, appears to have been received for record four minutes later than the mortgage. But we do not understand that the trial court held that the Merwin deed was in fact delivered after the mortgage, or held that it did not sufficiently appear that the Merwin deed was delivered first, but it decided that, by the common-law doctrine of estoppel, the title acquired by Marsh Bros. from Merwin on the 26th of October inured to the benefit of Alfred Young, the first purchaser from Marsh Bros., the moment Marsh Bros. acquired their title, even assuming that the deed from Merwin was delivered before the mortgage, and decided that, the title having thus vested in Young, there remained nothing which Marsh Bros. could convey to Burr & Knapp by the mortgage, or which Burr & Knapp could assign to the plaintiff.

The rule referred to is that where one without title has conveyed with covenants of warranty, and has afterwards acquired title, he is estopped from asserting his want of title at the time of making such first con-

veyance; and the contention of the defendant, in effect, is that under this rule, upon the facts before us, not only Marsh Bros., but their mortgagees, Burr & Knapp, are estopped from denying that Marsh Bros. had title at the time of their conveyance to Young, on July 7, 1900. To carry this doctrine to the extent of giving priority to the title of one who, from his negligent failure to examine the records, has been induced to purchase land of a person having no title, over that of one who, without negligence, in good faith and for value, and without knowledge of such prior deed, has purchased after his grantor has acquired title from one having both the legal and record title, is opposed to the principles of equity and to the spirit of our registry laws. *Bingham v. Kirkland*, 34 N. J. Eq. 229-234; *Calder v. Chapman*, 52 Pa. 359, 91 Am. Dec. 163; *Farmers' Loan & Trust Co. v. Maltby*, 8 Paige, 361; *Way v. Arnold*, 18 Ga. 181; *Salisbury Savings Society v. Cutting*, 50 Conn. 113, and reporter's note, page 122.

The doctrine of estoppel is one which, when properly applied, "concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when, in conscience and honesty, he should not be allowed to speak." *Van Rensselaer v. Kearney*, 11 How. 301-326, 13 L. Ed. 703. "As understood and applied in modern times, there is nothing harsh or unjust in the law of estoppel. It cannot be used but to subserve the cause of justice and right." *Lessee of Buckingham v. Hanna*, 2 Ohio St. 551-560. "To allow a title to pass by conveyance executed and recorded before it is acquired may therefore be a surprise on subsequent purchasers, against which it is not in their power to guard, and is contrary to the equity which is the chief aim of the doctrine of estoppel, as molded by the liberality of modern times." 2 *Smith's Leading Cases* (7th Am. Ed.) pp. 634, 701. It may be said that such estoppel by deed is not an equitable doctrine, but is a rule of the common law, based upon the recitals or covenants of the deed. We reply that as a rule of law it has been so far modified by the registry laws as to be no longer applicable to cases where its enforcement would work such an injustice as to give priority to the title of one who negligently failed to examine the records before purchasing of a grantor having no title, or who purchased at the risk that his grantor might thereafter acquire title, over that of a subsequent purchaser in good faith, and in reliance upon the title as it appeared of record. "The whole system of registering deeds of land would become of no value if a purchaser could not rely upon the records as he finds them." *Kinney v. Whiton*, 44 Conn. 262-270, 26 Am. Rep. 462; *Whiting v. Gaylord*, 66 Conn. 337-349, 34 Atl. 85, 50 Am. St. Rep. 87. In the case above cited, of *Salisbury Savings Society v. Cutting*, the question of whether a deed with

covenants of title, given before the grantor acquired title to the land conveyed, and placed on record, would prevail over a deed given after the title was acquired, to a purchaser taking it in good faith and without knowledge of the first deed, was left an open question. The case was decided upon the ground that the second grantee was neither a purchaser for value, nor, because of certain facts found, a purchaser without notice of the title of the first grantee. The note to the case by the reporter, the late Mr. Hooker, contains an able discussion of the question left undecided by the court, in which he reaches the conclusion that the deed of the subsequent bona fide purchaser for value, and without knowledge of the prior deed, must prevail, under our registry laws, over that of the prior recorded deed of the negligent grantee. We think his reasoning is convincing, and is especially applicable to the facts of the present case.

The plaintiff here asks for the enforcement of the registry laws. He says that from September 8, 1899, until October 26, 1900, both the legal and the record title to this property was in Orange Merwin, and that on said 26th of October his (the plaintiff's) assignors, Burr & Knapp, purchased from those who on the same day acquired title from Merwin. The defendant asks for the enforcement of the law of estoppel, by which he claims that neither Burr & Knapp, nor the plaintiff, should be permitted to assert that Merwin had title, and that Marsh Bros. had no title, from September 8, 1899, until October 26, 1900. In inquiring which of the two grantees, Young or Burr & Knapp, has acted in good faith and without negligence in purchasing from Marsh Bros., and which is entitled to priority of title under the registry laws, we must examine their conduct in connection with certain facts, with a knowledge of which they are charged by our registry laws. The effect given by the law of this state to the proper record of conveyances of land has been very clearly declared in the recent case of *Beach v. Osborne*, 74 Conn. 405-411, 50 Atl. 1019, 1118. We said in that case, as conclusions from the authorities there cited, that "every person who takes a conveyance of an interest in real estate is conclusively presumed to know those facts which are apparent upon the land records concerning the chain of title of the property described in the conveyance, and that this presumption of knowledge is for all legal purposes the same, in effect, as actual knowledge"; that "this presumed knowledge is present at every step he takes, at every act he does," and that his good faith and belief must be "consistent with an actual knowledge of the facts affecting his title which are apparent upon the land records"; that "one who fails to examine to see what the records disclose concerning the title he proposes to take is, in the eye of the law, negligent, and equity does not, as a general rule, relieve from the

consequence of one's own negligence." Applying these principles to this case, we find that Alfred Young, in the eye of the law, knew, when he purchased from Marsh Bros., that they had no title, but that Marsh Bros. on the 8th of September, 1899, had conveyed to Merwin, and that the title was still in Merwin, and that it so appeared upon the public records. In contemplation of law, therefore, he did not act in good faith, but was negligent in making such purchase without having first examined to see what the records disclosed concerning the title to the land he proposed to purchase. When Burr & Knapp took their mortgage from Marsh Bros. on the 26th of October, they knew that the title to the mortgaged property had been in Merwin from September 8, 1899, until October 26, 1900. Since they had no reason to suppose that one having no title to the property would convey it during that period, they had no occasion to search the records to ascertain whether Marsh Bros. had made any conveyance during that period. They were only required to search against each owner during the time he held the record title. The deed of Marsh Bros. to Young was not in the line of record title, and Burr & Knapp were not charged with knowledge of its existence. *Bingham v. Kirkland*, and the other cases above cited. But it is said that the Merwin deed was not on record when Burr & Knapp took their mortgage on the 26th of October. But the Merwin deed was not in fact delivered until that day, and Burr & Knapp had no reason to think that a deed delivered on that day, and before their mortgage was delivered (that is, before 3:01 p. m.), ought to be recorded when their mortgage was delivered, nor was there any reason why they should require it to be recorded before accepting the mortgage. The records showed a good title in Merwin up to the time of the delivery of the mortgage deed. Burr & Knapp had only to satisfy themselves that a deed had been given by Merwin to Marsh Bros. that day, which was the fact, and that no conveyance had been made by Marsh Bros. since they received their deed from Merwin, which was also true. As the deed of Marsh Bros. to Young and the mortgage back by Young to Charles B. Marsh were not incumbrances upon the title of record, the information given to Burr & Knapp by the searcher that "the premises were free and clear of all incumbrances, and the legal title in Marsh Bros.," was entirely consistent with the facts as they appeared by the records concerning the chain of title, and the fact that Marsh Bros. had that day acquired title from Merwin. The facts before us show that Burr & Knapp acted in good faith and without negligence, and without knowledge of the Young deed, and that, having on the 26th of October taken a mortgage from those who on that day had received a deed from the legal owners, and the owners of record, their mortgage is valid.

As Alfred Young had no title superior to the Burr & Knapp mortgage when he conveyed to the defendant Young on January 2, 1901, the defendant Young by his deed of that date took no title superior to the mortgage. The plaintiff is entitled to a judgment of foreclosure.

There is error in the judgment of the trial court, and it is reversed, and the case remanded for the entry of a judgment of foreclosure in favor of the plaintiff. The other Judges concurred.

(97 Md. 330)

PRINCE GEORGE'S COUNTY COM'RS v. MITCHELL.

(Court of Appeals of Maryland. June 29, 1903.)

CONSTITUTION—COUNTY COMMISSIONERS—DUTIES—COURT CRIER—DUTIES—APPOINTMENT BY JUDGES—NONJUDICIAL ACTS.

1. Under Const. art. 7, § 1, providing for county commissioners, and declaring that their powers and duties shall be such as may be prescribed by law, the Legislature may pass laws changing such powers and duties, so long as such laws do not conflict with any other constitutional provision.

2. Acts 1902, p. 670, c. 455, places the courthouse and grounds of Upper Marlboro, Prince George's county, in the care, custody, and control of the crier of the circuit court of that county. Const. art. 4, § 9, provides that the judges of any court may appoint the necessary court officers, etc. Declaration of Rights, art. 8, declares that no person exercising judicial functions shall discharge duties of another character. *Held*, that the statute is violative of the Constitution in that it indirectly imposes on the judges—who appoint the crier—nonjudicial functions, and interferes with the court by requiring its officer to discharge other duties than those pertaining to his office as crier.

Appeal from Circuit Court, Prince George's County, in Equity; Geo. C. Merrick, Judge.

Suit by James H. E. Mitchell, as crier of the circuit court for Prince George's county. From a decree overruling a motion to dissolve an injunction issued against defendants restraining them from interfering with complainant in his duties relative to the courthouse and grounds in Upper Marlboro, Prince George's county, the commissioners appeal. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, and SCHMUCKER, JJ.

F. Snowden Hill, for appellants. Joseph S. Wilson, for appellee.

BOYD, J. This is an appeal from a decree overruling a motion to dissolve an injunction issued against the appellants at the instance of the appellee, and making the injunction perpetual. Chapter 455, p. 670, of the Acts of 1902, provides "that the courthouse and grounds attached thereto of Upper Marlboro, Prince George's county, Maryland, be and the same are hereby placed under the care, custody and control of the crier of the circuit court for said county, who shall

be at said courthouse daily to see that it is properly cared for," and allows him a compensation of \$200 to be annually levied by the county commissioners of that county, in addition to the \$80 now paid him for his services as crier. The appellee is the crier of the court, and the bill prays that the county commissioners be enjoined and prohibited "from in any manner interfering with your orator in the discharge of the duties imposed upon him by the act of assembly herein mentioned, or from repairing or in any way exercising control over the courthouse and grounds attached thereto, in Upper Marlboro, Prince George's county, Maryland, and from refusing to give your orator free access to all portions of said courthouse necessary for him in exercise of his duties, as aforesaid, and from refusing to deliver to your orator any and all keys necessary for him to have, in order that he may fully do his duty as custodian of said courthouse and grounds." The injunction was issued as prayed.

The appellants contend that the court below erred, first, because the complaint of the appellee involves the title to a public office, which is not cognizable by a court of equity; and, second, because the act of assembly is unconstitutional. The latter question being the more important one, we will proceed at once to the consideration of that. No point was made at the argument about the language of the statute which refers to the "courthouse and grounds attached thereto of Upper Marlboro," etc., but it seemed to be assumed that it referred to the courthouse of the county, and hence we will not stop to discuss that language. Section 1, art. 7, of the Constitution, as amended, after providing for the election of county commissioners in 1891, reads: "Their number in each county, their compensation, powers and duties, shall be such as now or may be hereafter prescribed by law; they shall be elected at such times, in such numbers and for such periods not exceeding six years, as may be prescribed by law." Section 1, art. 25, Code Pub. Gen. Laws, provides that "the county commissioners of each county in this state are declared to be a corporation, and shall have full power to appoint judges of election, road supervisors, collectors of taxes, trustees of the poor, a clerk to their board, and all other officers, agents and servants required for county purposes, not otherwise provided for by law or by the Constitution, and they shall have charge of and control over the property owned by the county," etc. Under the above section of the Constitution, there is no doubt that the Legislature may pass laws changing the powers and duties of the county commissioners, so long as such laws do not conflict with some other provision of the Constitution, and there have been many changes since the section of the Code just quoted was adopted. They no longer appoint judges of election, and in many of

the counties some of the other officers named are otherwise selected. It may therefore be conceded, for the purposes of this case (although we do not so determine, it not being necessary), that the Legislature could commit a county building, such as a courthouse, to the "care, custody and control" of some one other than the county commissioners; but the question is whether it can confer such powers and impose such duties on the crier of the court as are attempted by this statute. Since the decision in *Beasley v. Ridout*, 94 Md. 641, 52 Atl. 61, it could not be contended that a statute which provided for the appointment by the circuit court of some one to have the care, custody, and control of the courthouse and grounds attached would be valid. The statute then under consideration provided for the appointment, by the Judges of the Fifth Judicial Circuit, of visitors to the jail in Anne Arundel county, and this court held that the provision requiring such appointment was unconstitutional, because in violation of the Declaration of Rights, art. 8, which declares that no person exercising the functions of the legislative, executive, or judicial department of the government shall assume or discharge the duties of any other. In speaking of that statute, the court said, "No argument is needed to show that the duty thus sought to be imposed is not judicial, and that in making these appointments the judges were not performing a judicial function." See, also, the recent case of *Board of Supervisors v. Todd et al.* (not yet officially reported) 54 Atl. 963. Those cases and others cited in them leave no room to doubt that the judges of the circuit court could not properly be required or authorized to appoint a person to discharge the duties contemplated by this statute, and the question is, can they be required or authorized to do indirectly what they cannot do directly?

The office of crier has always been deemed one of some importance in this state. It is said in *Evans' Practice*, 33, that "the duty of the crier is to make proclamation, to assist in administering oaths, and generally to give facilities to the business of the court during its actual session." He is usually required to be present during all the sittings of the court, to formally announce the opening and adjournment of court for the day or the term, as the case may be, by statute is required to give notice to the members of the bar of the time and place of drawing juries, and performs other important duties under the direction of the judges. Each county court of the judicial system of Colonial Maryland had a crier, as did the provincial court. *Thomas's Chronicles of Colonial Maryland*, 121, 145. As early as chapter 25 of the Laws of Maryland, 1779, his fees were regulated by statute (*Dorsey's Laws of Maryland*, 152), and, although they were then payable in tobacco, most of the services for which the statute thus provided

compensation are still enumerated in the Code of Public General Laws now in force (article 86, § 18). In many of the counties his compensation is fixed by local laws, and in some of them he is required to perform duties that were not originally imposed on him; but, so far as they have been brought to our attention, they have not attempted to go to the extent that the one under consideration has gone. The present Constitution in section 9, art. 4, provides that "the judge or judges of any court may appoint such officers for their respective courts as may be found necessary. * * * It shall be the duty of the General Assembly to prescribe by law a fixed compensation for all such officers; and said judge or judges shall from time to time investigate the expenses, costs and charges of their respective courts, with a view to a change or reduction thereof, and report the result of such investigation to the General Assembly for its action." Without that provision, the judges would undoubtedly have the power to appoint such officers as are necessary for the proper conduct of the business of their respective courts; but it shows that the subject was regarded by the framers of the Constitution as of considerable importance, as they inserted an entire section in reference to it. It was not intended that such an officer of the court as a crier was to have "the care, custody and control" of the courthouse and grounds attached thereto. To impose such duties on him would necessarily require some of his time that the court would be entitled to, as crier. In that way his usefulness as crier might be seriously interfered with. If he had simply been required to attend to the courtroom and other rooms connected with the circuit court, it would have been more in line with his other duties; but the record shows that this building is not only used by that court, but by the orphans' court, the county commissioners, and the treasurer, and in most, if not all, of the counties of this state, the courthouse is used by most of the county officers. The general law gives the county commissioners "charge of and control over the property owned by the county" (section 1, art. 25); "they may sue for any injury done to the property of the county, or to recover possession thereof, or may be sued by any claimant of such property" (section 4); they are required to "provide for the support of the courts * * * and pay and discharge all claims on or against the county which have been expressly or impliedly authorized by law" (section 7); but, under the interpretation placed on this statute by the appellee and the court below, they are prohibited "from repairing, or in any way exercising control over, the courthouse and grounds attached thereto." With that injunction in force, they could not insure the building or institute proceedings to eject a trespasser from the grounds, and cannot even have control of their own room, although the legal

title to the property is vested in them. If the statute must be so construed, it would unquestionably be invalid, irrespective of the question whether it imposes nonjudicial functions on the judges; and, inasmuch as the injunction granted does contain such prohibitions, the decree would have to be reversed for that reason.

But we are of the opinion that it is unconstitutional because it does require the judges to discharge nonjudicial functions—indirectly, it is true, but just as objectionable as if directly done, and possibly more so. The judges alone have the power to appoint criers of their respective courts. If there was ever any question about that, the Constitution has settled it. The Legislature cannot compel them thus indirectly to appoint the custodian of the courthouse and grounds by providing that the crier shall be such custodian, nor can it interfere with the court by requiring its officer to discharge other duties which may prevent him from properly performing the duties that belong to the office of crier. A person may be well qualified to act as crier, but may be utterly unfit to be custodian of the courthouse and grounds, or one who may be competent to have the care, custody, and control of that property might not be at all suited to the discharge of the duties of a crier. Yet if this statute is to be enforced whenever the court is called upon to appoint a crier, it must select one who is qualified for both positions, which certainly could not always be done for such compensation as this statute fixes.

Without discussing the other grounds relied on by the appellants, we must, for the reasons given, reverse the decree; but as the record does not disclose that the appellee was in any wise responsible for the passage of the statute, we think the county should pay the costs.

Decree reversed, and the bill of complaint dismissed, the appellants to pay the costs.

(97 Md. 294)

CONNECTICUT FIRE INS. CO. OF HARTFORD v. COHEN.

(Court of Appeals of Maryland. June 29, 1908.)

FIRE INSURANCE—AWARD OF APPRAISERS—INSURED'S APPRAISER PREVENTING AN APPRAISEMENT—EFFECT—INSURED'S RIGHT OF ACTION.

1. A fire policy provided that any loss, in the event of a disagreement as to the amount thereof, should be ascertained by appraisers, the insurer and insured each selecting one, and the two electing an umpire to whom they should refer their differences. It stipulated that no action on the policy should be sustained until after compliance by the insured with such requirement. On a disagreement as to the amount of a loss, the insurer and insured each appointed an appraiser. The two failed to agree on an umpire, though the appraiser appointed by the insured submitted two names for an umpire, and the other appraiser submitted one. After that disagreement no further attempts were made to proceed with the appraisal.

ment. There was evidence that the adjuster stated to the insured's attorney that the appraiser appointed by the insurer would resign, and that the insurer was considering whether another appraiser should be appointed, and that the adjuster would inform the attorney in a few days, which was never done. There was no evidence connecting the insured with the conduct of the appraiser appointed by him. *Held*, that the insured was not prevented from maintaining an action on the policy for the loss sustained.

Appeal from Baltimore City Court; J. Upshur Dennis, Judge.

Action by Aaron Cohen against the Connecticut Fire Insurance Company of Hartford. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, and SCHMUCKER, JJ.

George Whitelock and John B. Deming, for appellant. Jacob J. H. Mitnick and Charles F. Harley, for appellee.

SCHMUCKER, J. This is an appeal from a judgment of the Baltimore City court in favor of the appellee in an action of assumpsit against the appellant company on a policy of fire insurance. The policy is in the standard form, insuring, to the extent of \$2,000, merchandise located in the appellee's store in Baltimore City. It contains the usual clause providing that, in the event of a loss by fire to the insured goods and a disagreement as to the amount of the loss, it shall be ascertained by two competent and disinterested appraisers, the insured and the company each selecting one, the two so chosen to first select an umpire, and the appraisers then to estimate and appraise the loss, and, failing to agree to submit their differences to the umpire, the award in writing of any two to determine the amount of the loss. The policy further provides that the loss shall not become payable until 60 days after due notice and proof, "including an award by appraisers when appraisal has been required," and that "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

The insured goods were damaged by fire on August 26, 1901, while the policy was in full force. A disagreement as to the amount of loss caused by it having arisen between the appellee and the adjuster representing the company, the appellee requested that the extent of the loss be ascertained by an appraisal. The appellee named Louis Applefeld as one of the appraisers, and the appellant named Albert H. Likes as the other, and a formal agreement for an appraisal was drawn up and signed by the parties on October 29, 1901. This agreement authorized Applefeld and Likes (together with a

third person to be first appointed by them, as required by the policy of insurance, and to act as umpire on matters of difference only) to appraise and estimate the actual cash value of, and the loss and damage by fire to, the property described in the policy. The two appraisers failed to agree upon an umpire, and, as a result, no appraisal was made. Each appraiser was a witness in the case, and gave his version of the cause of their disagreement. The evidence, although conflicting, tends to prove that the appraisers met promptly after their appointment, and three names were proposed, two by Applefeld and one by Likes, of persons from whom to select the umpire, but, after taking a day for reflection, each rejected the name or names suggested by the other. After that interview no further attempt seems to have been made to proceed with the appraisal. Likes testified that he rejected Applefeld's nominees partly because he had reason to believe that they had sold some of the insured goods to Applefeld, although it does not appear that he informed the latter of his reasons for the rejection. Applefeld gave as his reason for rejecting Likes' nominee that he did not know him. He further testified that he requested Likes to suggest additional names, but the latter refused to do so. Likes, on the contrary, testified that, when no choice of an umpire was made from the three names first mentioned, he at that same interview proposed to submit a list of six names of representative business men of Baltimore and let Applefeld select one of them, but the latter rejected the proposition. Applefeld testified that, when he declined to accept the person proposed by Likes for umpire, Likes said, "If you are not satisfied with him, I will get out of it." Likes denied having said so, but he admitted having told Mr. Deming, the company's adjuster, that he would prefer to step out and let them get another appraiser in his stead. There was also testimony tending to show that, after the failure of the appraisers to select an umpire, the company's adjuster called on the appellee's attorney and inquired whether they would name another appraiser, and that the company were considering whether they would name another appraiser in his place, and that he (the adjuster) would let the attorney know in a few days; but he never gave him any further information on the subject.

The effort at an appraisal which was initiated on October 29, 1901, having produced no practical result up to December 24, 1901, the appellee on that day brought the present suit on the policy. The appellant filed the general issue pleas, and also a special plea setting up the terms of the policy in relation to an appraisal of the amount of loss in case of a fire and a disagreement as to the extent of the loss resulting therefrom, and averring that a disagreement as to the amount of the loss by the fire had

occurred, and that appraisers had been selected, the agreement for an appraisal had been executed, and that the defendant had in good faith done all in its power to procure the making of the appraisal, but that the appraisal was still pending and unconcluded. To this plea the appellee replied, first, that the appraisal had been abandoned by the appellant, second, that the failure to appraise was not caused by the fault of the appellee, and, third, that the failure of the appraisers to select an umpire, and the abandonment of the appraisal, had occurred without fault on the part of the appellee. The issue was made up by rejoinders to these replications.

There is but one bill of exceptions in the record, and that brings up for our review the action of the court below in rejecting the defendant's first and second prayers. The prayers are as follows: (1) If the jury shall find that the plaintiff's appraiser, Louis Applefeld, prevented the selection of an umpire on matters of difference between the appraisers named in the agreement of October 20, 1901, offered in evidence, and that there has been no appraisal and estimate of the actual cash value of, and the loss and damage by fire to, the property of the plaintiff described in the defendant's policy of insurance, as stipulated in said agreement, then the verdict of the jury must be for the defendant. (2) If the jury shall find that the failure to reach an appraisal and estimate of the actual cash value of, and the loss and damage by fire to, the insured property of the plaintiff in accordance with the agreement of October 20, 1901, offered in evidence, was due to the failure of Louis Applefeld, the plaintiff's appraiser, to do in good faith all that he could reasonably be expected to do to agree with the defendant's appraiser, Albert H. Likes, upon a suitable umpire in accordance with said agreement, then the verdict of the jury must be for the defendant. These two prayers plainly present the proposition that an appraiser named in such an agreement as appears in this record is to be regarded as the agent of the party who nominated him, in so far, at least, that he can, without the co-operation or connivance of that party, deprive him of the entire fruits of his insurance by pursuing a policy of inaction or bad faith in performing the duties of the appraisal. To that proposition we cannot give our assent. It is fundamental to the conception of such an appraisal—which is, in effect, an arbitration—that the persons selected to make it should be free from the control or direction of the respective parties whose interests have been confided to them, and should act independently and upon their own judgment. If it could be shown that an appraisal had been arrived at through pressure or control exercised over the appraisers or any of them by one of the parties to the submission, that fact would be sufficient to avoid the ap-

praisement. This is equally true whether an entire controversy is covered by the arbitration, or, as in the present case, only a single element of it is submitted for determination. It being thus the duty of the parties to the submission to abstain from all interference with the appraisers, it would be manifestly unjust, when they have observed such abstinence, to hold them responsible for the negligence or misconduct of the appraisers. In order to defeat the rights of a party to a submission to an appraisal by reason of the conduct of the appraiser, the evidence should connect the party himself with that conduct.

The legal principles involved in this case have already been passed upon by this court in the *Caledonian Ins. Co. v. Traub*, which three times has been before us, in 80 Md. 214, 30 Atl. 904, 83 Md. 533, 35 Atl. 13, and 86 Md. 86, 37 Atl. 782. The policy of insurance which formed the subject of that suit was similar in its terms to the one now under consideration, and contained a like provision for an appraisal of the amount of loss in case of a fire. After a fire had occurred, appraisers to determine the amount of loss were appointed under that provision, and they selected an umpire, and the three had partly done their work, when the appraiser who had been nominated by the assured withdrew without any apparent good reason. The other appraiser and the umpire then completed the appraisal. It therefore became necessary for the court to pass upon the effect and legal consequences of the provisions of the policy relating to an appraisal. The appraisal in that case was held to be not binding on the parties, because it had not been made in accordance with the stipulations of the policy, which contemplated joint action by both appraisers at every stage of the arbitration, the umpire having had no authority to act except where they differed in their estimates. In the court's opinion in that case, in 83 Md. 533, it is said: "The withdrawal of the appraiser appointed by the insured without any apparent good reason, and with no explanation except such as is given by the telegram above mentioned, ought to have been the subject of an inquiry by the jury. It ought to have been left to them to determine whether the failure of the appraisal was in any way caused by the agency or procurement of the insured. * * * On the hypothesis that Reinhart [the withdrawing appraiser] was their agent, they would be responsible for his action, and if it caused the failure of the appraisal there can be no recovery in this suit. Because this inquiry was not submitted to the jury in any of the plaintiff's prayers, the judgment must be reversed. If the appraisal failed without the fault of the insured, the failure would not be an impediment to their right of recovery if they could maintain their suit upon other grounds." The law as thus stated was affirmed when

the case was here for the last time in 86 Md. 86, 37 Atl. 782, the court then prefacing its opinion with the statement that "on the former appeals the law of the case was fully discussed and finally settled, and there are but few new questions presented for decision now." The appellant contends that, notwithstanding this distinct affirmance of the court's reasoning and conclusions in the former appeals, the opinion in 86 Md. 86, 37 Atl. 782, must be regarded as having modified the law, because of the presence in that opinion of the statement "though it would have been undoubtedly competent for the appellant to show that the failure of the appraisers or arbitrators to reach a conclusion was due to the misconduct or bad faith of the appellees or their agent, Reinhart, or their appraiser, Rosenfeld." Although that expression, apart from its context, apparently gives color to the appellant's contention, it must be observed that it was used in affirming the action of the lower court in withholding from the jury certain interrogatories which the appellants sought to require them to answer, because there was no evidence in the case "which could possibly furnish the jury with an answer to them." The expression as thus used was not necessary to the determination of that matter, and it was not intended to reverse or modify the full and deliberate expressions used in the opinion upon the former appeal defining the effect upon the rights of the insured of a failure to complete an appraisal, without his fault. We regard the propositions asserted in the opinion in 83 Md. 533, 35 Atl. 13, in Traub's Case, as conclusive of the present appeal, in so far as to require us to hold that, unless the jury were satisfied from the evidence in the case that the failure or abandonment of the appraisal was caused by the fault of the appellee, it constituted no impediment to his right to recover. The rejected prayers of the defendant failed to submit that question to the jury, and were for that reason properly rejected.

The conclusions which we have reached in the case now under consideration and in Traub's Case are not in conflict with the weight of authority elsewhere. The cases all agree that, when the policy provides for ascertaining the amount of loss by appraisal, both the insured and the insurer, who have submitted the amount of a loss to appraisal, must act in good faith, and each must do his part to have the appraisal completed; but only one case, so far as we are informed, has held that the failure of an appraisal through the conduct of the appraisers, without the fault of the insured, interposed any impediment to his right to recover on his policy. Ordinarily, the insured does his part toward the success of the appraisal by uniting in good faith in the selection and appointment of the appraisers, and furnishing them all needed facilities and opportunities for the inspection and exami-

nation of the insured property and the ascertainment of its value, and then abstaining from all attempts to influence or interfere with them in the discharge of their duty.

In a number of cases cited by the appellant the insured was held entitled to recover on his policy in spite of the failure of an attempted appraisal of the amount of his loss, when that failure had been caused by the unreasonable attitude and conduct of the insurer's appraiser. From these cases the appellant contended that it must be held, conversely, that the insured was barred from recovering on his policy when the appraisal had been defeated by the acts of the appraiser nominated by him. That does not necessarily follow. It is in our judgment sufficient, to maintain the right of the insured to sue in such cases, to find that the failure of the appraisal was without fault on his part, and it is unnecessary, for that purpose, to ascertain that the insurer was the cause of the failure. The title of the insured to maintain his suit rests upon his policy, and not upon the conduct of the insurer in relation to the appraisal. He may, when the policy provides for an appraisal, be estopped from bringing his suit by his own conduct in reference to the appraisal; but, if his conduct in that connection be free from fault, he is not estopped from suing by the failure of the appraisal from other causes.

It is further to be observed that, in most of the cases cited by the appellant in this connection, there was evidence tending to implicate the insurance company itself in the conduct of the delinquent appraiser. That is true of the case of *Uhrig v. Insurance Co.*, 101 N. Y. 362, 4 N. E. 745; *Hamilton v. Insurance Co.*, 136 U. S. 255, 10 Sup. Ct. 945, 34 L. Ed. 419; *Chapman v. Insurance Co. (Wis.)*, 62 N. W. 422, 28 L. R. A. 405; *Bishop v. Insurance Co.*, 130 N. Y. 488, 29 N. E. 844; and *Hickerson v. Insurance Co. (Tenn.)*, 33 S. W. 1041, 32 L. R. A. 172. In the last-mentioned case, which was cited by the appellee, but was much relied on by the appellant in argument, the court, in its opinion, not only held that the appraisal clause of the policy was inoperative because there had been no real effort to agree upon the loss by the parties themselves, but also found from the evidence that the appraisal had "failed in consequence of the perverse conduct and want of good faith of the insurance companies, represented by their adjuster and appraiser." All of these cases were in substantial accord with us, upon the main question in this case, in refusing to hold that the insured was prevented from maintaining a suit on his policy by a failure of an appraisal which occurred without fault on his part.

In the case of *Davenport v. Ins. Co.*, 10 Daly, 535, the Court of Common Pleas of New York held that where appraisers had

been selected to fix the amount of loss by a fire under a policy similar to the one now before us, and they failed to agree upon an umpire, the insured, although not at fault himself, was not entitled to at once institute an action on his policy; that it was his duty to suggest the name of a new appraiser, and make further attempts at procuring an appraisement. No authority was there relied on except that of an earlier case in the same court. Without meaning to say that there are no circumstances under which it would be the duty of an insured to suggest the name of a new appraiser and make further efforts for an appraisement before bringing suit on his policy, we do not think that the appellee was bound to do so, under the facts of this case, before he brought the present suit. The judgment appealed from must be affirmed.

Judgment affirmed, with costs.

(97 Md. 674)

ROGERS et al. v. SAFE DEPOSIT & TRUST CO. OF BALTIMORE et al.

(Court of Appeals of Maryland. July 2, 1903.)

WILLS—CONSTRUCTION—REMAINDER—DISTRIBUTION—ACCELERATION—RELEASE BY LIFE TENANT.

1. Where, by the terms of a will, testator's children took vested interests in the estate in equal proportions, defeasible as to the share of any one of them on his or her death during the life of testator's widow, in which event the share of the child so dying would become vested in his or her children, and the will fixed the period for the division of the remainder at the death of the widow, the distribution of the remainder could not be accelerated by a release of the widow's life estate; it being impossible before her death to ascertain with precision the persons who would be entitled to take the remainder on the occurrence of such event.

Appeal from Circuit Court of Baltimore City; George M. Sharp, Judge.

Bill by Anna Virginia Rogers and others against the Safe Deposit & Trust Company of Baltimore, trustee, and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Argued before BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Thomas Hughes, for appellants. A. Hunter Boyd, Jr., and Edward I. Koontz, for appellees.

PAGE, J. The appellants in this case filed a bill to procure the division of certain funds in the hands of the appellee, trustee under the will of Philip Rogers, deceased. By the provision of the will, the executor was directed to convert the entire estate into money, and, after the payment of debts and expenses, to transfer what remained to the appellee, in trust to invest the same and pay the interest to his wife during her life, and after her death to divide the said interest-bearing securities and the accrued interest thereon among his children, share and share alike; and, "in said division, the child or

children of a deceased parent, if there be such, are to take in equal proportion, the share to which that deceased parent would have been entitled had he or she been living at the time of said division." By the third clause the testator makes reference to certain policies of insurance on his life for the exclusive benefit of his wife after his death, and expressed the "desire" that, as soon as she had collected the amount due her, she should hand over the proceeds to the appellee, to hold subject to the same uses and trusts as are expressed in the second clause of the will, as already hereinbefore set forth. And later on, by an instrument of writing executed on the 24th January, 1889, she did, as desired by her late husband, deliver and pay to the appellee a considerable sum of money, the same being the proceeds of the life insurances, "in order that the same might be invested by the appellee for the trust purposes and upon the terms and conditions set forth in said will and thus become a part of said trust estate." Subsequently Mrs. Rogers "executed and delivered" (to whom, does not appear) a paper by which she undertook to release all her claim in the trust estate in consideration of one dollar and the "immediate benefit and enjoyment to accrue to" her children, upon the "express condition that it will be void and of no effect, so far as it relates to said declaration of trust and its terms, in the event" of the decree of the circuit court dismissing her bill for the annulment of the trust "being reversed by the Court of Appeals," etc. The words of the release are as follows: "I hereby formally and solemnly renounce all my right and interest as sole life tenant under the terms of said will * * * and declaration of trust," etc., "as fully and effectually as if I were now deceased," etc. It further appears that there are now surviving four children of Philip and Elizabeth Rogers, all of whom are adults and parties to this proceeding. There are also several grandchildren, who have not been made parties. On demurrer the court dismissed the bill, and from this decree the appeal is taken.

The contention is that in consequence of the release of Mrs. Rogers an acceleration of the remainder has resulted, and that the appellants are now entitled to have a division of the trust estate. By the terms of the will, it seems to be clear that his children took vested interests in the estate in equal proportions, defeasible as to the share of any one of them upon his or her death in the lifetime of the widow, and in this event the share of the person so dying would become vested in his or her children. *Cox v. Handy*, 78 Md. 108, 27 Atl. 227, 501. The period at which the division among the remaindermen is to take place, as fixed by the will, is after the death of Mrs. Rogers; and if at that time one of the children is deceased, leaving a child or children then living, such child or children must be substi-

tuted in his place; but, if the child so dying leave no children, his share is not divested, but goes to his personal representatives. *Cox v. Handy*, 78 Md. 125, 27 Atl. 227, 501. We do not understand that the appellants, by their counsel, dispute these conclusions. With this construction of the will, it is impossible to ascertain with precision the person or persons who will be entitled to take at the period of the death of Mrs. Rogers, the life tenant. That event is yet in the future, and it is not possible to determine who may be entitled when it shall arrive. The testator desired that his estate should pass to all his children, share and share alike, but, if any one of them is deceased at the period of his wife's death, the children or child of such deceased child shall take; and, if there be no such child or children, inasmuch as the estate vested in the deceased child would not become divested by death, his share would go to his legal representatives. So that it seems clear that if the estate be divided at this present time, while Mrs. Rogers is still living, the result might ensue that the several portions of the estate will finally become vested in persons other than those contemplated by the testator, and in direct contravention of his will. The doctrine of the acceleration of estates is founded upon the desire of courts of equity to give effect to the manifest intention of the testator, and, when such intention would be frustrated by allowing it, it will be denied. The cases are too numerous to do more than to refer to some of the leading cases in this state. *Clark v. Tonnison*, 33 Md. 92; *Small v. Marburg*, 77 Md. 11, 25 Atl. 920; *Hinkley v. House of Refuge*, 40 Md. 469, 17 Am. Rep. 617; *Wehrhane v. Safe Deposit Co.*, 89 Md. 187, 42 Atl. 930; *Boyd v. Sachs*, 78 Md. 497, 28 Atl. 391; *Mercer v. Hopkins*, 88 Md. 316, 41 Atl. 156; *Randall's Case*, 85 Md. 440, 37 Atl. 209.

The record presents other questions that would require examination before we could reverse this decree, but, inasmuch as what we have already said disposes of the case, we need not advert to them.

Decree affirmed, with costs to be paid by the appellants.

(97 Md. 682)

LEE v. MARYLAND TELEPHONE & TELEGRAPH CO. OF BALTIMORE CITY et al.

(Court of Appeals of Maryland. July 2, 1903.)
TELEPHONES—DERELICT WIRES—OWNERSHIP—INJURIES TO PEDESTRIANS—EVIDENCE.

1. In an action for injuries to plaintiff by tripping over a telephone wire lying concealed in the grass in the street, evidence reviewed, and held insufficient to justify a finding that defendants owned or were in control of the wire at the time of the accident.

Appeal from Circuit Court, Harford County; James D. Watters, Judge.

Action by Rebecca Lee against the Maryland Telephone & Telegraph Company and

another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Argued before MCSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, JONES, and SCHMUCKER, JJ.

S. A. Williams and Harry Carver, for appellant. W. W. Preston and Thomas H. Robinson, for appellees.

SCHMUCKER, J. The appellant sued the appellees in the circuit court for Harford county for damages for injuries sustained by her through falling over a loose wire lying on a public street in the town of Belair. At the conclusion of the plaintiff's evidence the court granted a prayer offered by the defendants taking the case from the jury for want of any evidence legally sufficient to establish the defendants' liability for the plaintiff's injury. The only issue presented by this appeal is that of the propriety of the court's action in granting the prayer.

There is evidence in the record tending to prove that the plaintiff in the latter part of April, 1902, when starting to cross Broadway in Belair with the use of due care, caught her foot in a wire lying concealed in the grass, but attached at one end to a pole, and that she was thereby thrown to the ground and injured. The question in the case is whether there is any evidence that would warrant a jury in finding that the defendant corporations, or either of them, owned the wire or had such control over it at the time of the accident as to be responsible for negligence in the management or care of it. It is conceded that neither of the defendants owned, the pole to which the wire was attached, or had any poles at or near the locality of the accident. The pole was in fact shown by the evidence to be one of a system of electric light poles in which the defendants had no interest. It was sought to hold them liable for negligence in permitting the wire to lie on the ground along the public road, upon the theory that they were the assignees or successors in title of the persons who originally strung the wire, for the purpose of a former telephone connection, on the electric light poles, with the consent of the owners of those poles. In the attempt to support that theory, the plaintiff introduced evidence tending to show that four persons, as copartners, started the telephone service in Belair in 1894; that in March, 1895, they admitted two or three other persons into the firm; and that in September the firm became incorporated under the name of the Harford County Telephone Company. It was also testified that it was understood between the parties to this incorporation that the company became the owner of the electrical equipment and wires which had been owned by the individuals who composed it, but there was no formal or written transfer of the property from the individuals to the company. There was also evidence tending to show that the lines of the

Harford County Telephone Company were operated by the Maryland Telephone Company at the time of the accident. The plaintiff also offered evidence tending to prove that in 1894, while the telephone enterprise in Belair was still in the hands of its four originators, a pair of wires were strung by them out Broadway, passing by the place of the plaintiff's accident, on the electric light poles, in order to serve a telephone in Dr. Richardson's residence, and that those wires remained on the light poles after the telephone had been removed. She further offered evidence tending to prove that in February, 1902, several months prior to the accident, a naked wire, such as is used for telephone service, fell down off the light poles on to the ground on Broadway at or near the place of the accident, and that several persons had shortly prior to the accident encountered a loose wire of that kind lying there by the roadside. John H. Reckford, who was interested in the firm owning the light poles on Broadway, and had been one of the promoters of, and for five years a director in, the Harford County Telephone Company, testified for the plaintiff that he knew from correspondence and conversations with Mr. Brown, who was an officer of both of the defendant corporations, that the telephone wires in question belonged to the Harford County Telephone Company, but he did not state what the correspondence and conversation were by which he arrived at that conclusion. He also testified that he had called the attention of the managers of the telephone company to the presence of the loose wires on Broadway, and that the latter promised to remove them, but did not do so. This witness admitted on cross-examination that he did not know of his own knowledge who had put these wires on the light poles, or whether Dr. Richardson ever had a telephone in his house, or that the telephone company had, while he was one of its directors, ever put any telephones on Broadway. So it is apparent that his belief as to the ownership of the wire in question rested upon hearsay. Walter Finney, who was also one of the promoters of the Harford County Telephone Company, and its first manager, and was connected with it for some time, testified for the plaintiff that he never heard of the telephone wires on Broadway until some time after the company had taken hold of the telephone enterprise, and further testified that the company had never exercised any acts of ownership over those wires or had anything to do with them. The plaintiff's evidence, of which we have stated the material portions, is, in our judgment, not legally sufficient to affect the defendants, or either of them, with liability for the accident, because it does not tend to prove that they owned or were in control of the wire which caused it at the time of its occurrence. The witness Reckford did state that, from the correspondence and conversations with their officers, he

was satisfied that the appellees owned the wire; but this was merely an expression of his own opinion, as he did not say what statements those officers made in their correspondence and conversations, so that the jury could determine whether they amounted to admissions of ownership of the wire. The legal incompetency of such evidence as that to prove its ownership is apparent. There is evidence in the record tending to prove that a wire similar to the one which caused the accident had been strung along Broadway on the electric light poles some years ago by the individuals who originated the telephone enterprise in Belair, and used for a brief period to serve a telephone, and that it had been permitted to hang on the poles after it was no longer in use, but this evidence does not tend to prove its ownership by either of the appellees. Any presumption of ownership that might arise from the testimony that it was the understanding and purpose of the incorporators of the Harford County Telephone Company that the company, when formed, was to have the plant and wires theretofore owned by them, is negated by the latter part of the same testimony, which shows that this wire, at least, never was actually transferred to the company, or taken into its possession, or used by it. If it was the intention of the incorporators to transfer their wires and plant to the company in payment for its capital stock, there is a total absence of evidence of a compliance by them with the method of procedure which the law declares to be essential to the effectual accomplishment of that purpose.

We think the learned judge below properly refused to send the case to the jury, and we will affirm his action in so doing. Judgment affirmed, with costs.

(97 Md. 630)

MARYLAND TELEPHONE & TELEGRAPH CO. v. CLOMAN.

(Court of Appeals of Maryland. July 1, 1903.)

MASTER AND SERVANT—TELEPHONE LINES—CONSTRUCTION—INJURIES TO LINEMAN—DEFECTIVE CROSS-ARMS—NEGLIGENCE—EVIDENCE.

1. Plaintiff, an experienced lineman, was injured by the breaking of a cross-arm at the top of a telephone pole. The arm broke, while plaintiff was straining certain wires upon it, by reason of the existence of a knot in the arm near where one of the pins inserted to hold the insulators was placed. The defect was obscured by paint, and could not have been discovered by ordinary inspection. The arm was of the kind ordinarily used, and purchased by defendant after being painted. Held, that such facts were insufficient to establish negligence of defendant in furnishing such defective arm for use, and that the court's refusal to direct a verdict for defendant was therefore error.

Appeal from Circuit Court, Baltimore County; N. Charles Burke, Judge.

Action by Charles E. Cloman against the Maryland Telephone & Telegraph Company.

From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Wm. L. Marbury and Osborne I. Yellott, for appellant. Frank I. Duncan, for appellee.

BOYD, J. The appellee sued the appellant for injuries sustained by him while engaged in stringing wires on the telephone poles of the company, and recovered a judgment for \$3,000 damages. He had been employed in similar work for the Chesapeake & Potomac Company for about nine months. At the time of the accident, he and another employé, named Uhler, were stretching 10 wires on a cross-arm with what are called "jack straps," there being 5 wires on each side of the pole. The cross-arm was made of wood, and was about 10 feet long, $3\frac{3}{4}$ inches wide, and 4 inches thick. There were 10 holes bored in it, about a foot apart, and $1\frac{1}{2}$ inches in diameter, in which wooden pins were inserted to hold the insulators for the wires. The arm was fastened to the pole by a bolt, was supported by braces on either side of the pole, and was about 35 feet from the ground. At the time of the accident the appellee was sitting on the cross-arm, with his feet resting on the lower arm, upon which wires had not been stretched. He was towards the outer end of the arm, and was working with the strap around the third pin, when the arm broke, throwing him down and seriously injuring him. The appellee stated that he could not say exactly at what point the arm broke, but it was on the side he was sitting; and one of his witnesses said he thought it was at the fourth pin from the end, and another that it was at the third or fourth. The defendant offered no testimony. There are 18 bills of exception in the record, 17 of which present the rulings of the court on the admissibility of testimony offered, and the last embraces the prayers. Two prayers were offered by the plaintiff, which were granted, and 20 were offered by the defendant, 12 of which were rejected, 1 conceded, and the remaining 7 granted. Under the view we take of the case, it will not be necessary to consider all of the exceptions.

It cannot be doubted that a knot, which was discovered after the accident, in the cross-arm at a point where one of the holes was bored, was, at least to some extent, the cause of the accident; but the responsibility of the appellant must depend upon the further question whether it was negligent in furnishing the cross-arm with such defect in it. It must be admitted that there was no apparent defect in the arm, and it is well established by the testimony that the knot was not visible by any ordinary inspection. The plaintiff testified that he did not notice anything about it that indicated it was not

safe, and that it looked very similar to the creosote bars he had been accustomed to while working for the Chesapeake & Potomac Company, which used creosote and red-painted white pine arms. The former he said weighed from 75 to 100 pounds, while the latter were much lighter. The arm that broke had been put on the pole, the day before the plaintiff was injured, by some of the other employés. He said: "The wires in questions were thought to have been permanently deadened before he went up the pole. That they were fastened to the insulators, but it was found that they were not pulled hard enough, and he and Uhler went up to take up the remaining slack. They had to unfasten them and readeaden them. The jack straps were used to take in slack which could not be taken in by hand pull." When the wires are spoken of as being "deaden," it is meant that they did not go beyond that pole, but were fastened to that arm.

In determining whether the appellant is responsible, it will be well to first ascertain the character of the cross-arms furnished by it to its employés, the opportunities which its agents had to be assured that they were safe, what they actually did in that respect, and the use the appellee was making of this particular one at the time of the accident. Charles F. Knox, who was "gang foreman" of the plaintiff and the other linemen engaged in the work, testified he was sent by the company to take charge of this construction work at Towson; that "he went to the company and asked them what material he was to use in the work, and was told to use the material then on the ground, the cross-arm which broke being one of those already in the work, on the pole." Joseph S. Caskey said he was at the time of the accident "head assistant to Mr. Holliday, the material boss," who, the record shows, was reported sick the day before Caskey testified. The material boss had full charge of all materials, and saw that the men received bolts, cross-arms, screwdrivers, wrenches, and other things they needed. Caskey testified that the cross-arm which broke came from their supplies—was sent from their High Street yard. He examined it after the accident, and said that the knot was not visible before the arm was broken—that the paint obscured it—and in answer to the question whether the paint or creosote, whichever it was, was on when it came into the possession of the company, replied: "It was on it when it came into the possession of the company, to the best of my knowledge." The question being, in substance, repeated, he said: "I saw the arms when they came in there. They were painted, to the best of my knowledge." He also said: "The holes came also in them when they were purchased." Mr. Knox also testified that the knot referred to weakened the seven-eighth inch strip by the pin, but said it was not the mistake of the man who bored the hole next to the knot, as all 10 holes were

bored at the same time by machinery; that the knot was not visible to the plaintiff when he went up on the arm, because it was painted; that it could have been seen on two sides if the paint had been removed; that knots in wood were not an uncommon thing sometimes. He further testified that he never knew a cross-arm to break except when broken by storms. In answer to the question how this arm compared in size and quality with the ordinary cross-arms that are used in the telephone business for the construction of lines, he said: "In size, I think it was about the regular size. I didn't notice any difference in them. They were light in weight; very much like the regular old-style red arm; about the same weight." He also testified "that the arms referred to were much lighter in weight than the creosote arm, but, as to quality, a good red arm would be as good as a creosote arm, the arms in use by the defendant company being lighter than the creosote arms," and "that all cross-arms were bored similar to those used by the defendant company, though some had small iron pins in them, but such were not generally used." It is true that he said that this particular arm was not, in his opinion, safe for the purpose it was sent there, but he explained that by saying that he thought it was not safe by reason of the knot being where the hole was bored, which weakened it; and Caskey spoke of the wood as inferior—called it a "culling"—but he ascertained that from his examination of the arm after it was broken.

It must be remembered that all the testimony offered was produced by the plaintiff, and that both Knox and Caskey were in positions to know the facts; and, as we understand the record, neither of them was in the employ of the defendant when they testified. They certainly showed no bias in favor of the company. In addition to what we have already referred to, it is shown that there were other cross-arms at hand, and that the lineman could get them as desired; and a witness (Archer) said "the arms used by the defendant on its work at Towson were about the same size as those used by the Chesapeake & Potomac Company." There is nothing whatever to indicate that the defendant did not procure its cross-arms as other companies do, and it cannot be said, from anything we have found in the record, that there was any negligence on the part of the defendant in the purchase, selection, or use of this cross-arm, or that there was any apparent difference in its construction or weight from those in use by other telephone companies. As we have seen, it was proven by the plaintiff that the knot was concealed by reason of the paint, and it was shown that it is customary for such companies to purchase arms already painted, and with the holes already bored. It would hold a telephone or other company using such arms to a very unreasonable responsibility

to say that it was negligent in purchasing arms in that condition, especially when the evidence shows, as it does here, that it is so unusual for them to break, excepting as the result of storms, and it is probable that age and use tend to weaken them so as to cause them to break under those circumstances. But these arms were not only handled at the yard, but the men putting them on the poles had an opportunity to examine them; and those who string the wires can, to some extent, test them before putting their weight on them. In this instance it is shown that this arm was fastened to the pole the day before the accident, and wires were actually stretched on it, and it did not then break. Nor did it break with the lineman, Uhler, who was at work with the plaintiff on the other side of the pole. There would seem, therefore, to be no doubt that it broke by reason of the knot being at one of the holes, and the great strain it was subjected to by the weight of the plaintiff and the use of a jack strap, which enabled him to exert so much more power than he could have done with his hands.

Courts naturally and properly hesitate to withdraw cases from the consideration of the jury, which is the tribunal, under our system to pass on facts; but when all the testimony in the case is offered by the plaintiff, and it establishes facts that preclude a recovery, it is the duty of the court to so instruct the jury, when requested, and we think there was error in the court below in not doing so in this instance. It did instruct them that, if they found the facts in the twelfth prayer, the plaintiff could not recover; and, although the plaintiff and his witnesses proved every fact therein submitted, the jury found for the plaintiff. The only thing there mentioned that could be said to be at all in doubt, under the evidence, was whether the jury believed the knot was the immediate and proximate cause of the injury. If they found in the negative, then, unquestionably, the defendant could not be held liable, for there was nothing else to base the claim of negligence on; and, if they found in the affirmative, they were instructed to return a verdict for the defendant. We refer to this to illustrate the danger of a jury being allowed to conjecture or speculate. If this defendant is to be held liable, then it must be because some one of its agents did not detect a defect which all the testimony of the plaintiff, including his own, tends to show could not be detected by any means that are shown to be used in the kind of work the defendant is engaged in. If there be any test which might and ought to have been used, which would have disclosed the defect, the plaintiff should have so proved; but, in the absence of such proof, the jury was not at liberty to assume that there was, and to speculate on the subject.

For the sake of humanity, and for the protection of those who are required to occupy

perilous positions in order to gain a livelihood, and have no means for the protection of themselves, employers should not be permitted to trifle with the safety of their employes, or, for the sake of dollars and cents, withhold from them such safeguards as can be reasonably demanded of them; but the law does not exact of them unreasonable care and caution, and does not make them insurers of their employes' safety. As was said in *Wood v. Helges*, 83 Md. 267, 34 Atl. 872, and repeated in *South Baltimore Carworks v. Schaeffer*, 96 Md. 88, 53 Atl. 665: "When a servant engages to perform certain services for a compensation, it is implied as a part of the contract that, as between himself and his employer, he assumes all the risks incident to the service. And these risks include such as arise from the hazardous character of the service, and from the negligence of other servants in the same employment, even though they may be in a different grade. But the master himself is bound to use ordinary (that is, due and reasonable) care and diligence to provide proper materials and appliances to do the work, and in the selection and employment of competent and careful fellow servants." In the latter case, in which an employe was injured by a knife flying from a molding machine, which was alleged to have been caused by defective bolts, we said: "It is obvious, therefore, that the plaintiff must not only show that he was injured because the bolts were defective, but he must go one step further, and offer evidence legally sufficient to show that the defendant did not use reasonable care in procuring proper bolts for the adjustment of the knife." The appellee seeks to distinguish this from *Schaeffer's Case*, because in the latter the defendant placed witnesses on the stand to explain the breaking of the bolts, as well as it could, while in this case it did not call any witnesses. But it must be remembered that the plaintiff himself called those who were apparently most familiar with the steps taken by the company, excepting, perhaps, Mr. Holliday, who, the record shows, had been reported sick. In addition to that, the plaintiff's testimony furnished all the explanations that we have any right to infer could be made, and established such facts as negatived the probability of being able to discover such a defect as caused this accident by any inspection that could be reasonably required. When a plaintiff proves such circumstances as furnish prima facie evidence of negligence on the part of the defendant, the law requires him to explain them; but, when the plaintiff himself furnishes that explanation, there is no occasion for the defendant doing so. This plaintiff not only attempted to show that the arm broke by reason of this defect in it, but established beyond all controversy that the defect was not visible, and that such was the case when the defendant purchased the arm. If it was possible to discover the defect by some cus-

tomary method of inspection that was not used, then the plaintiff should have established that fact. As was said in *Schaeffer's Case*: "It was the duty of the plaintiff, if he relied on failure to inspect, to have offered some testimony which would have justified the jury in finding that the defect causing the injury was one which could have been discovered by the usual and ordinary methods of inspection, commonly adopted by those in the same kind of business which was conducted by the defendant."

So, without discussing the alleged contributory negligence on the part of the plaintiff, and other questions presented by the record, we are of the opinion that the case should have been withdrawn from the jury because the plaintiff failed to establish any legally sufficient evidence of negligence on the part of the defendant; and, as the plaintiff cannot recover, it would be useless to remand the case. Judgment reversed, without awarding a new trial; the costs to be paid by the appellee.

(25 R. I. 217)

WICKFORD SAV. BANK v. COREY et al.

(Supreme Court of Rhode Island. June 4, 1903.)

GIFT—PAYMENT—TRANSFER OF DEPOSIT—EXPRESS TRUST—TRUST FUND—EVIDENCE.

1. A son turned over certain money of his on deposit in a bank to his mother's account, and surrendered his book to the bank; a pass-book being issued to the mother, of which she had possession for 15 years, and to the time of her death. She also held full control of the deposit, the son never demanding either principal or interest. *Held* that, treated as a gift or payment, the transaction would be complete.

2. Testimony on the son's behalf tended to show an understanding at the time of the transfer that the money was to be his, the purpose of the change being to keep it out of the hands of the guardian if one should be appointed. On the other side was testimony that the mother stated to her executor shortly before her death that the deposit was transferred to her in settlement of a debt for board, referring to the bankbook as her own, and telling him where to find it. The son also relied on a letter to him from his mother saying: "If you need any of that money you must send me word and I will try and send you some. I don't intend to use any of it. Its only to have it for you." *Held* insufficient to establish the son's claim.

Action by the Wickford Savings Bank against Isaac S. Corey and others, and bill of interpleader by the executor of the estate of Mary Rathbun, deceased. Heard on bill, answers, and proof. Judgment for the executor.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

S. W. K. Allen and Thomas F. I. McDonnell, for respondent.

STINESS, C. J. The question raised on this bill of interpleader is whether a bank deposit belongs to the respondent Isaac S. Corey, or to the estate of his mother, Mary

Rathbun. In 1886 Isaac Corey had \$642.14 on deposit in the complainant bank, \$582 of which was turned over to his mother's account, and a passbook issued to her; Isaac surrendering his book to the bank, receipted in full. The deposit remained in the mother's name, and she had the possession of the book, to the time of her death. These facts are not disputed, but it is claimed that Isaac Corey had been under guardianship in Massachusetts, but released therefrom just before the transfer, and that the purpose of the transfer was for safe-keeping, and to keep his wife and her friends from drawing it. In order to secure the fund the father and mother of Isaac had a writ issued on a claim for board, which was served on the bank. A settlement was then made, allowing \$60.14 to be paid in money, and the remaining \$560 to be deposited in the mother's name. This sum, with accumulated dividends, is claimed by Isaac as fund held in trust for him by his mother. We do not think this claim can be maintained. The deposit was fully transferred to the mother. For fifteen years she held it under her full control, and Isaac never demanded either principal or interest. Treated as a gift or payment, it would be complete. Isaac Corey claims that it should not be treated as a gift or payment. Testimony on his behalf tends to show that the understanding at the time of the change of deposit was that it was to be his, and that the purpose of the change was to keep it out of the hands of a guardian if one should be appointed. Mrs. Rathbun also had a separate account in the bank. On the other side is testimony that the mother stated to her executor shortly before her death that the deposit was turned over to her in settlement for a debt for board, the claim for which the deposit was attached; that she referred to the bankbooks as her own, and told the executor where to find them.

Isaac Corey also relies on a letter from his mother as an admission of his ownership of the fund, and as a recognition of trust. The words of the letter relating to this matter are: "Dear Son, you spoke of coming home to see us. If you need any of that money you must send me word and I will try and send you some. I don't intend to use any of it. Its only to have it for you." While this language is consistent with the claim made by Isaac, it does not establish it. The words "I don't intend to use it" imply a power and right to use it as much as they imply a trust. They show a private intention not to use it, but to save it for him, but they do not disclose a trust to that effect. The words "that money" may refer to the deposit transferred, or they may refer to other money. The rule laid down in *Taft v. Dimond*, 16 R. I. 584, 18 Atl. 183, was that where letters are relied upon to establish a trust they must identify the property and disclose the terms of the trust. We are un-

able to say, either from the oral or written testimony, that Mrs. Rathbun held this deposit in any way for her son. The facts of an attachment and settlement, the subsequent conduct of the parties in regard to the deposit, and the uncertainty of the terms of the letter, fail to show that there was not a complete gift or payment, or that there was an express trust. On the contrary, we think the inferences are in favor of the mother's sole ownership.

We therefore decide that the fund in question should be paid to the executor of Mary Rathbun.

(25 R. I. 224)

STATE v. BABCOCK.

(Supreme Court of Rhode Island. June 6, 1903.)

DISORDERLY HOUSE — CONVICTION — SUFFICIENCY OF EVIDENCE — ADMISSIBILITY OF EVIDENCE — CROSS-EXAMINATION OF PARTY'S OWN WITNESS — CREDIBILITY OF WITNESS.

1. Evidence examined, and held to sustain a conviction of keeping a disorderly house.

2. In a prosecution for keeping a disorderly house, it is not improper, as permitting the state to cross-examine its own witness, to allow state's counsel to ask on redirect examination whether it was since the last winter that the witness went there; the cross-examination having disclosed that the witness was uncertain as to the date of his visit.

3. In a prosecution for keeping a disorderly house, it is proper to refuse to permit cross-examination of a witness for the state as to whether, in his opinion, the fact that certain persons of bad character who frequented the place were relatives of defendant would excuse his reception of them.

4. One prosecuted for keeping a disorderly house may properly be asked on cross-examination by the state, as affecting his credibility, whether he has not previously been convicted of the same offense.

Fred G. Babcock was convicted of maintaining a disorderly house, and petitions for a new trial. Denied.

Argued before STINNESS, C. J., and DOUGLAS and DUBOIS, JJ.

William B. Greenough, for the State. Samuel W. K. Allen, for defendant.

PER CURIAM. The defendant, convicted of keeping and maintaining a common nuisance in the town of North Kingstown, has brought his petition for a new trial upon the grounds that the verdict is against the evidence and the weight thereof; that the court erred in its rulings, and in admitting testimony, contrary to law, which was prejudicial to the defendant.

The evidence, consisting of testimony that beer and whisky were sold and drunk in the house of and in the presence of the defendant on several Sundays, that men and women danced in said house on said Sundays, that drunken people were found on the premises, and that bottles, jugs, and receptacles for liquor were also there found, with testimony as to the notorious character of the premises, was sufficient.

The first exception taken by the defendant was to the ruling of the court overruling his objection that the counsel for the state was cross-examining its own witness by asking the following question in the redirect examination of George Card, viz.: "Do you know whether or not this was since last winter that you went there?" The question directed the attention of the witness to the time when he was at the defendant's house, in order to satisfy the jury that the witness was testifying to events that occurred within the time covered by the indictment, and was asked after the cross-examination by the counsel for the defendant, which had disclosed the fact that the witness was not positive as to the exact date of his visit. Under the circumstances, the question was not improper, and was so much within the discretion of the court that we should hesitate before interfering in such a matter. *State v. Williams*, 6 R. I. 207.

The second exception was to the refusal of the court to allow Albert C. Reynolds, a witness for the state, to testify as to his opinion, on cross-examination by the counsel for the defendant, in answer to the following incomplete question: "If he had a sister-in-law and a brother-in-law at this place, and a niece at this place, and he went there on Sunday to see them, do you mean—" It appears from an examination of the record that the witness Reynolds had testified that the house of the defendant was the resort of two men named Gavitt, father and son, said by him to be men of "bad character, disreputable, loafers, and hangers-on of these kind of places"; and the defendant was attempting to show the jury by the witness that the elder Gavitt was the defendant's father-in-law, and the younger Gavitt was his brother-in-law, and that they had relatives whom they were accustomed to visit at the house of the defendant, in order to prove that it was merely a family gathering. In answer to the suggestion of the defendant's counsel: "I understand this witness to say they were there—loafing around there. Am I not entitled to put this hypothetical question to him?"—the court made this ruling: "No; I think the jury can draw their own conclusions after the evidence is all in. You can show family relationship, if there was one. (Exception taken by Mr. Allen.)" The court was clearly right. It was not the province of the witness to give his opinion upon the question whether, if this was a place or tenement where intemperate, idle, dissolute, noisy, or disorderly persons are in the habit of resorting, it would make a difference if such persons were relations or connections of the owner or keeper thereof. That was one of the questions to be determined by the jury under instructions from the court.

The last exception taken by the defendant was to the overruling by the court of his objection to the following question asked by

the state's counsel in cross-examination of the defendant: "You have been convicted previously for this offense—of the same offense as this?" The ruling was correct. A defendant offering himself as a witness may be asked in cross-examination, for the purpose of affecting his credibility, whether he has previously been convicted of crime or misdemeanor. *State v. Ellwood*, 17 R. I. 763, 24 Atl. 782.

No other exceptions have been called to our attention.

New trial denied and dismissed, and case remanded to the common pleas division for further proceedings.

(25 R. I. 226)

PEASE v. FRANCIS.

(Supreme Court of Rhode Island. May 29, 1903.)

PRINCIPAL AND AGENT—AGENT'S INDIVIDUAL LIABILITY—APPLICATION OF PAYMENTS—RATIFICATION—DURESS—BREACH OF AGREEMENT—VARIANCE—SUFFICIENCY OF EVIDENCE.

1. The cashier of a bank, who, on purchasing for himself property from a debtor of the bank, agrees that the price shall be applied in a certain manner on the indebtedness to the bank, acts, in making such agreement, in his official capacity, and is not individually liable for a breach thereof.

2. A bank cashier, who, on purchasing for himself property from a debtor of the bank, volunteers to arrange for the application in a particular manner of the price to the indebtedness to the bank, is to that extent the agent of the debtor, and is not individually liable if the bank refuses to make the arrangement.

3. A bank held notes, one of which was secured by a pledge of corporate stock. The cashier purchased for himself certain property from the maker, and agreed that the price should be so applied on the notes as to release the collateral. This was not done. A statement of the application in fact made was given the maker, after which he executed a renewal of the secured note, on which he paid interest for two years without objection. *Held* a ratification.

4. A threat to do what one has a right to do—as to foreclose a chattel mortgage unless the mortgagor will ratify certain acts of the mortgagee—does not constitute duress.

5. The unwarranted refusal of the secretary of a corporation to sign a stock transfer will not support a declaration against him for the breach of an agreement to so apply the proceeds of a sale to him in his private capacity as to release the stock as collateral to a note held by a bank of which defendant was also cashier.

6. Evidence in an action for breach of an agreement by a purchaser to apply the proceeds to a note of the seller held by a bank of which the purchaser was cashier, so as to release collateral, examined, and *held* not to sustain a finding that an indorsement of the fact of pledge was not on a renewal note when signed by the seller.

Action by Leroy B. Pease against E. Charles Francis. Judgment for plaintiff, and defendant petitions for a new trial. Granted.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

¶ 4. See *Contracts*, vol. 11, Cent. Dig. § 437.

Barney & Lee, for plaintiff. Edwards & Angell, for defendant.

STINESS, C. J. The evidence shows that in August, 1893, the plaintiff owned real estate in Woonsocket, which he sold for \$5,000 over incumbrances. At that time he owed to the Woonsocket National Bank \$5,000 on a note of April 4, 1892, secured by pledge of 150 shares of stock of Woonsocket Reporter Company. He also owed a note for \$1,000, dated April 4, 1893, with pledge of 150 shares of said stock; a note for \$700, dated June 27, 1893, with the same pledge; a note for \$375, one for \$450, and a note for \$725, these last three notes not being secured by an express pledge. On the sale of the real estate the plaintiff claims that he made an agreement with the defendant, the acting cashier of the bank, that the proceeds of the sale should go to pay the \$5,000 note, thereby releasing the shares held as collateral for it. This action is based upon a breach of that agreement by the defendant, in applying the payment to the smaller notes, leaving only a balance of \$1,350 to be applied to the \$5,000 note, whereby the stock was still held in pledge, and loss occurred from inability to sell the stock so pledged. The evidence was contradictory; the plaintiff testifying to the contract as stated, and the defendant denying it.

Assuming, as we must from the verdict, that the jury found that such a contract was made, the question arises whether the defendant is liable for the breach of it. We think it is clear that he is not liable. The defendant could not make an agreement affecting the collateral or the notes except as an officer of the bank. If he made the contract in question in his official capacity as cashier, it was the contract of the bank; and the remedy is against the bank, and not against him personally. The plaintiff must have understood that he was dealing with the bank, for he knew that the bank held the note and collateral, and the bank alone could release them. He was dealing with the bank through its authorized agent, the cashier.

The plaintiff claims that the defendant had been his adviser. Still the plaintiff must have known that the defendant could make no contract touching the interest and affairs of the bank except in his official capacity. If the trifling matters of collecting rebate of interest and insurance were outside of his duties as cashier, there is no claim of breach of duty in this respect, but the charge is for failure to apply the \$5,000 to the payment of the note for that sum. In this matter he would only act as the agent of the bank. If, on the other hand, as the plaintiff says, the defendant "volunteered" to make the arrangement, he was to that extent the plaintiff's agent, and not responsible if the bank would not do what the plaintiff wanted. There is no evidence of any consideration running to the defendant

to support the contract with him. The only consideration shown is the payment to the bank.

In either view the plaintiff shows no cause of action against the defendant. While it may be admitted, as plaintiff claims, that an agent may make himself personally liable, we do not think that this is a controlling question in the case, because the plaintiff ratified and adopted what was done by the defendant by giving the note of April 3, 1894, for \$3,600. At that time he knew how the money had been applied, and knew that the stock was still held by the bank as a pledge, and testified that he supposed the defendant was acting for the bank. He accepted the benefit of the situation by an extension of time by renewal notes, and he cannot ratify a contract and then sue for its breach. Before signing the note of April 3, 1894, the plaintiff had received a full statement of the application of the \$5,000, showing a payment on that note of \$1,400—\$1,350 from the sale of the estate, and \$50 paid by him—thus reducing the note to \$3,600. The bank demanded payment, and the new note of \$3,600 was given, so far as appears, without objection or claim of breach of contract; all the stock still being left in pledge, and the plaintiff receiving back the note for \$5,000; the others having been previously returned to him. For two years afterwards he paid interest on this note, also without objection. Admitting that the defendant made an unauthorized application of the money, we can hardly conceive of a clearer case of ratification.

The plaintiff says that he was forced by his circumstances to do this, and by the threat of the defendant to foreclose a mortgage which he held on personal property of the plaintiff; thus claiming that he acted under a sort of duress, or at least of coercion. In *Dispeau v. First Nat. Bank*, 24 R. I. 570, 53 Atl. 868, this court said: "It is neither coercion nor duress to threaten or to do what one has a right to do. Payment of money, even upon a disputed claim, to avoid a pending or threatened suit or sale, when a creditor has an apparent right to sue or sell, does not make the payment voidable." In that case we also held that repeated payments of interest and the execution of a mortgage on an agreed amount was a ratification of all previous dealings. The same principle applies in this case. Here, as also in that case, the plaintiff had ample time to bring the disputed matters to adjudication. In 1893, if the plaintiff's stock was free from pledge, he could have sued for it. If he had, quite likely the bank would have sued on the note. Instead of taking this risk, the plaintiff accepted extension of time, and acquiesced in the pledge of the stock until he sold it and paid the note from the proceeds. From anything that appears, he might have done this in the first place, and thus avoided the damage which he alleges from the detention of the stock in pledge.

The plaintiff claims that the defendant, being secretary of the Reporter Company, refused to sign a transfer of the stock until it was offered to the company, according to the charter. If the charter so provided, the offer should have been made. *Sweetland v. Quidneck Company*, 11 R. I. 328. If there was no such provision, the defendant might be liable, but upon a cause of action quite distinct from that in this declaration. The fact, however, would not support a recovery on this declaration. If, as appears from the evidence, 150 shares were pledged on the \$5,000 note, and another 150 shares were pledged on a smaller note, which was paid and returned, it could make no difference to the plaintiff which block of shares was released, for he could sell one as well as the other. Whichever way the notes were paid, only 150 shares were released from pledge, and the same amount of debt reduced. Under the arrangement as stated by the plaintiff, he could as well have demanded one block of the stock as the other, both being of the same amount. Instead of demanding either block of stock, and knowing that the bank claimed both as a pledge, he acquiesced in the claim, gave his note accordingly, and paid interest thereon for two years. This conduct is both acquiescence and ratification.

The plaintiff relies upon the finding of the jury that the pledge of 300 shares of stock was not on the note for \$3,600 when the plaintiff signed it. It is true that the plaintiff first testified in the cross-examination that the 300 shares were not on the note; but he afterwards testified that he presumed they were pledged, that he signed the note with the full understanding that Mr. Francis held the shares for the bank, that he would not swear whether he meant to pledge the shares or not, and that he would not swear that the words "300 shares Woonsocket Reporter Co." were not on the note when he signed it. This testimony, in connection with the defendant's assertion that the shares were pledged on the note when it was made, shows obviously that this finding was against the evidence.

It is unnecessary to consider the exceptions presented separately, as they are already substantially covered. As to the remarks of counsel to the jury, it is enough to say that, while in several particulars they were far outside of the case and the line of proper argument, in view of the conclusions of the court further reference to them is needless.

Petition for new trial granted.

(25 R. I. 231)

DYER v. UNION R. CO.

(Supreme Court of Rhode Island. June 4, 1903.)

STREET RAILROADS—INJURY TO PEDESTRIAN—PREVIOUS ACTS OF NEGLIGENCE—ADMISSIBILITY OF EVIDENCE—HARMLESS ERROR.

1. Evidence in an action by a pedestrian against a street railroad for injuries that de-

fendant had failed to ring the bell on the car in question at the intersection of other streets prior to the time of the accident is improper.

2. Where appellant's liability is established so conclusively as to make a new trial unavailing, the admission of improper evidence is not ground for reversal.

Action by George M. Dyer against the Union Railroad Company. On petition for new trial. Denied.

Argued before STINESS, C. J., and TILLINGHAST and BLODGETT, JJ.

John W. Hogan and Philip S. Knauer, for plaintiff. David S. Baker and Lewis A. Waterman, for defendant.

PER OURIAM. The court is of the opinion that evidence as to the failure to ring the bell on the car in question at the intersection of other streets prior to the time of the accident was not proper. *Agulino v. R. Co.*, 21 R. I. 263, 43 Atl. 63. But a consideration of the evidence shows that the negligence of the defendant was so clearly established that a new trial would be of no avail, since it clearly appears that the plaintiff was overtaken from the rear by the car of the defendant company, which was then running at a high and excessive rate of speed. And the court fails to find that the damages awarded were excessive.

Petition for new trial denied.

(25 R. I. 231)

ANDREWS v. O'REILLY.

(Supreme Court of Rhode Island. May 29, 1903.)

STOCKHOLDERS—LIABILITY FOR JUDGMENT AGAINST CORPORATION—ACTION BY JUDGMENT CREDITOR—DECLARATION—SUFFICIENCY.

1. The declaration in an action against a stockholder for the recovery of a judgment against the corporation, which alleged that at the time of the rendition of the judgment the corporation was insolvent, and did not have property on which an execution could have been levied for the satisfaction of the judgment, sufficiently showed that the judgment creditor had exhausted his remedies against the corporation, without the averment that an execution had been issued on the judgment, and had been returned unsatisfied.

Action of debt, under Gen. Laws 1896, c. 180, § 22, by Clarence C. Andrews, administrator, against Francis L. O'Reilly. Heard on demurrer to declaration. Demurrer overruled.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Edward D. Bassett, for plaintiff. Comstock & Gardner, for defendant.

DOUGLAS, J. This is an action of debt, brought, under the provisions of Gen. Laws 1896, c. 180, § 22, against the defendant, as a stockholder of the Woonsocket Opera House Company, which is alleged to be a manufacturing corporation, upon an unsatisfied judgment recovered by the plaintiff's in-

testate against said company; it being alleged that said company failed to make the annual return prescribed by law for the year 1898. The declaration further alleges that at the time of the rendition of said judgment the said corporation was insolvent, and did not have property upon which an execution could have been levied for the satisfaction of the judgment obtained against it.

The defendant demurs to the declaration on the ground that, in order to enforce a stockholder's liability against the defendant, it is necessary to show that an execution has been taken out on the judgment against the corporation, and has been returned unsatisfied, which is not alleged. The plaintiff contends that this is unnecessary. He asserts that this action of debt is given by the statute in substitution for the remedy previously existing, of levying an execution issued against the corporation directly upon the property of a stockholder, and that the creditor, immediately upon obtaining his judgment against the corporation, may issue his writ against the stockholder. It seems that this view was taken by the court in *Re Penniman*, 11 R. I. 333. The court was divided upon the question of the constitutionality of the change in the law, but three of the judges discuss the new provisions, and two of them concur in the view that the new remedy is available immediately. Judge Potter says (page 349): "It leaves his property open to attachment, and his person to arrest, in the new action which it gives against him personally, and interposes no delay other than necessarily attends all litigations." Judge Stiness (page 351) says the new law does not withdraw any of the debtor's property from the obligation of the contract. " * * * It is liable at once to be levied on to answer to the judgment against the corporation," etc. Judge Durfee, who considered the alteration of the remedy so great as to constitute an impairment of the obligation of the contract, does not hint that the meaning of the law is different from that expressed by his associates. It does not seem to have occurred to the court that the change of relation between the corporation and the stockholder was more radical in this respect than in any other. Under the old law the stockholder was practically treated as a copartner with the corporation. After the alteration he very soon became recognized as occupying the position of a surety only, and as such became entitled to have the property of the principal debtor first applied to the extinguishment of the debt. In *Third National Bank v. Angell*, 18 R. I. 1, 29 Atl. 500, this principle is recognized in an action of debt on judgment. In *Allen v. Arnold*, 18 R. I. 809, 31 Atl. 268, it is directly decided in a suit in equity, and the reason assigned is "that the primary liability is that of the corporation, that of the stockholders being merely secondary"—a reason applying as well to the action at law as the suit in equity. These cases have been uniformly fol-

lowed since they were decided. *Kilton, Warren & Co. v. Prov. Tool Co.*, 22 R. I. 605, 610-612, 48 Atl. 1039, which was a suit in equity; *Elsbree v. Burt*, 24 R. I. 322, 53 Atl. 60, which was an action of debt.

The rule, then, may be considered as settled that neither the suit in equity nor the action at law to enforce the stockholder's liability can be commenced until the creditor has exhausted his remedies against the corporation. Up to this point the parties do not seriously disagree, but here they differ. The defendant contends that the plaintiff has not exhausted his remedy until he has given his execution to the sheriff to levy, and received it back, with the return *nulla bona*. The plaintiff argues that his remedy is exhausted when it appears by any other proof, as well as by the sheriff's return, that the corporation is insolvent and has no property which can be taken in execution. The decisions of this court in the somewhat analogous cases of creditors' bills brought to reach equitable assets emphasize the question, but do not answer it. Thus it is said in *Ginn v. Brown*, 14 R. I. 524, 527: "The reason of the rule requiring judgment to be obtained at law is that legal claims are properly cognizable in the first instance only in courts of law. Mere insolvency, therefore, does not dispense with the necessity of obtaining a judgment before a resort to equity. Whether or not it will dispense with the necessity for the issue and return of an execution is a question upon which the cases are conflicting." In *Stone v. Westcott*, 18 R. I. 517, 28 Atl. 662, it was not alleged that the defendant was insolvent. In *First Nat. Bank of Shreveport v. Randall*, 20 R. I. 319, 38 Atl. 1055, the court says: "We regard the rule as settled in this state that the best and conclusive evidence that the debtor has no other property is the return of an execution unsatisfied." While these decisions apply the rule with great strictness, they do not say that, where the best evidence is not attainable, secondary evidence may not be admitted. Neither do they apply directly as precedents to the question before us. In these cases, as in the case at bar, the question is whether legal remedies have been exhausted, but the inquiry is made for a different purpose. Where the general equity jurisdiction is invoked to supplement the common-law jurisdiction, allegations of diligence in the primary use of legal remedies may be required which are not necessary in a declaration at common law, or where the resort to equity is given by the statute.

We think, in the action to enforce the stockholder's liability, it is sufficient to allege that the creditor has exhausted all remedies which could have been fruitful, and not necessarily all remedies of mere form. The remedy of attempted levy of an execution, when it is certain in advance that nothing can come of it, is not required by the reason of the rule. The plaintiff here has alleged that a judgment against the corporation is

unsatisfied because the corporation is insolvent and has no property on which an execution can be levied. If he proves this at the trial, why should he not recover his debt of the stockholder? The best and conclusive proof of the fact that the corporation has no property is the return of an officer to that effect, but he may be able to offer other proof which will be convincing. The thing involved is the impossibility of recovering the judgment from the principal debtor. The means by which this impossibility is demonstrated are of minor consequence. Even where the statute expressly provided that "no suit shall be brought against any stockholder," etc., "until an execution against the company has been returned unsatisfied in whole or in part," it was held by the Supreme Court of the United States in *Flash v. Conn.*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966, following *Shellington v. Howland*, 53 N. Y. 371, that an adjudication in bankruptcy of the company excused a compliance with this condition. Mr. Justice Woods, who delivered the opinion, says (page 380, 109 U. S., page 269, 3 Sup. Ct., 27 L. Ed. 966): "The object of section 24 was to compel the creditor to exhaust the assets of the company before seeking to enforce the liability of the stockholder. When the declaration shows that this was done, and that a literal performance of the condition would have been vain and fruitless, the performance of the condition may well be held to have been excused. "Proceedings against the corporation are not required as a condition precedent to the right to charge the shareholders individually, when they would be impossible or nugatory." *Morawetz, Private Corp.* § 883; *Cook on Stock & Stockholders*, § 219, p. 281, note 2, and cases cited. In *De Camp v. Levey*, 19 Ohio Cir. Ct. R. 335, where the petition contained an averment that "the said company is utterly insolvent, and has no assets of any description whatever, real or personal, on which an execution could be levied, or out of which the said debt to the plaintiffs could be satisfied," the court say: "It would seem, therefore, to be unnecessary and futile to require the plaintiffs to first obtain judgment and issue an execution before proceeding against the stockholders." *Younglove v. Lime Co.*, 49 Ohio St. 663, 33 N. E. 234.

The demurrer is overruled.

(69 N. J. L. 610)

GOEBEL v. POMEROY BROS. CO.

(Supreme Court of New Jersey. Aug. 17, 1903.)

MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—BREACH—DAMAGES—VERDICT—EVIDENCE.

1. Where, in an action for breach of a contract of employment, plaintiff's efforts after discharge to obtain other employment were intermittent, and not during the whole unexpired period of the contract, a verdict in favor of plaintiff for the whole amount of compensation prescribed by the contract for such period was excessive and contrary to the weight of evidence.

Action by George H. Goebel against the Pomeroy Bros. Company for breach of a contract of employment. On rule to show cause why a new trial should not be granted. Rule made absolute.

Argued February term, 1903, before GUMMERE, C. J., and PITNEY and FORT, JJ.

Watson & Watson, for plaintiff. Gallagher, Kirkpatrick & Brower, for defendant.

FORT, J. This is an action for breach of a contract of hiring. While, upon the plaintiff's case, it may be that no breach of the contract of hiring, for one year, was proved to have occurred, yet there was no motion to nonsuit for that reason, and the defendant's proof makes clear the discharge of the plaintiff before the end of the year. The contract between the plaintiff and defendant was for the services of the plaintiff as a salesman from January 1, 1901, to January 1, 1902. He was discharged July 12, 1901, and the jury have found that the discharge was without cause. A careful reading of the clear and forceful charge of the Chief Justice leaves no room to question the fact that the case was submitted to the jury upon correct legal principles.

Under the contract as proven, the plaintiff was to have \$14 per week, and 2 per centum commission on all sales to new customers whom he secured, and certain small bonus items under special conditions. The verdict in the case is for \$397.88, and this after deducting two undisputed items of credit—one of \$17, and a note of \$267.50. That was practically allowing the plaintiff \$682.38. This was equal to the whole amount of his claim for the whole unrun period of his contract, including the full bonus. This would be proper if the proof would justify a finding that the plaintiff had made reasonably earnest efforts to secure other employment after the breach of his contract by the defendant. This we do not think the evidence warranted the jury in finding. It is quite clear that his efforts in this direction were intermittent, and not, during the whole period, of such a character as is requisite to entitle him to the full recovery for the whole unrun period of the contract.

We think the verdict in the case is excessive and should be reduced to \$200, and unless the plaintiff will elect to so reduce it the rule will be made absolute.

(69 N. J. L. 608)

STATE ex rel. SEARING v. CLARK.

STATE ex rel. MINDERMAN v. TILLYER.

(Supreme Court of New Jersey. Aug. 12, 1903.)

OFFICERS—RIGHT TO OFFICE—DETERMINATION—TRIAL—MANDAMUS.

1. Mandamus will not be granted to compel the surrender of a public office where relator's right to the office presents a debatable question of law.

Mandamus by the state, on relation of Edward M. Searing, against Edward D. Clark, and on relation of F. W. E. Mindermann against Lorenzo D. Tillyer. Applications denied.

Argued June term, 1903, before GARRISON and SWAYZE, JJ.

B. W. Ellicott, for relators. Willard W. Cutler, for respondents.

PER CURIAM. In each of these cases the relator applies for a writ of mandamus upon the ground that his right to it by virtue of his office is clear. The testimony shows that a contrary right is set up by the defendants. This question of right, viz., the title to the office in each case, has been argued before us. It presents a debatable question of law. So long as this question is unsettled the right of the relator to a writ of mandamus cannot be said to be clear. The contest between these individuals over the right to the office which each claims cannot be settled in this proceeding. The town of Dover is not a party, and hence no question concerning its rights are considered.

The relator's application in each case is denied, with costs.

FRANK v. PENNSYLVANIA R. CO.

(Supreme Court of New Jersey. July 27, 1903.)

RAILROADS—INJURIES AT CROSSINGS—SIGNALS
—EVIDENCE—VERDICT—DAMAGES
—EXCESSIVENESS.

1. Where, in an action for death at a railroad crossing, the negligence alleged was defendant's failure to give statutory signals by ringing the locomotive bell, and the evidence that the bell was rung was clear and positive, and the only evidence to the contrary, except certain witnesses whose attention was not aroused, was the testimony of one witness, whose testimony was seriously discredited, a verdict finding that the bell was not rung was contrary to the evidence.

2. In an action for death, a verdict awarding \$10,000 was so grossly excessive as to warrant an inference of prejudice on the part of the jury.

Action by Ida Frank, as administratrix of the estate of Jacob Frank, deceased, against the Pennsylvania Railroad Company. On motion to show cause why a new trial should not be granted. Rule absolute.

Argued February term, 1903, before GUMMERE, C. J., and FORT and PITNEY, JJ.

Benjamin M. Weinberg and Samuel Kalisch, for plaintiff. Vredenburg, Wall & Van Winkle, for defendant.

PER CURIAM. This was a crossing accident. We think the verdict is against the clear weight of the evidence upon the question of the failure of defendant's employes

to give the statutory signal by ringing the locomotive bell. The evidence that the bell was rung was clear and positive, and proceeded from the mouths of numerous witnesses, all of whom must be guilty of deliberate perjury, if in fact the bell was not rung. The evidence to the contrary, except that of Burke, proceeded from witnesses whose attention was not aroused. Burke testifies that he listened and failed to hear a bell, but his testimony is seriously discredited. We think, also, that there was strong evidence of negligence on the part of the plaintiff's intestate.

The damages awarded (\$10,000) are so grossly excessive as to confirm the view that the jury was prejudiced.

The rule to show cause will be made absolute.

FRANK v. PENNSYLVANIA R. CO.

(Supreme Court of New Jersey. July 27, 1903.)

RAILROADS—INJURIES AT CROSSING—SIGNALS
—RINGING BELL—EVIDENCE—VERDICT.

1. Where, in an action for death at a railroad crossing, the negligence alleged was defendant's failure to give the statutory signal by ringing the bell, and there was positive evidence by numerous witnesses that the bell was rung, and the only evidence to the contrary was from witnesses whose attention had not been aroused, except one, who testified that he listened and failed to hear the bell, but whose testimony was seriously discredited, a verdict finding that the bell was not rung was contrary to the evidence.

Action by Samuel Frank, by his next friend, against the Pennsylvania Railroad Company. On rule to show cause why a new trial should not be granted. Rule absolute.

Argued February term, 1903, before GUMMERE, C. J., and FORT and PITNEY, JJ.

Benjamin M. Weinberg, for plaintiff. Vredenburg, Wall & Van Winkle, for defendant.

PER CURIAM. This was a crossing accident. We think the verdict is against the clear weight of the evidence upon the question of the failure of defendant's employes to give the statutory signal by ringing the locomotive bell. The evidence that the bell was rung was clear and positive, and proceeded from the mouths of numerous witnesses, all of whom must be guilty of deliberate perjury if in fact the bell was not rung. The evidence to the contrary, except that of Burke, proceeded from witnesses whose attention was not aroused. Burke testifies that he listened and failed to hear a bell, but his testimony is seriously discredited.

The rule to show cause will be made absolute.

(65 N. J. E. 221)

TRUITT et al. v. DARNELL et al.

(Court of Chancery of New Jersey. July 29, 1903.)

ATTORNEY AND CLIENT—SUIT FOR FEES—PRELIMINARY NOTICE—ENFORCEMENT OF JUDGMENT—RESTRAINT IN EQUITY.

Attorneys at law conceived that their non-resident clients were indebted to them for alleged services. The attorneys did not state to their clients the nature of the services and the amount of fees demanded, nor did they serve their clients with a copy of a taxed bill of such fees. The clients did not know that any such bill was claimed, and deny that they owe anything to their attorneys. The latter issued a foreign attachment against their clients for the alleged debt, but gave their clients no notice of that fact. The clients had no knowledge of the attachment suit, and therefore made no defense. Judgment on the attachment was entered against the clients in favor of the attorneys for the sum claimed by them. After the judgment was entered, the clients were, for the first time, informed by their attorneys that suit had been brought and judgment entered against them. The clients applied to the law court in which judgment had been entered, and were refused relief on the ground that the court had no power to grant it. The attorneys were about to sell under the attachment judgment the property which their clients had put in their charge. *Held*:

1. The attorneys were obliged by section 12 of the practice act (Gen. St. p. 2535) to serve upon their clients a taxed bill of their fees, etc., before suit.

2. It was their duty as attorneys to have made known to their clients that the attachment was sued out and pending.

3. The omission of the attorneys to demand their fee by a bill of items, etc., before suit, and to notify their clients of the attachment, entitles the clients to the aid of this court to enjoin the sale or other proceedings under the attachment judgment until they be let in to defend that suit on its merits.

(Syllabus by the Court.)

Suit by Mary T. Truitt and others against Albert H. Darnell and others. Application for preliminary injunction. On bill, affidavits, and answering affidavits. Injunction issued.

The bill in this case is filed by Mary T. Truitt and others, owners of a hotel in Atlantic City called the "Hotel De Ville," and of the furniture, goods, and chattels therein contained, and seeks to restrain the defendant Albert H. Darnell from selling that property under a judgment in attachment entered by him in Atlantic county circuit court against the complainants for fees alleged to be due him from them for services as their attorney at law. The complainants allege that about June 1, 1901, they were the holders of a mortgage against the hotel above mentioned, and also of a mortgage upon the goods and chattels contained in it; that one of the complainants employed one John C. Sims and the defendant Albert H. Darnell, who were then partners as attorneys at law, to collect the amount due on the real estate mortgage; that afterwards the other complainants, who had originally employed another attorney, accepted Sims & Darnell to act for them, in conjunction with Mr. Gange-

wer, the complainants' solicitor in the present cause. Sims & Darnell, acting for the complainants, filed a bill to foreclose the chattel mortgage, and obtained a sale of the chattels for \$1,500, or thereabouts, and also filed an answer to a bill filed by one Phillips, foreclosing a previous mortgage on the real estate, which answer set up the mortgage of the complainants as a lien, etc. The amount due to the complainants on their real estate mortgage was in the neighborhood of \$28,000, which was subject to the previous lien of Mr. Phillips, and also to a mortgage for \$10,000 held by the estate of one Myers. The complainants, Truitt and others, bought in the hotel under Phillips' foreclosure, and found much difficulty in raising the money necessary to meet the prior obligations, but finally did so, and claim to have paid over to their attorneys, Sims & Darnell, for disbursement, various sums at different times, amounting to about \$12,000. They allege that they endeavored to obtain from Sims & Darnell a statement of their disbursements of these moneys, and finally, about July 15, 1902, received two statements, copies of which are annexed to the bill. The last of them concludes with this item: "Bal. due Sims and Darnell \$401.29, with fee to be added." They contain no statement of the amount of the "fee to be added," nor do they disclose for what service it should be charged. The complainants' affidavits deny that the services named in the statements were in fact rendered by Messrs. Sims & Darnell; deny that the claimed \$401.29 was owing to them; allege that no disclosure has been made of what amount was claimed as "fee to be added," or for what services, and declare that the complainants are not indebted to Sims & Darnell in any sum. The necessary inference from these affidavits is that, when the accounts between the parties are properly stated, Sims & Darnell will be found indebted to the complainants. No settlement of the accounts between the parties was had, nor was there any breach of their pleasant relations. The complainants had no reason to believe that Messrs. Sims & Darnell contemplated any hostile action. On August 26, 1902, Messrs. Sims & Darnell issued against the complainants a foreign attachment out of Atlantic circuit court, upon affidavit filed, claiming that the complainants (defendants in the attachment) were indebted to them in the sum of \$2,602.48 for services rendered by the affiants to the complainants. Messrs. Sims & Darnell caused the attachment to be levied upon the Hotel De Ville, the property of their clients, the complainants. The writ was returned August 28, 1902, and an auditor appointed, before whom the defendant Albert H. Darnell filed as proof of the claim of Sims & Darnell the following affidavit:

"State of New Jersey, County of Atlantic—ss.: Albert H. Darnell, being duly sworn according to law, on his oath says that he is of the late firm of Sims & Darnell, lately

composed of John C. Sims and deponent, said John C. Sims having departed this life; that there is due said late firm from the defendants the sum of two thousand six hundred and seven dollars and thirty-seven cents, which sum is made up as follows:

Commission on loan, \$40,000.....	\$ 800 00
Fee for conducting foreclosure suit, Mary T. Truitt v. May W. Truitt et al., and defending foreclosure suit, Arvine H. Phillips v. May W. Truitt et al., and for services rendered in general management of defendants' property in Atlantic City from May 13, 1901, to Oct. 15, 1902	2,200 00
	<hr/>
	\$3,000 00
Cr.	
By cash	392 63
	<hr/>
	\$2,607 37

"Albert H. Darnell.

"Sworn and subscribed to this 13th day of January, A. D. 1903, before me, Harry I. Raup, Notary Public."

On this proof the auditor reported that there was due to Darnell, surviving plaintiff in the attachment suit, the sum of \$2,607.37. Judgment was entered upon the auditor's report on February 2, 1903, and Mr. Darnell—the surviving plaintiff in the attachment—under it advertised for sale not only the Hotel De Ville, which was seized under the attachment, but also the furniture contained therein, which does not appear to have been included in the original attachment levy, and was about to dispose of both by public sale.

The complainants' affidavits show that no claim was ever made to them by their attorneys, Messrs. Sims & Darnell, that they owed them \$2,607.37, or any such sum, nor has any statement ever been made to them showing for what services such a fee was claimed. The issuing of the attachment which Sims & Darnell took out against their clients (the complainants in this suit) was not in any way disclosed to the latter. During the period of time that the attachment was pending, the complainants, and those who acted for them in their business with Sims & Darnell, frequently met Sims or Darnell, but nothing was said by either as to fees due, or attachment therefor pending. After judgment had been finally entered on the attachment, the attorney of Mr. Darnell, the surviving plaintiff in the attachment suit, made known to the complainants the fact that on an attachment suit a judgment had been obtained against them, and invited them to pay it. The complainants then applied to the circuit court judge for relief, asking that the attachment judgment be opened, and they be let in to contest with their lawyers the justice of their claims. The circuit court judge refused to let them in to defend the attachment suit, on the ground that the circuit court had full judicial power only over common-law procedures, and that it had no authority to control judgments entered under special statutory pro-

ceedings, where the statutory requirements had been observed. The complainants then filed their bill of complaint in this cause, and now, by their bill, and an amendment to its prayer, ask a preliminary injunction restraining Mr. Darnell from sale or further proceedings under the attachment judgment until he shall open the same and let the complainants in to defend that suit. An order was allowed that the defendant Darnell show cause why he should not be restrained from further prosecuting the attachment suit, and the auditor from selling the complainants' hotel, etc., under the attachment. On the coming in of the order the defendant Darnell filed no answer, but submitted his own affidavit, and copies of powers of attorney and letters, as his showing of cause against the allowance of a preliminary injunction restraining him from selling the complainants' hotel and its equipment. The defendant's affidavit does not contradict the complainants' claim that the only bill ever rendered to the complainants for services was that which claimed \$401.29 and "fee to be added." Nor does he show that at or before the time when the suit in attachment was brought for \$2,602.48 the complainants had ever been asked to pay that sum, or that they in any manner knew that Messrs. Sims & Darnell demanded any such fee. He states that "no specific sum for services, aside from commission for negotiating the loans, was ever mentioned." He does not deny that the complainants were ignorant of all the proceedings in attachment until after judgment had been entered, and they thus precluded from making any defense. Mr. Darnell declares that the steps in the attachment proceeding were regularly taken; that the "firm of Sims & Darnell were retained by complainants to represent them in a number of matters in relation to the premises described in their bill, and that said services continued over a period from about May 1, 1901, to August 1, 1902"; and that "at the time of issuing the said attachment said firm [Sims & Darnell] had no unsettled matters with complainants, other than the bill of said firm." The rest of the defendant's affidavit is a recital of services rendered to the complainants, which he claims entitle him to the \$2,607.37 for which the attachment judgment was entered.

A. K. Gangewer, for complainants. C. L. Cole, for defendant.

GREY, V. C. (after stating the facts). The defendant is the surviving member of the firm of Sims & Darnell, attorneys at law, residing in Atlantic City. The complainants are four women living in Philadelphia. Sims & Darnell had acted as their attorneys in various suits and matters at law. The complainants assert that Sims & Darnell were their employed attorneys at the very time they began the attachment suit, and continued to be while they were, unknown to

the complainants, pressing it to judgment. The defendant Darnell declares that when the writ was issued there were no unsettled matters between them, other than the unpaid bill. As this amount of the alleged debt was never agreed upon between the parties, and was not, in the nature of the case, ascertainable by mere computation, it is not quite clear that the plaintiffs in attachment might lawfully by their own ex parte oath fix the amount of their compensation with that certainty which an attachment proceeding requires. This case does not, in this court, raise this question. The affidavit of Mr. Darnell filed before the auditor, above recited in full, declares that there is due the firm of Sims & Darnell from the complainants in this suit, "for services rendered in the general management of defendants' property in Atlantic City from May 13, 1901, to October 15, 1902," etc. The attachment was issued on August 26, 1902. Counsel for the defendant strenuously insists that this date (October 15, 1902) ought to have been October 15, 1901; that in fact the services of Mr. Darnell to the complainants ended in October of 1901, and not in 1902. The defendant has been served with a copy of his affidavit containing the statement that his services ended October 15, 1902. If he denies the accuracy of the complainants' copy, he should have produced the original, or a sworn copy of it. He cannot be permitted to contradict the proof that it presents by a mere parol statement contradicting it. Upon examining all the proofs, I am satisfied, not only that the copy of Mr. Darnell's affidavit annexed to the bill of complainant is correct, but that he did in fact continue to be in the service of the complainants as their attorney at the very time he issued the attachment against them, and afterwards—probably up to and beyond October 15, 1902. The affidavits submitted by the complainants so declare. The copies of the powers of attorney, letters, etc., annexed to the defendant's affidavit in this cause, indicate the same thing. The employment of the defendant consisted, as appears by the defendant's own statement, not only of the conduct and defense of suits, but also of various matters relating to the property of the complainants. Mr. Darnell's affidavit and accompanying papers show that the defendant claims to have negotiated loans, rented the hotel, and spent money in repairing it for the tenant. To enable Sims & Darnell to conduct this business, they took from the complainants a power of attorney, authorizing that firm, "for the space of one year from the date hereof, for us and in our name, place and stead, to rent and receive rents and execute lease or leases, to keep in repair and pay the necessary expenses thereon out of the revenues derived therefrom, and also from said revenue to pay all interest on mortgages, taxes, insurance, water rents, sewerage rents, and other charges

of every description." This paper is dated April 23, 1902. It is produced by the defendant himself, and shows that Sims & Darnell accepted an appointment as attorneys for the complainants for the period of one year from April 23, 1902. There is no pretense of proof that this power of attorney was ever revoked or surrendered. The attachment was issued on August 26, 1902, during the continuance of the employment of Sims & Darnell under this power of attorney. Other copies annexed to Mr. Darnell's affidavit on file show that he was in active correspondence with the complainants, accepting authority from them to act for them as their attorney in various matters, by letters, the last of which is dated June 21, 1902. When it is considered that the nature of the business carried on by Sims & Darnell for the complainants (renting the property, receiving the rents, paying them out to keep the hotel and premises in repair, and paying interest on mortgages, taxes, etc.) was continuous in its character, and that it was formally undertaken on April 23, 1902, for one year, and never revoked or surrendered, it is I think, established that, when the attachment was issued against the complainants by Sims & Darnell, the latter were yet the employed attorneys of the complainants. The facts stated in the defendant's affidavit filed with the auditor seem to indicate that the defendant, who issued the attachment on August 26, 1902, went on rendering services in the general management of the complainants' property in Atlantic City until October 15, 1902, and that he recovered judgment not only for services rendered up to the time of the attachment, but for those rendered afterwards, up to October 15, 1902, for the sum sworn to before the auditor is in excess of the original affidavit in attachment.

The practice act (Gen. St. p. 2535, § 12) provides that no attorney shall commence or maintain any suit against his client for the recovery of any fees, charges, or disbursements until after he shall have delivered to his client a copy of the taxed bill of such fees, costs, or disbursements. In *Strong v. Mundy*, 52 N. J. Eq. 835, 81 Atl. 611, the Court of Appeals said this requirement cannot be limited to the charges taxed in the bill, usually known as "costs of the suit," mentioned in the previous sections; and on the following page intimates that before suit brought by a lawyer against his client for charges for general services, such as are the subject-matter of this attachment suit, the bill of charges, etc., must, under section 12, be settled by taxation before service. What mode of procedure shall be observed in taxing such a bill is not indicated by the court's opinion. In this case there was no taxation of the bill, no service of any copy, and a suit in attachment was begun by the attorneys before all the services for which the fees were claimed had even been rendered to their

clients. The complainants have been deprived of their right to defend the attachment suit by the action of their attorneys in suppressing the fact, which they were bound to disclose, that they had a claim for these fees, and were suing for them. Irrespective of the obligations imposed by the statute upon a lawyer who claims fees from his client, to serve copy of bill before suit, I think, upon general principles, in cases where compensation to be paid for services has not been fixed by agreement between the parties, the client has an equity to be informed of the amount claimed by the attorney, before suit is brought. The client may be willing to pay the amount claimed by the attorney without suit. The nature of the relation of attorney and client is such that the attorney is bound to disclose to his client the amount of his charge, so that the latter may not be subjected to costs of suit if he be willing to pay the sum demanded. No certainly efficient tender of payment can be made until there is either an agreement as to the amount of the sum due, or an acceptance by the client as correct of the sum claimed by the attorney. While the relation of attorney and client continues, and no circumstance has occurred which has put the parties in hostility to each other, so that the client no longer has a right to expect his attorney to care for his interests, the attorney is bound to inform his client of every matter known to the attorney which may threaten his client's interests, even if the endangering incident is the attorney's own claim for fees, which certainly is dangerous if enforced by attachment against nonresident clients. In the present case no such information was given. The attorney prosecuted a suit against his clients which he knew carried no personal notice to them. The basis of the suit was a claim for an amount of fees which the attorney knew his clients had not been informed was demanded of them. The attorney prosecuted this suit to judgment without giving his clients any information that it was pending, and thus deprived them of all opportunity to defend it. When they apply to the law court for relief, they are informed that it has no power to aid them. Under this judgment for fees which the clients insist are not due, and which both parties admit the attorney never asked his clients to pay until after judgment had been entered against them, the attorney is about to sell the very hotel property which his clients had committed to his charge.

The defendant's counsel insists that the complainants have their remedy at law, under the attachment act (Act March 20, 1901; P. L. p. 169, § 27), by suit on the refunding bond to be taken by the auditor. This assumes that the complainants shall submit to the forced sale of their hotel under the attachment, which would plainly inflict irreparable loss upon them, and rely upon a lawsuit for their remedy. It is the function of this court to prevent such loss where an eq-

uitable right is exhibited which justifies its interference.

The defendant further contends that under the rulings in *Tomkins v. Tomkins*, 11 N. J. Eq. 515, and *Herbert v. Herbert*, 49 N. J. Eq. 70, 22 Atl. 789; on appeal, 49 N. J. Eq. 568, 25 Atl. 368, where the proceedings in an attachment suit are regular in all formal respects, the court of chancery cannot intervene merely on the ground that the claim which has passed to judgment is not, in point of fact, justly due, or is of a contestable character. He insists that in the *Herbert Case* the Court of Appeals expressly declared that "the only ground upon which a defendant in attachment can have any relief in this court is that the plaintiff fraudulently used and managed the attachment suit for the enforcement of a claim which he knew had no legal efficacy." The defendant insists that under these rulings, if any sum be due to a plaintiff in attachment, no matter how small it may be, this court can afford no relief, although the plaintiff may have obtained judgment for much more than is in fact owing to him. The fraudulent conduct of any suit by a plaintiff in such manner that the defendant is prevented from making his defense at law raises an equity which justifies the interference of this court to secure to the defendant the opportunity to be heard, of which he has been deprived by the fraud of the plaintiff. Every man is entitled to present his defense to a suit brought against him. Whether this defense be good or bad is for the court in which the suit is brought to determine, after hearing it. The right to be heard in the regular order of procedure is not dependent upon the meritorious character of the defense. Nor is it limited to those cases in which the defendant owes nothing to the plaintiff. A defendant has the same right to defend himself against an exorbitant increase of a bill as against a totally false claim. He has the right to the same equitable remedies in both cases. A party has his remedy in equity against a fraud which has cheated him of his right to defend a lawsuit, as he has against a fraud which has actually cheated him of his property. This fraud may consist just as effectually of a suppression of the truth which the plaintiff was bound to disclose, as of a suggestion of a falsehood, with a purpose to mislead. I do not understand the Court of Appeals judgment to deny these positions. Regarding its declaration in the *Herbert Case*, it may, I think, be fairly said that every plaintiff in an ex parte attachment who passes his claim to judgment for an amount which is not, in point of fact, justly due, in the sense that it is not owed to him by the defendant in attachment, has fraudulently used and managed his attachment for the enforcement of a claim which he knew had no legal efficacy. No refined distinctions are needed, however, in the present case. The plaintiffs in the attachment were at the time they brought their suit the attorneys of the de-

fendants in that attachment suit. No such relation appeared in the Herbert Case. The attorneys were, both by the statute and upon general principles of law, bound to notify their clients of the specific sum demanded for their fees, before they began suit against them. The attorneys were bound to have notified their clients of the beginning and pendency of the attachment suit which was levied upon the very hotel property of their clients which was in the attorneys' charge, the rents of which they were then, by power of attorney, authorized to collect. The omission of the defendants in this suit to perform their duty to their clients (the complainants in this suit), which prevented a defense in the attachment suit, entitles the complainants to the aid of this court, under any proper construction of the case of *Herbert v. Herbert*.

I will advise an order that upon the complainants filing a bond securing the defendant the benefit of his judgment in attachment if this suit shall fail, and securing also the payment of any final judgment in that attachment, a preliminary injunction shall issue, restraining the defendants from selling the Hotel De Ville and its equipments, and from collecting any rents or profits thereof, and from proceeding on the attachment judgment, unless the defendant shall consent that the judgment be opened, and the complainants be let in to defend said attachment suit on the merits of the case.

(35 R. I. 264)

In re PHILLIPS et al.

In re McKENNA'S WILL.

(Supreme Court of Rhode Island. June 13, 1903.)

WILLS—CONSTRUCTION—LAPSED BEQUESTS.

1. Testatrix, by the residuary clause of her will, declared that if the persons named in the will did not survive her, and could not take in person, their heirs should not take by substitution; and the succeeding clause declared that, in case any person whom testatrix had named in the will should die before herself, the bequest to such beneficiary should determine. *Held*, that such succeeding clause applied to the persons named as residuary legatees, and that, on the death of one of them before testatrix, the share of the legatee so dying did not pass as intestate estate, but became vested in the remaining residuary legatees who survived testatrix.

Action by William A. Phillips and others for the construction of the will of Margaret McKenna, deceased.

Argued before STINESS, C. J., and DOUGLAS and BLODGETT, JJ.

Joseph Oasfeld, Jr., and James M. Gillrain, for petitioners.

DOUGLAS, J. The court is of the opinion that the provision of clause 15, "In case any whom I have heretofore named in this instrument shall die before myself then the bequest to said beneficiary shall determine," applies to the persons named as residuary legatees in clause 14, but does not operate

to create intestacy with respect to the share of such legatee. It is not to be presumed that the testatrix intended a lapse of such share, and the intention is also emphasized by repetition that if the persons named in the will do not survive the testatrix, and cannot take in person, their heirs shall not take by substitution. The effect, then, of the fourteenth and fifteenth clauses, taken together, is to eliminate from the residuary clause the name of any beneficiary who should not survive the testatrix, as if the gift of the residuum had been to the three persons named, or such of them as should survive the testatrix. We are of the opinion, therefore, that the residuary estate passed to Mary Grinnell and Annie Mooney. The word "heirs" in the residuary clause seems to have been used as a word of limitation, suggested perhaps by the ordinary practice when real estate as well as personal property is included in a devise.

RHODE ISLAND MOTOR CO. v. CITY OF PROVIDENCE.

(Supreme Court of Rhode Island. July 15, 1903.)

NAVIGABLE WATERS—TIDE LANDS—RIGHTS OF STATE—PUBLIC USE—HARBOR LINE—ESTABLISHMENT—HARBOR COMMISSIONERS—ERRECTIONS OUTSIDE LINE—RIPARIAN PROPRIETORS.

1. The rights of the state to tide lands below high-water mark are held in trust for the benefit of the inhabitants of the state, and not as a private proprietor.

2. The public's right to use tide lands below high-water mark for passage, navigation, and fishing extend to all lands below high-water mark not used, built upon, or occupied so as to prevent the passage of boats and the natural ebb and flow of the tide.

3. Where a harbor line has been established in front of tide lands, the riparian owner is entitled to carry the upland or high-water mark out from the natural shore, but, until the shore is actually filled out, the public's right over the land exists to the same extent as before.

4. Gen. Laws 1896, c. 118, § 10, confers on harbor commissioners the general care and supervision of all public harbors and tide waters within the state, with authority to prosecute all "unauthorized obstructions and encroachments therein." Section 12 authorizes persons to build over tide waters, by authority of said commissioners, any wharf and other structure, etc., on condition that the plans for such improvement shall be approved by the commissioners; and section 14 declares that every erection upon public tide waters not authorized by the General Assembly or harbor commissioners shall be deemed a public nuisance. *Held* that, where the harbor commissioners had established a harbor line, they had no authority under such sections to permit a city to construct a public bathhouse and its appurtenances outside such line, to the injury of an adjoining riparian proprietor.

Bill by the Rhode Island Motor Company against the city of Providence to restrain the location of a public bathhouse at the end of a passageway beyond the harbor line in the Seekonk river. On motion for a preliminary injunction. Motion granted.

Herbert Almy and Amasa M. Eaton, for complainant. Albert A. Baker, Asst. City Sol., for respondent.

DUBOIS, J. This is a motion for a preliminary injunction to restrain the respondent, until further hearing, from locating a bathhouse in the public tide waters of the state on the westerly side of the Seekonk river, and east of the established harbor line near the shore of said city, and from erecting and maintaining a permanent passageway between said shore and said bathhouse upon piles to be driven for that purpose, in such a way as to impede the navigation of said river, and especially in such manner as to interfere with the complainant's right of access to and from said navigable river and its premises, which abut thereon. The defendant denies that said bathhouse and approaches, when located, will interfere with the complainant's rights to the enjoyment of its premises, and as to the claim they will be impediments to the navigation of the river it replies that said proposed location of said bathhouse and its appurtenances was made with the assent of the harbor commissioners; to which the complainant objected that the harbor commissioners cannot assent to such location beyond the established harbor line.

There is no question but that the General Assembly has power to authorize encroachments upon the public tide waters, where they are made in the interests of navigation, for the erection of wharves, or are affected for other public purposes. *Clark v. The City of Providence*, 16 R. I. 342, 15 Atl. 763, 1 L. R. A. 725. But it is claimed that by the provisions of Gen. Laws R. I. 1896, c. 118, §§ 10, 12, 14, the General Assembly has, at least by implication, delegated such power to the harbor commissioners. Section 10 does confer upon the harbor commissioners the general care and supervision of all public harbors and tide waters within the state, with authority to prosecute for and to cause to be removed all unauthorized obstructions and encroachments therein, but it does not empower them to allow obstructions or permit encroachments in such harbors or tide waters. Section 12 provides that persons who shall build into or over public tide waters by authority of said commissioners or by authority of the General Assembly any wharf, pier, bridge, or other structure, or drive any piles into the land under public tide water, or fill any flats, shall, before beginning such work, give notice to and submit plans to said harbor commissioners of the work they intend to do, which may be altered by said commissioners, and must be approved by them before any work is done. It is claimed that the words "by authority of said commissioners" in said section 12 constitute such delegation of authority to them, and that section 14, which reads "every erection made into or encroachment upon

the public tide waters of the state, not authorized by the General Assembly or by the harbor commissioners, shall be deemed to be a public nuisance and shall be prosecuted as such by the Attorney General," in the words "not authorized by the harbor commissioners" by implication gives them power to authorize the same. The state holds the legal fee of all lands below high-water mark. This right of the state is held, however, by virtue of its sovereignty, and in trust for all the inhabitants, not as a private proprietor. The public rights secured by this trust are the rights of passage, of navigation, and of fishery, and these rights extend to all land below high-water mark, unless it has been so used, built upon, or occupied as to prevent the passage of boats and the natural ebb and flow of the tide. The establishment of a harbor line permits the riparian owner to carry the upland or high-water mark out a certain distance from the natural shore. Until actual filling out, the public rights exist as before. *Allen v. Allen*, 19 R. I. 115, 116, 32 Atl. 166, 30 L. R. A. 497, 61 Am. St. Rep. 738. "While the shore itself, and the space between high and low water mark is public for passage, the riparian owner has a right of access to the great highway of nations, of which he cannot be deprived. And this riparian right of access is valuable—is property. So far as concerns the front of his land, the riparian owner has the undoubted right of access to it; and no one could do anything in front of his land to make it less accessible, without being liable for damages. But wherever the tide water flows, and so long as it flows, it is a portion of the great highway. So long as the dock is not filled by the owner of the bank, it is subject to the *jus publicum* of being used for passage by the whole public. Even if the riparian owner fills out his whole front, so long as the adjoining owner does not wharf out, he has a right of access to the sides of his wharf. He has, indeed, no exclusive right to the use of the water opposite the adjoining land. He has it in common with the world. But it is enough that he has it. To him it is of especial value as giving him additional facility of access to his wharf. In the case of a highway on land there may be an obstruction of the right of the public for which the remedy would be by indictment; but, if that obstruction was of such a nature and so placed as to prevent the access of any proprietor to his own land, then there would be a special damage to him for which he might sue. So in the case of the highway on tide waters. It is admitted that the adjoining owner has the right to wharf out, but no one else has the right to prevent the plaintiff's access to the sides of his wharf, and that, although it might be a public nuisance to navigation, the plaintiff is entitled to claim for any special damage." *Clark v. Peckham*, 10 R. I. 35, 14 Am. Rep. 654. Where a harbor line has been established,

the public has notice that navigation is liable to be impeded between the shore and that line. The riparian proprietors have notice that thus far they can go, and no further. The harbor commissioners have notice of the existence of the same, for they proposed it after mature consideration and deliberation, and under the provisions of the law it has been adopted. They are bound by it. They cannot modify it, and, in my opinion, they cannot assent—legally assent—to encroachments in the public tide waters beyond it; and so I find that the assent of the harbor commissioners to the proposed location of said bathhouse and of the approach thereto is without authority, which leaves for determination the question, will the complainant's right of access to the navigable water of the Seekonk river from its premises be infringed by such location of the bathhouse and its appurtenances? For, if it will not, then this proceeding must fail, the only remedy for the public nuisance being by prosecution by the Attorney General. The evidence satisfies me that the complainant's right of access will be curtailed, and its premises rendered less desirable for its legitimate purposes; that navigation of the river to and from its premises would be rendered more dangerous if the bathhouse and its approaches and appurtenances are located in the place where and in the manner in which it is proposed they shall be placed.

Motion granted.

(25 R. I. 255)

FOX v. SMITH.

(Supreme Court of Rhode Island. June 13, 1903.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—MALICE—EVIDENCE—RECORD OF ACQUITTAL.

1. In an action for malicious prosecution the lack of probable cause cannot be inferred from malice.

2. Knowledge of the innocence of a person charged with crime, acquired by the prosecutor after the institution of criminal proceedings, is insufficient to establish want of probable cause in an action for malicious prosecution.

3. Defendant, who was an agent for the society of prevention of cruelty to animals, was anonymously informed that a cockfight had been engaged in in a certain town, and that B. would give him information concerning the same. Defendant inquired of B., who informed him that a cockfight had taken place, and that plaintiff, whom he said he knew, was present. Defendant inquired of two other persons, who informed him that plaintiff had been present at such fight; and, after defendant went to the place and found feathers on the ground, he submitted the matter to the attorney of the society, who advised that a prosecution be instituted against plaintiff. After proceedings had been instituted, B. and another of defendant's witnesses informed him that they had been mistaken in regard to plaintiff, and that the person they mistook for plaintiff was another man, whereupon the proceeding was dismissed. *Held*, that the evidence of want of probable cause for the prosecution was insufficient to sustain an action for malicious prosecution.

4. In an action for malicious prosecution, evidence tending to prove plaintiff's innocence of the crime charged was irrelevant.

5. In an action for malicious prosecution, the record of the court, showing the prosecution and termination thereof, was admissible to prove that the proceedings had terminated favorably to plaintiff.

Action by Michael J. Fox against James N. Smith. On petition for a new trial. Granted. Argued before STINESS, C. J., and DOUGLAS and DUBOIS, JJ.

John E. Bolan, for plaintiff. James C. Collins, Jr., for defendant.

DUBOIS, J. This is an action of trespass on the case for malicious prosecution. After verdict for the plaintiff, the defendant petitions for a new trial, and assigns as his reasons therefor the following: First, the verdict was against the evidence, as grounds for probable cause in commencing this prosecution are shown; second, the evidence tending to show the innocence of the plaintiff of the crime alleged was improperly admitted; third, the improper admission of the district court record, and the lack of proof of the criminal proceedings complained of and their termination; fourth, the plaintiff assented to the discontinuance of the criminal proceedings; fifth, the defendant acted under the advice of counsel in commencing the prosecution; sixth, if the verdict is to be sustained, the damages to be awarded are excessive.

The prosecution complained of was criminal. The defendant, as chief prosecuting agent of the Rhode Island Society for the Prevention of Cruelty to Animals, made complaint and caused the issuance of a warrant against the plaintiff, charging him with being present at a cockfight at Warren. The complaint was made after an investigation by the defendant, whose attention had been directed to the matter by an anonymous written communication containing the statement that there had been a cockfight in Warren some two weeks before, and that one Bousquet would give information, which writing was left at the office of the defendant, who was at home, recovering from an illness, and was brought there to him. On March 5th the defendant began his investigation by going to Warren and interrogating Joseph Bousquet, who informed him, among other things, that there was a cockfight at Warren on Sunday, February 16, 1902, and that 12 or 15 persons were present, including Michael Fox, whom he said he knew. The defendant also interviewed one Gustavus Barnaby, who informed him that there had been a cockfight, at which Michael Fox was present, and that he saw him. The defendant attempted to talk with a Frenchman, the hired man of Joseph Bousquet, but was unable to do so, except through an interpreter, as the hired man spoke no English, and the defendant did not speak or understand French. Mr. Bousquet

¶ 4. See *Malicious Prosecution*, vol. 33, Cent. Dig. § 135.

acted as interpreter, and, in answer to questions put by the defendant, Mr. Bousquet reported that his employé stated that he knew the parties, including Fox. The defendant also found the place where the fight had been, and saw feathers on the ground. That after making this investigation he submitted the matter to Lycurgus Sayles, Esq., a well-known practicing attorney at law, who had been attorney for the society for over 25 years, to obtain his advice as to whether, under the circumstances, complaints should be made and criminal proceedings instituted against the accused, including Michael Fox. Mr. Sayles advised him to proceed, and the defendant made his complaint against Michael Fox, who was notified to be present at the proper district court and give bail for his appearance for trial, which was done. That at the same time four other defendants, charged with being present at the same fight, pleaded "Guilty," and were fined, the plaintiff pleaded "Not guilty," and the case was continued for trial. After the arraignment of the plaintiff, the witness Bousquet informed the defendant that he and his hired man were mistaken in regard to Michael Fox; that the person they mistook for Michael Fox was a man named William McDonald; and also Gustavus Barnaby informed him that he did not see Michael Fox himself, but that Joseph Bousquet informed him that Fox was there. The defendant, finding that his witnesses were not prepared to substantiate the statements made to him, notified the counsel for the plaintiff, and claims that an arrangement was made by which the case was to be adjusted by giving the names of the informants to the plaintiff, and by discontinuing the criminal case against him. Mr. Sayles testified in regard to such proposed adjustment of the matter, and neither appeared before the district court in further prosecution of the case. The plaintiff and his counsel denied that there was any such arrangement or adjustment. The district judge testified in regard to the proceedings and their termination as follows: "On page 65 of the records, I find the warrant No. 2,479, of March 9th. James N. Smith, agent for the Rhode Island Society of Prevention of Cruelty to Animals, against Michael J. Fox; Cady, officer; day, March 9th. March 11th, plea, 'Not guilty.' Trial. Adjudged 'Not guilty.' Costs taxed \$5.95. Defendant discharged. Court at Warren."

Malicious prosecution for crime has been defined as a prosecution on some charge of crime which is willful, wanton, or reckless, or against the prosecutor's sense of duty and right, or for ends he knows or is bound to know are wrong and against the dictates of public policy. Public policy favors prosecution for crime, and requires that a person who in good faith and upon reasonable grounds institutes proceedings upon a criminal charge shall be protected. 19 Am. & Eng. Ency. Law, 650, and cases cited. The

law presumes that every prosecution proceeds from proper motives and upon sufficient reasons. Therefore the plaintiff in an action for malicious prosecution must prove both malice and want of probable cause. Malice may be presumed from the want of probable cause, but lack of probable cause cannot be inferred from malice. Probable cause for prosecution for crime is the existence of a state of facts sufficient to cause an ordinarily careful and prudent man to believe the accused guilty. Knowledge of the innocence of the person charged with crime, acquired by the prosecutor after the institution of criminal proceedings, will not show a want of probable cause in the institution of the prosecution. It is not necessary for the prosecutor to act upon his own personal knowledge of the facts. It is sufficient if he acted in good faith upon credible information received from reliable sources. *Wills v. Jordan*, 20 R. I. 630, 41 Atl. 233. There is no evidence that the defendant did not act in good faith, and the presumption is that he did. Whether he acted upon credible information, or whether its sources were reliable, were questions of fact for the jury to determine. As the jury found for the plaintiff, they must have found either that the information the defendant received was incredible, or that the sources from which it came were unreliable. The subsequent event disclosed that they proved unreliable, but that was not the question to be decided. Would an ordinarily careful and prudent man, of the experience of James N. Smith, have believed the story told by the witnesses, and would he have considered them reliable, at the time they gave the information? If he would, then the defendant was justified in proceeding as he did. There was no evidence tending to prove that the witnesses did not give the defendant the information that he relied on in commencing his prosecution of the plaintiff, nor was there any evidence that they were unworthy of belief. Neither was there anything disclosed that should have put the defendant on his guard against the story told, or the tellers thereof. In our opinion, the verdict is strongly against the evidence, as there was no evidence at all of want of probable cause.

The defendant excepted to rulings of the court admitting, against his objection, testimony tending to prove the innocence of the plaintiff of the crime alleged, by proving that he was elsewhere at the time. This testimony was clearly irrelevant. Probable cause does not depend upon the guilt or innocence of the accused, but upon the prosecutor's belief in his guilt, upon reasonable grounds, at the time of prosecution. The testimony may, and was liable to, have prejudiced the jury to the injury of the defendant. *King v. Colvin*, 11 R. I. 582.

The defendant's said exceptions are sustained. We find that the court did not err in admitting the record of the district court for the purpose of proving that the proceed-

ings had terminated favorably to the plaintiff. Even if the objection was technically tenable, the fact was proved by the defendant and his witnesses.

The fourth and fifth grounds raise questions of fact determinable solely by the jury. Whether the plaintiff assented to the discontinuance, or not, was a question of fact, and the jury must have found that he did not. And whether the defendant acted under advice of counsel in commencing the prosecution is a question that embraces another, viz., whether in obtaining such advice he made a full and fair, frank and free, disclosure of all the circumstances, for the counsel to advise upon. And the jury decided the question in the negative. The question relating to damages need not be considered.

New trial granted, and case remanded to the common pleas division for further proceedings.

(25 R. I. 249)

HATHAWAY v. OSBORNE, Town Treasurer.

(Supreme Court of Rhode Island. June 5, 1903.)

MUNICIPAL CORPORATIONS — TOWNS — TRESPASS — NOTICE OF CLAIM — STATUTES — APPLICATION — SPECIAL DAMAGES — PLEADING.

1. A municipal corporation is liable in its corporate capacity, in trespass, for the acts of its agents in entering on private land by order of its town council for the purpose of laying out a highway thereon.

2. Gen. Laws 1896, c. 36, § 15, provides that towns shall be responsible for damages caused by defective highways in certain cases; and section 16 requires that any person claiming damages for causes mentioned in section 15 shall give notice thereof to the town within 60 days, and bring suit within a year, after the injury or damages suffered. *Held*, that section 16 relates only to causes of action referred to in section 15, and has no application to an action for trespass on private land by officers of the town in the work of laying out a highway over the same.

3. Where officers of a town unlawfully entered on private land and laid out a highway over the same, the laying out of such highway, and the tearing down of certain sea walls, causing subversion of the soil and influx of the sea, not being a necessary result of the unlawful entry, were properly alleged in aggravation of damages in an action against the town for trespass committed by such entry.

Action by Jennie M. Hathaway against Henry C. Osborne as town treasurer of the town of Tiverton. On demurrers to defendant's plea and to certain counts in the declaration. Demurrer to plea sustained, and demurrer to declaration overruled.

Argued before STINESS, C. J., and TIL-
LINGHAST and DOUGLAS, JJ.

Wm. P. Sheffield, Jr., for plaintiff. William J. Brown, for defendant.

DOUGLAS, J. This is an action of trespass, complaining of the town of Tiverton for entering upon the plaintiff's land, removing boundary walls and barriers to the inflow of the sea, and building a road across the land.

The defendant pleads that the plaintiff did not file her claim with the town council within 60 days of the date of the committing of the trespasses, and the plaintiff demurs to this defense on the ground that the statute does not require notice within such time. The defendant demurs to the third and fourth counts of the declaration on the ground of duplicity and erroneous joinder of diverse causes of action. The defendant furthermore objects to the whole action that trespass will not lie against a town for the acts of its agents in the circumstances set forth, but that the plaintiff's only remedy is against the agents themselves. These demurrers and objections give rise to the following questions:

First. Is a municipal corporation liable in trespass for the acts of its agents in entering upon private land by order of the town council for the purpose of laying out a highway there? The contention of the defendant is that such an act is ultra vires, and involves only the agent who commits it. We can see no reason in this view. The laying out and construction of highways is within the general powers of a municipal corporation, and when the council, without right, directs the officers of the town to enter upon private land for that purpose, the town commits the trespass which it directs. 2 Dill. on Mun. Corp. §§ 971, 972, and cases cited; Lee v. Sandy Hill, 40 N. Y. 442; Squiers v. Neenah, 24 Wis. 588; Hawks v. Charlemont, 107 Mass. 414. The case of Allen v. City of Decatur, 23 Ill. 332, 76 Am. Dec. 692, is directly in point, and clearly states the reasons why a municipal corporation is held liable in trespass for a direct wrong, as well as in case for negligence of its agents. "If it had committed a lesser tort," says the court, "so that the injury was indirect and consequential, it would be liable in an action on the case; and we will not say that it is not liable for a greater wrong producing a direct injury, for which by the mere form of proceeding the party is required to seek his remedy in an action of trespass. There is no reason and no propriety in such a distinction, and the wisdom of the law cannot recognize it." The true distinction between causes of action in trespass and in case is laid down in *Mosses-
sian v. Callender, etc., Co.*, 24 R. I. 186, 52 Atl. 806. The objection is overruled.

Secondly. Does the statute providing for actions against towns require that notice shall be given of trespasses committed by authority of the town within 60 days after they are committed, as preliminary to bringing suit for the same?

The statute relied upon is chapter 36 of the General Laws of 1896, of which the sections deemed to apply are as follows:

"Sec. 12. Every person who shall have any money due him from any town or city, or any claim or demand against any town or city, for any matter, cause, or thing whatsoever, shall take the following method to obtain the same, to wit: Such person shall

present to the town council of the town, or to the city council of the city, a particular account of his claim, debt, damages, or demand, and how incurred or contracted; which being done, in case just and due satisfaction is not made him by the town or city within forty days after the presentment of such claim, debt, damages, or demand aforesaid, such person may commence his action against such treasurer for the recovery of the same."

"Sec. 15. If any person shall receive or suffer bodily injury or damage to his property by reason of defect, want of repair, or insufficient railing, in or upon a public highway, causeway, or bridge, in any town which is by law obliged to repair and keep the same in a condition safe and convenient for travelers with their teams, carts, and carriages, which injury or damage might have been prevented by reasonable care and diligence on the part of such town, he may recover, in the manner hereinafter provided, of such town the amount of damage sustained thereby, if such town had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence on its part.

"Sec. 16. A person so injured or damaged shall, within sixty days thereafter, give to the town by law obliged to keep such highway, causeway, or bridge in repair, notice of the time, place, and cause of such injury or damage; and if the said town shall not make just and due satisfaction therefor within the time prescribed by section twelve of this chapter, he shall, within one year after the date of such injury or damage, commence his action against the town treasurer for the recovery of the same, and not thereafter."

Section 12 applies to all claims and demands against a town, and provides that notice must be given to the town council before suit in such cases, and that suit shall be against the treasurer. Section 15 makes the town responsible for damages caused by defective highways in certain cases. Section 16 requires the person who claims damages for the causes mentioned in section 15 to give notice within 60 days, and to bring suit within 1 year, after the injury or damage is suffered. The provisions of section 16 relate only to the causes of action referred to in section 15, and have no application to such causes of action as are set forth in this declaration. There was therefore no obligation upon the plaintiff to observe the conditions of section 16. The demurrer to the second and third pleas is sustained.

Thirdly. Are the matters stated in the third and fourth counts of the declaration proper matters in aggravation of damages, or should they be presented in a separate action? The only cause of action alleged is an entry by force upon the plaintiff's land, and acts committed there while the trespass continued. The tearing down of walls, subversion of the soil, and building the road were willful acts, and together constituted a continuous and ag-

gravated injury to the plaintiff's possession of the land. A direct consequence of the removal of the barrier was the influx of the sea. It was not a necessary result of the unlawful entry, and hence is properly specially alleged. The defendant refers to *Carroll v. Rigney*, 15 R. I. 81, 23 Atl. 46, where it was held that a landlord could not maintain trespass against a tenant for injuries done during the tenancy, but that the proper remedy was case. The reason of that decision is the well-settled doctrine that trespass *quare clausum fregit* is an injury to the possession of land, and a landlord is not in possession while the term continues. All the injuries here complained of are infractions of the owner's present right. The principles involved are elementary in the law of pleading. *Gilbert v. Pritchard*, 41 Hun. 46; *Rucker v. McNeely*, 4 Blackf. 179; *Waldo v. Waldo*, 52 Mich. 91, 94, 17 N. W. 709, 710; *Gulle v. Swan*, 19 Johns. 381, 10 Am. Dec. 234; *Tyson v. Booth*, 100 Mass. 258; 1 Chit. Pl. 412, note "k." The defendant's demurrers to the third and fourth counts of the declaration are overruled.

The case will be remitted to the common pleas division for further proceedings.

(97 Md. 563)

WESTERN MARYLAND R. CO. v. SCHAUN.

(Court of Appeals of Maryland. July 1, 1903.)
CARRIERS—TICKETS—DESCRIPTION OF HOLD-
ER—EJECTION—ACTIONS—NATURE
AND FORM—EVIDENCE.

1. Where a passenger was ejected from a railroad train by reason of a defect in her return ticket, in failing to properly describe her personal characteristics, which resulted from the conductor's negligence in punching said return ticket on the going trip, such passenger was only entitled to recover damages in an action for breach of contract, and could not recover in an action *ex delicto*.

2. Evidence that the conductor who ejected plaintiff was the same conductor who punched plaintiff's ticket on the going trip, and that he was acquainted with her, was insufficient to establish that such conductor had knowledge that plaintiff was the same person who presented the going part of the ticket, where he and the brakeman on the going train both testified that they did not see plaintiff on such train, but that they remembered seeing plaintiff's daughter thereon.

Appeal from Court of Common Pleas; Albert Ritchie, Judge.

Action by Maria A. Schaun against the Western Maryland Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEAROE, and SCHMUCKER, JJ.

R. E. Lee Marshall and J. Hanson Thomas, for appellant. William Colton, for appellee.

FOWLER, J. This is an action to recover damages by reason of the plaintiff's alleged

¶ 1. See *Carriers*, vol. 9, Cent. Dig. §§ 1424, 1427, 1432, 1433.

unlawful ejection from one of the cars of the defendant railroad company. The plaintiff, Mrs. Schaun, resides in Baltimore City, but spends the summer at Pen Mar, on Western Maryland Railroad, and it appears from the testimony that she frequently uses the defendant's road in traveling between these points. On the 18th July, 1901, she purchased at Hillen Station, Baltimore, a Pen Mar excursion ticket. These tickets were issued by the defendant company, at a greatly reduced price, for use on the Pen Mar excursion train, No. 13, and on that train only, on the date stamped on the ticket. There were other conditions; and among them, that the excursion ticket must be presented to conductor on west-bound trip, who was required to issue in exchange a return ticket, Pen Mar to Baltimore, good only on excursion train No. 24, of date stamped on said return ticket, and canceled by conductor on margin thereof. This return ticket was not to be furnished by conductor unless he had personal knowledge that the individual by whom it was to be used was actually on west-bound excursion train on date stamped on said excursion ticket. It was further conditioned that this exchange ticket issued by the conductor in exchange for excursion ticket from Baltimore to Pen Mar would be honored for passage only for the person as described on such exchange ticket. On the exchange ticket itself is printed the following:

"Description of Holder of Balt. Ticket No. 12108, who alone is entitled to use this return ticket from Pen Mar to Walbrook as indicated by punch mark."

Following this are 12 small divisions on the ticket, thus arranged:

Man	Dark	Short	Elderly
Woman	Light	Stout	Middle age
Child	Tall	Slight	Young

In order to prevent the transfer of these tickets, the railroad company required the conductor to punch a general description of the passenger to whom such exchange ticket was given.

It appears, according to her testimony, that, on the day named, Mrs. Schaun, the plaintiff, after purchasing her excursion ticket at Hillen Station, got on the proper train, gave up her Baltimore Pen Mar excursion ticket, and received an exchange ticket, which she said, believing it was correct, she put in her pocket without any inspection or examination. It is apparent that the slightest inspection of the ticket would have informed the plaintiff that she was not the person described as the holder thereof. Naturally she was much surprised, therefore, when, on returning the same evening on the proper train, the same conductor who gave her the exchange ticket refused to accept it because it did not describe her personal ap-

pearance. The ticket called for a woman, light, slight, and young, and the plaintiff was dark, stout, and middle aged. She refused to pay the fare of \$2.20 from Pen Mar to Baltimore, and the conductor put her off at Blue Ridge Summit, without using any undue force or violence. It also appears from the testimony of the witness Hoover that he was the conductor in charge of the excursion train the morning of July 18th; that he had known the plaintiff for three years, and that he did not see her on the train that morning; that her daughter was; and that she was travelling on a Pen Mar excursion ticket. He also testified that, by the rules of the company, he was authorized to call on the brakeman to assist him in collecting and punching the tickets; that he had requested him to punch tickets that morning, owing to the number of people that were on the train, and the fact that he (the conductor) was liable at any moment to be called away to look out for signals or orders; and that he did not examine the ticket after he gave it to the brakeman to see whether it was punched correctly. The witness Gelbach, the brakeman, testified that he assisted the conductor, punched the tickets, and handed them to the passengers; that he knew the plaintiff; that she frequently rode on defendant's trains; he did not see her, but did see one of her daughters, on the train on the morning of the 18th July. The witness Miss Schaun, the daughter of the plaintiff who was referred to by the brakeman, testified she was not on the train at the time mentioned.

While the foregoing is a brief statement of only a part of the facts, sufficient has been said to present the one question the solution of which, in our opinion, will dispose of this case. That question is presented by the defendant's first prayer, by which the court was asked to instruct the jury that there was no legally sufficient evidence to prove that the plaintiff was unlawfully ejected from the defendant's cars. Starting with the concession that the plaintiff was in fact upon the defendant's cars, for the jury evidently so found from the evidence, under the court's instruction given in lieu of plaintiff's second prayer, and also conceding, if, as the jury found, she was then on the train, that the misdescription placed upon the exchange ticket was through the fault or negligence of the conductor or brakeman, or both, we are to decide whether, in this action, the plaintiff can recover.

Since the decision of *Stocksdale's Case*, 83 Md. 245, 34 Atl. 880, it is settled law in this state, and the proposition is supported by the weight of authority, "that, when a passenger receives a defective ticket from an agent of the company by reason of the mistake or negligence of the agent, the conductor may refuse to accept such ticket, and is authorized to compel the passenger to leave the train if payment of the fare is refused."

"In these cases," we said in the case just cited, "the passenger should pay the fare demanded, and seek his remedy by an action for the breach of the contract, and not by an action of tort for the ejection." In the case of *Hufford v. Grand Rapids & I. Ry. Co.*, 53 Mich. 118, 18 N. W. 580, the absolute necessity of such a rule is recognized by Judge Cooley; and he says that not only railroad companies, but the public, are especially interested in having the rules whereby conductors are to govern their action certain and definite, so that they may be enforced without confusion and without stoppage of trains, "and, if the enforcement causes temporary inconvenience to a passenger who, by accident or mistake, is without proper evidence of his right to a passage, though he has paid for it, it is better that he should submit to temporary inconvenience, than that the business of the road be interrupted, to the general annoyance of all who are upon the train." It is said by the learned counsel for the plaintiff that there has been an astonishing change in the views of the Supreme Courts of Missouri and Kansas upon this question, but there has been no such change in the views of this Court since we expressed our opinion in *Stocksdale's Case*, supra; and, so long as the law laid down in that case remains unquestioned, an action of tort for damages will not lie on the case made by this plaintiff, and she must be left, as is said in *Bradshaw v. South Boston Railway Co.*, 135 Mass. 407, 46 Am. Rep. 481, to her remedy, if any she has, in an action against the defendant for a breach of contract.

But it is said the fact that the conductor who gave the plaintiff the defective ticket is the same one who on the return trip refused to accept it distinguishes this case from the *Stocksdale Case*, and other cases of that kind. We cannot, however, understand what effect this fact can have, unless the jury are to infer therefrom that, when the conductor refused to accept the plaintiff's exchange return ticket, he knew she was in fact on the train in the morning, and knew also that he had erroneously punched the ticket. Now, whatever the fact may be, he swears he did not see the plaintiff that morning. The brakeman testifies that he did not see her, and both of them swear they saw her daughter. But let us assume both he and the brakeman are mistaken. They may have forgotten. It is not reasonable to require that he should remember the fact that the plaintiff was on the train, any more than that he should be held to remember many others he was accustomed to see there day after day. The very fact that she and many others were constant travelers on his train would render it difficult for him to say with certainty whether she or they were on the train on any particular day. We do not think, therefore, it can be inferred, merely from the fact that she was on the train, or

even that he saw her there, that morning, that he remembered and knew the fact in the evening, when she presented the ticket, which upon its face described a person of entirely different personal appearance from the plaintiff. There is no other proof in the case that at the time he refused to accept the ticket on the evening train he knew she was on the train in the morning, and that she was the person to whom he had given the rejected ticket. If there was any legally sufficient evidence in the case of such knowledge on the conductor's part, then his conduct would have been entirely unjustifiable; but, in the absence of proof, we cannot infer, nor allow the jury to infer, such knowledge on the part of its agent as would render the defendant responsible in this form of action.

We are of opinion, therefore, that the judgment appealed from must be reversed, but without prejudice to the right of the plaintiff to enforce her rights, if any she has, in another form of action. Reversed, without prejudice, with costs.

(97 Md. 656)

UNITED RYS. & ELECTRIC CO. v. ROWE
et al.

(Court of Appeals of Maryland. July 1, 1903.)

ASSIGNMENTS FOR CREDITORS—CONSTRUCTION—RECORD—FILING BOND.

1. An assignment of a claim for personal injuries to the assignor's attorney, in trust, in case a recovery was had, to pay himself one-half of the amount recovered, to pay a physician's bill for services, and, if sufficient remained, to pay the balance to such persons as the assignor should direct, was not an assignment for the payment of the assignor's debts generally, within Code Pub. Gen. Laws, art. 16, § 205, requiring every trustee for the benefit of creditors to file with the clerk of the court in which the instrument creating the trust is to be recorded a bond, etc., and providing that no title shall pass to the trustee until such bond is filed; and hence such assignment was valid, in the absence of fraud, without record or the filing of a bond by the trustee.

Appeal from Circuit Court No. 2 of Baltimore City.

Action by W. L. Rowe, as administrator of Charlotte W. McPherson, and others, against the United Railways & Electric Company, garnishee of Ulyssia S. G. Swindell. From a judgment in favor of plaintiff, the garnishee appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

Wm. S. Bryan, Jr., for appellant. J. Kemp Bartlett, for appellee.

BRISCOE, J. On the 21st of April, 1902, Charlotte W. McPherson, the appellee's decedent, obtained a decree in personam against Ulyssia S. G. Swindell for the sum of \$1,801 in circuit court No. 2 of Baltimore City, being a balance due on a mortgage,

under a foreclosure proceeding. On the 26th of April, 1902, an attachment was issued on this decree, and was laid in the hands of the appellant, the United Railways & Electric Company of Baltimore City, garnishee of Swindell, to recover a claim in a damage suit instituted by Mrs. Swindell against the electric company for personal injuries alleged to have been sustained by her. On the 25th of October, 1901, the following order was filed in the case: "Mr. Clerk: Enter the above case and the judgment to be recovered thereon to the use of Hyland P. Stewart. Hyland P. Stewart, Attorney for Plaintiff." It appears from the record that Mrs. Swindell executed and delivered to Mr. Stewart, her attorney in the case, the following paper: "For value received I hereby assign and set over unto Hyland P. Stewart, trustee, all my right, title and interest, in the above case, and in the judgment that may be recovered in the above-entitled case, to pay himself personal one-half part of the whole amount recovered; to pay Dr. J. J. Ingle, his bill for professional services, if sufficient remain, and the balance if any, to such person or persons as I shall direct. Witness my hand and seal this 28th day of February, 1901. Ulyssia K. Swindell. [Seal.] Test: T. B. Layfield." It also appears that a prior order, dated the 8th of February, 1900, had been given by Mrs. Swindell to enter the judgment that may be recovered in the case for the use of Mr. Stewart to the extent of one-half thereof, but this order was not filed in the case. It further appears that the damage suit was entered settled on the 15th of September, 1902, by an agreement between Mr. Stewart, assignee, and Mr. Slingluff, attorney for the United Railways & Electric Company, by the payment of \$1,500, to be held subject to the decision in the attachment suit. The case at bar was heard in circuit court No. 2 of Baltimore City, and from a decree of that court passed on the 11th day of March, 1903, directing that the garnishee pay to the appellee the sum of \$750 in full settlement of its liability, this appeal has been taken.

The defense relied upon by the appellant at the trial below, and urged here, is that there were no credits due at the date of the attachment by the garnishee to the plaintiff, subject to attachment. The circuit court of Baltimore City overruled the motion to quash, upon the ground that the assignment of February 28, 1901, was in contravention of section 205, art. 16, Code Pub. Gen. Laws, which requires every trustee to whom any estate, real, personal, or mixed, shall be limited or conveyed for the benefit of creditors, to file with the clerk of the court in which the deed or instrument creating the trust is to be recorded a bond, which bond shall be recorded in the office of the clerk, etc. No title shall pass to any trustee until such bond shall be filed and approved. The assignment to Mr. Stewart, dated February 8,

1900, of one-half of the judgment that may be recovered, was sustained and declared to be valid. The question, then, for us to consider, is whether section 205, art. 16, Code Pub. Gen. Laws, applies to an assignment such as the one in this case, so as to defeat the defense relied upon by the garnishee. We cannot agree that it was necessary to record this assignment from Mrs. Swindell to Mr. Stewart, to make it valid and operative. It was not an assignment by a debtor for the payment of his debts generally, within the meaning of the Code referred to, and hence its provisions are not applicable to this case. In *Moore v. Title Trust Company*, 82 Md. 292, 33 Atl. 641, this court said, in construing this statute, that the bond required by the statute was to be filed with the clerk of the court in which the deed or instrument creating the trust is to be recorded, and that, if the deed is not required to be recorded at all, then no bond is to be given. Assignments of specific property for the benefit of particular creditors, in the absence of fraud, are sustained by the courts. *Green v. Trieber*, 3 Md. 30; *Price v. De Ford*, 18 Md. 489; *Fouke v. Fleming*, 13 Md. 392; *Stockbridge v. Franklin Bank*, 86 Md. 200, 37 Atl. 645. There being no fraud shown in the case to impeach the assignment, it must be held as valid.

In this view of the case, it becomes unnecessary to discuss the other questions raised on the record, and the decree of the court will be reversed and the cause remanded, to the end that an order may be passed granting the motion to quash the attachment issued in the case. Decree reversed and cause remanded, with costs.

(97 Md. 555)

MARSHALL v. DOBLER et al.

(Court of Appeals of Maryland. July 1, 1903.)

TRUSTEES — ACCOUNT — ATTORNEY'S SERVICES
— ALLOWANCE — APPEAL — AFFIRMANCE
— ACTION ON BOND.

1. On an accounting of certain trustees, the court allowed them certain commissions, and to plaintiff's intestate, for services rendered to the trustees, the sum of \$10,000, instead of \$12,500 claimed. Certain creditors of the estate appealed, and a cross-appeal was taken on behalf of plaintiff's intestate, because of the reduction of intestate's claim; such creditors executing a bond to pay, in case such parts of the order should be affirmed, all damages and costs decreed by the circuit court, and all damages awarded by the Court of Appeals. The court on appeal further reduced all the allowances appealed from, with the exception of that allowed to plaintiff's intestate, which was affirmed, without any provision relating to interest or other allowance. *Held*, that intestate's administrator was not entitled to recover on the appeal bond interest on the allowance for the time that it was unpaid by reason of the appeal.

Appeal from Baltimore City Court.

Action by R. E. Lee Marshall, as administrator, etc., against Dobler and Mudge and

others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

R. B. Lee Marshall and J. Hanson Thomas, for appellant. George Whitelock, Allan McLane, Randolph Barton, Jr., and Edward I. Koontz, for appellees.

BOYD, J. The appellant sued the appellees on a bond given by them on an appeal from an order of the circuit court of Baltimore City, passed in a case to be reported as *National Bank v. Dulaney*, 96 Md. 159, 53 Atl. 944. Exceptions had been filed to the auditor's accounts which distributed the assets of the Charles A. Vogeler Company, and the court passed an order disposing of the various questions raised, which was divided into twelve paragraphs. Those involved in the former appeal were paragraphs 5, 6, 7, and 8. By paragraph 5 the circuit court reduced the commissions of the trustees from 8 to 6 per centum on \$238,453.41; by the sixth it reduced the commissions on \$194,847.92 from 4 to 2 per centum; by the seventh it reduced the compensation allowed Francis T. Homer from \$25,000 to \$19,484.79, being 10 per cent. on the last-named sum; and by the eighth the allowance of \$12,500 to Col. Charles Marshall was reduced to \$10,000. On the 13th of March, 1902, the appellees appealed from the allowances made in those four paragraphs, and entered into the bond sued on. The trustees took a cross-appeal from the order in so far as it made the reductions in paragraphs 5 and 6, and on the 10th of May this appellant entered an appeal from the order making the reduction of his decedent's compensation; Col. Marshall having died after the passage of the order. In this court the trustees' commissions were further reduced, 2½ per cent. being allowed on both amounts above mentioned. The allowance to Mr. Homer was further reduced from 10 to 7 per centum, and that to Col. Marshall was affirmed. The appeals were heard together, and resulted in a decree of this court reversing in part and affirming in part the order of the court below. The costs were directed to be paid out of the funds in the hands of the trustees, and the cause was remanded. The compensation allowed Mr. Homer was for services rendered by him, especially in connection with a sale to a syndicate in London of the business, good will, trade-marks, etc., of the Vogeler Company; the trustees having been previously authorized by the court to employ a member of the Baltimore bar to go to Europe for the benefit of the estate. They were authorized to expend a sum not exceeding \$1,500 for his expenses, and to pay him such fee as may seem right and reasonable, subject to the approval of the court. Col. Marshall filed a petition setting out at length the

services rendered by him to the trustees, and asked for an allowance of proper compensation.

After the disposition of that case by this court, this suit was brought on the appeal bond. The theory of the appellant is that, by reason of the appellees staying the order by their appeal and bond, he has sustained damages which are to be measured by interest on the \$10,000 for the time he and his decedent were deprived of the use of it. The defendants filed five pleas, and the plaintiff demurred to four of them and replied to the fifth. The defendants demurred to the replication, and the court overruled all the demurrers, and judgment was entered for the defendants for costs. We will not discuss the several demurrers separately, but will give what we deem sufficient reasons for affirming the judgment.

Although the order of court appealed from directed that there be allowed and paid to Col. Marshall the sum of \$10,000, it must be remembered that it was "as fees or compensation for professional services rendered by or through him to" the trustees. It was in reality determining what sum the trustees should be allowed to pay him out of the trust funds. It may be that trustees who employ counsel should pay him for his services more than the court would be justified in allowing out of the fund, as they may employ him to do what they should do themselves, and what they are paid for doing by the commissions allowed them; but when it is proper for the trustee to employ counsel the law allows him to do so, and, inasmuch as it is for the benefit of the estate, the trustee is permitted to compensate the counsel out of the funds in his hands. The allowance is, in theory, if not actually, made to the trustee to compensate him for an expense which he is authorized to incur. In *Davis v. Gemmell*, 73 Md. 565, 21 Atl. 722, Judge Miller said, in a separate opinion filed by him, in speaking of counsel fees: "The claims for these allowances are not made by petitions filed by their client, according to the usual practice, but by petitions filed by themselves in their own names; and it is only by treating them as bona fide assignees of their proportional parts of the judgment, as specified in the contracts for their contingent fees, that relief can be granted them." That was the theory upon which those allowances were made, as will be further seen by reference to *McGraw v. Canton*, 74 Md. 558, 22 Atl. 132, and *Chew v. Perkins*, 81 Md. xvi, 31 Atl. 507. "When compensation is allowed out of a common fund for expenses incurred and services rendered on behalf of the common interest, it is upon the principle of representation or agency." *Miller's Eq. Proc.* 665. So, although a practice has grown up in this state of attorneys filing petitions in their own names for compensation for services rendered trustees, strictly speaking, such allow-

ances are made to the trustees, and they are given credit for so much of the trust funds as they are authorized to pay counsel who have rendered the services. Ordinarily the attorney does not have a claim against the fund, but against the trustee employing him, and the trustee is reimbursed for what he has paid or is to pay, if sanctioned or authorized by the court. When, then, the appellees excepted to the audit, they objected to the allowance to the trustees in those four paragraphs; and, while it is true that Mr. Homer and Col. Marshall were interested in the result, they could only make their claims through the trustees. No such question was raised, but, if it had been, it is not clear that the appeal of the administrator of Col. Marshall could have been entertained in the former case. It was not a controversy between him and the trustees, but between the appellees and the trustees, as to whether they should be allowed to pay Col. Marshall \$10,000, or more, for his services to them. The appeal of these appellees was docketed in this court against the trustees, and was there decided, and there was no case in their name against the administrator of Col. Marshall. We mention that to show how it was regarded, not only under the practice of this court, but by the counsel who took part in the argument, as it was not suggested that there should be a case docketed against this appellant, and the decree was entered in the case against the trustees.

The case as presented by the appeal of those who are now appellees was against the trustees, disputing the four allowances to them as made by those paragraphs of the order appealed from. The trustees' commissions and the compensation to Mr. Homer were materially reduced, and the only item they failed in was the fee allowed Col. Marshall. There were 664 claims distributed to in the audit, all of which profited by the exceptions of these four creditors to the extent they succeeded in reducing the allowances; and yet, according to the theory of the appellant, these four creditors are to be mulcted in damages for an amount considerably in excess of any sum they could possibly get from the reduction made by this court, because they did not succeed in reducing this item. To establish a precedent of that kind might deter creditors from objecting to what they believe to be excessive allowances to trustees or others, to an extent that would seriously affect the proper administration of insolvent estates, and cannot be sanctioned by this court. This estate was administered at enormous and unusual costs and expenses, and, although we do not mean to criticize the trustees, as the character of the assets were such as required the expenditure of much more than usual, the audits show that the trustees were charged with over a half million dollars, but less than half of that amount was distributed to creditors, owing to the large amounts nec-

essarily expended in conducting the business and administering the estate. By the audit the trustees were allowed nearly \$30,000 commissions, and Messrs. Homer and Marshall were allowed \$37,500 fees, besides some fees and expenses previously paid them; and, although they were reduced by the circuit court of Baltimore City, the commissions and fees for counsel allowed the trustees still amounted to over \$50,000, notwithstanding the creditors were only getting 55 per cent. of their claims. The creditors who prosecuted the appeal cannot, therefore, be said to have done so without any cause, and the result in this court showed that it thought they had sufficient grounds to complain against several of the items excepted to. Although the amount allowed for Col. Marshall's fee was approved of and affirmed, its payment out of the trust fund is upon the theory that his services were for the benefit of the whole estate. When, therefore, these four were acting for the benefit of all creditors, if the appellant is entitled to damages, to be measured by interest on the sum allowed his decedent, would it not be simply applying the same principle to them that enables the appellant to be paid out of the trust fund, to allow out of that fund any such damages as they should pay? One of the conditions of their bond was to pay, "in case the said parts of said order shall be affirmed, as well all damages and costs decreed by the said circuit court of Baltimore City, as all damages and costs that may be awarded by the Court of Appeals, to be paid by the said appellants." If, then, the appellant was entitled to such damages on the affirmation of the order, in so far as it affected his claim, he ought to have applied to this court to allow it out of the fund.

It must be remembered that the claim of Col. Marshall was not against the firm of the Charles A. Vogeler Company, but against the trustees, for services rendered to them in the settlement of the estate of the firm. The court below did not provide for the payment of interest on the sum allowed, and this court did not do so, but, on the contrary, after fully considering the evidence and all circumstances connected with it, affirmed the action of the lower court, which allowed \$10,000 in addition to \$1,250 already paid. If it had thought it should be increased by the equivalent of interest, and its attention had been brought to that, it could have so ordered. Although the statute now provides for judgments being so entered as to bear interest, and an order ratifying and confirming an audit is a judgment of the court, there are some early cases in this state, the principles of which could still be applied to a claim such as this. In *Contee v. Findley*, 1 Har. & J. 331, the court said: "It was a mistaken idea that interest was always given by this court as a matter of course. It is in their discretion, and they will allow interest, in the nature of damages, in such cases

as they think it should be allowed." And it did allow interest as additional damages. In *Butcher v. Norwood*, 1 Har. & J. 485, which was a suit on an appeal bond, the court said: "If the Court of Appeals had been applied to for that purpose, they would have assessed additional damages for the interest which had accrued from the time of the recovery of the judgment in the county court to the day when they affirmed the judgment on the appeal from the general court. But it appears that the judgment of the general court was affirmed, with costs only. Nonpayment of this judgment is a breach of the condition of the appeal bond, and is only covered by the penalty. The court are of opinion that the plaintiff in this case can only recover in this action interest from the day when the Court of Appeals affirmed the judgment of the general court." In *Hammond v. Hammond*, 2 Bland, 371, the chancellor, after saying that, where a debt is liquidated by an auditor's statement confirmed, the whole carries interest from the date to which such confirmation relates, added: "And if the debtor should appeal, and the judgment below should be affirmed, here, as in England, the appellate court may, according to the express provisions and the spirit of several legislative enactments, add the interest which had accrued upon the judgment below to its aggregate amount, and direct the whole to carry interest from the time of the affirmance until paid." We see no reason why the principles announced in the above cases cannot be applied to a claim of this kind, if this court should deem such damages proper, for, as we have already said, the question was what sum should the trustees be allowed as compensation for the attorneys, and if the court had been of the opinion that they should pay the additional sum, equivalent to interest, it could have so ordered on application to it. But this appellant took a cross-appeal from the order of March 10, 1902, reducing the allowance from \$12,500 to \$10,000. Without determining whether such appeal could be properly taken by him, the fact is it was taken without objection, and the whole question was considered by this court. It is difficult to see, therefore, how the appellant could hold the appellees responsible for damages for not paying the \$10,000, when he was claiming that it was not sufficient, and that he was entitled to \$12,500. As long as his appeal was pending, he could not properly require the payment of the \$10,000, if these creditors had abandoned the appeal as to that item. He could in no way more forcibly assert his unwillingness to receive the \$10,000 as compensation than by appealing from the order reducing the amount to that sum. His appeal, as disclosed in the order filed as part of his replication, was from so much of this order "as sustained the exceptions filed in the auditor's account allowing a fee of \$12,500 to Charles Marshall for professional ser-

vices, and allowed to him in lieu thereof the sum of \$10,000." It is nowhere suggested that he was willing to accept the \$10,000, but, having appealed within the time allowed by law from that order, the presumption was that he was not; and having prosecuted his appeal to the conclusion of the case, which was then decided against him, it would present a peculiar condition of affairs to hold this bond responsible for damages because the appellant did not receive the \$10,000 under an order of court which he was himself refusing to accept. If the views of the appellant had been adopted on his appeal, the sum of \$12,500 would have been allowed, and it could hardly be contended that the bond would then have been liable for damages because of the appeal, to be measured by interest on the \$10,000. There certainly could have been no recovery of damages from the date of his appeal, and there is no suggestion in the pleadings that prior to that time he was willing to accept the \$10,000 in full of the compensation to be allowed his decedent.

So, without further reference to the several pleas, or to whether the terms of this bond—"in case the said parts of said order shall be affirmed"—are broad enough to authorize the appellant to sue alone, under the circumstances we have stated, we are of the opinion that the appellant is not entitled to recover, and the judgment will be affirmed. Judgment affirmed, the appellant to pay the costs.

(25 R. I. 243)

HEINEMANN et al. v. DE WOLF et al.

(Supreme Court of Rhode Island. June 5, 1903.)

WILLS—CONSTRUCTION—POWER OF APPOINTMENT—EXERCISE.

1. Testatrix's father, by his will, provided that if either of his daughters should die, leaving no children or issue of a deceased child, that portion which by his will would go to such daughter's children, or issue of her child, if living, should go to her sisters then surviving, and the issue then living of any of her sisters then deceased, share and share alike to each sister, and the issue of a deceased sister taking its parent's share, to them severally for their own use forever. By another clause he declared that if either of his daughters should die, leaving children her surviving, or leaving a child and issue of a deceased child, such daughter was empowered to divide into such shares or portions the whole or any part of testator's estate which by his will and former codicil would go to her children, and to appoint the same to and among such children in such proportions as she should deem fit. *Held*, that such latter provision related only to property devised to testatrix's children, and did not include a portion of the share of a deceased sister dying without children, which passed to testatrix in fee under the first provision of the will.

2. Testatrix, under one provision of her father's will, acquired the fee in a portion of the share of her deceased sister who died without children; and under another provision of such will testatrix was empowered to appoint by will among her children such portion of the father's estate, or any part thereof which by his will

was bequeathed to such children. Testatrix's will provided that, for the purpose of executing the power under her father's will, she devised the estate which she was authorized by such will to appoint, to her children living at her death, etc., in equal shares, and devised the residue of her estate to her husband. *Held*, that the exercise of the power of appointment was limited to the property bequeathed to testatrix's children by her father's will, and did not include testatrix's interest in the share of the deceased sister, which on testatrix's death passed to her husband, as her residuary legatee.

Action by Emily M. Heinemann and others against James F. De Wolf and others for the construction of a will. Judgment for complainants.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

James Tillinghast, for complainants. William R. Tillinghast and Norris & Hoffman, for respondents.

TILLINGHAST, J. The real estate described in this bill of complaint having been sold by the commissioner who was appointed for that purpose, the same is now before the court for the purpose of determining as to the ownership of one-twelfth part of the proceeds of the sale, in accordance with a decree heretofore entered in the case. This one-twelfth part is claimed by the respondent James De Wolf Perry, to whom, after the death of Mrs. Perry, her husband, Raymond H. Perry, by deed dated September 13, 1900, conveyed to his brother, said James De Wolf Perry, "all his interest in the estate of his late wife, Ellen M. Perry, deceased, under and by virtue of her will, or otherwise, whether real or personal, and of whatever kind and nature," in trust for certain purposes mentioned in said deed. And he, said James De Wolf Perry, claims that said one-twelfth passed to Raymond H. Perry, under the residuary clause of Mrs. Perry's will, and now belongs to him by virtue of said conveyance. This one-twelfth part of the proceeds of the sale of said real estate is also claimed by the Fidelity Insurance, Trust & Safe Deposit Company, of the city of Philadelphia, as trustee for the children of Mrs. Perry; the contention in their behalf being that it did not pass under the residuary clause of Mrs. Perry's will, and hence was not included in said conveyance. The title to this one-twelfth part of said proceeds therefore depends upon the construction which shall be put upon the fourth clause of the will of said Ellen M. Perry. And the specific question raised may be stated thus: Does the fourth paragraph of the will of Ellen M. Perry include and dispose of the one-twelfth interest of the real estate of her father, Charles H. Dabney, of which she became seised in fee simple on the death of her sister Frances Elizabeth Rhett without issue?

Charles H. Dabney died December 15, 1879, leaving a last will and testament, which was duly admitted to probate in Philadelphia, Pa., on August 6, 1880, and was also filed and

recorded in Bristol, R. I., on March 10, 1900. By said will he left the bulk of his estate in trust for the benefit of his wife, Ellen Maria Dabney, for life, and after her in trust for the benefit of his four daughters, namely, Ellen Maria De Wolf, wife of James F. De Wolf, Jr., of Bristol, and who, after the death of said James, married Raymond H. Perry; Emily M. Heinemann; Frances Elizabeth Dabney, who afterwards married Julius Rhett; and Mary F. Payson.

So far as the question at issue is concerned, the material parts of Mr. Dabney's will are contained in the first and second codicils thereto, which read as follows:

(1) "If either of my daughters shall die leaving no children or issue of a deceased child, then and in every such case it is my will that the portion which by said will would go to such daughter's children or issue of her child, if living, shall go to her sisters then surviving, and the issue then living of any of her sisters then deceased, share and share alike, to each sister, and the issue of a deceased sister taking its parent's share; to them severally for their own use forever.

(2) "It is my will and I order and direct that if either of my daughters shall die, leaving children her surviving, or leaving a child and issue of a deceased child, her surviving, such daughter is empowered hereby to divide into such shares or portions, the whole or any part of my estate, which by said will and former codicil would go to her children, and to give, grant, devise, bequeath or appoint the same to and among such children and issue or any of them in such proportion, ratio or shares, equal or unequal, as she shall deem fit."

Mrs. Dabney died a number of years ago. Mrs. Rhett died without issue on January 2, 1898, whereby the one-fourth of the estate held in trust for her under her father's will vested in her three surviving sisters, namely, Mrs. Perry, Mrs. Heinemann, and Mrs. Payson, one-third in each (that is, one-twelfth of the whole estate), in fee simple.

Mrs. Perry (formerly Mrs. De Wolf) died May 28, 1899, leaving, surviving her, her second husband, Raymond H. Perry, and three children by her first husband, and leaving a will dated July 20, 1898, which was duly admitted to probate. The fourth paragraph of this will, in so far as it is material to the question raised, reads as follows:

"For the purpose of executing the power which is vested in me under the will and codicil of my father, Charles H. Dabney, I give, devise and bequeath the estate which I am authorized by said will and codicil to appoint, to my children who may be living at the time of my death and the issue of any of my children who then may be deceased, such issue taking the share which their parent would have taken if living, in equal shares and portions, but it is my will that the estate thus appointed shall be held by the said Fidelity Insurance, Trust & Safe De-

posit Company, of the city of Philadelphia—in trust,” etc.

On the part of said trust company, representing the children of Mrs. Ellen M. Perry, it is contended that by the fourth clause of her will she intended to pass all her interest in said estate to them, and not leave it to pass to her husband, as a part of her general residuary estate. And it is argued that the language of said clause appropriately expresses this intention, and is apt and sufficient to include said one-twelfth of the estate. This contention is based mainly upon the claim that Mrs. Perry took this one-twelfth part under the first codicil of her father's will, and by the second codicil was given power to dispose thereof by appointment among her children or issue, only. We are unable to assent to this contention. Under the first codicil of Mr. Dabney's will, the share of any daughter dying without issue passed to her sisters then surviving, and the issue of any deceased sister equally—the issue of a deceased sister taking its parent's share—“to them severally for their own use forever.” Upon the death of Mrs. Rhett, therefore, one-fourth of her father's estate was discharged of the trust created by his will, and vested absolutely in the three surviving daughters, namely, Mrs. Heinemann, Mrs. Payson, and Mrs. Perry; each taking one-third of the one-fourth, or one-twelfth of the whole. And this part of said estate being vested in Mrs. Perry in fee simple, of course she could dispose of it by will or otherwise, as she saw fit. As showing that the one-twelfth in question does not belong to the children of Mrs. Perry, it is to be observed that the property covered by the first codicil of Mr. Dabney's will was not to go to the children of a surviving sister, but only to the children of a deceased sister. And at the time of the death of Mrs. Rhett, Mrs. Perry was a surviving, and not a deceased, sister. It is also to be observed that the power of appointment conferred by Mr. Dabney under the second codicil of his will is limited to such portions of his estate as would pass under the first codicil to the children of a deceased daughter who should survive her. Upon the death of Mrs. Rhett without issue, therefore, it would seem to be clear that her surviving sisters, and not their children, were entitled to, and became the absolute owners of, the one-fourth part of the estate which she took under her father's will. Moreover, as pertinently argued by counsel for Mr. James De Wolf Perry, “If Mr. Dabney intended that the power given by his second codicil should in any way limit the absolute estate which might vest in Mrs. Perry, then the limitation was void as being repugnant to the absolute gift. But the clearly expressed intention of Mr. Dabney was to empower his daughters to appoint the shares their children should take in that part of his estate which went to such children under his will, leaving his daughters free to do what they wished with their own estate.”

It appearing, then, that the interest in question passed to Mrs. Perry absolutely on the death of her sister, Mrs. Rhett, we come now to consider the question hereinbefore suggested, namely, whether she disposed of said interest by the fourth clause of her will. We think this question must be answered in the negative. In this clause the testatrix uses the expression, “the estate which I am authorized by said will and codicil to appoint.” She thereby clearly restricted herself to the power of appointment contained in her father's will. The language used plainly shows that this was the only thing she had in mind; that she was not attempting to dispose of her own estate, but only of that which was covered by the power. And to hold that anything outside of the exercise of the power was intended to be accomplished by said clause would be to force the language used beyond its natural meaning. The term “appoint,” particularly, shows that the testatrix did not intend to dispose of her own property, as this term is never used to convey one's absolute estate. The use of the word “power” also shows that she did not intend to include her own estate held by her in fee, as a power, when given by will, contemplates not an estate in one's self, but simply the authority to give title thereto. And in the absence of anything to show an intention to the contrary, it is to be presumed that the testatrix used the words referred to in their strict legal sense and meaning. *Chapin v. Hill*, 1 R. I. 446; *Bailey v. Brown*, 19 R. I. 669, 36 Atl. 581. We not only fail to find anything in Mrs. Perry's will to indicate that the technical words referred to were not used in their strict legal sense, but, on the contrary, the language used by her in the fifth paragraph, in which she refers to the fourth paragraph as disposing of that estate “over which I have a power of appointment under the will of my father,” shows that she well understood and clearly appreciated the distinction between her own property and that over which she had and was exercising the power of appointment. In this connection it is pertinent to observe that when she executed her will, on July 20, 1898, her sister Mrs. Rhett had been dead for more than six months. And it must be presumed that she knew and well understood at that time that she had an absolute estate in one-twelfth of the property included in the trust created by her father's will. And the fact that she failed to use any language in said fourth clause which would be apt and pertinent to convey any estate excepting that to which she specifically refers shows that she did not intend to include any of her own estate therein. And of course the law is “that by the simple exercise of a power the donee will pass only the interest of the person creating it, and not any interest or franchise of his own.” 1 Sug. on Powers, 293. For “a power of appointment,” as well defined by Jessel, M. R., in *Freame v. Clement*, 18 L. R. (Ch.

Div.) 504, "is a power of disposition given to a person over property not his own, by some one who directs the mode in which that power shall be exercised by a particular instrument." And where the donee of a power makes a disposition of the subject-matter thereof in express execution of the power, as in the case under the clause now under consideration, such disposition, in the absence of anything in the context showing a contrary intention, should be restricted to an execution of the power so as not to affect the donee's individual estate. 22 Am. & Eng. Ency. L. (2d Ed.) 1115; *Moore v. Humpton*, 1 Whart. 433; *Beardsley v. Hotchkiss*, 96 N. Y. 212.

We think the intention of the testatrix, by the fourth clause of her will, to exercise the power of appointment only, and not to dispose of any of her own absolute estate, is so apparent and clear as not to be fairly susceptible of any other interpretation. And hence, under the well-settled rule in relation to the execution of powers (see *Blagge v. Miles*, 1 Story, 426, Fed. Cas. No. 1,479; *Cotting v. De Sartiges*, 17 R. I. 668, 24 Atl. 530, 16 L. R. A. 367; *Mason v. Wheeler*, 19 R. I. 21, 31 Atl. 428, 61 Am. St. Rep. 734), the interest in question did not pass to said trust company, but did pass to her husband under the residuary clause of her will. We therefore decide that said one-twelfth interest now belongs to the respondent James De Wolf Perry, by virtue of the deed of conveyance to him from Raymond H. Perry, dated September 13, 1900, hereinbefore referred to.

(25 R. I. 189)

TOWN OF BRISTOL v. BRISTOL & WARREN WATERWORKS.

(Supreme Court of Rhode Island. May 12, 1903.)

EQUITY—AMENDMENT OF BILL—SUPPLEMENTAL BILL—CONSENT DECREE—TOWNS—PURCHASE OF WATERWORKS—FORFEITURE OF FRANCHISE—EVIDENCE OF VALUE—CARE OF PROPERTY—DUTY OF VENDOR—HARMLESS ERROR.

1. An amendment or a supplemental bill containing assertions and prayers for relief contradictory to and inconsistent with those of the original bills is not permissible, especially after the prayer of the bill has been granted, and a reference ordered by a consent decree to determine what property can be conveyed to complainant, and the value thereof.

2. A consent decree cannot be set aside except by consent.

3. Where a town exercises its option to buy the plant of a water company, by voting to purchase, the company's franchise passes to the town, and the company cannot by any act thereafter forfeit the franchise, so as to deprive itself of the right to compensation therefor as part of the plant.

4. Any error in interpreting an answer as an acceptance of the offer of the bill is harmless, defendant having accepted the offer by signing a consent decree.

5. Where a town elects to purchase the plant of a water company, and brings suit for specific

performance, the master, to whom the matter of value is referred, will hear evidence as to value, though discovered after the election.

6. Though, where a town exercises its option to buy the plant of a water company by vote to purchase, there is an absolute contract, from which it cannot relieve itself, yet the property to be delivered and the price to be paid being undetermined, and these questions, by consent, being referred to a master, the company is required to take such care of the property, pending the determination of such questions, as a prudent man would take of his own, but not to provide against deterioration by time and natural wear, or to make improvements or additions, without some understanding with the town or direction of the court. So it is the company's duty to repair on discovery that, by leakage in the reservoir dam, salt water is mixing with the water stored; but it is not its duty to establish filters which had never existed, or to acquire the right to fence out cattle from access to the water sources.

Suit by the town of Bristol against the Bristol & Warren Waterworks. Heard on motions of complainant. Motions denied.

See 49 Atl. 974.

Argued before STINESS, C. J., and TILTINGHAST and DOUGLAS, JJ.

Francis Colwell and Albert A. Baker, for complainant. James M. Ripley, Edwards & Angell, and Henry W. Hayes, for respondents.

DOUGLAS, J. This case, which has been referred to a master for the determination of certain questions, is now sought to be brought into court upon three motions made by the complainant. It asks, first, to be allowed to amend its bill; secondly, to reargue the case either before or after amendment; thirdly, to stay proceedings before the master. To understand the application of these motions, it is necessary to glance at the travel of the case hitherto.

The bill was filed August 17, 1895, and alleges, amongst other things, that the town of Bristol on May 4, 1895, voted to purchase the defendant's waterworks system, and other property rights and appurtenances connected, used, or belonging therewith, and complained that the defendant refused to sell, and prayed that it might be compelled to do so, and that the court would ascertain by a master what parts of the waterworks owned by the defendant it could convey to the town, and the value of the same. The defendant filed an answer October 15, 1895, in which it advances certain matters by way of demurrer, and after full argument the demurrer was overruled March 28, 1896 (19 R. I. 414, 34 Atl. 359, 32 L. R. A. 740), and on April 27, 1896, a decree was entered in accordance with the opinion of the court as follows: "And now, the demurrer of the Bristol & Warren Waterworks to the bill of complaint in the above-entitled cause having been overruled, upon motion of the complainant it is ordered that said cause be referred to Thomas C. Greene, Esq., one of the standing masters in chancery of this court, to inquire and state to the court how

¶ 2. See Equity, vol. 19, Cent. Dig. § 1039.

much and what part of said waterworks and waterworks system of said town of Bristol, in said bill described, the defendant the said Bristol & Warren Waterworks can convey to the complainant for use in connection with a system of waterworks for said town of Bristol, and how much and what part of said waterworks and waterworks system it is incumbent upon the complainant to purchase and pay for in accordance with the terms of contract between said complainant and George H. Norman, in said bill referred to, and also what is a fair and reasonable price to be paid by the complainant for the same," etc., etc. This decree was subscribed by counsel as follows: "We assent to the entry of the foregoing order. Comstock & Gardner, Plaintiff's Solicitor. B. M. Bosworth, of Counsel for Defendants."

It is to be observed that this decree, by necessary implication, awarded to the complainant the relief it prayed for, and afforded the only means available for enforcing the right to purchase which it claimed. The court could hardly have done this without the consent of the defendant, for there were material statements in the bill which were traversed by the answer. Among these were the allegation that the water supplied by the defendant was inadequate in amount and inferior in quality to the supply which the complainant was entitled to under the contract, and the statement that the defendant could not convey a complete system of waterworks to the town of Bristol. By consenting to this decree both parties waived these issues as a ground for relief, and referred them to the master, as involved in the duty of ascertaining what could be bought, and how much ought to be paid for it. A subsequent order, entered by consent May 23, 1896, substituted the name of David S. Baker, Esq., as master, for the name of Thomas C. Greene, who declined to serve, but did not change the decree otherwise.

It appears that the defendant repented its hasty assent to these decrees, for on October 31, 1896, it filed a motion as follows: "And now in the above-entitled cause comes the respondent, and moves that the interlocutory order entered April 27, 1896, referring the cause to a master, be revoked, and that the said cause be set down for a hearing on bill and answer." This motion was opposed by the complainant, and its right to go to a master to determine the terms of the purchase was reaffirmed. The rescript, filed November 19, 1896, is as follows: "Per Curiam. The decree which the respondents by their motion seek to have revoked, having been entered by consent, cannot be set aside or revoked except by consent. 2 Dan. Ch. Pr. (6th Am. Ed.) *973, 1459, and notes; 5 Ency. Pl. & Pr. 960. However, it appears that the motion is also to set down the cause for hearing on bill and answer. By stipulation of the parties the bill was amended so as to incorporate the letter of Mr. Bosworth, and

we find no denial of this letter, or any statement of circumstances which can change the construction necessarily given to it on the hearing of the demurrer. Whatever reason may have moved the respondents to refuse to appoint an arbitrator, or whatever expectation of procedure they may have had in mind after the demurrer had been disposed of, the letter was still a refusal which entitled the complainant to come into equity, and thereby their right to proceed in equity attached. Motion denied."

The case then went to the master, and his report was filed April 7, 1900, and a supplemental report was filed June 29, 1901. Exceptions taken by both parties were heard, and the decision of the court was announced July 27, 1901 (23 R. I. 274, 49 Atl. 974), and a decree was entered January 21, 1902, in accordance with that opinion, recommitting the report to the master. The court approved the master's finding that the water furnished was of reasonably good quality and ample in quantity, and overruled his finding that the respondent could not convey a complete system of waterworks to the complainant. It also held that the exclusive right for 50 years under which the respondent operated its works in the town of Bristol at the time the complainant elected to purchase was a part of the property to be bought, and must be considered in fixing the value of the works. The decree directed "that this cause be referred and recommitting to David S. Baker, as special master, to set off to the complainant such portion of the reservoirs or water rights of the respondent as may be necessary to secure to the complainant a supply of water ample for its present and future needs; to determine what other property of the respondent should be conveyed to the complainant as a part of a system of waterworks for the complainant; to estimate the value of the reservoirs or water rights and the property thus to be conveyed, and of the rights, privileges, and franchises used and enjoyed by the respondent in supplying the complainant town with water; and to make statement thereof to the court," etc. The decree is a reaffirmation of the former consent decree, expressed in different language, with more particular directions to the master, but in no way changing the duties imposed upon him. It directs him, in effect, to make another attempt to ascertain the property to be conveyed, and the price to be paid for it. It now appears that after the entry of this decree neither party took any further steps before the master or the court until January 30, 1903, when the complainant filed the motions under consideration. They were all simultaneously filed, but, as the view which we take of the petition for leave to file an amendment or supplemental bill is decisive of all the applications, we will consider that petition first. It asks permission to allege that the water now furnished by the defendant (1) is unsuitable for drink-

ing, culinary, and domestic uses; (2) for manufacturing uses; (3) that the supply is insufficient in quality and pressure; (4) that the pipes are old and defective, and so arranged as to give the complainant only a surplus after the town of Warren is supplied; (5) that the works have depreciated, since the case was before the master, by neglect of the defendant; (6) that to remedy these defects it is necessary to clean the reservoirs, fence them in, establish a filtration plant, reconstruct the dam at Kickemult reservoir, reconstruct a new pumping station, with its appurtenances, etc., and that these deficiencies and defects should be considered in estimating the value of the property to be conveyed; and (8) to pray that the court will declare that the defendant has failed to furnish sufficient water, in quantity and quality, and hence will eliminate the defendant's exclusive franchise, and relieve the complainant from its offer to purchase any part of said waterworks; that, because of depreciation in value since the filing of the bill, the complainant may be relieved of its offer to purchase any part less than the whole of a complete system of waterworks; that the present value of such completed system may be determined; that the findings of the master may be reversed and adjusted to the allegations of this amendment.

A comparison of the matter thus presented with the original bill is sufficient to show that it is not admissible either as an amendment, or as a supplementary bill, or as a bill in the nature of a bill of review. This petition does not offer the amendment in substitution for the allegations and prayer of the bill, but as an addition thereto; and the bill, if amended as proposed, would contain contradictory assertions and prayers for relief to such an extent as to be unintelligible. As is aptly said in the defendant's brief: "If such a petition were allowed, we should have the singular situation of a complainant in one part of his bill making an offer for certain property, and praying that the defendant may be compelled to convey it to him, and in another part of the same bill asking to be relieved of this same offer. For an original bill and amended bill and a supplemental bill are in legal contemplation only one bill. *Cunningham v. Rogers*, 14 Ala. 147." The inconsistency is not confined to the main contentions of the bill. It is conspicuous in its minor details. Thus the bill alleges that the water supply is insufficient in quality and amount, and the complainant has no use for any part of the system except the standpipe and the pipes and appurtenances in the town of Bristol, and asks that the defendant be compelled to sell these. The amendment alleges that the water supply, always bad, has become worse since the filing of the bill; that the complainant has no use for the pipes, etc., without water supply, and asks leave to withdraw its offer to buy these; that is, because the water is bad, the defendant ought

to be compelled to sell the pipe system by itself, and the complainant is willing to purchase that part of the waterworks; and also, because the water is bad, the complainant ought not to be compelled to buy the pipes without the water supply, and asks to be excused from doing so. The amendment asks that the complainant be excused from buying, or, if it must buy, that both the forfeiture and purchase clauses of the contract be enforced together; one of these clauses by its terms taking the whole franchise, the other taking away only its exclusive character. Such an amendment, after the prayer of the bill has been granted, and proceedings have been ordered by a consent decree, and are going on to carry out the contract, is anomalous. Whether in the form of an amendment or of a supplemental bill, such a change of position is not permitted by the rules of chancery practice. It is not the office of an amendment or of a supplemental bill to set up new rights or a new case. New matters may be thus added, like changes of title, etc., but not new causes of action. The principle has been repeatedly asserted by this court. *National Bank of Commerce v. Smith*, 17 R. I. 244, 21 Atl. 959; *Smith Granite Co. v. Newell & Co.*, 22 R. I. 302, 47 Atl. 596; *Haskins v. Gleazen* (Eq. 5720, March 23, 1903) 55 Atl. 639. In *Straughan v. Hallwood*, 30 W. Va. 274, 4 S. E. 394, 8 Am. St. Rep. 29, it is held that a party who has no cause of action at the time of filing his original bill cannot maintain his suit by filing a supplemental bill stating facts subsequently arising out of the transaction, the subject of the original bill. The court say (page 294, 30 W. Va., and page 405, 4 N. E., 8 Am. St. Rep. 29): "There is another objection to this supplemental bill, so fatal that the court was bound to dismiss it at the hearing. The supplemental bill being but an addition to the bill, and, as asked for on the very face of the bill, to be read with it, of course no decree could be rendered upon it if it was based upon grounds and sought a redress utterly inconsistent with the original bill." The defendant cites, besides this case, numerous authorities to the same effect, among which are *Dan. Ch. 1515*, notes; *Leonard v. Cook* (N. J. Sup.) 21 Atl. 47; *Gillett v. Hall*, 13 Conn. 426, 434; *New York Security Co. v. Lincoln St. Ry. Co.* (C. C.) 74 Fed. 67; *Milner v. Milner*, 2 Edw. Ch. 114; *Barker v. Prizer* (Ind. Sup.) 48 N. E. 4, 5; *Clark v. Hull*, 31 Miss. 520; *Heffron v. Knickerbocker*, 57 Ill. App. 339.

So much of the matter of amendment as would be appropriate in a bill in the nature of a bill of review is inadmissible, because it seeks to set aside a consent decree. In *Hazard v. Hidden*, 14 R. I. 356, a motion to amend the bill was made, as the present one is, while the case was pending before a master under a decree entered by consent of the parties, and the case is decisive of that part of the present petition. The court must meet

the complainant's attempt to set aside the decree with the same answer which it gave the defendant in the rescript of November 19, 1896, quoted above.

The petition for reargument and rehearing is based upon the claim of newly discovered evidence of the quality and quantity of the water, and upon the allegation that the court erred in finding that the offer of the complainant to purchase any part or parts of said waterworks was accepted by the answer of the defendant, and that the court erred further in holding that the defendant's exclusive franchise should be considered in estimating the price to be paid for the waterworks, because the defendant has forfeited his exclusive franchise by not furnishing water of good quality. The evidence submitted as newly discovered is entirely cumulative, except such as relates to the conduct of the defendant since the beginning of the suit; and, as the complainant elected to buy the waterworks before the suit commenced, the equitable ownership of the franchise passed to the complainant, and could not be forfeited by any subsequent act or neglect of the defendant. The franchise consisted of the right to supply water to the town of Bristol and its inhabitants for a certain term of years without competition. This right the defendant had at the time of the vote to purchase. Then it passed to the town irrevocably. The defendant now can only supply water in Bristol until the town takes possession of its works. The value of the franchise is measured by the profits which can be made in the business, less interest on the value of the plant. Since the vote of the town, these profits, in equity, became the property of the town, and the defendant on final settlement must account to the town for them. It is running the works now not on its own account, but as trustee of the town. It no longer owns the franchise, and cannot forfeit it. There is nothing in the evidence relating to the condition of the water at the time the bill was filed which leads us to believe that the voters of the town were deceived as to the quality of the water they were using every day when they voted to purchase. The same watershed and the same rainfall supply the water now, and when the town comes into possession it can increase the capacity of the reservoirs at its pleasure. The court interpreted the answer of the defendant as accepting the offer of the bill to purchase the whole or any available portion of a complete system of waterworks. If this was error, it was harmless, for two reasons: The defendant did accept this offer by signing the consent decree, and, as we have found upon the evidence submitted to the master that the defendant can deliver to the complainant a complete system of waterworks, it makes little difference whether we call the decision of the complainant to take a part, and the assent of the defendant thereto, a claim and an admission of right,

or an offer and an acceptance. This petition must therefore be dismissed. The third petition, for a stay of proceedings before the master, depends upon the granting of the other two, and must likewise be dismissed.

In effect, the three petitions together amount to a request for leave to discontinue the present bill, and bring a new one to declare that the defendant has forfeited its exclusive franchise. If the application came in that form, only two reasons could be urged in favor of it:

First. That the property when the complainant elected to purchase it in 1895 was worth less than it appeared to be. But the whole question of values is still open before the master, and he will hear any evidence on that subject, whether known to the parties then, or discovered since. *Pomeroy, Con. Spec. Perf. § 456.*

Secondly. That the neglect of the respondent to keep the waterworks in good condition ought to excuse the complainant from purchasing any part of the system. It has been held in Massachusetts that a town cannot rescind its vote to purchase a waterworks, but that the vote completed a contract from which the town could not withdraw. *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482, 18 N. E. 420; *Rockport Water Co. v. Rockport*, 161 Mass. 279, 37 N. E. 168. So where one has contracted to sell land, and the vendee has announced his option to buy, the vendor and his heirs hold the legal title in trust for the vendee. *Newport Waterworks v. Sisson*, 18 R. I. 411, 413, 28 Atl. 336. In the ordinary case of a contract of sale, where the vendor is ready to convey, and the delivery is only postponed until the vendee shall pay the price, so much is the vendee considered, in contemplation of equity, as actually seised of the estate, that he must bear any loss which may happen to the estate between the agreement and the conveyance, and he will be entitled to any benefit which may accrue to it in the interval. And the reason assigned is that by the contract he is the owner of the premises, to every intent and purpose, in equity. *Robb v. Mann*, 11 Pa. 300, 51 Am. Dec. 551, citing *Richter v. Sellin*, 8 Serg. & R. 440; *Sug. on Vend. c. 5, § 1*, p. 270; *Reed v. Lukens*, 44 Pa. 200, 84 Am. Dec. 425. The vendor who is prepared to deliver is not obliged to keep the property in repair, or to prevent deterioration from natural causes. *Heilriegel v. Manning*, 97 N. Y. 56, 61, 62; 2 *Warvelle on Vendors* (2d Ed.) pp. 181, 182, par. 842; *Morgan v. Scott*, 26 Pa. 51, 54. We think these principles cannot be held strictly to govern the present case. Here the contract binds to an absolute sale, but the property to be delivered is undetermined. The complainant has invoked the aid of the court to compel the defendant to convey. The defendant has admitted its obligation, and by consent both parties have referred to the master the questions preliminary to delivery of the property

and payment therefor. In these circumstances, it seems to us to be the duty of the defendant to the complainant to take such care of the property as a prudent man would take of his own, but not to provide against the deterioration caused by time and natural wear, or to make improvements or additions thereto. The principles laid down by Lord Selborne in *Phillips v. Sylvester*, 8 Ch. App. 173, 176, seem to us quite applicable. He says: "On principle, I can see no reason why a vendor who insists in continuing in possession of the land over which he has security—the contract being one which, in the view of a court of equity, has changed the title of the land—I see no reason why such a vendor should not be under the same obligations as those under which any other person would be, who, having security on land, insisted on the possession of the land as a further security. He, when the account comes to be taken between himself and the purchaser, will be entitled to credit for all proper expenditures for the purpose of maintaining the purchaser's property in a proper condition, as against the account of rents and profits to which he is necessarily subject. He will receive, on the other hand, the interest which by the contract he is entitled to receive. Perfect justice is done in that way." Undoubtedly, when it was found that by leakage in the dam of the lower reservoir the salt water was mixing with the water stored, it became the duty of the defendant to repair the leak, as the evidence shows it did; but it is not the duty of the defendant, as vendor, to establish filters which have never existed, and to acquire the right to fence out cattle from access to the river and ponds, when the complainant elected to purchase the plant without these safeguards. So long as the reservoirs are of sufficient capacity to contain the requisite supply of water, we cannot see that it is the duty of the defendant to deepen them. The defects in the plant which may have accrued from natural decay since 1895 may as well be attributed to the negligence of the complainant in not pressing this suit as to the defendant. If either party had shown due diligence, the litigation might have been much abridged. The peculiar character of this property, charged as it is with a public trust, may be considered to impose a greater measure of care upon the vendor while it is in its possession than is usual in sales of land generally. But if special and extraordinary expenses are required to be made in the interest of the consumers, and the parties cannot agree upon the adjustment of such expenses, the court, having acquired jurisdiction of the subject-matter, may, on proper application, give directions for its preservation, and even for necessary extensions and improvements, and may direct how the same shall be paid for; but the fact that the respondent has not made such improvements without some understanding with the complainant or some di-

rection of the court on the subject is not just ground for a rescission of the contract of sale, or for adjudication that the franchise was not a part of the thing purchased.

The fifth allegation in the proposed amendment is of matter which, if true, the complainant will be entitled to bring before the court at the proper time. The first step in furtherance of the case must be to ascertain what property is to pass from the defendant to the complainant; then the value of that property at the time when the complainant voted to purchase must be ascertained; then, when the time of delivery and payment arrives, any depreciation caused by the vendor's fault or neglect may be deducted from the fixed valuation at the time of the purchase. A statement of such depreciation now is impossible, and an attempt to ascertain it would be premature.

(4 Pen. 231)

TYLER v. FIDELITY BUILDING & LOAN ASS'N.

(Superior Court of Delaware. New Castle.

March 6, 1903.)

FOREIGN ATTACHMENT—SINGLE SUIT—SEVERAL WRITS—ISSUANCE.

1. A plaintiff in a single suit by foreign attachment is entitled to issue several writs to sheriffs of different counties.

Action by Leander A. Tyler against the Fidelity Building & Loan Association. On motion to quash certain writs of foreign attachment. Motion denied.

The plaintiff filed an affidavit in New Castle county, which defendant admitted to be in proper form, alleging that the corporation defendant was indebted to him, etc. One suit was docketed. The prothonotary, under instructions of the plaintiff's counsel, issued three original writs, viz., one to the sheriff of New Castle county, one to the sheriff of Kent county, and one to the sheriff of Sussex county, on all of which writs were returned, attachments laid in the hands of certain garnishees.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

William S. Hilles, appearing specially for defendant, moved to quash the said writs of attachment for the following reasons: (1) That the said writs are issued contrary to the statutes in that behalf enabling. (2) That there are three original writs issued in said cause, contrary to the statute in that behalf. (3) That the writs of attachment issued in the said cause are not authorized by law. (4) That the prothonotary has not followed the provisions of law in issuing the writs of attachment in said cause. (5) It does not appear from the record which is the original writ issued in said cause. Rev. Code, p. 783, § 9; Id. p. 784, § 15; Id. p. 786, §§ 1-3; *Holland & Crawford v. Leslie & White*, 2 Harr.

† 1. See Garnishment, vol. 24, Cent. Dig. § 172.

306. Counsel for defendant admitted that if there had been three suits docketed, three writs could have been issued.

J. Harvey Whiteman, for plaintiff, replied that he had considered all these questions before requesting the prothonotary to issue the writs, and that he was governed in the matter entirely by section 19, art. 4, of the Constitution; that if he had docketed three suits, he was confronted with the probability of being ordered by the court to consolidate the three suits into one, to avoid costs; that we have no original writ in this state; that the only original writ in Delaware is the first writ that is issued by the court; that original writ was that which gave jurisdiction to the court; and in that as long as it was not a paper issued out of the court, it was the court's mandate, and it directed the court to do justice to the complainant's writ to come into court to answer his accuser. Plaintiff was acting upon the theory that there is but one mandate in this case,—the court's mandate to this defendant,—having served notice upon him constructively by attaching a number of his debtors, some of whom reside in New Castle county, some in Kent county, and some in Sussex county; and there was no other way out of the necessities of the case to effectuate plaintiff's remedy with the least possible expense to the defendant than to issue the writs in the way they had been issued. *Christie v. Walker*, 25 E. C. L. 263, 1 Bing. 48; *Rev. Code*, § 20, p. 785; *Dun v. Harding*, 25 E. C. L. 263, 10 Bing. 553; 3 Chitty's Practice, 250.

LORE, C. J. The question is whether it was regular to issue the three writs. Counsel for defendant concedes that in three different suits in this county process might issue to the sheriffs of New Castle county, Kent county, and Sussex county. The effect would be the same whether there were three writs issued, one to the sheriff of each county, in one suit or in three separate suits. We are only dealing with the question whether we have the right to issue these three writs in one suit. What may be done under them and what risks are taken are entirely different matters.

The motion to quash the writs of attachment is refused.

(25 R. I. 260)

SMITH v. UNION INS. CO. et al.

(Supreme Court of Rhode Island. June 15, 1903.)

FIRE INSURANCE — POLICIES — MORTGAGE CLAUSE—CONSTRUCTION—FAILURE OF MORTGAGOR'S INSURABLE INTEREST—EFFECT ON MORTGAGEE—ACTION BY MORTGAGEE.

1. A policy issued to a mortgagor and alleged owner of the property provided that the loss should be payable to the mortgagee as his interest might appear, and the insurance as to the mortgagee's interest only should not be invalidated by any act or neglect of the mortgagor

or owner of the property, nor by foreclosure, or change in title or ownership, nor by occupation for more hazardous purposes. *Held*, that the policy in effect contained two separate contracts of indemnity, one insuring the risk of the mortgagor, and the other that of the mortgagee, and the fact that the mortgagor, before issuance of the policies, conveyed the property to a sister, and she procured the issuance of the policies in his name, did not preclude the mortgagee from recovering a loss sustained to the extent of his mortgage by destruction of the premises.

2. Where a policy insured both the interest of an alleged owner of the property and a mortgagee, and such owner paid the premium on account of the mortgagee, in fulfillment of his duty so to do, the promise of the insurance company to pay a loss to the mortgagee was direct, and not collateral, so as to entitle the mortgagee to sue thereon in his own name.

Action by Daniel Smith against the Union Insurance Company and others. On demurrers to the declaration. Overruled.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Tillinghast & Murdock, for plaintiff. Van Slyck & Mumford, for defendants.

DOUGLAS, J. These cases are brought by the mortgagee of certain real estate, the buildings upon which have been destroyed by fire, to recover the amounts specified in three policies of insurance in the standard form, each containing the following clause:

"Loss or damage, if any, under this policy, shall be payable to Daniel Smith, as the mortgagee (or trustee), as interest may appear, and this insurance as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the property for purposes more hazardous than are permitted by this policy: provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

"Provided, also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of use thereof; otherwise this policy shall be null and void.

"This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this company shall have the right, on like notice, to cancel this agreement.

¶ 2. See Insurance, vol. 22, Cent. Dig. § 1565.

¹("In case of any other insurance upon the within-described property, this company shall not be liable under this policy for a greater portion of any loss or damage sustained, than the sum hereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having an insurance interest therein, whether as owner, mortgagee, or otherwise.)

"Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made under all securities held as collateral to the mortgage debt, or may at its option pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of this mortgagee (or trustee) to recover the full amount of his claim."

The plaintiff held two mortgages on the property insured to secure notes made by a former owner of this property from whom it had come to Thomas Cullam, named as the insured in the policies. Before the taking out of the policies Cullam had conveyed the estate to his sister Melinda Paradie, as the declaration alleges, "without consideration," and she took out these policies in his name.

To the declaration in each case the defendants have demurred, alleging as grounds of demurrer: (1) It appears that, at the time of the issuing of the policy in said declaration mentioned to one Thomas Cullam, said Thomas Cullam had no insurable interest in the property claimed to have been insured by said policy. (2) It appears that said policy, it not being otherwise provided by agreement indorsed thereon or added thereto, was void: (a) Because the interest of the insured was other than unconditional and sole ownership; (b) because the subject of insurance was a building or group of buildings on ground not owned by the insured in fee simple. (3) There appears no consideration for the promise alleged to have been made by the defendant to the plaintiff. (4) It does not appear what was the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering the property described in the policy of insurance in said declaration mentioned.

The first three of these demurrers are substantial; the fourth does not affect the merits of the case, but may be obviated by amendment if necessary.

The first question raised is whether the in-

terest of Thomas Cullam alone was insured; for, if so, and he had no interest, nothing was insured; or, if he had no insurable interest, it was not in the interest which it was represented to be, and so was not insured, and the policy was void from the beginning.

The defendant contends that this is the effect of the policy in question; and the plaintiff, as mere assignee of the loss accruing to the insured, can recover nothing, as an insured person who has no interest can lose nothing. His reasoning is perfectly sound if his interpretation of the contract is correct. To this effect is the quotation from Judge Story in *Carpenter v. Providence-Washington Insurance Company*, 16 Pet. 495, 10 L. Ed. 1044, as follows: "It is clear, both upon principle and authority, that an assignment of a policy by the insured only covers such interest in the premises as he may have at the time of the insurance and at the time of the loss. It is the property of the insured, and his alone, that is designed to be covered; and when he parts with his title to the property he can sustain no future loss or damage by fire, but the loss, if any, must be that of his grantee. The rights of the assignee cannot be more extensive under the policy than the rights of the assignor; and as to the grantee of the property he can take nothing by the grant of the policy, since it is not in any just or legal sense attached to the property or an incident thereto."

And to the same effect are the words of Judge Harris in *Grosvenor v. Atlantic Fire Insurance Co.*, 17 N. Y. 391. He says: "The contract was made with McCarthy, the mortgagor; but the policy provides that in case of loss such loss shall be payable to the plaintiff. What is the legal effect of this provision? Without it the plaintiff could have no claim against the defendant for indemnity. Is this provision to be regarded as an appointment of the plaintiff to receive any money which might become due from the insurers by reason of any loss sustained by the mortgagor, or has it the effect to render the policy, which would otherwise be a contract to indemnify the mortgagor against loss, a contract to indemnify the mortgagee?"

* * * It seems to me to be very clear that it was the intention of all the parties that the interest of the mortgagor, and not that of the mortgagee, should be insured. It is stated in the policy that the property insured is the property of McCarthy, and that he is the person insured. McCarthy paid the premium. He made the contract. His interest as owner, and not that of the plaintiff as mortgagee, was the subject of the insurance. The plaintiff was merely the appointee of the party insured to receive the money which might become due him from the insurers upon the contract. The provision in the policy in this respect had no more effect upon the contract itself than it would if it had been provided that the loss for which the insurers

¹ This paragraph occurs only in the policy issued by the Rochester German Insurance Company; not in the other two.

should become liable should be deposited in a specified bank to the credit of the party insured."

Under such a contract the right of the mortgagee to recover is dependent upon the inception and continuance of a valid contract of insurance between the insured and the insurer. *Sun Insurance Co. v. Greenville B. & L. Ass'n*, 58 N. J. Law, 367, 33 Atl. 962; *Bank v. Amazon Ins. Co.*, 125 Mass. 481; *Foote v. Hartford Ins. Co.*, 119 Mass. 259; *Smith v. Union Ins. Co.*, 120 Mass. 90; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391; *Carpenter v. Providence-Washington Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044; *Continental Ins. Co. v. Hulman*, 92 Ill. 145, 34 Am. Rep. 122; *Franklin Inst. for Sav. v. Cent. Mut. Fire Ins. Co.*, 119 Mass. 240.

Taking these propositions as incontestable, the defendant argues that the new form of mortgage clause contained in this policy is nothing more than an amplification of the old form of the clause, whose effect was simply to change the payee of the loss, not to insure a different interest. He notices that the new clause saves the insurance as to the mortgagee from certain causes of forfeiture which would otherwise bar the right of the insured, but he insists, notwithstanding, that the original contract is not initiated unless the party named as insured has an insurable interest to which it may attach.

We cannot read the clause in question without finding in it a much wider departure from the tenor of the old form of contract. It appears to us to contain two separate contracts of indemnity, relating to the same subject, but applying to different interests therein. Before the adoption of this form a mortgagee might insure the property pledged to secure his debt on his own account. If the debt was paid he no longer had an insurable interest, and the insurance became void. If the property was destroyed by any risk insured against, the mortgagee received his insurance money if not more than his debt, and gave no credit to the mortgagor therefor, but held his debt pro tanto for the insurer, or, if it were fully paid, assigned it to him.

Now, all the elements of such a contract appear in this new form. Taken together with the rest of the policy, the company insure first Thomas Cullam for any loss which may come to him by reason of the destruction of the property described. This contract is subject to certain conditions appropriate to the relation of owner to the insurer. So long as this relation exists and these conditions are performed, the contract with Cullam is in force. If loss occurs while it is in force it is paid, by direction of the mortgage clause, to Smith to the amount of his mortgage, and the balance, if any, to Cullam. The amount paid to Smith extinguishes his mortgage debt fully or pro tanto. All this would have taken place under the old form of clause, and when the conditions are as supposed the new parts of the clause have

no application. When Cullam parts with or loses his interest, fails to pay premiums, or violates the conditions of the policy, the new provisions become effectual. These deal with the interest of the mortgagee. "This insurance as to the interest of the mortgagee only therein shall not be invalidated by any act or neglect of the mortgagor or owner," etc., is the language which meets the new condition of affairs; and the closing paragraph conclusively shows that the subsisting agreement which springs into life when the contract with the owner dies is the familiar one of insurance of a mortgagee's interest—an indemnity for loss of the security—in which the owner has no part and from which he can claim no benefit. The contract thenceforth is between the insurer and the mortgagee only, and the relation of the original insured to the property, and his acts or neglect concerning it, are of no account. And the two contracts combined in the policy and the mortgage clause are separable and independent from the beginning. When the first fails, or if it never attaches, the second begins and proceeds subject to its own conditions and limitations.

This construction has been adopted by all the courts whose decisions on the subject have been brought to our attention. In *Hastings v. Westchester Ins. Co.*, 73 N. Y. 141, Miller, J., says: "The legal effect of the mortgage clause was that the defendant agreed that in case of loss it would pay the money directly to the mortgagees, and they were thus recognized as a distinct party in interest. It created a new contract from that time with the mortgagees, the terms of which most clearly indicate that it had no relation to the application of the condition referred to. The insurance had been to the owner, and the additional provisions which were incorporated in the policy by the mortgage clause created a distinct contract with the mortgagees. It was an independent agreement, partaking in no sense of the character of an assignment of a policy of insurance, but one in which the mortgagees were recognized as a separate party, having distinct rights, and entitled to receive the full amount of insurance money, without any regard whatever to the owner of the property." Judge Rapalle, concurring, says (page 153): "I think that the intent of this clause was that in case, by reason of any act of the mortgagors or owners, the company should have a defense against any claim on their part for a loss, the policy should, nevertheless, protect the interest of the mortgagees and operate as an independent insurance of that interest, and indemnify them against loss resulting from fire without regard to the rights of the mortgagor under the policy, and that to effectuate that intention we should hold that, as against the mortgagees, the defendant cannot set up any defense based upon any act or neglect of the mortgagors, whether committed before or after the issu-

ing of the policy, or the making of the agreement between the company and the mortgagees."

In *Hartford Fire Ins. Co. v. Olcott*, 97 Ill. 439, the court quote with approval the language of Judge Miller in *Hastings v. Westchester*, etc., and add: "If this be the effect of adding a mortgage clause like that before us after a policy is issued, we are unable to perceive any ground upon which it can be said to have a different effect if made contemporaneously with and as a part of the policy." And on page 456: "In effect there are two distinct contracts of insurance—one by the mortgagor, the other by the mortgagee—and this view gives full force to all the language, and none other will."

In *Eddy v. L. A. Corporation*, 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686, Peckham, J., says, page 322, 143 N. Y., page 309, 38 N. E., 25 L. R. A. 686: "The effect of the mortgage clause herebefore set forth is to make an entirely separate insurance of the mortgagee's interest, and he takes the same benefit from his insurance as if he had received a separate policy from the company free from the conditions imposed upon the owners." The words of the mortgage clause considered in this case were slightly different from those considered in *Hastings v. Westchester*, and neither of these clauses was exactly like the one we are concerned with, but all of them are alike in the material characteristics which affect the question before us.

The decisions of the New York court, which excused the mortgagee in case of loss from scaling his policy pro rata with other insurance held by the owner on the same property, no doubt occasioned the insertion of the paragraph on that subject contained in the form used by one of the defendants as above quoted. In *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774, 53 Am. St. Rep. 719, the person named as owner in the policy had conveyed his title before the policy was issued, exactly as in the case at bar; but it was held that the contract with mortgagee was valid, under the principles of the cases cited. These considerations dispose of the first and second demurrers.

The third must likewise be overruled. In Massachusetts, where it is held strictly "that no one can sue or be sued on a simple contract who is not a party to it, disclosed or undisclosed, yet it is not in all cases necessary that the consideration should move from the promisee to the promisor, in the ordinary sense of those words." *Palmer Savings Bank v. Ins. Co.*, 166 Mass. 189, 195, 196, 44 N. E. 211, 32 L. R. A. 615, 55 Am. St. Rep. 387, where it was held that upon this form of policy the mortgagee might sue in his own name. Here the premium was paid by the owner or on his behalf, but the insurance company received it as consideration for its double undertaking to the owner and to the mortgagee. The decisions of our

own court are ample to support an action on this contract in the name of the mortgagee. *Brown v. Roger Williams Ins. Co.*, 5 R. I. 395; *Urquhart v. Brayton*, 12 R. I. 169; *Wood v. Moriarty*, 15 R. I. 518, 9 Atl. 427; *Adams v. Union R. R. Co.*, 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273; *Kehoe v. Patton*, 23 R. I. 360, 50 Atl. 635.

If the original contract is with the owner, and it is assigned to the mortgagee with the consent of the company, the process may be considered as a novation; but it is not necessary to rely upon any supposed change of relation where the original undertaking is solely for the benefit of the mortgagee, and the promise is made directly to him. In this case the owner pays the premium on account of the mortgagee, and in fulfillment of his duty to do so, and the promise thereon is directly made by the company to the mortgagee himself.

Substantial demurrers overruled, and cases remanded to the common pleas division for further proceedings.

(25 R. I. 269)

McGARRITY v. NEW YORK, N. H. & H. R. CO.

(Supreme Court of Rhode Island. June 19, 1903.)

MASTER AND SERVANT—RAILROADS—DEATH OF BRAKEMAN—LOOPED TELLTALES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—EVIDENCE—OTHER LIKE INCIDENTS—CROSSING—WITNESSES—EXPERTS—CROSS-EXAMINATION—OBJECTIONS TO EVIDENCE—MOTION TO STRIKE—REQUESTS TO CHARGE.

1. In an action for the death of a railway brakeman by his being caught and thrown from a freight car by certain looped telltales, evidence that other telltales in the freight yard where the accident occurred, shortly before the happening thereof, had become looped in the same manner, was admissible to show that the railroad company knew, or ought to have known, of the danger connected therewith, and was negligent in not remedying the defect.

2. Where a brakeman was killed by being thrown from a car by certain looped telltales, evidence that the ropes of the telltales forming the loop by which deceased was caught were knotted at the end was competent, notwithstanding negligence in that regard was not alleged, for the purpose of describing the entire telltale, and showing a loop formed of ropes so knotted was more dangerous than a loop formed by ropes free from knots.

3. Where evidence is admitted without objection it cannot be stricken out on motion at a subsequent stage of the trial.

4. Where, in an action for the death of a brakeman caused by his being thrown from a car by a looped telltale, defendant's expert bridge superintendent, who had charge of the telltales on the railroad, had been fully examined by defendant regarding the proper construction and inspection of these appliances, it was not error to permit him to testify on cross-examination that if the telltale was so looped or twisted together that a man going along on the top of a car and running into it was caught by the chin and held there, so that he was dragged over the car he was on and the next one, the telltale was not in proper position.

5. Where, in an action for death of a brakeman thrown from a car by a looped telltale,

defendant had introduced evidence of orders given to the brakemen in the yard requiring them to straighten out telltales which were looped up, the exclusion of evidence that it was customary for a brakeman in pursuance of such orders to straighten out the telltales when he saw them looped was not reversible error, there being no occasion for proof of a custom.

6. The refusal of a requested instruction, fully covered by an instruction given, was not error.

7. In an action for death of a railway brakeman by being thrown from a car by looped telltales, an instruction that if deceased knew, or by the exercise of reasonable care might have known, that telltales are apt to become looped, he assumed the risk of injury therefrom, was properly refused for omission to require that deceased had knowledge of the danger reasonably to be anticipated from such looped telltales.

8. Where a brakeman who was standing on top of a furniture car, with his back toward the engine, where his duties required him to stand in order to transmit signals to the engineer, was struck by looped telltales; and thrown from the car, an instruction that if he might have known that telltales were apt to become looped from time to time he assumed the risk of injury was properly refused for failure to include the brakeman's position and duties at the time of the accident.

9. Where, in an action for death of a brakeman by being thrown from a car by looped telltales, there was no evidence that deceased was ever instructed to untie looped telltales or that he appreciated the danger from such looping, and was not absorbed in his duties at the time of the accident to such an extent that he had no thought of their condition, an instruction that if he had been told to look out for such telltales, and untie them when he found them looped up, defendant was not liable for his death, was properly refused.

10. Where it was the duty of a railroad company to see that telltales were in proper condition, and were not looped up, instructions, in an action for death of a brakeman by being thrown from a car by looped telltales, that if it was customary for the yard brakemen to look out for such telltales, and untie them when they were looped, the failure of such yard brakemen to do so was the negligence of a fellow servant, and hence defendant was not liable, were properly refused; the negligence in failing to see that the telltales were in proper condition being that of the railroad company, and not that of decedent's fellow servants.

11. Where the charge as given by the court, with the requests given, stated the law applicable to the case with substantial accuracy, a new trial will not be granted for the court's refusal to give a particular request.

12. In an action for death of a brakeman by being thrown from a car by looped telltales, while he was approaching them with his back to them in the performance of his duties in transmitting signals from switchmen to the engineer, a verdict in favor of plaintiff, on the ground that the railroad company was guilty of negligence in failing to keep such telltales in proper position, held not contrary to the evidence.

13. Where a brakeman was thrown from a freight car by looped telltales, which he struck while riding on the car with his back toward them, which was necessary in the performance of his duties in transmitting signals from switchmen to the engineer, whether he was in the exercise of ordinary care at the time of the accident was a question for the jury.

Action by Theresa McGarrity, as administratrix of the estate of Hugh McGarrity, against the New York, New Haven & Hartford Railroad Company. A verdict was rendered in favor of plaintiff, and defendant

applies for a new trial. Application denied.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

John W. Hogan and Philip S. Knauer, for plaintiff. David S. Baker and Lewis A. Waterman, for defendant.

TILLINGHAST, J. The plaintiff's intestate, Hugh McGarrity, lost his life by being caught by the neck in a telltale on the defendant's railroad near the Conant street bridge, in the city of Pawtucket. He had been in the defendant's employ at its freight house in Pawtucket, trucking freight, for several years, and until a day or two before the happening of the accident in question.

The facts connected with the happening of the fatal accident are substantially as follows: On the 30th day of August, 1900, said Hugh McGarrity was in the defendant's employ in the capacity of head brakeman, and was at work on freight cars in the freight yard of the railroad at Pawtucket, his duty being to aid in switching cars back and forth on the various tracks of the yard. In doing this the cars were hauled forward from the various sidings in the yard onto the main track, which was connected with all the sidings. This track ran under the Conant street bridge. When the cars were far enough over the switch to clear it, it would be turned, and the cars would be pushed back wherever they were going for the time being. Said bridge had a telltale north of it, to warn the brakemen when they were approaching the bridge from that direction that they must stoop. On the day of the accident McGarrity was standing on top of a furniture car that was being hauled forward from one of the sidings. Three of the ropes of the telltale near the bridge had become looped in some way in a sort of half-hitch; that is, one rope was thrown about two of the others and looped over. In some way McGarrity's neck was caught in this half-hitch, and the ropes held together in such a manner that he was dragged off of his feet and thrown from the car, receiving injuries from which he shortly afterwards died. The plaintiff was afterwards appointed administratrix of his estate, and she brings this action for the benefit of herself as widow and the children of the deceased, alleging in her declaration that the defendant "unlawfully, negligently, and carelessly suffered and permitted its certain appliance, to-wit, a railroad telltale, then and there owned, provided, and maintained in its freight yard adjacent to said railroad bridge, to become and be in a dangerous, improper, and unsafe condition, and perilous to the safety and health of the plaintiff's intestate, Hugh McGarrity, in that the hanging cords or ropes which then and there hung from the crossbars of said telltale, and which were a part and parcel thereof, became and were caught, tangled, and twisted together so that the same were liable to

catch the plaintiff's intestate; * * * of which dangerous condition of said telltale the plaintiff's intestate was unaware." At the time of the accident McGarrity was standing about in the center of the roof of the furniture car, which is one of the highest types of a freight box car, being from 18 inches to 2 feet higher than the ordinary box car. He was the head brakeman, and it was his duty to be upon the first or head car on the train, and to take signals from the switchman in the yard and transmit them to the engineer, the proper discharge of which duties necessitated that he should have his back to the engine, the way the train was going, in order to see the switchman and take the signals. He was standing in this way at the time of the accident. The telltales consist of a bar of wood or iron extending over the track, and supported by posts upon either side, from which short ropes are suspended at such a height as to strike brakemen about the head and shoulders when riding on box cars and approaching the bridge. These ropes are sometimes called lashes, and are hung about six or eight inches apart. The telltales in question consisted of ropes about half an inch in diameter and about two feet long, wound about at the bottom end with fine wire or string to prevent the ropes from unraveling and fraying at the ends. Said half-hitches or loops in the telltales were formed by the exhaust of the engine when passing under them. There is evidence to the effect that the ends of the ropes in question had become frayed by reason of the unraveling of the wire or string which bound the ends, and that the ends afterwards became enlarged, and sometimes were knotted, forming a bunch at the end; and also that, whenever ropes which were thus knotted were thrown together in a half-hitch or loop, the loop tended to tighten and bind, upon pressure, by reason of the enlarged condition of the ends of the ropes.

At the trial of the case to the jury a verdict was rendered for the plaintiff, and the case is now before us upon the defendant's petition for a new trial on the grounds of certain alleged erroneous rulings of the trial court in the admission and rejection of testimony, and also in his charge to the jury; that the verdict is against the evidence; and that the damages awarded are excessive.

The first class of exceptions relied on by the defendant are those which were taken to the admission of testimony as to the condition of the telltales in said freight yard at various times shortly before the happening of the accident; it being contended in support of these exceptions that whether this telltale and others in the immediate vicinity had been looped up at some previous time, unless the particular looping which caused the injury had continued down to the time of the accident, or whether other telltales had become looped up in a similar manner, was immaterial; that to allow this to be

shown was to permit the plaintiff to prove other acts of negligence, and thereby prejudice the defendant's case.

This position is untenable; for while it is true, as held by this court in *Agulino v. N. Y., N. H. & H. R. Co.*, 21 R. I. 263, 43 Atl. 63, that in an action of negligence the plaintiff cannot be permitted to show facts and circumstances connected with other accidents or other occasions which would tend to raise collateral issues, yet it is not the law that only the particular facts and circumstances immediately connected with the happening of an accident can be shown in evidence. On the contrary, the plaintiff may properly show the condition of the machine or appliance by which the injury was caused before the time of the accident, for the purpose of proving that the defendant knew, or ought to have known, of the danger connected therewith, and was negligent in not remedying the defect.

After the plaintiff had rested her case, defendant's counsel moved the court to strike out all the testimony which had been introduced showing that the ropes of the telltale forming the loop by which the deceased was caught were knotted at the ends. This motion was refused, and the defendant excepted. The ruling was correct. It was clearly competent for the plaintiff to show the particular condition of the telltale in all its parts at the time of the happening of the accident. The presiding justice said: "The description of the telltales—what they were made of—I think was very properly put in, notwithstanding the fact that no particular stress was laid in the declaration upon the fact that there was a knot at the end of it. They had a right to describe that whole telltale from beginning to end, but when they come to lay stress upon it, and say that is what held it, I think they haven't a right to do it."

This ruling, taken as a whole, was quite as favorable to the defendant as it was entitled to. Indeed, we fail to see why the plaintiff had not the right to lay stress upon the fact that the ends of the rope were knotted for the purpose of showing that a loop, when formed of three of such ropes, was much more dangerous than a loop formed by ropes which were free from knots.

We deem it proper for us to observe, in regard to the exception now under consideration, that the practice of allowing testimony to be introduced without objection, and then, at some subsequent stage of the trial, moving to strike it out, should not be encouraged. As a rule, the objection should be made when the testimony is offered, and if not then made it should be deemed to be waived. Otherwise a party could sit by during a protracted trial and allow all sorts of testimony to go in, and then call attention to such parts thereof as he saw fit by way of objection, and move to strike it out, thus putting the other party to a disadvantage by put-

ting him off his guard, and causing confusion and delay in the trial of the case.

The next exception is to the ruling of the court in permitting one of the experts called by the defendant to answer the following question: "If the telltale is so looped or twisted together that a man going along on the top of a car and running into it is caught by the chin and held there, so that he is dragged over the car he is on and the next one, was that telltale in proper position when he got to it?" His answer was: "I should say not." The argument against the admission of this testimony is that the accident in question was a very peculiar one, and, so far as known, no such a one had ever happened before; and that the question is not what a man's opinion as to whether a thing is proper or not is after he has observed the accident in question, but what would be his opinion as to the condition of the thing concerning which he is testifying prior to the occurrence of the accident. In short, the argument is that the defendant would not be chargeable with knowledge of the danger where such knowledge was acquired in consequence of the accident in question. We agree to the soundness of this part of the argument, but do not think it is pertinent in the case at bar; for it cannot be said with any show of reason that a telltale in the condition that the evidence shows this one to have been was not a dangerous appliance, and it did not require the testimony of an expert to prove this. And while it is true that no evidence was offered that such an accident ever happened before, it cannot be said that, in view of the conditions existing, it was not such a one as was liable to happen. While there was no occasion, therefore, for the production of expert testimony to show that the telltale was out of order and dangerous to brakemen while in the discharge of their duties, yet the error in admitting it, if it can properly be said to be error, was clearly harmless to the defendant. Moreover, it is to be noted that the witness John B. Sheldon, of whom the question now under consideration was asked, was the supervisor of bridges for the defendant corporation, and had charge of the telltales on the railroad, and he had been fully examined by defendant's counsel as an expert regarding the proper construction and inspection of these appliances, and hence it would seem that the question was pertinent in cross-examination.

The defendant claims that the court erred in excluding testimony that it was customary for the brakemen to straighten out the telltales when found to be looped up. The witness George H. Coffin, called by the defendant, having testified that he was a brakeman at said yard, was asked the question: "Were orders given to the brakemen as to those telltales?" He answered: "I had orders ever since I worked on the road." "Q. Were orders given to the brakemen, no matter what

time, as to those telltales? A. Yes sir. Q. What were those orders?" This was objected to by Mr. Hogan on the ground that it was mere hearsay. The court said: "If the orders were general, given at the time or about the time that this man went there—if you can trace them home to him—it would be pertinent. But those orders may have been given some time before, and may not have been obeyed or considered by the brakemen, and it may be they were given when it was too late for this man to know anything about it. If you can show those orders were given about the time the deceased went on the road as a brakeman, it would be proper to show that to affect, if it would, the testimony of the track-walker, who says he did walk the track and did look out for those things. If he did those things, of course the brakemen could assume that the railroad corporation was looking out for those things." Mr. Waterman, in behalf of the defendant, said: "The track-walker said it was done between Providence and Worcester, but not in this section." The court: "It is necessary to show that the instructions given were so close to the time of this accident that the men presumably knew what the orders were." Mr. Baker's exception was then noted, but he immediately proceeded to show by the witness, without objection, that the orders referred to were given ever since he had worked on the road and down to the time when McGarrity was hurt. "Q. What were those orders? A. If you see any of those telltales looped up or anything, straighten them out. Q. How would you straighten them out when you saw them looped up? A. By hand. Q. Where would you be when you did it? A. On top of the car. Q. And could a brakeman in the performance of his duty see when it was looped up readily? A. Yes sir. Q. Was it customary for the brakemen, in consequence of those orders, to straighten out the telltales when he saw them looped up?" Mr. Hogan: "I object to the custom there." Mr. Waterman: "I have shown that orders were given." The court: "How is the question material?" Mr. Waterman: "I was stating it was material, in connection with what has been shown, that orders were given to do this thing, and I am showing it was customary for brakemen to do those things in consequence of orders, and it would be brought home to Mr. Garrity by the orders and by brakemen being accustomed to do those things while they were there." The court ruled that the particular question objected to was not proper. While we fail to see any very cogent reason for ruling out this particular question, yet the error, if it were such, was clearly harmless, and hence not such a one as to be ground for a new trial.

The defendant had already been allowed to show the orders which were given to the brakemen in the yard concerning the telltales, and also to offer testimony that the

brakemen had obeyed such orders. In other words, the defendant had been permitted to show, in effect, what the custom of the brakemen was in the premises, and hence the particular question asked was practically calling for the repetition of a fact already proved. Moreover, it was competent for the defendant to call all of the brakemen in said yard, and prove by them, if it could, that they knew of and obeyed the orders referred to; so that it would seem that there was no occasion for offering proof of any custom, and also that the evidence offered was not the best evidence.

But, however this may be, the defendant had all of the advantage from the testimony offered which it could have had if the particular question referred to had been answered, and hence there was no reversible error in ruling it out.

We come now to consider the exceptions taken by defendant's counsel to the rulings of the court in refusing to instruct the jury as requested by its counsel. The defendant's requests to charge the jury, together with the rulings of the court thereon, were as follows:

"(1) The defendant is not required to have the best telltales. If its telltales are such as are in common use by ordinarily well-managed railroad companies, it has performed its duty in this respect." This request was granted.

"(2) The defendant is not bound to have the best inspection of its telltales, but only such inspection as ordinary railroad companies give to their telltales under like circumstances." This request was refused, and the defendant's exception noted.

"(3) Unless the telltale that caused the death of Mr. McGarrity had been looped up for a sufficient time for the defendant to have become aware of it by such inspection as is given to telltales by ordinary railroad companies in like circumstances, the verdict must be for the defendant." This request was granted.

"(4) If Mr. McGarrity knew, or in the exercise of reasonable care might have known, that telltales were apt to become looped from time to time, he assumed the risk of injury from such looping, and the verdict must be for the defendant." This request was refused, and defendant's exception noted.

"(5) If Mr. McGarrity was told to look out for these telltales, and to untie them when he found them looped up, the verdict must be for the defendant." This request was refused, and defendant's exception noted.

"(6) If it was customary for the yard brakemen to look out for these telltales and to untie them when they were looped up, the verdict must be for the defendant." This request was refused, and defendant's exception noted.

"(7) If the yard brakemen were told to look out for these telltales, and to untie them when they were looped up, their failure to do so is the negligence of a fellow servant,

and the verdict must be for the defendant." This request was refused in these words, and the defendant's exception noted.

"(8) If Mr. McGarrity knew, or in the exercise of reasonable care might have known, that this telltale had a loop or a half-hitch, the verdict must be for the defendant." This request was refused, and defendant's exception noted.

"(9) If the telltale became looped up so short a time before the accident that the defendant could not have discovered it by ordinarily careful inspection, the verdict must be for the defendant." This request was granted.

Although the second request to charge was substantially correct as a proposition of law, and might properly enough have been granted, yet as the third request which was granted embodies, to all practical intents and purposes, the same identical principle of law contained in the second, and which fully covered the law applicable to the case upon the point then under consideration, the defendant clearly had all which it was entitled to on this point. There was therefore no occasion for the granting of both requests. Repetition of statement is not only unnecessary, but both court and counsel should always seek to avoid it.

The fourth request was properly refused, for several reasons. First. It was incomplete, inasmuch as it omitted one of the vital and essential elements of assumed risk; i. e., knowledge of the danger reasonably to be anticipated from a known defect. *McGar v. Natl. & Prov. Worsted Mills*, 22 R. I. 347, 47 Atl. 1092, and cases cited. See, also, *Pilling v. Narr. Machine Co.*, 19 R. I. 686, 36 Atl. 130.

Another reason why the request should not have been granted is that it fails to take into account the position and exacting duties devolved upon the deceased at the time of the happening of the accident. He was standing on top of a freight car of unusual height, with his back towards the engine, as his duties then required him to stand, so that he could signal to the switchman at the rear of the train when the proper time came for the engine to be reversed, and the cars could be pushed back upon another track. His duty also required him to signal the engineer when the rear car had passed over the switch, so that he would know when to reverse his engine. The telltale, therefore, by which the deceased was caught was behind him; and even if he knew of its condition—of which there is but very slight, if, indeed, it can properly be said that there was any substantial, evidence—it was competent for the jury to find that his duties were so engrossing at the time as to take away all thought of danger, especially from an appliance which was not only not dangerous in proper condition, but was known to be a warning against danger.

As pertinently remarked by the court in

its charge to the jury, in speaking of the telltale: "It was not an appliance to assist him in running the train, but to protect him, as well as others, from coming in contact with that bridge. It was placed there to guard those who were upon the cars." See *Darling v. R. R. Co.*, 17 R. I. 708, 24 Atl. 462, 16 L. R. A. 643. Even in those cases where the machine or appliance by which one is injured is inherently dangerous or obviously defective, and known to be so by the servant, he is not necessarily precluded from recovering if it appears that the circumstances connected with the discharge of his duties at the time of receiving the injury would naturally divert his attention for the instant from the danger. See *Disano v. Brick Co.*, 20 R. I. 452, 40 Atl. 7; *Baumler v. Brewing Co.*, 23 R. I. 430, 50 Atl. 841, and cases cited; *Mayott v. Norcross Bros.*, 24 R. I. 187, 52 Atl. 894; *Beach on Contrib. Neg.* (2d Ed.) § 40.

The fifth request to charge was properly refused. It does not follow that, if McGarrity was told to look out for these telltales and to untie them when he found them looped up, that the plaintiff was not entitled to recover; for, as just suggested, notwithstanding such a duty might have been imposed upon him by the defendant, which of course would have given him knowledge of the condition of the telltales generally, yet he might not have appreciated the danger arising from the existence of such looping up, and might have been so absorbed in his duties at the time of the accident as not to have had any thought of their condition. Moreover, we fail to find any evidence which shows that the deceased was ever given any such instruction as is contemplated by the fifth request, and hence there was no ground upon which to base it.

The sixth request was rightly refused. A master cannot escape liability for his failure to perform a duty which the law devolves upon him by reason of the fact that it is the habit or custom of his employes to discharge it for him. Indeed, he cannot avoid liability for the neglect of his servant who is expressly delegated by him to discharge such duty; for the negligence of the servant in this regard is the negligence of the master. *Hanna v. Granger*, 18 R. I. 507, 28 Atl. 659; *Morridge v. Tel. Co.*, 20 R. I. 386, 39 Atl. 328, 78 Am. St. Rep. 879. And this being so, a fortiori a master cannot avoid his liability for the failure of his servants generally to observe a mere custom or habit of themselves performing his duty for him, where he has chosen to rely upon such a custom or habit.

The seventh request was rightly refused for substantially the same reason. The duty to keep the telltales in repair was the duty of the defendant as master, and hence the negligence of any servant of the defendant in the premises was its negligence, and not the negligence of a fellow servant. *Crandall v. Stafford Mfg. Co.*, 24 R. I. 555, 54 Atl. 62.

The eighth request was properly refused. It is practically a repetition of the fourth request, except that it limits the question of the knowledge of the deceased to the particular loop by which he was injured, while the former referred to his knowledge of the condition of the telltales generally. But what we said regarding the fourth request is applicable and controlling here.

Finally, with regard to the requests to charge, we are of the opinion that those which were granted by the court, taken in connection with the charge which had already been given, stated the law applicable to the case with substantial accuracy, and hence that no ground for a new trial is shown in connection therewith.

We cannot say that the verdict is against the evidence. The testimony for the plaintiff shows that the loop by which the plaintiff's intestate was caught was similar to those which were frequently formed by the exhaust from the engines in passing under the telltales. Frank A. Whipple, a freight conductor of long experience, testified that "the exhaust catches the telltales and throws them up in the air, and sometimes they flop together and form a half loop, and sometimes three or four of them get over and hang there." He had seen the engine loop them up times without number. Joseph Miller, a brakeman of 12 years' experience, testified to substantially the same state of facts. Peter Rivard, a brakeman who was present at the time of the accident, and opened the loop after McGarrity had been caught in it, also testified to like effects from the exhaust of the engine. He further testified that such a loop as caused the accident was not made by human hands, and was not a knot formed by tying the ropes together. Roy A. Macomber, another brakeman, who saw this particular loop for a day or two before the accident, testified that it was clearly distinguished from a knot in the telltale made by tying the ropes together by hand. The witness Frank A. Whipple also testified that the loops caused by the exhaust of the engine were clearly different from those tied by brakemen. The following questions and answers illustrate his testimony: "Q. Have you ever seen a looping up of the telltales—a half-hitch made by hand? A. No, sir. Q. What kind of a knot was there in those ends where you saw them tied—a half knot or a whole one? A. Well, it was what we would call a running knot, wound right around and thrown over in that manner (indicates), as you wind your handkerchief and draw it into a sailor knot. Q. Is that the same condition of the knot you describe in the case where you say the more pressure you brought to bear the harder they would hug up, where there were bunches on the ends? A. No, sir; the one is a loop and the other that where somebody tied them. I make it very distinct; yes, sir. Q. Then 'tied' means something to you? A.

There is a very great difference between a loop and a knot. Q. What is the difference? A. The difference, in my estimation, is this: that a knot could not possibly be made in any other way than the hand of man, and a loop can, for I have seen fifteen times that number. Q. What do you say of a loop—that it was tied? A. No, sir." The brakeman Miller testified that pressure upon any such loop caused it to bind and tighten, and if the ropes had knots or bunches on the ends the loop would hold all the harder. The plaintiff's evidence shows that the loop by which the plaintiff's intestate was caught had existed in the telltale for several days prior to the accident. Charles F. Perry, who was an eyewitness to the accident, frequently saw such loops before the accident. The witness Macomber, who was working with one of the crews in said freight yard, saw loops in the telltales before the accident, and saw and touched the loop in question a day or two before the accident. The following questions and answers illustrate his testimony in this regard: "Q. Did you notice them on the day of the accident? A. Yes, sir; I did. Q. Did you notice them the day before? A. Yes, sir; for a week or so before. Q. What did you notice for the week just prior to the accident, every day? A. The way they were looped up. Q. Where were they looped up? A. Right over tracks No. 5 and 7. Q. When you say 'looped up,' what do you mean? A. Tangled up and thrown over one another—part of them are knotted on the end. Q. How many were looped together in that condition over track No. 5? A. I think there were three tied up there and one was looped over—these three made a kind of loop. Q. How was your attention called to it? A. Well, I was working that forenoon, and the back of my head was caught—took the hat off of my head—and when I came by again I pushed them out of my way. I saw they were pretty hard there—stuck together. Q. Did they come apart when you pushed them? A. No, sir. Q. These particular loops that you saw that day, had you noticed them before that day? A. It was the day before that I noticed them." Peter J. Hevey, a young man who crossed the Conant street bridge four times daily, testified that he saw the ropes in the telltales frequently looped there. Gerald De Vere, another eyewitness to the accident, who went down by this bridge and through the freight yard daily, testified that he saw this very loop a day or two before the accident, and called the attention of the yard boss to it at that time. In speaking of the telltale where deceased was caught this witness testified, in referring to the ropes, that "they looked as if they had been thrown over that way—a half knot, what I call. I should say there were three of them; one of them was tangled round two of them that way." He also testified that one or two days before he was talking to the boss of the section,

and said: "Jim, I think you will have an accident here yet." "Q. What telltale did you call his attention to? A. These ones that were knotted together. Q. What telltales with reference to Mr. McGarrity? A. The same ones. Q. And what was their condition when you called his attention to it? A. The same way. Q. How long before the accident? A. I should say a day or two before the accident. * * * Q. Was there any change made in the telltales from the time you called the attention of the yard master to it to the time of the accident? A. No, sir." The plaintiff also offered testimony to the effect that the ropes in question showed weather marks after the loop was opened; that they did not hang down as they should, straight and at full length, but were drawn up and twisted in a spiral shape. This fact tended to show that the ropes had been looped up for some time. The testimony for the plaintiff also shows, and there is no dispute about this, that the defendant corporation had adopted a system of care and inspection of these telltales in order to prevent the very danger which was the cause of this accident, by providing its track-walkers with a long pole, equipped with an iron hook on the end of it, for the purpose of opening these loops and pulling out these tangles in the telltales as they went by them in the discharge of their duties. Several of the witnesses called by defendant corroborated the testimony offered by plaintiff as to the manner in which the loops in the telltales were formed, and there is practically no dispute that the loop in question was formed in the way above described. It therefore clearly appears that the defendant had full knowledge of the general condition of the telltales long before the accident, and recognized its duty in protecting its employes from danger therefrom; and whether it failed in this regard was a question of fact for the jury to decide under the testimony submitted. Whether the plaintiff was in the exercise of due care at the time of the accident was also a question of fact for the jury to determine under the evidence.

The last ground of the petition for a new trial, viz., that the damages are excessive, was not relied on at the hearing.

Petition for new trial denied, and case remanded for judgment on the verdict.

(80 N. J. L. 270)

ALLEGHENY CO. v. ALLEN et al.

(Court of Errors and Appeals of New Jersey. July 21, 1903.)

CONTRACT—VALIDITY—INTERPRETATION—LEX LOCI—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS—PENALTIES—ACTION ON CONTRACT—PLEA IN BAR—DECLARATION.

1. A contract void by the law of the state where made will not be enforced in this state.
2. When the statute of the state where a contract is made does not expressly declare the contract to be void, and recourse must be had to interpretation to settle the question of its

validity, the construction given to the statute by the courts of the state which enacted it will be adopted here.

3. The tendency of judicial decision on this subject, when the statute does not declare the contract to be void, is to a strict construction, maintaining the validity of the contract, and holding that the only effect of such legislation in the state where it is enacted is to impose the prescribed penalties and the expressed disabilities outside of such state. Until its courts give the legislation a wide scope, no greater latitude will be attributed to it.

4. The New York statute provides that no foreign corporation shall do business in that state without having first obtained the certificate required by the act, and that no foreign corporation doing business in that state shall maintain any action upon it in that state unless prior to the making of such contract it shall have procured such certificate. *Held*, the only penalty prescribed by the New York act is a denial of the right to maintain an action in that state. It does not attach to the contract so as to deprive it of a suable quality in this state.

5. Disqualifications of a penal character have no extraterritorial operation, and comity does not require a recognition of them in other states.

6. The courts of Pennsylvania have adjudged that a contract made by a foreign corporation in contravention of the statute of that state is void, and therefore that effect will be given to it in this forum.

7. The Pennsylvania courts have also construed their statute as we do our own, and hold that isolated acts of business are not in violation of it.

8. The special plea in bar in this case sets up no facts which are inconsistent with the legality of the contract, as the consummation of an isolated transaction in Pennsylvania.

9. To constitute a bar to an action on a contract by setting up a highly penal statute, there must be a precise averment of sufficient facts to bring the case within the statute. It cannot be based upon inference.

10. Greater strictness is required in framing pleas in bar than is exacted in declarations. In pleading a promise which must be in writing, the declaration need not aver that it is in writing, but it is otherwise when such a promise is set up in a plea in bar.

(Syllabus by the Court.)

Error to Supreme Court.

Action by the Allegheny Company against Isaac N. E. Allen and others. Judgment for plaintiff, and defendants bring error. Affirmed.

See 52 Atl. 298.

James A. Gordon, for plaintiffs in error. Lindabury, Depue & Faulks, for defendant in error.

VAN SYCKEL, J. This suit was instituted in the Supreme Court to recover the amount due upon a promissory note dated July 16, 1900, given by the defendants Isaac N. E. Allen & Co. to the plaintiff company for \$1,989.54, upon which payments amounting to the sum of \$1,000 were indorsed. The defendants pleaded four several pleas:

First. The general issue.

Second. That the said promissory note was executed and delivered in the state of New York to the plaintiff company, a business corporation created and existing under the laws of the state of North Carolina. That when said note was executed and delivered it

was provided by the statute of the state of New York that: "No foreign corporation * * * shall do business in this state without having first procured from the Secretary of State a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state. * * * No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract, it shall have procured such certificate." The New York law, as originally passed, was less stringent, and provided as follows: "No foreign stock corporation doing business in this state without such certificate shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate." Laws 1892, p. 1805, c. 687, § 15. The statute was subsequently amended, and was in the form above set forth at the time the said promissory note was given. The second plea further averred that at the time of the making of the said promissory note the plaintiff was a business stock corporation other than a moneyed corporation foreign to the state of New York, and had not theretofore procured from the Secretary of State of said state of New York a certificate that it had theretofore complied with all the requirements of the law of said state to authorize it to do business in said state, and that the business of said plaintiff be carried on in said state was such as might be lawfully carried on by a corporation incorporated under the laws of said state for such or similar business according to the form of the said statute of New York in such case made and provided. And the said plea further averred that the said plaintiff at the time of the making of the said promises and undertakings and at the times of the sale and delivery of the goods and chattels for which the said promissory note was given was doing business in the said state of New York contrary to the form of the statute aforesaid, and that said goods and chattels were sold and delivered by the plaintiff to the defendants in the state of New York.

Third. The third plea sets out: That the said promissory note was made and executed in the state of Pennsylvania to the plaintiff company, a foreign corporation created and existing under the laws of the state of North Carolina. That when said note was executed and delivered it was provided by the statute of the state of Pennsylvania that: "(1) No foreign corporation shall do any business in this commonwealth until said corporation shall have established office or offices and appointed an agent or agents for the transaction of business, therein. (2) It shall not be lawful for any such corporation to do

any business in this commonwealth, until it shall have filed in the office of the Secretary of the Commonwealth a statement under the seal of the said corporation, and signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its attorney, agent or agents, therein, and the certificate of the Secretary of the Commonwealth under the seal of the commonwealth of the filing of such statement shall be preserved for public inspection by each of said agents in each and every of said offices. (3) Any person or persons, agents, officers or employees of any such foreign corporations who shall transact any business within this commonwealth for any such foreign corporation without the provisions of this act being complied with shall be guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment, not exceeding thirty days and by a fine not exceeding one thousand dollars or either at the discretion of the court trying the same." The said plea further averred that at the time of the making of the said promissory note the said plaintiff was a corporation foreign to the said commonwealth of Pennsylvania, and had not theretofore filed in the office of the Secretary of the said Commonwealth a statement under the seal of said plaintiff, and signed by the president or secretary thereof, showing the title and object of said plaintiff, the location of its office or offices, and the name or names of its authorized agent or agents therein, according to the form of the said statute of the said commonwealth. And the said plea further averred that, notwithstanding the said premises, the said plaintiff at the time of the making of the said promissory note did business in the said commonwealth of Pennsylvania contrary to the form of the said statute.

Fourth. The fourth plea alleges that the plaintiff joined with other creditors in accepting and receiving a percentage of its claim in full satisfaction of its said promissory note, and discharged the defendant from further liability thereon.

The plaintiff demurred to the second and third pleas, which, on argument before the Supreme Court, were held to be no sufficient answer to the plaintiff's cause of action, and the cause was thereupon sent down to the circuit court of Hudson county for trial on the issue of fact raised by the fourth plea. The trial judge there directed a verdict for the plaintiff, and we are of opinion that in such direction there was no error, for the reason that there was no evidence which would have justified the jury in finding that the plaintiff, through its agent or otherwise, had accepted the offer of settlement. Error is assigned upon this direction of the trial judge, and also upon the judgment of the Supreme Court upon the demurrers to the second and third pleas aforesaid.

The first question to be considered is

whether the contract made in New York can be enforced in this state. There are two settled rules which must be applied to the determination of this question, as well as to the effect of the Pennsylvania statute: (1) A contract void by the law of the state where made will not be enforced in this state. *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. Law, 33. A contract void at the place where made is illegal and void everywhere. *Hyde v. Goodnow*, 3 N. Y. 266. (2) When the statute of the state where the contract is made does not expressly declare the contract to be void, and recourse must be had to interpretation to settle the question of its validity, the construction given to the statute by the courts of the state which enacted it will be adopted here. *Lane v. Watson*, 51 N. J. Law, 186, 17 Atl. 117; same case affirmed 52 N. J. Law, 550, 20 Atl. 894, 10 L. R. A. 784. If, therefore, the New York statute expressly declared the promissory note in suit to be a void contract, or if the courts of New York have adjudged that the statute of that state is to be construed to that effect, the same effect must be given to it here, and it must be held to furnish no legal foundation for an action in our courts. The New York statute does not, in terms, declare the contract void; it provides that no suit on it shall be maintained in that state. No case has been brought to our attention in which the courts of New York have held that under the statute as it now exists the contract made in that state is void. In *Neuchatel Asphalt Co. v. The Mayor*, 155 N. Y. 373, 49 N. E. 1043, which was an action upon a contract made under the law as framed in 1892, the New York Court of Appeals decided that the purpose of the act was, not to avoid contracts, but to provide effective supervision and control of the business carried on by foreign corporations; that it provided no penalty in the event of noncompliance, other than the suspension of civil remedies, and that such, and such only, were the consequences of the violation of the statute, and none other will be implied as intended by the Legislature. This construction of the statute is manifestly the correct one, and it has been adopted by other courts. *Crefeld Mills v. Goddard* (C. C.) 69 Fed. 141; *Sullivan v. Beck* (C. C.) 79 Fed. 200; *American Insurance Co. v. Wellman*, 69 Ind. 413. When the rule of comity is invoked, it might with equal force have been insisted under the New York act, as it stood in 1892, that the contract should not be suable outside of the state of New York until compliance with the statutory provisions of that state. Comity does not require a broader effect to be given to legislation than the state which enacted it impresses upon it. The North Carolina corporation may justly claim the right to enforce in our jurisdiction a contract which has not been pronounced to be void either by the Legislature or the judiciary of New York. Personal disqualifications, and especially such as are of

a penal nature, are strictly territorial in their operation. Story on Conflict of Laws, § 104. The New York Legislature had the exclusive right to declare what consequences should follow the failure to comply with the law in order to secure effective control over the business, and having in the act provided for no penalty on the foreign company other than denial of the right to maintain an action in New York, the courts of this state should not penalize the foreign corporation to a greater extent by declaring the contract void, or by increasing the disability imposed by the New York act. State laws have no extra-territorial effect for the enforcing of penalties. The fact that the amendment of the act of 1892 provides that "no action shall be maintained in New York upon any contract made by it in that state unless prior to the making of such contract it shall have procured the certificate," without declaring that in such case the contract shall be void, suggests very strongly the inference that the New York Legislature did not intend to give it that effect. The tendency of judicial decision on this subject, when the statute does not declare the contract to be void, is to a strict construction maintaining the validity of the contract, and holding that the only effect of such legislation in the state where it is enacted is to impose the prescribed penalties and the expressed disabilities. Outside of such state, until its courts give the legislation a wider scope, no greater latitude will be attributed to it. See cases cited in 6 Thompson on Corporations, § 7957. In my judgment, the second plea is no bar to the plaintiff's right of action.

The Pennsylvania statute remains to be considered. It expressly provides that it shall not be lawful for the corporation to do business in that state until compliance, and makes the agent or officer of the corporation, through whom a corporation must necessarily act, subject to indictment and imprisonment for violation of the act. The courts of Pennsylvania, we think, have properly held that a contract made in violation of the statute is void, and that must be the accepted law in this state. *Lasher v. Stimson*, 145 Pa. 30, 23 Atl. 552; *Delaware River Quarry Co. v. Bethlehem & N. Pass. R. Co.* (Pa.) 53 Atl. 533. If, therefore, the third plea contains averments which show that the promissory note sued on was a contract made in contravention of the Pennsylvania statute, it is void, and unenforceable in New Jersey. In *D. & H. Canal Co. v. Mahlenbrock*, 63 N. J. Law, 281, 43 Atl. 978, 45 L. R. A. 588, this court said that a foreign corporation which makes a single sale of its product and accepts a guaranty of payment in this state does not transact business in contravention of our statute which prohibits foreign corporations to transact any business in this state without authority first obtained therefor. In the recent case of *Delaware River Quarry Co. v. Bethlehem &*

N. Pass. R. Co., supra, in the Supreme Court of Pennsylvania, Judge Fell, in delivering the opinion of the court, said: "This act has been liberally construed, and isolated transactions between a foreign corporation and citizens of this state have been held not to come within its prohibition." The cases on this subject are cited in the opinion of Judge Scott in the court below, which appears on page 533. Judge Mitchell, who dissented from the opinion delivered by Judge Fell on other grounds, said: "The act of 1874 is a highly penal act, and the dishonest use made of it in this case is a sharp reminder of the necessity of adherence to the general rule of strict construction of such statutes. This was but a single transaction, although it occupied several months. I cannot consider it a 'doing of business' within the statute." The controversy as to the third plea turns, therefore, upon the question whether it contains allegations which show that the said promissory note was given in pursuance of business carried on in the state of Pennsylvania, and not in consummation of a single transaction. The plea as to the New York statute is much broader and more ample than the third plea. It avers that at the time of the sale and delivery in New York of the goods for which the note was given the plaintiff was doing business in New York contrary to the statute of that state. The third plea, after reciting the Pennsylvania statute, avers that at the time of making the note the plaintiff was a foreign corporation which had not complied with the requirements of the said statute. The only averment to bring the plaintiff within the penalty of the act is that at the time of making the said note the plaintiff did business in the state of Pennsylvania contrary to the form of the statute. There is no intimation in this plea—certainly no allegation—that this note had any connection with business unlawfully transacted in Pennsylvania, or that it was given for goods sold and delivered in Pennsylvania. The demurrer admits that the note was given in Pennsylvania, and it also admits that at the time the note was given the plaintiff did business in the state contrary to its statute; but it does not admit that of that unlawful business this note was a product. The admitted averments may be true, and yet the note may have been given for an obligation contracted out of the state of Pennsylvania, and consequently not in violation of its laws. It is quite clear under the Pennsylvania cases that the agent of the plaintiff would not have subjected himself to the penalties of the act by taking a note to the company for such a debt. The institution of a suit to collect a loan, the taking a subscription to capital stock, the purchase of shares of stock in Pennsylvania corporations, or buying merchandise to use at home, executing a lease of personal property, and any other isolated act, which, from

its nature, is not continuous, are transactions which are held not to be in contravention of the Pennsylvania statute. The cases are cited in Delaware River Quarry Co. v. Bethlehem & N. Pass. R. Co., *supra*. The averment in the third plea might be made if the only act of the plaintiff in the state of Pennsylvania had been the taking of the note sued on. The taking of a note is a business act, and in taking it the plaintiff did business, but such a transaction is not prohibited.

The rule of pleading is well settled that, to defeat the plaintiff's right of action, the plea must contain allegations which show conclusively that there is no cause of action. It is a maxim in pleading that everything shall be taken most strongly against the party pleading, or, rather, that, if the meaning of the words be equivocal, they shall be construed most strongly against the party pleading them; for it is to be intended that every person states his case as favorably to himself as possible. 1 Chitty's Pl. 242; 1 Saunders, 259, note 8. This rule applies with even more strictness to pleas than to a declaration: Where a plea has two intendments, it shall be taken most strongly against the defendant. In pleading a promise which must be in writing, the declaration need not declare that it is writing, but it is otherwise in a plea. 1 Chitty's Pl. 522-603; 1 Saunders, 276a, 277a, & note. Gould's Pl. c. 4, § 46. To constitute a bar to an action on a contract by setting up a highly penal statute, there must be a precise averment of sufficient facts to bring the case within the statute. It cannot be based upon inference.

Contrary to my first impression, my conclusion is that the third plea discloses no defense to the action, and the judgment of the Supreme Court on the demurrers as well as the judgment of the trial court should be affirmed.

(65 N. J. E. 681)

In re BERDAN'S WILL.

(Prerogative Court of New Jersey. June 30, 1903.)

WILL—EXECUTION—EVIDENCE—PRESUMPTIONS.

1. A paper writing, produced and offered for probate as a will, is shown to have been written and signed by the testator. It has a complete attestation clause appended, also in the handwriting of testator, and beneath that clause are the admitted signatures of two competent witnesses. *Held*, that a presumption of due execution is thereby raised, which will require the admission of the paper to probate, unless overcome by strong and convincing evidence.

2. Both of the subscribing witnesses, when called, while admitting the genuineness of their signatures, testify that the paper was not signed by testator, nor the signature thereto acknowledged by him, in their presence, and that their signatures were not made at the same time or in the presence of each other. Although the evidence of one witness was open to serious question affecting his recollection of

the transaction, the evidence of the other witness being found credible, and to establish that he did not see the attestation clause, or know its contents, and that the statements therein certified were not in fact true, *held*, that the presumption arising from the attestation clause was overcome, and that probate should be denied.

(Syllabus by the Court.)

In the matter of the application for probate of the last will of Jacob G. Berdan. Probate denied.

Milton Demarest, for proponent. Gilbert Collins, for Hackensack Hospital, a legatee. John W. Harding, for caveators.

MAGIE, Ordinary. The paper writing offered for probate as the last will and testament of Jacob G. Berdan, who died in the city of Paterson December 26, 1902, is shown by the evidence and conceded by counsel for the caveators to have been written by the testator himself, whose genuine signature is thereto appended. There is appended to the will, and also written by the testator, an attestation clause, certifying to an execution by the testator in all respects in conformity with the provisions of our statute of wills respecting the execution of such instruments. Below the attestation clause appear the signatures of two persons, Albert Bogert and Albert H. Blauvelt. These persons have been produced as witnesses, and each testifies that his signature was made by himself. Proof that testator signed this instrument, and that two persons signed this attestation clause, raises a presumption of the due execution thereof as a testamentary disposition of property, which will permit and require its admission to probate. The burden of proof is thereby cast upon the contestants, who must, to justify its rejection, negative its averments by strong and convincing evidence. Darnell v. Buzby, 50 N. J. Eq. 725, 28 Atl. 676, and cases therein cited; Buzby v. Darnell, 52 N. J. Eq. 337, 31 Atl. 382; Hildreth v. Marshall, 51 N. J. Eq. 241, 27 Atl. 465; Swain v. Edmunds, 53 N. J. Eq. 142, 32 Atl. 369; *Id.*, 54 N. J. Eq. 438, 37 Atl. 1117. The caveators are children and heirs at law and next of kin of the deceased.

It is first contended in their behalf that upon the face of the will the attestation clause is shown to be untrue or ineffective. The first of these contentions is that the will could not have been signed in the presence of the witnesses, and that the attestation clause does not certify that the signature was acknowledged by the testator in the presence of the witnesses. Passing the question whether the statute which requires signing in the presence of the witnesses, or that the signature should be made or acknowledged in their presence, is not satisfied by a certificate that the will was signed, it is sufficient to dispose of this contention to say that it is not raised upon any admissible fact. Testator undoubtedly

wrote the whole will and the signature. The writing was done with a pen evidently differing from that used by the witnesses. But that circumstance does not indicate that the signature was necessarily written at the time the body of the will was written. It may well have been written at the time the witnesses wrote their names, and, if written with the same pen which the testator used in writing the body of the will, it would present the exact appearance that it does. The proofs show that testator was accustomed to use a fountain pen, and writings and signatures made by him with such a pen have been put in evidence. They resemble in all respects the body of the will and the testator's signature. It is further proved that testator carried such a pen, and when he needed to write would take it from his pocket, rather than use other pens. There is nothing on the face of the will to indicate that he may not have done so in the presence of the witnesses.

It is further contended that the certificate in the attestation clause is ineffective, because below the last words of the clause was written, in testator's handwriting, the word "witnesses," and it is contended that the certificate of the two, witnesses must be taken as limited to what is included in that word, and not to the details of signing and publishing the will. But I am unable to yield to this contention. The word "witnesses" is written to the left of, and not over, the signatures of the witnesses. It is evidently intended by the writer to indicate the place where the witness should sign his name, and could not have been taken by the witness as limiting the force of the certificate to which his signature was in fact appended. This compels the consideration, of the evidence before me, and a determination whether it justifies the court in admitting the paper to probate. As before stated, the proof is plenary that the will has the signature of the testator appended to it in his own handwriting, and that a proper attestation clause is also appended, to which the two witnesses have made their signatures in their own handwriting. This raises a presumption of due execution, which presumption, however, may be overcome by due proof. Unless overcome, it will require and support a decree for probate. The contention of caveators is that the presumption is overcome by the evidence of the two persons who placed their names at the foot of the attestation clause as witnesses. The particular contention is that, by their evidence, the certificate is shown to be untrue in two respects: (1) That it untruly certifies that the will was signed in their presence, while in fact it was neither signed nor the signature acknowledged by the testator in their presence, or the presence of either of them; and (2) that they were not together at the time when they appended their signatures to the attestation clause, but that each appended

his signature thereto at a different time and a different place. Both of these witnesses were old friends of testator, and, although each knew the other by sight, they were not intimate acquaintances. They lived in different directions, and each at some distance from the city of Paterson. The writing bears date December 12, 1891. After the death of the testator, Mr. Samuel Demarest, Jr., a counselor at law, practicing in Hackensack, N. J., was found to be in possession of an envelope indorsed in the handwriting of the testator with these words: "The last will and testament of Jacob G. Berdan, December 12, 1891." Upon being opened, the envelope was found to contain the instrument now offered for probate. Mr. Demarest, the custodian, was called as a witness, and testified that the envelope had been deposited with him for safe-keeping by the testator himself, but he was unable to fix the exact date of such deposit, though his statement would indicate that the time of the deposit was approximately near to the date of the instrument and the date on the envelope. Albert Bogert, whose signature on the paper in question first follows the attestation clause, was called as a witness by the proponents. Upon their examination he testified that his signature was made by him; and at the request of the testator. Upon cross-examination on the part of caveators, and upon further examination by the counsel of proponents and the counsel of the legatee, he stated the circumstances under which his signature was made in the following manner: He testified that his signature was written at a place called "Wickoff," which is a station on the New York & Susquehanna Railroad in Bergen county, at which place he was upon some official business; that he met testator there, and that testator asked him if he would be a witness to his will, and, upon witness' assenting, testator told him to sign it "right down there," and that he thereupon signed his name in the place indicated by testator; that testator was then living at the house of a Mrs. Winters, near Wickoff station; that witness signed his name either at the station or at the Winters' house, at which he took lunch with the testator on that day, and that he wrote his name with a fountain pen furnished by testator. He further testifies that no one was present when he signed his name except testator and himself; that no one did any writing upon the paper at the time except himself; that testator did not tell him that he had signed the paper; that he did not see testator's name on the paper, and that he did not look at or see what was on the paper. If Bogert's evidence is entitled to entire credit, it is obvious that it overcomes the presumption arising from the attestation clause, for he was not made acquainted with its contents, and, if his memory of the transaction is to be relied on, the paper was not executed with the formalities required by our statute to make

it a testamentary disposition of property. But his statement of the transaction is so inconsistent with other facts incontestably proved, and has such discrepancies with itself, that the amount of credit which ought to be given to it is open to serious doubt. He had testified that he was at Wickoff on the day in question on some official business as sheriff of the county. But his term of office as sheriff did not coincide with the time at which this document must have been signed. He then stated that he might have been there on some business as a chosen freeholder of the county. When confronted with his sworn statement of his services as freeholder for a period covering that during which this paper was doubtless signed, he failed to indicate any charge for official work which would have required him to go to Wickoff. He was at first clear in his statement that testator was then living at the Winters' house, but it is proved beyond doubt that testator did not go to board at Mrs. Winters' until 1894, and the evidence is convincing that this paper had been deposited with Demarest long before that time. There are other discrepancies, unnecessary to dwell upon. I do not intend to intimate that his evidence could be rejected as consciously and intentionally false, but only that it indicates lapses of memory, and to such an extent that it might be a question whether his recollection can be relied on, and whether, if standing alone, it would be such convincing testimony as would suffice to overcome the presumption arising from the signed attestation clause. Testimony of one of the subscribing witnesses suggesting doubt, or his own want of recollection of the transaction, will not justify refusal of probate if the other witness corroborates the accuracy of the attestation clause as to execution. *McCurdy v. Neall*, 42 N. J. Eq. 333, 7 Atl. 566. But there is other evidence which cannot be ignored. Albert H. Blauvelt, the other subscribing witness, was called by proponents, and testified that he made his signature (which is below that of Bogert) at the request of testator. Upon cross-examination and further examination he gave this account of the transaction: He testified that he was in a saloon in the city of Paterson, in which place testator (who was an insurance agent) was accustomed to do business; that this was at a time 10, 11, or 12 years prior to the time he was examined, and this would be approximately near the date of the will; that testator asked him to be a witness to his will, and, upon his assenting, testator walked to a desk in the saloon, brought out a paper, and folded it; that witness put his name where testator showed him, and then testator picked up the paper and put it in his pocket. He expressly declares that the paper was folded in such a manner that he did not see what was on it; that testator did not sign the paper in his presence, nor did testator say in his presence that he had

signed it. While witness admits that somebody—either the bartender or the owner—was at the time in charge of the saloon, and that others were, perhaps, in the place, he testifies that Albert Bogert was not there, and that no person in the saloon was near enough to testator and himself to take part in the transaction. He further states that he casually met testator not long before his death, and that testator remarked that he was a witness to his will, to which witness then assented.

Unless I can find in the proved facts in the cause or in this evidence itself ground for rejecting it as incredible, I must give it effect. I can find no ground for rejecting it. The only fact which has raised any doubt in my mind is the singular resemblance in the signatures of this witness and of Bogert, which gives the impression that they were written with the same pen and the same ink. But this circumstance will not, in my judgment, justify me in finding that Blauvelt does not recollect what he professes to recollect respecting his part in the transaction. As I deem his evidence credible, I am compelled to conclude that this instrument was not executed in the manner required by law, because it was not signed, or the signature acknowledged, by testator in the presence of two witnesses present at the same time. Any presumption arising from the attestation clause has been overcome by Blauvelt's testimony that he did not see the attestation clause, or knowingly certify to the facts therein stated, and that the facts, in the respects above stated, are not true.

It results that the probate must be denied. As proponent had in his possession a will perfect upon its face, in the handwriting of his testator, duly signed by known citizens attesting its proper execution, it was his duty to present it for probate, and to pursue his application. His costs and proper counsel fee ought to be allowed out of the estate of the deceased.

(65 N. J. E. 736)

KINKEAD v. RYAN et al.

(Court of Errors and Appeals of New Jersey.
July 20, 1903.)

WILL—CONSTRUCTION—NATURE OF ESTATE—REMAINDER IN FEE—TENANCY IN COMMON—SUBROGATION.

1. The will of Christopher Mathews devised as follows: "Third. I give, devise, and bequeath unto my beloved wife, Catharine Mathews, all my estate, both real and personal, for and during the term of her natural life. Fourth. After the death of my said wife, I give, devise, and bequeath all my estate, both real and personal, unto my beloved children, George Thomas, Christopher Alfred, Mary Ann, and Catharine, and any other child of mine that may be born hereafter, share and share alike, and to their heirs and assigns, forever. Fifth. If any of my said children should die before my said wife, then it is my will that upon my wife's death the share of my said estate which would have gone to such deceased child if living shall go to the heirs of such de-

ceased child." *Held*, that at his death his son George took a vested remainder in fee in his lands, which was capable of being sold during the lifetime of the widow, under execution, on a common-law judgment against George.

2. When one of several tenants in common pays off an incumbrance upon the common estate, a court of equity will consider the incumbrance as still existing, in order to enforce contribution from the co-tenants, or as extinguished, according to the justice of the case and the actual intention of the party making the payment.

3. Under the circumstances of this case, the party paying off the common incumbrance was considered to have intended its complete extinguishment, and therefore no right of subrogation remained.

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by Catharine Kinkead against Jerome Alfred Ryan and George T. Mathews. Decree for complainant (53 Atl. 1053), and defendants appeal. Modified.

Black & Drayton and Paul Eugene Jones, for appellants. C. L. Corbin, for respondent.

DIXON, J. We agree with the opinion of the learned vice chancellor so far as it holds that, under the will of Christopher Mathews, his sons, George and Christopher A., took each a vested remainder in fee in an undivided fourth of his land; that on the death of Christopher A. in the lifetime of his mother the estate of George was increased to one-third; and that, by the sheriff's deed in execution of the judgment against George, that third passed to his mother, and by her will was devised to the complainant. This disposed of the appeal by George T. Mathews.

As to the appeal of Jerome Alfred Ryan, the circumstances are as follows: On March 1, 1894, the lands of which Christopher Mathews had died seised in 1875 were held by his widow as tenant for life, and the remainder was owned equally by the widow, her daughter, the complainant, and her grandson, the appellant, as tenants in common. The entire estate in a part of the lands was subject to a mortgage securing a bond given by the said Christopher to the Equitable Life Assurance Society in November, 1868, on which there remained due \$2,500. On the day first above mentioned, the widow, with her own money, paid off this bond, and caused both the bond and the mortgage to be canceled, and an entry of satisfaction to be made on the record of the mortgage. From that time until her death, in November, 1901, she never asserted any right against her co-tenants or their estate because of that payment. On these facts the vice chancellor concluded that the widow had become entitled to stand in the place of the mortgagee, for the purpose of securing contribution by her co-tenants, and that this right passed to the complainant as executrix and sole legatee of the widow, and could now be enforced by her against the estate of the appellant. From this determination the appeal is taken.

There can be no doubt that, when the wid-

ow paid the amount due upon the bond and mortgage, she was entitled to acquire the right of an equitable holder of those instruments, in order to compel the estate of her co-tenants to bear a just share of the incumbrance; but whether she would acquire such right depended on her intention at the time of making the payment. A court of equity will keep an incumbrance alive or consider it extinguished, as will best serve the purposes of justice and the actual and just intention of the party. *Starr v. Ellis*, 6 Johns. Ch. 393, 395; *Robinson v. Leavitt*, 7 N. H. 73, 100; *Duncan v. Smith*, 31 N. J. Law, 325; *Sheldon*, Subr. 21; *Bispham*, Eq. § 337. On paying the debt, she was entitled to have the bond and mortgage delivered to her by the assurance society uncanceled, and that would constitute an equitable assignment thereof to her. *Hamilton v. Dobbs*, 19 N. J. Eq. 227; *Bigelow v. Cassedy*, 26 N. J. Eq. 557. Such a course would have made clear her purpose to preserve the right of subrogation, not only as to the specific lien of the mortgage, but also as to the more general obligation resting upon the devisees of the obligor. But by canceling both of these instruments, she furnished substantial evidence of a design that the burdens which they created should be wholly extinguished. Although this evidence might not be deemed conclusive, incapable of rebuttal, yet, when we find that the burdens thus to be removed could rest only upon her daughter and infant grandson, and that during a period of more than seven years thereafter she gave no sign of a thought that the burdens remained, we are impelled to the belief that she intended their extinguishment. The suggestion that her cancellation of the mortgage may have been for the purpose of increasing her financial credit as an owner of the land, or of facilitating her transfer of the title, finds no support in the circumstances disclosed by the testimony, and, besides, leaves undisturbed the force due to the cancellation of the bond, her relationship to the persons concerned, and the long period of her inaction and silence. We think that when Mrs. Mathews paid off the bond and mortgage, she intended a benefaction to her daughter and grandson, and not to be subrogated to any claims against them or their estate.

Let the decree, so far as it charges the estate of Jerome A. Ryan with a share of the sum paid by Mrs. Mathews in satisfaction of the bond and mortgage, be reversed, and in other respects be affirmed.

(65 N. J. E. 748)

HEADLEY v. LEAVITT.

(Court of Errors and Appeals of New Jersey. July 20, 1903.)

MARRIED WOMAN—CONTRACT—CONSIDERATION.

1. Where a married woman takes up and becomes the owner of promissory notes on which

she is accommodation indorser, her contract to release a prior indorser for sufficient consideration is binding upon her. It is a primary promise by her which she is under no legal disability to make under section 28 of the married woman's act (2 Gen. St. p. 2017).

2. The consideration of such a contract need not move directly to the married woman, for, if it passed to a third person at her request, it is sufficient.

3. An accord and satisfaction that is unexecuted is not an available defense at law against the original cause of action, but it may, in a proper case, become available as an equitable defense thereto.

4. Where an equitable defense to such an action fails only because it was not cognizable in the law court, such result will be no bar to the action of a court of equity in applying such equitable remedy to the relief of a defendant by enjoining the collection of the judgment recovered in such action.

5. Such a defendant is not required to first test the accuracy of the ruling of the law court by writ of error before proceeding in equity. He may accept the ruling of the law court, and pursue his remedy at once in the court of equity.

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by Charles M. Headley against Martha B. Leavitt. From an order denying an injunction, complainant appeals. Reversed.

Linton Satterthwaite, for appellant. John H. Backes, for respondent.

HENDRICKSON, J. This is an appeal from an interlocutory order denying to the complainant relief by injunction against a judgment obtained against him by the respondent in the Supreme Court. Since this appeal was taken, the respondent has departed this life, and by order of this court the action stands revived as against Harry D. Leavitt, her executor.

Upon referring to the bill and affidavits, it appears that the controversy arose in this way: The complainant and one William H. Leavitt, a son of the respondent, about the year 1892, organized the Headley-Leavitt Company, a New Jersey corporation, the former becoming president and treasurer and the latter secretary. The complainant was the owner of the one half of the capital stock, and William H. Leavitt and his wife, Emma D. Leavitt, owned the other half; he holding one share thereof, and his wife the balance. The corporation had its place of business in the city of Trenton, and was a dealer in gas fixtures, mantels, and other builders' supplies. In the year 1895 the secretary, who had been a collector of moneys due the company, was found to be short in his accounts to the amount of about \$6,000, which he had misappropriated. The company then had outstanding its notes in bank aggregating about \$6,600. These notes had been discounted upon accommodation indorsements made by the complainant and by the secretary, or by others procured by the latter. Among the accommodation indorsers procured by Leavitt were his father, Lyman Leavitt, his mother, Martha B. Leavitt, one Nicholas Jahn, and

one Enoch W. Hooper. The proceeds of all notes discounted were placed to the credit of the company. A conference took place between the complainant and the secretary and the latter's father. The misappropriation and the financial embarrassment were among the subjects discussed. The son had promised to raise some money to pay part of his misappropriation, and the father refused to advance more money, and shortly obtained the appointment of a receiver to wind up the affairs of the company as an insolvent corporation. A little later the respondent called upon complainant, and said that she and her husband, knowing that their son was responsible for the failure of the company, had decided to take up all the accommodation paper of the company. The complainant replied that he did not care to have them do that, but made this proposition: that if she (the respondent) would take up and relieve complainant of all responsibility for what notes were in the Mechanics' National Bank, together with the notes she and her husband had already taken up, the complainant would assume responsibility for the notes in the Trenton Banking Company. The respondent accepted this proposition, and the two at once proceeded to the company's place of business, and there, in the presence of the receiver, took from the note book of the company two lists of notes; one list being made up of notes held by the Mechanics' National Bank, designated in the bill as "Group A," and the other list being made up of notes held by the Trenton Banking Company, designated in the bill as "Group B." The two lists were made up so as to divide the notes as near equally as possible. The agreement, as above indicated, was there restated as applying to the respective lists, and reaffirmed between the parties. It was agreed that respondent would take up the notes in group A, and relieve complainant from all liability thereon, if the complainant would take up and become responsible for all notes in group B, and relieve from liability thereon all the indorsers or makers thereof, with the exception of the company, together with the \$1,200 note in the Mechanics' National Bank on which the complainant and A. C. Reeves were accommodation indorsers. It was also agreed between the parties that they would have the notes protested, so that they might present their claims to the receiver in better form, and that for whatever loss resulted upon the claims above the returns from the receiver each would be responsible for his or her own loss. Upon the notes in group A the respondent was an accommodation indorser after the complainant. Of the notes in group B she was accommodation indorser on one note for \$100 after complainant. On five notes of this group there were other indorsers prior to complainant. Soon after the agreement thus made, the complainant made known to the Trenton Banking Company his desire to assume personal liability for the notes in group B, though they

were not yet due, and his liability thereon was not yet fixed, and secured the bank by a mortgage upon his city property, arranging with it to hold the notes until the affairs of the company should be wound up by the receiver. The complainant was the largest creditor of the company, and his object was to apply his dividends from the receiver to aid him in taking up the notes. Both the complainant and the respondent presented claims to the receiver, based upon the notes in their respective lists, and received dividends thereon to the amount of 8 per cent. of their claims. There was a delay in settlement of the company's affairs by the receiver. No demand was made by the Trenton Banking Company upon any of the indorsers of the notes in group B, nor any complaint made by the respondent to the complainant that he had not taken up the notes in group B and released the indorsers thereof. Nor did the respondent give any notice to complainant of any desire or purpose on her part to rescind the contract before bringing her suit against the latter as indorser upon the notes in group A. The first intimation the complainant had as to any dissatisfaction of the respondent in regard to said contract, or as to any delay in the final performance of its terms by complainant, was when, on October 15, 1901, process was first served upon him in the suit. The complainant appeared and put in the defense of accord and satisfaction founded upon the contract and the acts of the parties thereunder, but because the defendant had not in fact taken up the notes in group B, and therefore could not show satisfaction, the defense was overruled by the learned trial judge, and verdict was directed for the plaintiff. After the trial the complainant at once completed the performance of his part of the contract by taking up the notes in group B and releasing and discharging therefrom all the indorsers thereof. These facts, and others to be hereafter referred to, were set out in the bill, and relief was prayed on the ground that it would be unconscionable to permit the judgment to be satisfied out of complainant's property. A demurrer was filed to this bill. In support of the demurrer it was contended that the alleged contract by the defendant was invalid (1) because she was a married woman, and her undertaking was to pay the debt of another without consideration moving to her; (2) the agreement was not an accord and satisfaction; (3) the judgment was *res adjudicata*. The learned vice chancellor, after argument, filed a memorandum to the effect that he was unable to discover any equitable ground for restraining the common-law judgment creditor from enforcing her rights thereunder.

The first ground of demurrant's contention would be good if the agreement of the wife was in the nature of a suretyship, or of a collateral promise to answer for the debt of another, within the meaning of sec-

tion 26 of the married women's act (2 Gen. St. p. 2017). The collateral promise here mentioned is of like character to that arising under a similar clause of the statute of frauds requiring such promise to be made in writing in order to be enforceable (2 Gen. St. p. 1803, § 5), and is subject to a like construction (*First Nat. Bank of Cranbury v. Dohm*, 52 N. J. Law, 363, 19 Atl. 258). In that case the married woman purchased of a bank the note of her husband and a third person, and the judgment obtained thereon, and gave her own note to the bank for the consideration; and it was held that, although no formal transfer had been made of the judgment, she became the equitable owner thereof, and there remained no debt or liability of another person to the bank to which her promise could be collateral, and that the note was not invalid under the proviso of the married women's act. And it was held generally in that case that, if a defendant's promise is made upon a substantial consideration moving to himself for his own use and advantage, it creates an enforceable obligation, although not reduced to writing. The same principle is laid down in *Cowenhoven v. Howell*, 36 N. J. Law, 323, where it was held that the statute of frauds does not apply where the effect of the new promise is to extinguish the liability of the original party before the obligation of the new promise attaches. This principle, as applied to contracts between persons contingently liable upon notes and others interested therein, is illustrated in the cases of *Sanders v. Gillespie*, 50 N. Y. 251, and *L'Amoreux v. Gould*, 7 N. Y. 849, 57 Am. Dec. 524.

There is another aspect of the case sub judice, which shows the promise to be original, and not collateral. Complainant is not here relying upon that part of defendant's agreement which provided that she should take up and pay the notes upon which her action at law was brought. That part of her engagement had been performed (and, as may be presumed, voluntarily performed) before the action at law was commenced. The stipulation whose enforcement is now sought is this: that if and when she should acquire from the Mechanics' Bank the notes in group A, she would release the complainant from all liability thereon. Such a stipulation is not collateral; it is original. Neither is it a promise to pay a debt; it is rather a promise that, if the promisor shall acquire by purchase a certain chose in action binding severally upon the promisee and others, the promisor will release the promisee from liability thereon. Such a promise is not within the statute.

It thus appears that the engagement of the respondent whose enforcement is here sought was not invalid under the proviso of the married women's act. It is, therefore, valid if made upon sufficient consideration. Was her contract based upon a

sufficient consideration? It cannot be said that any valid consideration arose to her growing out of her indorsement of the notes in group A, for she was only an accommodation indorser thereon, and, being a married woman, she could not be held liable. But one effect of the agreement, if performed, would be to release her son, William H. Leavitt, who stood primarily liable on a note of \$800 in group A, from his liability to the complainant, a subsequent indorser. It would also have the effect of releasing Jahn and Hooper, who became indorsers on notes in group B at her son's request. They were liable before complainant to an amount exceeding \$900. Her husband was also released from contingent liability on one or more of the notes in group B. The consideration to respondent evidently arose out of a benefit to herself or to third persons she desired to aid, and out of the detriment to complainant by her inducing him to release indorsers prior to himself. The consideration to support a promise may be either a benefit accruing to the promisor or a loss or disadvantage to the promisee. *Conover v. Stillwell*, 34 N. J. Law, 54; *Corle v. Monkhouse*, 50 N. J. Eq. 537. The detriment to the promisee necessary to constitute a consideration is, sufficient if it consists of the simple surrender of a legal right. And in fact any act which constitutes a change of the legal position of the promisee may be a valid consideration. *Harriman on Contracts*, 91. It was not necessary to the validity of the contract that the consideration should move directly to the respondent. It was sufficient if it passed to third persons at her request. 6 Am. & Eng. Enc. of Law (2d Ed.) 686. Nor does the matter of the adequacy or inadequacy of the consideration enter into the question of validity. That is left to the free choice and personal judgment of the parties. *Id.* 694.

Are the complainant's rights foreclosed by the action of the common-law tribunal? An affirmative answer must follow if the jurisdiction of that court was complete. But the defense of accord and satisfaction was overruled because it was unexecuted, or only in part executed. This condition rendered the defense unavailable at law. *Allen v. Harris*, 1 Ld. Raym. 122; *Lynn v. Bruce*, 2 H. Blacks. 318; *Stone v. Todd*, 49 N. J. Law, 274, 8 Atl. 300; *Line & Nelson v. Nelson & Smalley*, 38 N. J. Law, 358. The defense offered would have been good in equity. The agreement was lawful in character at its inception. The defendant, in bringing the suit at law, acted in disregard of it only because of the delay of complainant in actually taking up the notes in group B and discharging the indorsers thereon. The agreement was silent as to the time of performance. It will, therefore, be construed as requiring performance within a reasonable time. And that means a reasonable time under the particular circumstances of

the case. *Harriman on Contracts*, 279, 280; *Gaslight Co. v. Mfg. Co.*, 122 U. S. 300, 7 Sup. Ct. 1187, 30 L. Ed. 1190. By giving the mortgage to the bank to secure the payment of the notes in group B out of his own private estate, he secured a binding contract from the bank to hold the notes until the receiver should be discharged. This was done in part performance of the contract. Neither the respondent nor the indorsers upon the notes in group B had suffered any injury or damage by the delay in final performance, nor were they likely to suffer any. There was no refusal on the part of the complainant to perform his part of the contract by the actual taking up of the notes. The bank was made safe, and equity, we think, would have controlled this security for the benefit of the indorsers upon the notes in group B. It further appears that respondent's son, William H. Leavitt, died in 1901, and not until after this event was the suit commenced. By resting upon respondent's promise, complainant was deprived of an opportunity to take action toward indemnifying himself as against the son on the \$800 note in his lifetime. It is apparent, we think, that upon the facts stated the complainant, in reliance upon the respondent's promise, surrendered rights and changed his position in a way that would render it inequitable for her to be permitted to withdraw from the contract without any effort to restore him to his rights as they had before existed. Under the circumstances we think the contract was an existing one at the time of the trial, and that the complainant had an equitable defense to the action, which was not within the jurisdiction of the common-law court to consider. This being so, the complainant is not barred in equity from seeking the remedy that was determined adversely to him in the law court. The rule is that, where the party has equitable rights not cognizable in a court of law, which would in a court of equity have prevented such an adjudication as was made in the court of law, the judgment will interpose no obstacle to redress in equity, since the court of law had no proper jurisdiction of the subject-matter forming the basis of redress in equity. 2 Story, Eq. Jur. 1673. In *Smalley v. Line et al.*, 28 N. J. Eq. 348, it was held that the fact that a complainant attempted to set up a merely equitable defense in a suit at law will not debar him from subsequently setting it up in a court of equity against the judgment. This doctrine is sustained also in *Hughes v. Nelson*, 2 Stew. 547. Nor is a party denied such remedy because he did not test the accuracy of the action of the law court in overruling his defense by a review on error. He may accept the ruling of the law court, and pursue his remedy in equity. *Borcherling v. Ruckelshaus*, 49 N. J. Eq. 340, 24 Atl. 547.

The bill shows that soon after the trial

in the law court, and before this bill was filed, the complainant, as before stated, took up and made satisfaction to the bank for all the notes in group B, and relieved and discharged from liability thereon all the makers or indorsers except the Headley-Leavitt Company. We think that, under all the circumstances, he did this within a reasonable time, and that he is entitled to invoke the equitable powers of a court of equity to protect him against the judgment of the defendant's executor.

The result is that the order dismissing the rule to show cause will be reversed, and an order should be made overruling the demurrer, and directing that an injunction issue according to the prayer of the complainant's bill.

(69 N. J. L. 419)

TITUS v. GUNN.

(Court of Errors and Appeals of New Jersey.
June 15, 1903.)

MECHANIC'S LIEN—RIGHT OF ACTION—CONTRACT—CONSTRUCTION—RELEASE OF LIENS—USE OF MEMORANDUM.

1. In an ordinary action commenced by summons, the plaintiff, in order to succeed, must show that his right of action was complete at the time the action was commenced.

2. The same rule applies to an action brought against the builder and owner, by virtue of the mechanic's lien law (P. L. 1898, p. 547, §§ 23, 24).

3. A building contract that required the contractor to do the work and furnish the materials required for the construction of certain buildings in this state contained provisions for the payment of the consideration price in installments as the work progressed, the final payment to be made when the buildings were completed and "delivered to the owner with a full release of liens." *Held*, that the clause quoted was intended to protect the owner against liens and claims arising under the mechanic's lien law (P. L. 1898, p. 538).

4. In such a case, the delivery of a release of liens is a condition precedent to the contractor's right to recover, unless it affirmatively appear that there are no liens or claims to be released.

5. In an action brought against the builder and owner under the mechanic's lien law (P. L. 1898, p. 538), the releases must be delivered or tendered before suit brought.

6. It is erroneous to permit a witness to use, as a memorandum from which to testify, a document in the preparation of which he did not participate, and concerning the accuracy of which he has no personal knowledge.

(Syllabus by the Court.)

Error to Circuit Court, Gloucester County
Action by William F. Titus against Frank Gunn. Judgment for plaintiff, and defendant brings error. Reversed.

Robert S. Clymer, for plaintiff in error. A. H. Swackhamer, for defendant in error.

PITNEY, J. This was an action upon a mechanic's lien claim, brought against the defendant as builder and owner. The plaintiff prevailed in the court below, and a reversal of the judgment is now sought, on the ground of errors committed at the trial, evidenced by bills of exceptions.

The principal part of the plaintiff's claim

arose under a contract in writing between the parties, providing for the construction at Mount Royal, in the county of Gloucester, of two dwelling houses by the plaintiff for the defendant, including the furnishing of all materials required for the work. The contract provided, as usual, for payment of the consideration price in installments as the work progressed, the final payment to be made "when each house is completely finished and delivered to the said Frank Gunn with a full release of liens." The only rational construction of this clause is that it was intended to protect the owner against liens and claims arising under the mechanic's lien law (P. L. 1898, p. 538). *Turner v. Wells*, 64 N. J. Law, 269, 45 Atl. 641; *Id.*, 67 N. J. Law, 572, 52 Atl. 358. As the contract was not filed pursuant to section 2 of the act, the buildings were subject (sections 1, 16, 18, etc.) to the liens of laborers and materialmen to be filed within four months after performing the work or furnishing the materials. The contract work was finished not earlier than August 12, 1902, and this action was commenced on or before September 1st following. The release of liens was therefore essential for the protection of the defendant, and was a condition precedent of the plaintiff's right to recover, unless it affirmatively appeared that there existed no liens or claims to be released. *Turner v. Wells*, *supra*. No attempt was made by the plaintiff to show the nonexistence of such claims or liens; on the contrary, it was admitted that one or more of the materialmen remained unpaid. There was no tender of releases before suit brought. Releases were introduced in evidence, but a considerable number of them were dated, and presumably executed, after the commencement of the suit. It was admitted that one, at least, was signed on the day of the trial. The trial judge, against objection based on the nondelivery of releases before commencement of suit, directed the jury to render a verdict for the entire amount claimed by the plaintiff, including the amount of the final payment. An exception was duly sealed. The judge acted upon the theory that it was immaterial whether the releases were made or tendered before the suit was brought, so long as they were duly executed before being introduced in evidence, and were produced and tendered to the defendant upon the trial. This was clearly erroneous. The action having been commenced by summons, the adjudication must relate to the status that existed at the beginning of the suit. *Felt v. Steigler* (N. J. Sup.) 54 Atl. 243. The practice indicated in *Devlan v. Wells*, 65 N. J. Law, 213, 220, 47 Atl. 467, is based upon the peculiar procedure laid down in the attachment act, and has no reference to actions commenced by summons.

In view of the necessity of a second trial, it is proper that we point out another error apparent upon the record now before us. A part of the plaintiff's claim is for "extra work," not included in the contract. A bill of

particulars, embodying a specification of the items of this claim, was annexed to and filed with the declaration. Upon the trial, the plaintiff was a witness in his own behalf, and was asked whether he had done any work for the defendant outside of the contract. Having answered in the affirmative, he was asked to give the amounts due for the extra work, and was unable to do so, having no memorandum made by himself from which to testify. He was then permitted, against objection, to refer to the bill of particulars annexed to the declaration, and to testify from it as to the amount and price of the extra work. There was nothing to show that he had participated in the preparation of the document, or had any personal knowledge with respect to its accuracy. It was therefore improper to permit him to use it as a memorandum from which to testify.

The judgment should be reversed, and a venire de novo awarded.

(65 N. J. E. 759)

STONE et al. v. GOSS et al.

(Court of Errors and Appeals of New Jersey.
July 10, 1903.)

INJUNCTION—DISCLOSING TRADE SECRET.

1. One who is under an express contract, or a contract implied from a confidential relation, not to disclose a trade secret, will be enjoined from disclosing the same.

2. Others who induce him to disclose the secret, knowing of his contract not to disclose it, or knowing that his disclosure is in violation of the confidence reposed in him, will be enjoined from making any use of the information so obtained, although they might have reached the same result independently by their own experiments or efforts.

3. The disclosure necessarily made to the court does not deprive the complainants of their right to an injunction.

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by Albert H. Stone and others against John Goss and the Grasselli Chemical Company. Decree for complainants, and defendants appeal. Affirmed.

Cortlandt & R. Wayne Parker, for appellants. Charles W. Fuller, for respondents.

SWAYZE, J. This is a bill for an injunction to restrain Goss from divulging a secret process of the complainants for the manufacture of depilatories (compounds used to remove hair and wool from skins and hides), and to restrain the Grasselli Chemical Company from using or divulging any information derived from Goss with reference to the secret process. The vice chancellor advised a decree for the complainants.

Goss was in the employ of the complainants from 1892 to 1901, during which time they had, by constant experiment, made improvements in the manufacture of depilatories, and had put upon the market what were called "Stone's XXX Depilatory" and

"Stone's XXXX Depilatory." The ingredients out of which the depilatories were made were well known and had been in use for several years before 1892, but the depilatories manufactured had not been entirely satisfactory until the complainants succeeded in producing the XXX and XXXX. The Grasselli Chemical Company, along with other branches of manufacture, was also engaged in the manufacture of depilatories from the same ingredients used by the complainants, and was their chief business rival. Some time in the year 1901, the Grasselli Chemical Company bought, through one of its agents, some of the complainants' XXX Depilatory, and caused a chemical analysis to be made, and thereafter conducted experiments with a view to the production of a depilatory equal in quality to the product of the complainants. In August, 1901, Goss became dissatisfied with his position with the complainants. He had received a letter two or three months before from Atteaux, a sales agent of the defendant company in Boston. About the middle of August, Goss wrote Atteaux, and by appointment met at Atteaux's office. Grant, a director of the Grasselli Chemical Company. Goss fixes the date of this interview at about the middle of August, and, as he says he gave the complainants eight days' notice that he would leave their employ, and left September 3d, he apparently gave the notice after the interview with Grant. In the second week in September, he went into the employ of the Grasselli Company, in what was known as the sulphide department, which was the department concerned with the manufacture of depilatories. During the first two or three weeks he was in the employ of the Grasselli Company he did no work, but immediately upon his employment, Frazier, the superintendent of its plant at Tremley, questioned him "in regard to what he knew about the manufacture of depilatories," and Goss informed Frazier of the complainants' method of manufacture, and described fully the complainants' apparatus. Frazier reported to the defendant company the information obtained from Goss, with a sketch of the apparatus, and the manner in which it should be made and put up. This sketch was made by Frazier, and corrected by Goss. The Grasselli Company approved of Frazier's plan, and directed him to put up the shed to contain the apparatus. He was proceeding with this work when stopped by the injunction.

The complainants allege that Goss was under a contract with them not to reveal the secrets of manufacture. Goss denies this contract. We agree with the vice chancellor that the contract is established by the weight of evidence. The right of a manufacturer, whose goods are made by an unpatented secret process, to protection by injunction against the divulging of his secret in a proper case, is now established by a well-considered line of cases in England and in several states. The

¶ 1. See Injunction, vol. 27, Cent. Dig. § 110.

leading case is *Morrison v. Moat*, 9 Hare, 241, 20 L. J. Eq. 513, decided by Vice Chancellor Turner in 1851, and affirmed in Court of Appeals by Lord Cranworth, 21 L. J. Ch. 248. The principle has since been applied to cases in various aspects in the English courts. *Merryweather v. Moore* (1892) 2 Ch. 518, 61 L. J. Eq. 505; *Lamb v. Evans* (1892) 3 Ch. 462, 61 L. J. Eq. 681, affirmed on appeal, 62 L. J. Eq. 404. A leading case in this country is *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664. In New York the principle is established in *Tabor v. Hoffmann*, 118 N. Y. 30, 23 N. E. 12, 16 Am. St. Rep. 740; *Eastman v. Reichenback* (Sup.) 20 N. Y. Supp. 110; *National Gum Co. v. Braendly* (Sup.) 51 N. Y. Supp. 93; *Little v. Gallus* (Sup.) 57 N. Y. Supp. 104; *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475. In Michigan it was adopted in a very well-considered opinion in *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 149, 72 N. W. 140, 38 L. R. A. 200, 68 Am. St. Rep. 469. In Pennsylvania, *Fralich v. Despar*, 165 Pa. 24, 30 Atl. 521. In Indiana, *Westervelt v. National Paper Co.*, 154 Ind. 673, 57 N. E. 552. In the federal courts, *C. T. Simmons Medical Co. v. Simmons* (C. C.) 81 Fed. 163. The rule has been applied in this state in the Court of Chancery by Chancellor Runyon in *Salomon v. Hertz*, 40 N. J. Eq. 400, 2 Atl. 379. *Salomon v. Hertz*, *Peabody v. Norfolk*, and *O. & W. Thum Co. v. Tloczynski* are the leading American cases. These cases establish the principle that employes of one having a trade secret, who are under an express contract, or a contract implied from their confidential relation to their employer, not to disclose that secret, will be enjoined from divulging the same to the injury of their employer, whether before or after they have left his employ; and that other persons who induce the employe to disclose the secret, knowing of his contract not to disclose the same, or knowing that his disclosure is in violation of the confidence reposed in him by his employer, will be enjoined from making any use of the information so obtained, although they might have reached the same result independently by their own experiments or efforts. We approve the principle thus established.

We find in this case, as already stated, that an express contract between the complainants and Goss for secrecy is proved. Two questions remain: (1) Did Stone possess a secret process for the manufacture of depilatories? (2) Did the Grasselli Chemical Company obtain knowledge of that secret process from Goss under such circumstances that it should be enjoined from making use of it?

1. The ingredients used in the manufacture of Stone's depilatories were well known, and had been used for that purpose for years before the XXX and XXXX were put upon the market, and the same ingredients were used by the Grasselli Chemical Company in

the manufacture of a depilatory. It is urged that the only advantage possessed by the complainants arose out of skill in handling, and not out of a secret process, and that there was no secret either in the ingredients or in the method of compounding them. The complainants combined the ingredients by a different method from any other in use, and the result was a product of a different character. The complainants' process of manufacture was considerably more complicated than the defendants'. The secret consisted in a knowledge of the proper method of mixing the ingredients, and treating them, in order to produce a product of proper consistency. The difference between mere skill in manipulation and a process of manufacture is illustrated by a recent case in the United States Supreme Court. *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968. In this case the process which was held patentable consisted in retaining a quantity of molten iron in a reservoir, to serve as a basis for mixing the varying products of the blast furnaces preparatory to converting the same into steel. The difficulty to be overcome was a lack of uniformity in the molten metal. The use of a reservoir in which the varying products of the blast furnaces had been mixed was known prior to the patent involved in that case, but the importance of always maintaining in the reservoir a sufficient quantity of molten metal to "dominate" (to use the court's expression) the whole mass had not been before appreciated. The majority of the court held that the process was therefore patentable. There the ingredients were the same, the idea of mixing the molten metal of different qualities was not new, and the only novelty was the retention in the reservoir of a "dominant mass" sufficiently large to control the average character of the product from time to time. If such an improvement was patentable, it is clear that a process of treating the ingredients, as complicated as that involved in the present case, resulting in a product of novel character, is a process which, if kept secret, is entitled to the protection of the court. The evidence is convincing that the complainants made efforts to keep the process secret, and had succeeded until Goss revealed the secret to the Grasselli Chemical Company. Since we are satisfied that Stone had a secret process of manufacturing a depilatory, and that Goss was under a contractual obligation not to disclose the secret, the complainants are clearly entitled to an injunction against Goss. The question remains whether the injunction should go also against the Grasselli Chemical Company.

2. The evidence satisfies us that the Grasselli Chemical Company knew that Stone was manufacturing a superior article to its own; that it had been for some time trying to discover Stone's method of manufacture; that it had entered into correspondence with

Goss and employed him while he was still in Stone's service; and that, immediately upon his coming into the employ of the defendant company, it sought through Frazier to learn Stone's secret, and, having learned it, was about to make use of it to manufacture a similar substance by Stone's process, to be sold in competition with his. These facts leave no doubt that the Grasselli Chemical Company acted in fraud of Stone's rights in the effort to learn his secret by inducing his employé to divulge the same. Even though they did not know of the contract, they must have known of the confidential character of Stone's business, and the confidential character of the relation between him and his employés. The defendant company is a party to Goss's fraudulent disclosure of the secret, and the complainants were entitled to an injunction restraining the Grasselli Chemical Company from making any use of the information thus obtained from Goss. The injunction should not be refused because the process was such that it would probably have been discovered by independent experiments in the manipulation of the ingredients of which the products of both parties were alike composed. The Grasselli Chemical Company, by its own conduct, has put itself in such a position that it may even lose the advantage of future independent experiments. It would be quite impossible hereafter to decide how much of the improvement in the product of the Grasselli Chemical Company would be attributable to its own independent efforts, and how much to the knowledge of Stone's process fraudulently acquired by it. Every doubt must be resolved against the parties to a fraudulent act. If the defendant thereby suffers, it suffers only by reason of having been a party to Goss's fraudulent disclosure of the secret. The legal principle governing the case is, in effect, the same that was applied by this court to a case of fraudulent intermixture of goods. *Jewett v. Dringer*, 30 N. J. Eq. 291.

It was argued in behalf of the appellants that the disclosure of the complainants' secret, necessarily made during the trial, would render an injunction nugatory. This difficulty was expressed by Lord Eldon in an early case. *Newberry v. James*, 2 Merivale, 446, 451. To obviate it as far as possible, the testimony in this case was taken in camera, and care was taken to print only enough copies of this portion of the evidence to supply the members of the court. It has not been found necessary in this opinion to describe the process, and we see no reason why this disclosure to the court, necessarily made for the purpose of the case, should deprive the complainants of their right to relief. The defendants were already possessed of the secret, and they cannot now take advantage of a disclosure made in order to secure relief against them. Such a disclosure is no publication to the world, and, although it may endanger the complainants' secret,

it does not deprive them of the right to enjoin the defendants from making use of it. The doubts felt by Lord Eldon have not prevented the courts from giving such protection as they could in the later cases cited above.

The decree should be affirmed, with costs.

(65 N. J. E. 735)

WARWICK v. PERRINE et al.

(Court of Errors and Appeals of New Jersey.
July 20, 1903.)

**BILL—MULTIFARIOUSNESS—SETTING ASIDE
CONVEYANCE.**

1. A bill to set aside, as fraudulent as to creditors, several deeds of land conveyed by the judgment debtor to distinct grantees, is not multifarious, when it does not appear how many of such deeds are to be set aside, or in what order, and all the grantees are entitled to be heard on such questions.

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by William Warwick against William D. Perrine and others. Decree for plaintiff, and defendants appeal. Affirmed.

Howard W. Hayes and George Biller, for appellants. A. S. Appelget, for respondent.

FORT, J. The bill in this case is filed by a judgment creditor, and prays for a discovery, and that the defendants, or some of them, may pay the full amount of the complainant's judgment, and that certain conveyances affecting the lands out of which the complainant seeks to have the judgment paid may be decreed to be fraudulent and set aside, and that the lands be decreed to be sold under the complainant's execution to satisfy said judgment. The allegations of the bill are that the defendant William D. Perrine has conveyed several pieces of land to Samuel E. Perrine, Sarah M. Perrine, and Ellen E. Perrine, respectively, which conveyances are specifically set out in the bill. Two of the defendants file demurrers, and each alleges as ground for demurrer that said bill "is exhibited against the defendant, and the several other persons therein named as defendants thereto, for distinct matters and causes, in several whereof, as appears by said bill, this defendant is not in any manner interested or concerned, and that the said bill is altogether multifarious." The court of chancery of this state has long since held that such a bill, which brings in the alleged fraudulent transactions of the same character, occurring before the entry of the complainant's judgment, and which makes all the grantees of the judgment debtor parties defendant, specifically stating the ground for the making of each of said grantees a defendant, is not multifarious. A bill thus drawn prevents multiplicity of actions, and enables the court to determine by a decree

¶ 1. See *Equity*, vol. 19, Cent. Dig. § 32; *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 688.

in one suit the rights and equities of all the parties.

The decision of the learned vice chancellor in the case before us was based upon the decisions of the court of chancery in *Way v. Bragaw*, 16 N. J. Eq. 231, 84 Am. Dec. 147, and *Randolph v. Daly*, 16 N. J. Eq. 313. In *Way v. Bragaw*, Chancellor Green stated the rule in this way: "Where there is one entire case stated as against the debtor, it is no objection that one or more of the defendants to whom parts of the property have been fraudulently conveyed had nothing to do with the other fraudulent transactions. * * * In such case neither defendant can demur for multifariousness." The principle here stated has our approval.

The bill in this case is not multifarious for seeking to set aside, as fraudulent as to creditors, several deeds of land conveyed by the judgment debtor to distinct grantees. It does not appear from the bill how many of said deeds it may be necessary to set aside, or in what order. Upon all these questions, as between the judgment debtor and each of his grantees, and the judgment debtor and the complainant and his rights under his judgment, each of the defendants is entitled to be heard.

The order of the court of chancery appealed from, overruling the demurrer, is affirmed.

(65 N. J. E. 741)

WHITE v. WHITE.

(Court of Errors and Appeals of New Jersey.
July 20, 1903.)

DIVORCE—MAINTENANCE OF CHILDREN—PROCEDURE — NOTICE — JURISDICTION — INCREASE OF ALLOWANCE—CONSTITUTIONAL LAW.

1. Under sections 23 and 24 of "An act concerning divorces," approved March 27, 1874 (Gen. St. p. 1271), the Court of Chancery, in making a decree for the maintenance of children of divorced parents, after a divorce decreed in another state, may reserve in the decree the power to increase or decrease the amount of the allowance for such maintenance from time to time thereafter as circumstances may require.

2. In proceedings under section 24 notice of the inception of such proceedings is jurisdictional, and must be served within the state, unless the parent waives notice by appearing and submitting himself to the jurisdiction of the court.

3. But where jurisdiction has once been acquired over his person, and a decree has been made establishing the parental duty of maintenance, and requiring payment of a weekly allowance, at the same time reserving for future determination the question of an increase in the amount of the allowance, notice of further proceedings intended to be made the basis of such an increase may be given in such manner as the chancellor, in his discretion, sees fit. Where personal notice is prescribed, it is immaterial whether it be served within or without this state.

4. A decree establishing the parental duty, and providing for stated weekly payments for a time, reserving the question of the amount of future payments, does not dismiss the parent from the jurisdiction. It is not within his power to evade the full performance of the de-

cree by absenting himself from the state or changing his legal domicile.

5. Proceedings taken to increase the amount of the allowance are merely a continuation of the proceedings in which the parental duty became fixed. Service outside of the confines of this state of notice of proceedings for an increase of the allowance is not an invasion of the provision contained in the fourteenth amendment of the Constitution of the United States that no person shall be deprived of property without due process of law. Such service of the notice is itself "due process of law."

(Syllabus by the Court.)

Appeal from Court of Chancery; Reed, Vice Chancellor.

Proceedings by Hope V. Stahl White against Howard M. White for the support of children after divorce. From the order entered, defendant appeals. Affirmed.

Edwin Robert Walker, for appellant. Linton Satterthwait, for respondent.

PITNEY, J. The parties to this appeal were divorced by the decree of an Oklahoma court made in the year 1896. There are two children of their marriage, both of whom are still minors, and for whose maintenance the decree of divorce made no provision. In the year 1897, the children being inhabitants of this state, the Court of Chancery entertained a petition filed by the mother under section 24 of the act concerning divorces, approved March 27, 1874 (Gen. St. p. 1271). The father appeared, and on December 16, 1897, it was ordered and decreed by the chancellor that the petitioner (the present respondent) should have and retain the custody and care of the two children, and that the father (now appellant) should pay to the mother for the support and maintenance of the children the sum of \$3 per week for the period of one month from the date of that order, and until the further order of the court, and that the mother should be at liberty at the expiration of the period of one month to apply to the court for an increase in the amount to be paid by the father for the maintenance and support of the children. Some time after the expiration of the month, Mrs. White filed a petition asking that the amount allowed for the maintenance of the children should be increased. Mr. White having in the meantime become a resident of the state of Pennsylvania, notice of this application was served upon him there, without a special order of the court being first made in respect to the manner of service. The learned vice chancellor, conceiving that under section 24 of the divorce act a previous direction of the court with respect to the manner of giving notice of an application to increase the allowance was jurisdictional, declined to hold Mr. White to answer the petition. Thereupon, in the month of April, 1902, on application by the petitioner, the chancellor made an order directing that notice of the application be served personally upon the appellant, and such service was made upon him in the city of Philadelphia. He thereupon ordered a special

appearance for the purpose of objecting to the jurisdiction of the court on the ground that his domicile and residence were outside of the state of New Jersey. Upon the hearing of that objection it was overruled on the ground that the terms of section 24 of the act had been complied with by the giving of such notice as the court had directed, and an order was made requiring the appellant to answer the petition. From this order he now appeals.

The pertinent sections of the divorce act are as follows (Gen. St. p. 1271):

"23. That upon a decree of nullity or divorce, the court may make such further decree or order as may be deemed expedient, concerning the care, custody and maintenance of the minor children of the parties, and determine with which of the parents the children, or any of them, shall remain; and may also from time to time afterwards, on the petition of either of the parents, revise and alter such decree or order, and make a new decree or order, as the circumstances of the parents and the benefit of the children shall require.

"24. That after a divorce decreed in any other state or county, if minor children of the marriage are inhabitants of this state, the Court of Chancery, on the petition of either parent, or of a next friend in behalf of the children, such notice being given to both parents as the court shall direct, may make such decree concerning their care, custody, education and maintenance as if the divorce had been obtained in this state."

The Legislature of 1902, in revising the statutes, included the substance of the former section in section 19 of the act concerning divorces. P. L. 1902, p. 507. The provisions of section 24 were embodied as section 6 in the new act concerning minors, etc. Id. p. 263. The divorce act of 1874 was at the same time repealed, but with a saving of existing rights and of pending suits and proceedings. Id. p. 268. By the terms of section 24 the court is empowered to make the same decree concerning the care, custody, education, and maintenance of minor children who are inhabitants of this state, where the parents have been divorced in another state, as the court could make if the divorce had been obtained in this state. This refers us to section 23 for the limits of the jurisdiction and the mode of exercising it. The provision there contained is that, where a divorce is decreed, the court may not only make, at the time of decreeing the divorce, an order respecting the care, etc., of the children, but may also from time to time afterwards revise and alter this decree or order, and make a new decree or order, as the circumstances of the parents and the benefit of the children shall require. The act clearly recognizes the continuing duty of the parent to support the children during their minority, and provides for the enforcement of that duty by retaining the parent subject to the jurisdiction of

the court so long as the duty continues, to the end that the money allowance may be increased or diminished, and the provisions respecting the care, custody, education, and maintenance of the children may be varied from time to time according as the changing circumstances of the parties, the growing or diminishing needs of the children, and the increasing or decreasing ability of the parent may require. Sections 23 and 24 are, in this respect, quite analogous to section 19 of the divorce act of 1874, concerning which this court said in *Lynde v. Lynde* (N. J. Err. & App.) 52 Atl. 694, at page 700, 58 L. R. A. 471: "The amount of the allowance, the method of its enforcement, the method of its application, and the security to be exacted of the husband for its payment, are all confided to the discretion of the chancellor; and he is left at liberty to increase or decrease the amount of the alimony from time to time, according to the circumstances of the case. It will be observed that the statutory scheme is modeled closely after the practice of the ecclesiastical courts of England with reference to alimony. The purpose is to require the husband to pay to the wife periodically such sums as, in view of his circumstances and the necessities of the wife, will be a reasonable fulfillment of his continuing duty to support her." Section 23 of the divorce act makes no provision with respect to bringing the parent into court, because he is presumed to be already in court in the divorce proceedings, to which the proceedings for maintenance of the children are incidental. Section 24 requires notice to be given to the parent as the court shall direct, because until the parent is thus brought into court there is no proceeding pending. But, in either event, where the parent is once lawfully subjected to the jurisdiction, the proceedings are not concluded for all purposes by the making of a decree such as was made by the chancellor in the present case on December 16, 1897. While that decree was final in so far as it fixed upon the appellant the duty of supporting the minor children, yet by its own terms and by force of the statute it was subject to revision and modification from time to time in the future, so far as concerned the periodical contributions of money required for the discharge of that duty; leave being expressly reserved to the petitioner to apply to the court for an increase of the stated amounts, and leave being impliedly reserved to the appellant to apply to have them decreased. The cause was not thereby terminated, nor was the defendant dismissed from the jurisdiction of the court. Any subsequent application for a modification of the terms of the decree with respect to the manner in which the parental duty was to be discharged, was ancillary to the main purpose and effect of the decree, which was to conclusively establish the parental duty, and to require its performance.

In proceedings under section 24, the chan-

cellor is authorized to prescribe what notice shall be given to the parent. Notice of the inception of such proceedings is jurisdictional, and admittedly must be given within the state, unless the parent waives notice by appearing and submitting himself to the jurisdiction of the court. But where jurisdiction has once been acquired over his person, the question as to what measures ought to be taken to notify him of an inquiry relative to the amount of the allowance is necessarily left to the discretion of the court. On grounds of natural justice, and as a matter of fair practice, he is, of course, entitled to some notice, such as it may be practicable to give. But, where personal notice is prescribed, it is immaterial where it is served, if he be already subject to the court's jurisdiction. The objection of the appellant that at the time he was served with notice in April, 1902, he was a resident of the state of Pennsylvania, and that he was served in that state, is thus shown to be untenable. Prior to the 16th of December, 1897, he had become personally subject to the jurisdiction of the Court of Chancery by virtue of his own appearance in the proceeding. From that jurisdiction he has never been dismissed. It was not within his power to evade the full performance of the decree that fixed upon him the parental duty by absenting himself from the state or changing his legal domicile. Whenever it became necessary, in orderly procedure, to give him notice of a judicial inquiry affecting the quantum of his contributions towards the support of his children, such notice might be served upon him wherever found. Service outside of the confines of this state was not an invasion of the provision contained in the fourteenth amendment of the Constitution of the United States that no person shall be deprived of property without due process of law. Such service of the notice was itself "due process of law."

The Supreme Court of the United States has held that notice of an appellate proceeding is not such "process" as must necessarily be served within the jurisdiction of the court. *Nations v. Johnson*, 24 How. 195, 204, 16 L. Ed. 623. And in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, where it was held that "due process of law" requires, in actions in personam, that the defendant shall be subjected to the jurisdiction of the court by service of process within the state, or by his voluntary appearance, Mr. Justice Field, who delivered the opinion of the court, was careful to say (at page 734, 95 U. S.): "It is hardly necessary to observe that in all we have said we have had reference to proceedings in courts of first instance, and to their jurisdiction, and not to proceedings in an appellate tribunal to review the action of such courts. The latter may be taken upon such notice, personal or constructive, as the state creating the tribunal may provide. They are rather a continuation of the original litigation than the commencement of a new ac-

tion"—citing *Nations v. Johnson*. The same view is taken in a recent and well-considered case in Florida. *State v. Canfield*, 40 Fla. 47, 23 South. 594, 42 L. R. A. 76. There it was held that a statute providing for constructive notice of the institution and pendency of a writ of error does not violate that provision of the organic law that prohibits the deprivation of property without due process of law. The same reasoning applies, a fortiori, to a proceeding for modification of a decree for alimony, where the decree itself, pursuant to statute, is made expressly subject to such modification.

The order appealed from should be affirmed.

(69 N. J. L. 404)

GANSEVOORT BANK v. CARRAGAN.
(Court of Errors and Appeals of New Jersey.
June 15, 1903.)

PARTNERSHIP—FIRM ASSETS—DEPOSIT IN BANK—EVIDENCE.

1. The fact that a bank deposit stands in the individual name of one of the partners of a firm shows at most that he has legal title thereto, and is not conclusive evidence that the firm has no interest therein. Extraneous evidence is admissible to show that the equitable title and substantial ownership of the funds are in the firm, and that moneys going to swell the deposit in fact go to the benefit of the firm.

(Syllabus by the Court.)

Error to Supreme Court.

Action by the Gansevoort Bank against George Carragan, surviving partner of R. B. Poucher & Co. Judgment for defendant, and plaintiff brings error. Reversed.

Joseph Anderson and William D. Edwards, for plaintiff in error. Van Buskirk & Parker and Charles L. Corbin, for defendant in error.

PITNEY, J. This action was brought against the surviving partner of a firm that was second indorser upon three promissory notes amounting in the aggregate to \$5,600, all made in the summer of 1901, and discounted in the ordinary course of business by the plaintiff bank. The notes were identical in form with respect to parties, each being made by one J. A. Machemer, payable to the order of R. B. Poucher, and indorsed by Poucher and by the firm of R. B. Poucher & Co. The proceeds were credited on the books of the bank to an account that stood in the individual name of R. B. Poucher, and were used in whole or in part for the payment of maturing notes, similar in form with respect to parties, that had been previously discounted and credited to the Poucher account in like manner. These payments of the maturing notes were made by checks signed "R. B. Poucher," and drawn to the order of the bank. The firm of R. B. Poucher & Co. was formed in the year 1894, and continued until the death of Poucher, which occurred in the fall of the year 1901. The partners were R. B. Poucher and the present

defendant, George Carragan. Poucher was the active man of the concern, and was in sole charge of the conduct and management of its business. The partnership articles were in evidence, and show no limitation upon the powers ordinarily conferred upon the several partners by such an agreement.

Upon the trial of the action it appeared that Machemer, the maker of the notes, was a bookkeeper in the employ of the firm, and that the several notes were drawn up and signed by him; that the indorsements were in the handwriting of Poucher; and that the notes had been duly protested at maturity. The defense was that the partnership indorsement was made by Poucher for his own accommodation, without the knowledge or authority of the defendant, his copartner, and that the plaintiff had notice of the accommodation character of the transaction so far as the second indorsement was concerned, because the notes were presented for discount by the first indorser, and the proceeds were credited to an account that stood in his own name, and used in payment of maturing notes upon which he was primarily liable as between him and the firm. The trial judge acceded to this view, and held that under the circumstances the second indorsement must be presumed to have been made for the accommodation of the payee or of the first indorser, and that in partnership the presumption is against a binding accommodation indorsement unless by consent of all the partners, so that the bank was put upon inquiry to ascertain whether authority had been given by Carragan to Poucher to use the firm name for the personal benefit of the latter; and, since, according to the uncontradicted testimony, such inquiry would have developed the fact that Carragan knew nothing of the transaction, and had authorized no indorsement by his firm for Poucher's accommodation, it was held that a complete defense had been presented. A verdict was thereupon directed in favor of the defendant, and to this ruling a bill of exceptions was sealed.

The plaintiff's answer to the defendant's contention was that it was unfounded in fact; it being insisted that the notes in suit, and also the prior notes, of which they were in whole or in part renewals, were given in and about the business of the firm, and for the firm's benefit. If this was true, the signatures of the maker and of the first indorser were loaned for the accommodation of the firm, and the firm was, as between the parties, primarily liable. That being so, the making of the firm indorsements was within the ordinary partnership authority of Poucher as plainly as if the firm name had appeared upon the notes as maker, instead of indorser. A second contention made on the part of the plaintiff was that, even if it were true that the three notes in suit were given in and about the firm's business, and the proceeds thereof used in that business,

yet a course of dealing had existed between the bank and the firm of R. B. Poucher & Co. for some time prior to the making of the notes in question, in which numerous notes of like form had been discounted by the bank at the instance of Poucher, but for the firm's benefit, and the proceeds thereof passed to the credit of the R. B. Poucher account, and used in and about the firm's business; so that upon the presentation of the three notes in suit the officers of the bank had a right to believe, and that they did believe, that the R. B. Poucher account was really a firm account, and that the maturing notes were really firm obligations; so that those officers were not charged with notice that the firm indorsements upon the notes in suit were accommodation indorsements, and were not put upon inquiry to ascertain the authority of Poucher to indorse the notes with the firm name. Some evidence was offered by the plaintiff, and admitted by the trial judge, which, it is contended (and, we think, correctly), supports these insinuations. Much other evidence was offered by the plaintiff as tending in the same direction, and was overruled by the trial judge, bills of exceptions being sealed. The main purpose of the evidence thus excluded was to show that the R. B. Poucher account was in part or exclusively a firm account; and to prove the course of dealing that antedated the making and discounting of the notes in suit, in order to show that at least the bank officers had a right to believe (as they did) that moneys placed to the credit of that account went to the benefit of the firm. As the excluded evidence was offered in a manner to clearly indicate its purport and effect, and since that part of it which was documentary has been returned with the bill of exceptions, it is easy and convenient to discuss the case as if the excluded evidence had been admitted. So treating it, the facts bear this aspect: R. B. Poucher & Co. were produce commission merchants doing business in West Washington Market in the city of New York. At the formation of the firm in 1894, Poucher had an account in his own name in the Gansevoort Bank, and this account was continued without interruption and without change of name down to his death. During many years—and perhaps from the inception of the firm—a bank account was kept in the firm name at the Irving National Bank. The place of business of the firm was distant about three city blocks from the Gansevoort Bank, and about three miles from the Irving National Bank. During some years prior to the summer of 1901—commencing at least as early as December 17, 1898—the firm from time to time applied for and received from the Gansevoort Bank discounts of its mercantile paper. Applications were sometimes made by Machemer or Poucher personally, and sometimes made by letter, the letters being written upon the letter heads of the firm, bearing the names of Poucher and Carragan as partners. These letters were sometimes

signed "R. B. Poucher & Co.," and sometimes "R. B. Poucher." In each instance they were written either by Poucher or by Machemer, the bookkeeper; Carragan, as already mentioned, being an inactive partner. The applications for discount in each instance gave the officials of the bank to understand that the loans were asked for the benefit of the firm. The notes were in most instances, if not invariably, made by Machemer to the order of Poucher, and indorsed by him in his own name and in the name of R. B. Poucher & Co., precisely in the same form as the notes in suit. The proceeds were passed to the credit of the account of R. B. Poucher, and maturing notes were paid from that account by checks signed by Poucher. On October 1, 1900, a formal statement in writing of the assets and liabilities of the firm was made to the Gansevoort Bank. The statement began as follows: "For the purpose of procuring credit with the above bank for our negotiable paper, we furnish the following as being a fair and correct statement of our financial condition on the first day of October, 1900." Among the assets thus stated was the following item: "Cash in Gansevoort Bank \$1,071.87." This was the precise amount of the credit balance of the R. B. Poucher account in that bank on that day. The statement is signed, "R. B. Poucher & Co., by R. B. Poucher." Much evidence was excluded that would have tended to show that the Poucher account was in truth used in the business of the firm; that in many instances firm debts were paid by checks drawn upon this account; that on numerous occasions checks were drawn upon it payable to the order of Machemer, and deposited to the credit of the firm in the Irving National Bank; and frequently moneys and checks paid in to the firm in the ordinary course of its business were deposited by the employes of the firm in the Gansevoort bank to the credit of the Poucher account. Of the checks drawn against this account a large number was produced, covering a period extending from May 22, 1901, to September 14th of the same year, during which period the three notes in suit were discounted. With respect to the greater number of these checks, evidence was either introduced or offered tending to show that they were given in payment of firm indebtedness.

Enough has been said to demonstrate that the trial judge erred in directing a verdict for the defendant and in excluding evidence of the character indicated. His rulings were based upon the theory that the sole test of proprietorship over the funds represented by the R. B. Poucher account was the right of the other partner to control the account for firm purposes, and that when it was proved that the original discounts represented by the notes in suit were credited to that account, those moneys were thereby placed under Poucher's personal control, to the ex-

clusion of Carragan. We think this was no more conclusive, under the circumstances of the case, than the fact of finding money of the firm in the pocket of one of the partners would be conclusive of his individual ownership of that money. It may be that in prudent banking the Gansevoort Bank would not have recognized a check drawn otherwise than by R. B. Poucher himself. At most this would tend to show that the legal title to the funds on deposit there was in Poucher; but it did not prevent Carragan, or any one else concerned, from showing that the equitable title and substantial ownership were in the firm. We think the evidence in question was improperly excluded, and that, if admitted, it would clearly have raised a question to be submitted for the determination of the jury upon either or both of the issues tendered by the plaintiff in response to the case of the defense. From it the jury might have found that the notes in suit were in truth given in and about the business of the firm, and the proceeds credited to the use of the firm; and, failing this, they might have found either that the firm, by reason of the previous course of business, was estopped from disputing this fact, or that the bank, by reason of the previous course of business, was not chargeable with notice that the particular notes in question were made for the benefit of others than the firm. Upon such a finding it would have resulted that the bank was not put upon inquiry to ascertain the extent of Poucher's authority to use the firm name in the second indorsement.

The judgment should be reversed, and a venire de novo awarded.

(10 N. J. L. 619)

STATE v. ZDANOWICZ.

(Court of Errors and Appeals of New Jersey.
July 20, 1903.)

CRIMINAL LAW — ACCUSED AS WITNESS —
CROSS-EXAMINATION — INSTRUCTIONS — EX-
CEPTIONS — REVIEW — MURDER — DELIBERA-
TION.

1. When a defendant in an indictment avails himself of the privilege accorded by law, and becomes a witness in his own behalf, he waives any constitutional or common-law protection against being compelled to be a witness against himself, and may be cross-examined as a witness by the state's prosecutor. The extent of such cross-examination, and the mode of requiring answers thereto, are not deemed to require consideration in this case, for the defendant, having voluntarily testified in his own behalf in respect to his conduct and whereabouts during a period of time involved in the inquiry on the trial, a question by the prosecutor, respecting the clothes worn by him on a day included in such period, was permissible cross-examination, and there was no error in admitting that question.

2. When a defendant in an indictment under the provisions of the criminal procedure act takes a general exception to the charge of the trial court, and assigns error upon a portion thereof, the reviewing court is not restricted to the consideration of such portion of the charge, severed from its context and the rest

of the charge; for the duty to reverse in such case only arises when it appears that error in law was committed in the part of the charge so selected, to the prejudice or injury of the defendant in maintaining his defense.

3. The trial court, in its charge to the jury, defined the crime of murder in the first degree in the language approved by this court in the Donnelly Case, 26 N. J. Law, 601, and, in respect to the time required for deliberation and premeditation, declared that "it is [time] enough if the design to kill be fully and clearly conceived in the mind, and purposely and deliberately executed." The definition in this respect was not criticised nor disapproved in *State v. Bonofiglio*, 52 Atl. 712, 54 Atl. 99, 67 N. J. Law, 239, 91 Am. St. Rep. 423. A finding that a defendant had time sufficient to fully and clearly conceive in his mind an intent to kill, and that he did thus conceive the intent, and proceeded to purposely and deliberately execute it, satisfies the provisions of our statute as to both premeditation and deliberation.

(Syllabus by the Court.)

Error to Court of Oyer and Terminer, Mercer County.

Bartholomew Zdanowicz was convicted of murder, and brings error. Affirmed.

Edward Robert Walker, for plaintiff in error. William J. Crossley, for the State.

MAGIE, Ch. The writ of error brings up for review the conviction of the plaintiff in error of the crime of murder in the first degree, and a consequent judgment thereon in the court of oyer and terminer in the county of Mercer. The plaintiff in error has caused the entire record of the proceedings had upon his trial to be returned, under the provisions of section 136 of the Criminal Procedure Act of 1898 (P. L. 1898, p. 915). He has, however, specified as the causes for relief or reversal, required by section 137 of that act, no other matters than such as were likewise presented by assignments of error.

In behalf of the plaintiff in error the argument is first directed to an alleged error of the trial court in the admission of a question put to plaintiff in error when under examination as a witness in his own behalf. The rule of the common law which excluded a person indicted for crime from testifying in his own behalf was first altered in this state by a supplement to the act concerning witnesses, approved February 15, 1871. P. L. 1871, p. 12. It was thereby enacted that upon the trial of any indictment, allegation, or accusation of any person charged with crime, such person should be admitted to testify as a witness upon the trial, if he should offer himself as a witness in his own behalf. This act was repealed by the Revision of 1874, but the eighth section of the evidence act of that revision, approved March 27, 1874, was a re-enactment of the same provision. 2 Gen. St. p. 1398. The evidence act of the Revision of 1874 was repealed by the act to repeal sundry acts relating to evidence, approved March 23, 1900. P. L. 1900, p. 382. The act concerning evidence (Revision of 1900), approved March 23, 1900 (P. L. 1900, p. 362), contains no clause permitting a per-

son charged with crime to testify in his own behalf on the trial of an indictment, allegation, or accusation. But by the provisions of section 57 of the act entitled "An act relating to courts having criminal jurisdiction and relating to proceedings in criminal cases" (Revision of 1898, approved June 14, 1898; P. L. 1898, p. 866), it is, among other things, enacted that upon the trial of any indictment the defendant shall be admitted to testify if he shall offer himself as a witness. The record and the bills of exceptions show that the plaintiff was indicted by the grand jury, and thereby charged with the crime of murder, and put upon his trial in the court of oyer and terminer, and that he therein offered himself as a witness in his own behalf, and was admitted to testify. The point now made is presented by the exception, duly sealed, to the admission of a question over the objection of the plaintiff in error.

The objection to the question was made upon the ground that it was not competent cross-examination. That objection is now supported in argument on the ground that the admission of the question violated the well-settled doctrine which prohibits a person accused of crime from being compelled to testify against himself. By the fifth amendment to the Constitution of the United States it is, among other things, provided that no person shall be compelled in any criminal case to be a witness against himself. Many of the states have included a similar prohibition in their Constitutions. There is no such prohibition in the Constitution of the state of New Jersey. It is not deemed necessary to consider whether this constitutional provision will operate to prevent any state—if it is conceivable that any state should desire to do so—from exacting laws establishing a practice in criminal cases such as is in vogue in countries not following the course of the common law, or permitting an accused person to be subject to such compulsion as may be exerted by harassing examination or other means, forcible or practically forcible, compelling him to testify against himself; or to prevent the adoption by any state of a practice which might produce that effect. Although we have not deemed it necessary to insert in our Constitution this prohibitive provision, the common-law doctrine, unaltered by legislation or by lax practice, is by us deemed to have its full force. In New Jersey no person can be compelled to be a witness against himself. But this privilege, with which every individual is clothed for his own protection, is one that may be waived. When one voluntarily admits the commission of crime, or facts tending to justify an inference of the commission of crime, his voluntary confession is always admissible against him. When a person charged with the commission of crime offers himself as a witness in his own behalf, under laws permitting him to do so, he undoubtedly waives

his protective privilege to some extent. He becomes a witness, and as a testifying witness he may be cross-examined. How far such cross-examination may extend does not require consideration in this case, and we do not intend now to indicate the limit to which such cross-examination may properly be extended. Nor is it deemed necessary to consider what compulsion may be applied to require answers to proper questions asked of such a witness in cross-examination. In the state of New York, in which this privilege of the accused person is protected by a constitutional provision, the Court of Appeals calls attention to the varying decisions of the courts of other states in respect to the scope of the right of cross-examination under statutes permitting such a person to become a witness in his own behalf. It points out that in some of the states the rule has been adopted that such a witness subjects himself to the same rules of examination as any other witness, and may be asked any questions, on cross-examination, on matters pertinent to the issue; and that in other states it has been held that the right of cross-examination under such statutes is confined to matters referred to in the examination in chief. The opinion expressed by the Court of Appeals was that, notwithstanding the prohibition in the Constitution, no constitutional right of an accused was infringed, if, upon his electing to take the stand as a witness in his own behalf, he was subjected to the ordinary rules of examination. *People v. Tice*, 131 N. Y. 651, 30 N. E. 494, 15 L. R. A. 669.

It is sufficient to dispose of the contention in this regard in this case to note two grounds upon which it is deemed ineffective. In the first place, if the question asked was within the line of proper cross-examination, it cannot be claimed to be compulsory in character. Whether, if the witness had refused to answer, the court could have compelled him to do so, or whether, upon such refusal, the court could have struck out his evidence given on his direct examination, or otherwise exerted a compulsive power, is not, therefore, before us. In the second place, the counsel of plaintiff in error does not contend that plaintiff in error was protected from any cross-examination. On the contrary, the claim is that, being properly subject to cross-examination, the court should have limited his cross-examination to matters previously opened in his direct examination. The contention is that the accused may thus limit the scope of his examination and cross-examination, and that the question objected to was not competent, because not within matters respecting which he had testified on his direct examination. In the trial of *Rosell* the trial court overruled questions asked of a defendant admitted to testify in his own behalf, on the ground that they related to subjects not opened on his direct examination. *Rosell v. State*, 62

N. J. Law, 216, 41 Atl. 406. Afterward the Supreme Court held that the cross-examination of a defendant who offered himself as a witness in his own behalf must be limited to subjects originated in his examination in chief. *State v. Sprague*, 64 N. J. Law, 420, 45 Atl. 788. I repeat that we do not deem it necessary, and do not intend, to pronounce upon the propriety of this limitation upon cross-examination of a defendant who offers himself as a witness in his own behalf. If, when thus called, he should limit his testimony to a mere denial of the commission of the crime, it may be well made a question whether, upon cross-examination, his mind and conscience may not be searched as to all pertinent facts relied on by the state for conviction. But the question does not arise in this case.

Upon the direct examination of the plaintiff in error he was asked, and answered, many questions as to his conduct and whereabouts on a certain Sunday preceding the discovery of the dead body of the person he was charged with killing. The evidence had tended to show that plaintiff in error was the last person seen with the deceased on that day, and that the deceased had probably been murdered and brutally mutilated on that day. After his direct examination, in which the plaintiff in error had voluntarily answered such questions as to his conduct and whereabouts, he was turned over to the prosecutor for cross-examination. The question of the prosecutor deemed to be improper, and which was excepted to, was this: "What clothes did you have on on that Sunday afternoon?" This, we think, was admissible cross-examination upon matters brought out by the accused's direct examination. As part of his conduct, and tending to elucidate his whereabouts on that particular day, a question as to the clothing worn during that period with respect to which he had been examined was pertinent, and competent to be asked in cross-examination. The question was properly admitted.

The next ground urged for reversal is an alleged error in the charge of the judge presiding at the trial. There was no specific objection to the part of the charge now objected to. The matter comes before us only upon a general exception to the charge, such as permitted by the terms of section 140 of the criminal procedure act of 1898. Such an exception will not enable a plaintiff in error to single out a portion of the charge, and claim that the court of review must consider such portion separate from the context and the whole charge. On the contrary, the permission of a general exception brings into review, not mere excerpts from the charge, selected by the plaintiff in error, but the whole charge; for, although by section 141 error may be assigned upon any portion of a charge excepted to generally, yet by section 142 the duty of the court to reverse thereon only arises when it appears to

the court that error in law was committed in that part of the charge to the prejudice or injury of the defendant in maintaining his defense. This requires the examination of the excerpt selected in connection with the context and the whole charge. The excerpt of the charge relied on in this assignment of error is in these words: "This does not mean that every doubt must be dispelled; it does not mean, as indicated by counsel, that every possible hypothesis of innocence must be excluded by the evidence." Viewed by itself, this excerpt plainly indicates that it was used with respect to the subject of reasonable doubt, the benefit of which must be given to the person accused of crime; and, thus viewed, no error appears therein. An hypothesis of innocence which it may be possible to conceive may be utterly unreasonable to act upon. A fantastic, unreasonable hypothesis of innocence will not justify a jury in finding a reasonable doubt. That this was the plain intent of the trial court is rendered entirely clear by the context. The judge, in immediate connection with the excerpt excepted to, proceeded to charge thus: "What the law refers to as reasonable doubt is such a doubt as would exist if the jury, after a careful review of all the evidence, rejecting that which they considered unreliable and retaining that which they considered reliable, and weighing all the facts and circumstances, find that its judgment is not convinced of the guilt of the prisoner. If on the whole of the evidence such reasonable doubt exists in your minds with respect to his guilt, it is your duty to give him the benefit of it." It was thus plainly expressed that a reasonable doubt would not be raised upon every possible hypothesis, but only upon a reasonable hypothesis of innocence.

The next question raised is to that portion of the charge of the trial court defining the crime of murder in the first degree. This was the language of the court: "In order to constitute murder in the first degree, and to justify a conviction of that crime, it must appear by evidence beyond a reasonable doubt, not only that there was an unlawful killing, but that the defendant intended to take the life of the deceased, and that the intent was carried into execution willfully, deliberately, and with premeditation. The term 'willfully,' as here used, means the same as intentionally; the inquiry being, did the defendant intend to take the life of the deceased? The next inquiry is, was the killing done deliberately, and with premeditation? By 'deliberately' and 'premeditation,' however, the law does not mean that any particular length of time need intervene between the formation of the purpose to kill and its execution. It is not necessary that the deliberation and premeditation should continue for a day or an hour or a minute. It is enough that the design to kill be fully and clearly conceived in the mind, and purposely

and deliberately executed." Counsel asserts that this definition was adopted from the opinion of this court in the *Donnelly Case*, the decision of which in the Supreme Court is reported under the title *Donnelly v. State*, 26 N. J. Law, 463, and in this court under the same title in 26 N. J. Law, 601. It is claimed that the definition given in the *Donnelly Case* has been overruled or explained in this court, so as to indicate the error which is now alleged. The case in this court thus referred to is *State v. Bonofiglio*, 67 N. J. Law, 239, 52 Atl. 712, 54 Atl. 89, 91 Am. St. Rep. 423. But in that case the criticism of this court was directed to the opinion pronounced by Chief Justice Green in the *Donnelly Case* to the effect that proof of a specific intent to take life would be proof, under our statute, of a willful, deliberate, and premeditated killing, and therefore of murder in the first degree. It was pointed out that this part of the chief justice's opinion was not expressly, or even impliedly, approved by this court in the *Donnelly Case*; and it is to be noted that the presiding judge in the case now before us did not include in his charge the expression which was thus criticised. He did, however, charge in the terms approved in the *Donnelly Case* in this court which were not modified by the opinion in the *Bonofiglio Case*. In the latter case this court did not intend to cast doubt on the propriety of the charge in the *Donnelly Case* so far as it was approved in this court. The quotation in the opinion from *People v. Majone*, 91 N. Y. 211, to the effect that, to constitute murder in the first degree, a design to kill must precede the killing by an appreciable space of time, was not designed to indicate that the careful definition of murder in the first degree approved in the *Donnelly Case* was defective with respect to the time required for deliberation and premeditation, but rather to express the importance of that part of the definition which required that the design to kill must be fully and clearly conceived, and purposely and deliberately executed. The conception of such a design and its deliberate execution necessarily takes some appreciable time. It was in this language that the charge before us was framed, and I deem it unobjectionable. Time sufficient to fully and clearly conceive the design to kill, and purposely and deliberately execute it, satisfies our statute; and this assignment of error cannot prevail.

The fourth assignment of error, which is the last relied on, is based upon the fifth, sixth, and seventh requests to charge, all of which were refused. Counsel abandons as untenable any objection founded upon the sixth request. The other objections relate to the failure of the trial judge to charge as requested on the subject of reasonable doubt. A trial court is not bound to charge in the language of requests presented, if it has already charged sufficiently and unobjection-

ably upon the subject. We think the trial court charged the law on this subject correctly, and that there was no error in refusing the requests for a further charge on the same subject.

On the whole case no legal error is found pointed out by the assignments in error, and no manifest wrong appears to have been done to plaintiff in error entitling him to relief or reversal. The judgment must therefore be affirmed.

(25 R. I. 305)

MULLEN v. McKEON.

(Supreme Court of Rhode Island. July 3, 1903.)

WILLS—UNDUE INFLUENCE—EVIDENCE.

1. The evidence in a case where testator, having a son, with whom he was on good terms, gave all his property to a woman whom he had known but a week, during which he was under the influence of and weakened by drink, *held*, in view of the showing as to undue influence, insufficient to sustain a verdict sustaining the will.

Proceedings by Margaret McKeon, executrix, for probate of the will of William H. Mullen, deceased. On verdict sustaining the will, William J. Mullen petitions for a new trial. Petition granted.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

John W. Hogan and Philip S. Knauer, for appellant. P. H. Mulholland, for appellee.

TILLINGHAST, J. The question presented for our determination in this case is whether the verdict of the jury, whereby an instrument in writing purporting to be the last will and testament of William H. Mullen was found to be his will, is against the evidence. The substantial facts in the case, in so far as they are material to our decision, are as follows: For about two weeks prior to the fatal illness, which very speedily resulted in his death, the testator had been in a continued state of intoxication. For several months previous, and up to within a week of his death, he had been lodging at No. 39 North Main street, with one Lewellyn Jones, who kept a lodging house there. For a week before leaving this place he had been continually intoxicated. While in this condition, a woman, whom he introduced to Mr. Jones as his "female friend," and who, it is not denied, is the Margaret McKeon named in the will as sole legatee and executrix, accompanied him to his lodging place aforesaid, where she superintended the packing of his trunk, and took him away with her. He was so drunk at the time that he could not pack his things, and, while she was doing this for him he was crying, whining, and lamenting over his condition, and evidently had but little control over himself, either physically or mentally, but simply acted at the beck or suggestion of this woman. He gave no reason for leaving the place. He was in a condition at that time to be easily influenced,

and was evidently wholly under her control. Mrs. McKeon was seen in his company several times during this last spree of his, and on Saturday, May 31, 1902, they were together in the Board of Trade Building to see a Mr. De Wolf, who was a chum of Mr. Mullen, to get him to assist in getting Mullen's money out of the savings bank. This was the same day that the testator left his lodging house, as aforesaid. De Wolf saw the condition that Mullen was in, and notified the treasurer of the savings bank not to let him have his money. Mullen made several subsequent attempts to get his money through De Wolf, but the latter put him off, and kindly kept him from drawing it. Mullen's condition at these times is illustrated by the following testimony of De Wolf: "Q. Did he have any crying spells? A. Yes; he would come in and go into the back room in the basement, or into the fireroom, and sit down and cry like a child, and say, 'My God, Lou, what will I do?' And he seemed to worry about his boy. He wanted to get clear of this lady and go away. * * * Q. What do you know about his relations between himself and his son? A. His sole talk when we were alone was about his boy. Q. What would he say? A. He would tell about how good a boy he was, and how he had helped him along, and how it was he was so good a boy. * * * Q. Have you heard Mr. Mullen say anything about his estate—what he intended to do with it? A. He told me that he had enough to bury him decently, and that he wanted the boy, Billy, to have the balance." On Tuesday evening, June 4th, Mullen was found, with all his belongings, in Mrs. McKeon's house, where he was shortly afterwards taken violently sick with pneumonia, and where he died early on the following Sunday morning. On the 7th day of June Mrs. McKeon sent for Patrick H. Mulholland, Esq., a lawyer of this bar, to come to the house for the purpose of drawing a will for Mr. Mullen. In response to this call Mr. Mulholland went to the house, and after a few minutes' conversation with Mullen, who was very sick in bed, the latter said to the lawyer, "I want her to have all I've got." He referred to Mrs. McKeon, who was then in the room. He also spoke in relation to a small deposit that was in the bank, and said he would like to have it arranged so that some of it could be drawn out to be used by him for necessities. Mrs. McKeon then brought in the bankbook, and the attorney prepared an order making the deposit payable to her, to which order, after an ineffectual attempt on the part of deceased to sign his name, it was written for him, and he made his mark. After the will was drawn, Mrs. McKeon went out and procured a neighbor, Mrs. Hayden, as one of the witnesses. The will was signed by the testator making his mark, and was witnessed by Mr. Mulholland and Mrs. Hayden. By the terms of the will all of the property of

the testator was devised and bequeathed to her, and she was made executrix of the will, without being required to file a bond or return an inventory. At the time of the making of the will the testator had a wife and an adult son living, but he did not mention either of them in his will, nor did the lawyer who drew the will know of their existence, or that the deceased was a married man. On the contrary, he testifies that he supposed the deceased was a single man. The testator had not lived with his wife for many years, but he was on the best of terms with his son.

The testator had been committed to the state workhouse 20 times between 1883 and 1895 as a common drunkard, and he had had delirium tremens about two-thirds of the time between those dates. This disease, according to the testimony of Dr. George F. Keene, a well-known expert upon insanity, and the superintendent of the insane hospital at the state institutions for about 20 years, "is a delirium and a tremor. Delirium is the mental phase of it, and the tremor is the physical, and it is produced by prolonged drinking." In answer to the question as to what symptoms delirium tremens manifests, he said: "A man has wild deliria and hallucinations of scene. He sees and hears things, and is in a state of fear of everything about him, and shakes; and in this case, the last time I saw him, he had an attack of pneumonia and was very seriously ill, so ill we didn't think he would live, but he recovered. Q. What brought on the pneumonia? A. The result of alcohol. Q. What effect does it have upon a man's mental capacity—an attack of delirium tremens? A. A man is incapable of continued thought. His memory is interfered with, and his attention. There is no attention to his person, and he is in a state of abject fear. Q. Does the occurrence of the attacks of delirium tremens affect a person so as to make him more subject to the effects of alcohol as they go on? A. If one has had two or three attacks of delirium tremens, he is more liable to have them than if he hadn't had them. Q. If he were suffering from alcoholism and delirium tremens, would he be capable of transacting business? A. He would not. Q. How would he be as to being influenced by another person? A. I should say he would be very easily influenced. Q. And how would he be as to testamentary capacity? A. It would be impaired. Q. Did you see him after the period he left your place, and after he had reformed? A. Yes, I used to see him quite frequently. He used to come up and speak to me on the street, and we all considered it a very remarkable case of reform. I think what caused his reform was the nearness to death to which he came in 1894. I had a talk with him, and told him that he never would go through such a condition as that again. * * * Q. What are these crying spells—what do they indi-

cate after a man has been drinking? A. Undue stimulation of the emotions, and always a symptom of mental weakness. Q. You have heard Mr. Mullen's condition described here by the witnesses when he was under the influence of liquor and was mentally and physically weak, and from what you have seen of the man and knew of him, what would you say as to his mental condition, at such times, as to being subject to be influenced by others? A. Knowing the man as I knew him, and having seen him as I saw him up to 1895, I should say if he was under the influence of liquor he was in no condition to transact business, and would be easily influenced. He was always very easily influenced, and would do anything I wanted him to at the institution. Q. If the evidence in this case showed that he had an only son, with whom he was on good terms, and he left all of his estate, small as it was, to a woman with whom he had boarded only a week at the time, and while he was in a condition as it has been stated, what would you say as to his mental capacity from the testamentary standpoint? A. I should doubt his testamentary capacity, certainly."

The testator's son, William J. Mullen, was not notified of his father's illness, although the latter well knew where he resided. After learning from an outside source of his father's death, the son went to Mrs. McKeon's house, and saw the body, and asked Mrs. McKeon if his father did not offer to send for him, to which she replied: "Yes, but I didn't know what part of Attleboro you lived in. Q. Did she say when he told her to send for you? A. I think either Thursday or Friday." The testator and his son had always been on the best of terms, and the former had frequently told his son that, if anything happened to him, there was \$500 going to the son, and that he (the father) had enough in the bank to bury him with. Mrs. McKeon did not mention the matter of the will or the bankbook to the son. At the trial of the case Mrs. McKeon did not appear as a witness.

In view of the foregoing statements of fact and testimony, two things plainly appear. And the first thing which thus appears is that the will in question was a very unnatural one, and was also contrary to the testator's repeatedly expressed intentions. His son was the natural object of his bounty, and, in the absence of any proof or explanation to the contrary, it is to be inferred that, if he had been in the possession of his faculties, and in the exercise of his own free will and choice, he would have bestowed his property upon his son, instead of giving it without reserve or qualification to one who had no claim upon his bounty, and who, so far as appears, was practically a stranger to him up to within about a week of his death. And that he was in his right mind, and not under the influence or control of another, when he thus disregarded every feeling of

natural affection and duty, is a proposition so unreasonable, and so obnoxious to our sense of right and duty, that we cannot accept it as true under the evidence in this case. "Where the will is unreasonable in its provisions, and inconsistent with the duties of the testator with reference to his property and family, or what the civilians denominated an 'inofficious statement,' this of itself," says Mr. Redfield (see Redf. on Wills, part 1, 515), "will impose upon those claiming under the instrument the necessity of giving some reasonable explanation of the unnatural character of the will, or at least of showing that its character is not the offspring of mental defect, obliquity, or perversion." See *Clark v. Fisher*, 1 Paige, 171, 19 Am. Dec. 402. The rule upon this subject is very carefully defined by Chief Justice Buchanan in *Davis v. Calvert*, 5 Gill & J. 302, 25 Am. Dec. 282, thus: "A testator should enjoy full liberty and freedom in the making of his will, and possess the power to withstand all contradiction and control. That degree, therefore, of importunity or undue influence, which deprives a testator of his free agency, which is such as he is too weak to resist, and will render the instrument not his free and unconstrained act, is sufficient to invalidate it."

The second thing which plainly appears is that there must have been undue influence exerted upon the testator to cause him to make such a will. The circumstances of its execution, taken in connection with the silence of the sole beneficiary thereunder at the trial, are wholly inconsistent with any other hypothesis than the existence of such undue influence. And that the testator was under the control of Mrs. McKeon in the making of this will is so apparent from the evidence produced as to leave little room for doubt as to the existence and potency of such control. It is true that there is no positive or direct testimony to this effect, nor should we ever expect to find any in a case of this sort. But the inference to this effect being, as it seems to us, the only natural and reasonable one which can be drawn from the testimony produced, the duty of the jury was to find accordingly. In *Sears v. Shafer*, 6 N. Y. 268, the court said that undue influence will be inferred from the nature of the transaction alone in some cases; in others, from the nature of the transaction and the exercise of occasional or feeble influence. In *Rollwagen v. Rollwagen*, 63 N. Y. 519, Judge Rapallo says: "Undue influence is not often the subject of direct proof. It can be shown by all the facts and circumstances surrounding the testator, the nature of the will, his family relations, the condition of his health and mind, dependency upon and subjection to the control of the person supposed to have wielded the influence, the opportunity and disposition of the person to wield it, and the acts and declarations of such person." Numerous authorities are cit-

ed by Judge Rapallo in support of the position thus taken. In *Tyler v. Gardiner*, 35 N. Y. 559, Judge Porter says: "It is no sufficient answer to the presumption of undue influence, which results from undisputed facts, that the testator was aware of the contents of the instrument, and assented to all its provisions. This was the precise purpose which the undue influence was employed to accomplish." And in *Huguenin v. Basely*, 14 Ves. 273, Lord Eldon says: "The question is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced." See, also, *Van Kleeck v. Phipps*, 4 Redf. Sur. 99; *Haydock's Ex'rs v. Haydock*, 33 N. J. Eq. 494; *Wilson's Appeal*, 99 Pa. 545; *Gay v. Gillilan*, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712; *Potter's Appeal*, 53 Mich. 106, 18 N. W. 575; *Fagan v. Dugan*, 2 Redf. Sur. 341; *Burke v. Nolan*, 1 Dem. Sur. 436; *Delafeld v. Parish*, 25 N. Y. 95. In *Dale v. Dale*, 38 N. J. Eq. 274, it is held that, where one is in a position to exercise an improper influence over the testator, and the will is unnatural and in his favor, the burden is upon such person to show that it was executed without the exercise of undue influence by him. See, also, *Clark v. Fisher*, at page 174, 1 Paige, 19 Am. Dec. 402, and *Taylor on Evidence*, § 160. In 1 *Jarman on Wills* (1st Ed.) p. 49, the author says: "In cases of weakness of mind arising from the near approach of death strong proof is required that the contents of the will were known to the testator, and that it was his spontaneous act. A suspicion is justly entertained of a will conferring large benefits on the person by whom or by whose agent it was prepared, or of a will in favor of a medical attendant in whose house the testator resided."

These authorities, and many others which may be cited, show that courts look with a jealous eye and strong disfavor upon wills which are made under such suspicious circumstances as was the one before us, and require the fullest explanation of so unnatural a disposition of one's estate. Here the undisputed evidence shows that Mrs. McKeon induced the deceased, while in an intoxicated and practically helpless condition, to leave his lodgings, which he had occupied for a considerable time, and which, for aught that appears, were satisfactory to him, and go to her house; that she obtained possession of his bankbook, and was present when it was transferred to her by the deceased, who was so ill that he could neither write his name nor hold the pen; that she took charge of him during his illness; that she sent for the lawyer to draw his will, and was the only person present, excepting the lawyer, when it was drawn; that she obtained a witness to attest it; that she did not inform the lawyer that the testator had a wife and son, who were then living; and that she gives no explanation of the strange and very unnatural conduct of the deceased

in giving her all of his property, or of her strange conduct in taking him from his former lodgings, while in the condition aforesaid, and providing a place for him in her own home. These things are so inconsistent, not only with propriety of conduct on her part, but also with honest purpose, that the inference is well-nigh conclusive that the testator must have been under her control, both physically and mentally, from the time when she thus took him to her home until the time of his death, and hence that the will in question was practically her will, and not his.

In view of these facts, we think that the verdict of the jury was clearly against the weight of the evidence.

We do not wish to be understood, in what we have thus said, as casting any suspicion on the fidelity or fair dealing of the counsel who drew the will. "For," as said by the court in *Van Kleeck v. Phipps*, supra, "whatever undue influence has been exercised over a testator, that influence has taken effect before the instructions to prepare the will, and has been carefully kept from the draftsman, with the knowledge that, if exhibited or suggested to him, it would wholly defeat the unlawful purpose."

The verdict is set aside, and new trial granted.

(25 R. I. 289)

MUNICIPAL COURT v. WHALEY et al.
(Supreme Court of Rhode Island. Providence.
June 27, 1903.)

EXECUTORS—JOINT AND SEVERAL BOND—ACTION BY EXECUTOR ON THE BOND FOR ONE EXECUTOR.

1. Where two executors give a joint and several bond, action may be had thereon against one of them and the sureties for the benefit of the other, who is also a legatee.

Action of debt by the municipal court against Albert A. Whaley and others on a bond. Defendants demur to the declaration. Demurrer overruled.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Irving Champlin, for plaintiff. Edwards & Angell, for defendants.

STINESS, C. J. The ground of the demurrer to the declaration is that Joseph W. Smith, for whose benefit the action is brought, was a coprincipal with Henry W. Smith on the bond in suit, and a coexecutor with said Henry W. Smith on the estate of Sheffield Smith; that said action is therefore by one of the principals on a bond against the sureties thereon, to recover from said sureties for the default of his coprincipal, and is not maintainable. The bond is joint and several.

Pub. St. 1882, c. 184, § 10, in force at the time this bond was given, provided: "Every executor * * * shall give bond," etc. Under such a provision we understand that it has been customary, when so desired, as it

would be allowable, for several executors to give separate bonds. In most cases, however, the custom has been, as in this case, for joint executors to give joint and several bonds.

"On a joint bond all the obligors must be sued; but on a joint and several bond a creditor may sue all jointly or one separately for the whole amount. It is the same as though all had given a joint bond and each a separate bond, and the creditor could elect on which bond he would sue." *Bouv. Law Dict. tit. "Joint and Several"; 2 Woerner's Am. Law of Adm. (2d Ed.) § 558; 3 Williams on Exrs. (Am. Ed.) R. and T. 243; 3 Redf. on Wills (2d Ed.) p. 282.*

The defendant claims that Joseph W. Smith, being a principal, cannot sue the representatives of a co-principal or a surety, because he himself is liable, and he would thus be suing for his own default. As stated by Woerner, supra, an executor was not required by common law to give bond, and was not liable for the malfeasance of a coexecutor, unless he had concurred in it, or there had been a joint possession of the estate from which it could be inferred that one had yielded to the control of another who had squandered the property. Except as it may be modified by statute, the rule in this country is the same—that one executor is not liable, as such, for waste committed by his co-executor, nor for assets which the latter received and misapplied without the knowledge and consent of the former. By force of modern statutes, however, this rule now applies, practically, to liabilities of coexecutors as between themselves or on accounting, since the requirement of a bond protects legatees and creditors. There can be no question that on a joint bond all executors would be jointly liable, for that is the condition of the bond. The question, therefore, comes upon the distinction between a joint and a joint and several bond.

"Having said that upon a joint bond there would be an obvious joint liability, it follows that if there is only the same liability on a joint and several bond there is no difference between the two. Yet there is a well-recognized distinction between them, such as we have already pointed out. If, then, by reason of the several obligation, one may be sued alone, it follows that either party may sue the other in a distinct right. As several bonds, the sureties are sureties severally of each executor, as they might be on separate bonds. Only in this way can effect be given to the provision of severalty in the bonds. Most of the cases relied on by the defendant are distinguishable from the case at bar. *Jeffries v. Lawson*, 39 Miss. 791; *Jamison v. Lillard*, 80 Tenn. 698; *Brazier v. Clark*, 5 Pick. 96; *Boyd v. Boyd*, 1 Watts, 365; *Clarke v. State*, 6 Gill & J. 288, 26 Am. Dec. 576; *Ames v. Armstrong*, 106 Mass. 15; and *Sparhawk v. Buell's Adm'r*, 9 Vt. 41—are frequently cited to show the joint liability of coexecutors, but they are all suits of legatees

or creditors, who without question can hold them jointly on a joint and several bond.

The real plaintiff in the case at bar is a legatee, but the question is not whether he could sue if he were that and nothing more, but whether, though he is a legatee, he can sue, being also a coexecutor.

Aside from the cases of creditors and legatees cited by the defendants, in which courts have spoken of the joint liability of coexecutors under joint and several bonds, and others which are distinguishable on other grounds, we find but two which seem to support the contention that in no event can one executor sue his coexecutor.

In *Stephens v. Taylor*, 62 Ala. 269, the court held that two or more executors entering into a joint and several bond for the faithful performance of their duties are liable for the acts and defaults of each other, unless the bond shows that they did not intend to become bond for each other's defaults; that the sureties to such a bond become responsible to claimants for the faithful administration of the estate by their principals, the executors, and each of them, and the principals, and each of them, come under obligation to hold the sureties harmless against any default on the part of the principals; that there are the duties towards one another that spring out of the relation created by the bond. This states very plainly the position taken by the defendants in this case.

The same rule is held in *Hoell v. Blanchard*, 4 Desaus. 21, with the addition that a coadministrator cannot hold a surety for default by another administrator, though claiming in a different right—exactly the case before us. The reasoning of the court is that the relation between a principal and surety is very different from the relation between a surety and creditor; that a principal is bound to stand between his surety and the surety's responsibility in that character. It is to be noted, however, that the bond appears to have been a joint, and not joint and several, as in *Stephens v. Taylor*. As a joint bond, we think there can be no doubt as to the doctrine of *Hoell v. Blanchard*, but it does not reach the point of this case.

Towne v. Ammidown, 20 Pick. 535, was a bill by a surety on a joint and several bond for indemnity from the heirs of a deceased coexecutor who had been guilty of no default. Obviously, it was held that the heirs were not liable.

In *Nanz v. Oakley*, 120 N. Y. 84, 24 N. E. 306, 9 L. R. A. 223, a suit was brought on a joint and several bond in which an administratrix had joined with a coadministrator. The latter had the entire management of the estate, and had converted to his own use about \$4,000 belonging to the estate. The administratrix was also the sole heir and next of kin of the intestate. Upon her death her coadministrator was charged by the surrogate with the amount, and ordered to pay it over to her administrator. Suit was

brought against the coadministrator, and execution returned unsatisfied, whereupon the action was brought against the surety on the original bond by the administrator of the coadministratrix and heir. The court held that he was entitled to recover. Numerous authorities are reviewed by the court, and the underlying reasons upon which the decision is based are that the purpose of a bond is to insure the discharge of the duty reposed in the persons appointed; that it was not intended to change the liability or relation of the persons appointed from that which existed independently of the bond; and that joint administrators are liable for joint acts and severally liable for their own acts.

The same rule has been applied to joint and several notes. In *Beecham v. Smith*, E. B. & E. 442, it was held that a maker of a joint and several note who was one of the payees could sue a comaker on his several promise. Lord Campbell, C. J., said: "The contract sued upon is the several contract of the defendant, and the fact that there is also upon the same instrument a joint contract by the three makers is no defense." *Colebridge, J.*, said: "Practically there are three promissory notes signed by three different parties, and the note declared on is not that signed by the plaintiff, but that signed by the defendant." To the same effect is *Faulkner v. Faulkner*, 73 Mo. 327.

In *State v. Wyant*, 67 Ind. 25, where the statute required separate bonds, but the administrators executed a joint and several bond, the court construed it as separate bonds, and sustained a suit by one against the other administrator and sureties. While the case is largely controlled by statute, it is nevertheless in point upon the question whether an administrator can sue his coadministrator on his several obligation. In *Pringle v. Pringle*, 130 Pa. 565, 18 Atl. 1024, an executor was allowed to sue, as an individual, his coexecutor, who had received all the assets, for a debt due from the testator to him. It was not a suit on a bond, but it is in point to show that an executor is not, by virtue of his office, debarred of a personal right.

It is the general rule that one executor, on accounting, is not held by the acts of another, in which he has not participated or as to which he has not been negligent. *McKim v. Aulbach*, 130 Mass. 481, 39 Am. Rep. 470; *Wilson's Ap.*, 115 Pa. 95, 9 Atl. 473; *Paulding v. Sharkey*, 88 N. Y. 432; *In re Adams*, 51 App. Div. 619, 64 N. Y. Supp. 591; *Hall v. Carter*, 8 Ga. 388; *Ormiston v. Olcott*, 84 N. Y. 339; *Sparhawk v. Buell's Adm'r*, 9 Vt. 41 (by Redfield); *Gaultney v. Nolan*, 33 Miss. 569.

If the joint executors are not liable for the devastavit of each other, we see no satisfactory reason why one should not be entitled to sue for his separate and personal claim.

The defendants urge as a reason that the plaintiff is thereby suing his own sureties, whom the law regards with peculiar tenderness. It is true that sureties are, and should be, protected as far as possible, and that a principal cannot sue his sureties for his own default. But if a several bond is equivalent to a separate bond it follows that in a separate suit the sureties are those of the co-executor pro hac vice, and that they are not sued by the plaintiff as his sureties or for his default. If, also, bonds are to secure the beneficiaries of an estate, there is no just reason why the interest of a beneficiary, who happens to be an executor, should not be protected, as well as others, from acts for which he is not chargeable. It is said that he should not be able to sue, because, being a co-executor, he has the duty and opportunity to know what is done, which a mere creditor or other beneficiary does not have. There is force in this argument, and a court should hold an executor to clear proof of diligence and good faith on his part. Still, two executors cannot always have possession of money at the same time. Sickness, absence, or other causes may prevent one from having constant oversight; and in such a case it would be hard law, as between the two, to deny a remedy to the innocent against the guilty. We fail to see why the beneficiary may not sue the executor in default, although, by virtue of the bond, both might be sued by a creditor or legatee. Thus, the relation of executors is preserved between themselves and as to creditors; due effect is given to the form and obligation of the bond; only the one in default is held to answer; and the rights of all beneficiaries are protected. We think that this result is best sustained in reason and authority.

The demurrer to the declaration is overruled.

(25 R. I. 236)

PAOLINE v. J. W. BISHOP CO.

(Supreme Court of Rhode Island. June 27, 1903.)

MASTER AND SERVANT—INJURIES TO SERVANT—MECHANICAL DEVICES—FAILURE TO PROVIDE—IGNORANT SERVANT—OBVIOUS DANGERS—WARNING.

1. Where 849 beams, some longer and some shorter than the one in question, were safely raised and put in place in a building by hand, and only one rolled over and fell while it was being raised, and caused injury to plaintiff, the owner of the building was not negligent in failing to provide mechanical devices for raising the timbers.

2. In an action for injuries to an Italian laborer by the fall of a timber he was assisting to lift into place, an allegation that plaintiff was ignorant of the danger that, if he stood under the beam, it might fall from its narrow support, and injure him, was incredible.

3. A master is not bound to warn his servant against dangers which are perfectly obvious.

Action by Archangelo Paoline against the J. W. Bishop Company. Verdict for plaintiff, and petition for a new trial. Granted.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Matteson & Healey and George T. Marsh, for plaintiff. Walter B. Vincent, for defendant.

DOUGLAS, J. The plaintiff in this case, an Italian, ignorant of the English language, was employed by the defendant as a laborer. For some three or four weeks he had been at work excavating a cellar, and had never done any other work for the defendant. On the day of the accident he was called upon, together with others, to lift and place in position, as a floor beam, a hard pine timber, 12 inches square and between 23 and 30 feet long. They had proceeded so far in lifting the beam that one end of it rested upon a staging built against the outer wall of the structure, and the other end lapped upon the end of a similar beam supported by a brick pier. It was desired next to place the beam in such position that the outer end should be inserted in the wall, and the inner end should rest upon the pier against the end of the other beam. To accomplish this, the outer end of the beam had to be raised, and the whole beam brought forward in the direction of its length, and the other end dropped upon the head of the pier. Twelve men and a boss were assigned to place the beam in position. The plaintiff and three others of the twelve were stationed at the inner end, near the pier, and stood upon timbers which elevated them from the ground so that two of them could reach the timber in question for the purpose of guiding it into place. The other two of the group seem not to have had anything to do after the inner end had been elevated upon the pier. The other eight men stood on the platform or staging on which the outer end of the timber rested. As the eight men lifted their end of the timber and had it about as high as their knees, it rolled over sideways, which dislodged the other end from the pier; and as it fell it struck the plaintiff, and broke his leg, so that it became necessary to amputate it just above the ankle.

The declaration is in three counts. In the first it is alleged that the injury was caused by the negligence of the defendant in not providing stagings, jacks, derricks, or similar mechanical devices for raising and placing the timber. In the second the wrong is alleged to have been the directing the plaintiff, who was ignorant that a beam supported on a narrow pier, if slightly misplaced, was likely to fall and injure him, to work near such a beam without notice of the danger to him in case it should fall. In the third the negligence is alleged to have been in putting the plaintiff under the orders of an incompetent boss, who changed, or di-

¶ 3. See Master and Servant, vol. 24, Cent. Dig. § 512.

rected the change of, the position of the beam so as to cause it to fall upon him. The jury found for the plaintiff generally, with a special finding that the men, in lifting the end of the beam for the purpose of placing it in the wall, did not negligently allow the beam to turn, causing the displacement and fall of the opposite end, which was supported by the brick pier. The defendant prays for a new trial on the grounds: First, that the general verdict is against the evidence; second, that the special finding is against the evidence; third, that the court erred in its charge to the jury.

The third ground does not specify the error complained of, and cannot be considered.

The first and second grounds must be sustained. The fact stated in the first count, that no mechanical devices were employed, is undisputed, but the evidence is overwhelming that these beams could safely be raised and adjusted by hand. There were 350 of them to be placed in this building. Some were placed before and others after the accident. While it appeared that these beams could have been placed by means of various mechanical devices, it also appears that 849 of them, some longer and some shorter, but all generally like the one which fell, were placed safely in position by the hands of these laborers and their associates. It is very certain that what was done safely 849 times could have been done once more if they had exercised equal care. In raising the timber, if the men employed lost control of it, so that it rolled and fell, unless this was caused by accident—of which there is no evidence—it must have been from such failure to act in concert as constituted negligence or carelessness. This neglect on their part to use their hands properly, not the neglect of the employer to furnish other instruments, was the proximate and only cause of the accident.

The allegation of the second count—that the plaintiff was ignorant of the danger of assisting in lifting a heavy beam, and particularly of the danger that, if he stood under the beam, it might fall from its narrow support and hurt him, is incredible. The lifting of a timber in the way described in this case is a task requiring no more skill than an ordinary laborer possesses. The task was not different in grade from the employment of picking up or shoveling dirt in an excavation and wheeling a barrow. Either employment requires a knowledge of the action of gravity on solid bodies. It is the same elementary knowledge which a child acquires in building blockhouses. There were no special dangers in the task which were not obvious to any ordinary person, whether he understood the English language or not. If he accepted the assignment, he assumed the obvious risk.

There is no evidence to support the third count, either directly or indirectly.

The cases cited by the plaintiff's counsel have no bearing upon the questions of fact on which this case turns. Most of them are reviewed in the opinion in *Mayott v. Norcross*, 24 R. I. 187, 52 Atl. 894, and require no further comment here. It is undoubtedly the duty of the master to furnish the servant with suitable appliances for his work when he furnishes any; but in this case no machinery was used, and, as we have seen, the work could have been done very well by hand.

It is the duty of the master to warn the employé of any dangers in the task imposed upon him, or in the place where he is set to work, which are not obvious to the employé's senses; but in this case there was no hidden danger.

It is the master's duty to employ a sufficient number of men, where numbers are required to act in concert and an accident may occur from a deficiency of strength; but the neglect of this duty is not charged in this declaration, and it appears in evidence that the number employed in this work had raised the beam from the ground to the height of the pier and the platform, and that two of these were not wanted in the further movement which was in progress when the accident occurred. It would be difficult to convince any sensible person that ten men were not enough to handle the beam, as they attempted to do.

We find, therefore, that the verdicts, general and special, are against the evidence, and a new trial is granted.

(35 R. I. 297)

DAWLEY v. WILCOX.

(Supreme Court of Rhode Island. June 27, 1903.)

CRIMINAL LAW—IMPRISONMENT—PLEAS.

1. Gen. Laws 1896, c. 285, § 39, provides that any person liable to be imprisoned on conviction in any county of any criminal offense not punishable by imprisonment in the state prison, the punishment for which is a fine not less than \$5, or a term of imprisonment not less than 30 days, or both, shall be imprisoned in the jail of the county of Providence; and section 45 authorizes the common pleas division of the Supreme Court to sentence any person who may be convicted before them of an offense punishable by imprisonment in any jail, to be imprisoned in the jail of any county. *Held*, that such sections authorized a person convicted of illegally selling liquor in Washington county, under Gen. Laws 1896, c. 102, § 21, providing a punishment of \$20 fine and imprisonment in the county jail for 10 days, to be imprisoned in the county jail of Providence county.

Habeas corpus by the state, on petition of Albert J. Dawley, Jr., against Andrew D. Wilcox, as keeper of the Providence county jail. Petition denied.

Argued before STINESS, C. J., and TIL-
LINGHAST and DOUGLAS, JJ.

Clarence A. Aldrich, for petitioner. George H. Huddy, Jr., for respondent.

PER CURIAM. This is a petition for habeas corpus, brought against the keeper of the Providence county jail, claiming that the petitioner is illegally held in said jail, because, having been convicted of illegal sales of liquor in Washington county, the penalty for which (Gen. Laws 1896, c. 102, § 21) is, "He shall be fined twenty dollars, and be imprisoned in the county jail ten days," does not authorize a sentence to the jail of another county.

The court is of opinion that Gen. Laws 1896, c. 285, §§ 39, 45, expressly authorize such a sentence.

(25 R. I. 318)

SCANNEVIN & POTTER v. CONSOLIDATED MINERAL WATER CO.

(Supreme Court of Rhode Island. July 8, 1903.)

MECHANICS' LIENS—WIRING FOR ELECTRIC LIGHT.

1. A contractor, who furnishes labor and material in installing electric wires, conduits, switches, etc., in a house to be used for lighting it, is entitled to a mechanic's lien therefor under Gen. Laws 1896, c. 206, such installation being a fixture, and part of the freehold.

Petition by Scannevin & Potter against the Consolidated Mineral Water Company for a mechanic's lien. Granted.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

O. M. Lee, for petitioner. Barney & Lee and Van Slyck & Mumford, for respondent.

PER CURIAM. The question raised by this case is whether a contractor who furnishes labor and materials in installing electric wires, conduits, switches, etc., in a house, to be used for lighting the same, is entitled to a lien therefor under chapter 206 of the General Laws of 1896. We have no hesitation in answering the question in the affirmative. The materials in question are annexed to the structure, become a part of it, and are intended to remain there until they wear out. The raw materials of which the lighting installation is composed lose their character as yards of wire and individual articles of commerce, and become members of an organized system, with parts and proportions adapted to their place and service in the building, and by being adapted to this special use they lose their value for any other. It has been so held in *Mulholland v. T. H. Elec. Co.*, 68 Miss. 330, 6 South. 211. Under the statutes in Kansas, Missouri, New Jersey, and Oregon a system of electric poles and wires extending from a central station through the streets has been held subject to a mechanic's lien as fixtures or appurtenances of the station. *Southern Elec. Sup. Co. v. Rollo Elec. Light & Power Co.*, 75 Mo. App. 622; *Badger Lumber Co. v. Marion Water Supply*, 48 Kan. 182, 29 Pac. 476, 15 L. R. A. 652, 30 Am. St. Rep. 301; *Hughes v. Lambertville Elec. Light, Heat & Power*

Co., 53 N. J. Eq. 435, 32 Atl. 69; *Forbes v. Willamette Falls Elec. Co.*, 19 Or. 61, 23 Pac. 670, 20 Am. St. Rep. 793. We might hesitate to adopt these decisions under our statute, but the interior installation, with which we are concerned, is a fixture, and part of the freehold, in the strictest sense.

(25 R. I. 285)

PROVIDENCE COUNTY SAV. BANK v. VADRAIS.

(Supreme Court of Rhode Island. June 27, 1903.)

BILLS AND NOTES—JOINT LIABILITY—DEATH OF JOINT CONTRACTOR—ACTION AGAINST SURVIVOR.

1. Gen. Laws 1896, c. 233, § 21, providing that a plaintiff may join in the same action "all or any persons, severally or jointly and severally" liable on a note, was enacted to enable plaintiff to "join" persons liable severally or jointly and severally, and should not be construed conversely to exclude joint parties.

2. Gen. Laws 1896, c. 233, § 17, provides that on the death of a joint contractor, unless otherwise specified in the contract, his representative may be charged as if the contract had been several, instead of joint. *Held*, that where a husband and wife were jointly liable on a note sued on, and the wife died before suit brought, the holder of the note was entitled to sue the husband alone.

Action by the Providence County Savings Bank against Emanuel Vadrais. On demurrer to defendant's plea of defect of parties. Demurrer sustained.

Argued before STINESS, C. J., and DOUGLAS and DUBOIS, JJ.

John A. Tillinghast, for plaintiff. Thomas F. Vance, for defendant.

STINESS, C. J. The declaration sets out a joint note by the defendant and his wife, and the fact that the wife died about 5½ years before this action was brought. The defendant files a special plea, setting up that, as the note was joint, no action can be maintained against the defendant separately. The plaintiff demurs to the plea.

Gen. Laws 1896, c. 233, § 17, provides that on the death of a joint contractor, unless otherwise specified in the contract, his representative may be charged as if the contract had been several, instead of joint, provided that in a partnership its assets shall be first exhausted. In *Pearce v. Cooke*, 13 R. I. 184, the court said, "The statute makes the debt the several debt of each party," referring to Gen. St. 1872, c. 193, § 30, which was substantially the same. The plaintiff relies on Gen. Laws 1896, c. 233, § 21, which provides that a plaintiff may join in the same action "all or any persons severally or jointly and severally liable" on a promissory note, etc. As the purpose of this statute was to enable a plaintiff to join persons liable severally or jointly and severally, we do not think it can be construed conversely to ex-

¶ 2. See Bills and Notes, vol. 7, Cent. Dig. §§ 1436, 1436; Contracts, vol. 11, Cent. Dig. § 787.

clude joint parties. The omission of a joint party is covered by section 23, which provides that no action shall be defeated by the non-joinder of parties, but that new parties may be summoned in. This was held to be a right of a defendant in *National Bank v. Galvin*, 20 R. I. 159, 37 Atl. 811. We concur in the opinion there given as to this general statement, but the decision was erroneous in ordering in the other party when the action was brought against an executrix. The rule in such cases is stated by Gray, C. J., in *New Haven & N. Co. v. Hayden*, 119 Mass. 361: "At common law, in case of a joint contract, if one of the joint contractors died, an action at law could not be brought or prosecuted against his executor or administrator, but against the surviving contractor only; and if the contract was several, or joint and several, the executor or administrator of one could be sued in a separate action, but not jointly with the survivors, because he was to be charged *de bonis testatoris* and they *de bonis propriis*." See, also, 15 Ency. Pl. & Pr. 555. The statute in Massachusetts was like our section 17, and it was held that administrators could not be summoned in, but must be sued separately. The action cannot be defeated by reason of nonjoinder, and in this case the administrator cannot be made a party, because section 17 provides for a separate action against such a party.

It follows, therefore, that the action was properly brought against the surviving joint contractor, and the demurrer to the plea is sustained.

(25 R. I. 325)

KNOWLES v. KNOWLES.

(Supreme Court of Rhode Island. July 13, 1903.)

HIGHWAYS—PLATS—ESTABLISHMENT BY LEGISLATURE—ACCEPTANCE—NONUSER—ADVERSE POSSESSION.

1. The General Assembly ordered a committee to plat land owned by the state. The certificate of the surveyor on the plat stated that it was a draft of, among other things, a highway, the land of which was not included in the lots. The report of the committee stated that they had laid out a highway to a pond that every lot might have free access in case of drought. Held, that such statement of the reason therefor did not limit the meaning of the word "highway" so as to make it a private way.

2. The Legislature may establish a highway over land owned by the state.

3. Where the Legislature established a highway no acceptance is necessary.

4. A highway does not cease to be such from nonuser till discontinued by the proper authorities.

5. A highway is not extinguished by adverse user of a private individual.

Action by Charles H. Knowles against William H. Knowles. Judgment for defendant.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Nathan B. Lewis, for plaintiff. Benjamin W. Case, for defendant.

DOUGLAS, J. This is an action of trespass *quare clausum fregit* for breaking and entering the plaintiff's close, known as the "Horse Lot," located on the easterly side of the "Old Point Judith Road," so called, in Narragansett (formerly South Kingstown), fronting on said highway about the width of 150 feet, and extending about 600 feet. This lot is on the southwest corner of the farm of the plaintiff, and is on the northerly boundary of the farm of the defendant. The declaration charges in the usual form the breaking and entering of said close on the 1st day of January, A. D. 1899, and on divers days between that day and the date of the commencement of this suit, to wit, October, A. D. 1902. The defendant, in his pleas, justifies the several acts of going upon said premises mentioned in the declaration on two distinct grounds, to wit: First, that there is an ancient highway through and over said close, on which all the people of the state have a right to travel; and, second, that he, in common with certain other persons, has a private right of way over and through said close to a pond at the easterly end thereof. The plaintiff, in his replication, denies that the same, or any part thereof, is now, or ever was, a highway, and also alleges that all private rights of way over and through said close in which, etc., if any ever existed, have long since been extinguished and lost by nonuser and the absolute and exclusive adverse possession of the plaintiff and his predecessors in title for more than 20 years before the acts complained of in the plaintiff's declaration. The plaintiff also, in his replication, pleads in estoppel the fact that from April 7, 1846, until September 3, 1866, one Howard Knowles, grandfather of the plaintiff and father of said defendant, was the owner of and was seised and possessed in fee simple of the farm now owned by the plaintiff, including said horse lot and the farm owned by the defendant—the farm of the plaintiff being lot No. 3, and the farm of the defendant being lot No. 4, on the Sewall plat—and that the right of way, if any had existed prior to April 7, 1846, for the benefit of lot No. 4, was extinguished by merger of the title of the dominant and servient estates in one person. When said Howard Knowles conveyed away said lot No. 3, he made no reservation of any way. The locus upon which the trespasses are alleged to have been committed is a part of a larger tract called the "Sewall Farm," which was confiscated by the state in the time of the Revolution, and platted and sold by order of the General Assembly. The plat is printed as an exhibit in *Knowles v. Knowles*, 12 R. I. 400, and the report of the committee and the action of the General Assembly approving it may be found in 10 R. I. Col. Rec. 60, 71. On the plat adopted by the General

¶ 5. See *Adverse Possession*, vol. 1, Cent. Dig. § 44; *Highways*, vol. 25, Cent. Dig. § 280.

Assembly the locus is delineated as 8 rods wide and 40 rods long, extending easterly from the main highway to a fresh-water pond; and it is also referred to in the title or certificate on the plat, which says: "This is a draft of the State Farm lying in South Kingstown at Point Judith Point containing 1163 acres and also the Dividing lines where said farm is divided into Farms or Lots, and the Quantity of land Each Farm or Lot contains and also a Draft of a highway that runs part through said Farm and also of a highway to the Fresh Pond, and a drift way to the Salt Marsh surveyed by order of the committee this 9th day of August, A. D. 1794. By Robert Stanton, Surveyor." Appended to the above is a note, as follows: "N. B. The land the highway contains is not included in each farm or lot." The report of the committee (10 Col. Rec. 60) refers to the ways laid out by them as follows: "We have also laid out a highway partly through the said farm, beginning at the west side of the barway at the end of the stone wall, which is the line between the said farm and the Wolcott farm, thence south, 22 degrees west, 296 rods, where we fixed a stake and stones; thence south 132 rods to the northeast corner and the northwest corner of the two southernmost lots, laying all the said way two rods wide on the east side of the bounds. We have also laid a highway of eight rods wide and forty rods long on the south side of the lot No. 3, to the fresh pond, that every lot may have free access in case of drought. We also have laid out a lot of about ten acres on the south side of the marsh adjoining the sea and beach, for a common, and laid out a driftway beginning at the west side of the highway at the dividing line between lots 3 and 4, thence to run across the lot No. 4 and across the corner of the lot No. 5 to the elbow corner adjoining the salt marsh, that every lot may have free access to the marsh and to the common lot; all which will more fully appear by our plat herewith presented." The General Assembly by vote accepted the report, and appointed a committee "to sell the said farm or tract of land in separate divisions or lots agreeable to the said plat," and directed the general treasurer to execute deeds to the purchasers. The report of the committee (10 Col. Rec. 71) recited that "the committee had sold said farm agreeable to the plat," and gave an account of the sales, and this report was accepted.

It has been held that the deeds of the general treasurer are to be construed as conveying what the General Assembly through its committee, sold, whether the description in the deed accurately described the land as platted and reported or not. In *Knowles v. Nichols*, 2 R. I. 198, it was held that the deed of lots 4, 5, and 6 did not convey the common lot, although it was included in the boundaries given, because the general treasurer, under the resolution, had no authority

to convey it. This finding is approved in *Knowles v. Knowles*, 12 R. I. 400, 407, 408, following *Knowles v. Nichols*, 2 Curt. 571, Fed. Cas. No. 7,897. The two latter cases, however, disagree with *Kenyon v. Nichols*, 1 R. I. 411, and hold that rights to the common lot passed as appurtenant to the numbered lots on the plat, though not mentioned in the deeds. The plat and the report are conclusive as to what passed by the deeds. Taking the words of the report and the plat, we find a plain dedication of the highways and a reservation to the state of the title to the land contained in them. It is expressly stated that the land the highway contains is not included in each farm or lot, and the report and the plat enumerate the number of acres in each lot sold, and the price paid per acre.

It is argued that the words following the declaration of the layout of the strip in question limit the effect and meaning of the word "highway." We do not think such an interpretation is consistent with the language or the circumstances. Undoubtedly the object of laying out ways was for the benefit, primarily, of persons who should live upon these lots, as is the case usually when land is platted into lots with streets between them; and the natural effect of the language is, not to make either of these ways private, but to explain to the assembly why a highway in one case and a driftway in the other were laid in the places selected. By accepting the language of the committee, the General Assembly dedicated the highway, and approved the reason for laying it out. That such a layout by the sovereign power, which is the owner in fee of the land, is effectual, cannot be questioned. The right to establish highways resides primarily in the Legislature, but may be delegated to municipal or local authority. *Elliott on Roads and Streets*, § 421. In *Commonwealth v. McNaugher*, 181 Pa. 55, 18 Atl. 934, the court says: "Where a highway is established by the state itself, it requires no act of acceptance on the part of any one to make it a public highway. It becomes such by act of the sovereign power by which it was established. Neither its character as a highway nor the public right to use it as such can be lost by nonuser." Acceptance by the public is necessary in the case of private dedication (2 Greenl. Ev. [15th Ed.] § 662), but the Legislature is the absolute judge of the necessity of a highway, unless it chooses to delegate the discretion to some subordinate authority.

This conclusion brings us to the question, suggested by the defendant, whether the rights of the public in this way have become extinguished by nonuser or adverse occupation. The evidence of use of this way is meager. For many years a wall has been maintained across it at the main highway, in which there was a barway, or gate, from 1852 to 1890. Some of the witnesses say

that they have seen people who came from the shore drive their cattle along this way from the main highway to the pond during the years from 1840 to 1852-53. The defendant's witnesses seem to establish the claim that he and his predecessors have cultivated the soil and used it for pasture and other purposes for 50 years or more. It is conceded that no roadway was ever built there. If acceptance were necessary, we could not find it conclusively upon the evidence; but neither can we find that as matter of fact it has been wholly abandoned. This uncertainty in regard to the use of this way is of little account, as, in view of the decisions in this state, the question is a legal one. From early times the statutes have provided legal methods of discontinuing highways which should be found no longer useful. The General Assembly has guarded very jealously its control over the highways which it has laid out. While giving large control over highways generally to town councils, it reserved to itself until 1870 the power to abandon these. The Digest of 1798 contains this provision (page 384, § 6): "Provided that no town council shall have power to alter or change any highway which hath been or hereafter shall be laid out by the General Assembly." The same provision appears in Digest of 1822, p. 289, § 6; Digest of 1844, p. 321, § 6; Rev. St. 1857, c. 43, § 26; and was first repealed by Act Feb. 1870 (Pub. Laws 1870, c. 842) a reservation being then made, and still in force, of the highways along the Woonasquatucket river (Gen. Laws 1896, c. 71, § 23). This court, in accordance with the declaration of public policy implied in this legislation, and following the weight of authority, has adhered to the common-law rule, which is well stated in Wood on Nuisances, § 297, as follows: "When a highway is once established as such by the action of the proper authorities, it does not cease to be such, even though unused for many years, until it has been discontinued by the proper authorities."

In *Almy v. Church*, 18 R. I. 182, 26 Atl. 58, the evidence showed an abandonment by the public, and a private possession of the ways under discussion for 100 years or more. Yet the court held that, as they were once highways, the public right continued, and the town council might open them again. The arguments advanced by the plaintiff in the case at bar and most of the cases here cited are considered by the court, the conflict of authority is recognized, and the deliberate judgment of the court is recorded that the question whether title to the whole highway once dedicated to the public can be acquired by adverse possession on the ground that the public have waived or abandoned the dedication must be answered in the negative. The court sums up its conclusion on page 187, 18 R. I., and page 60, 26 Atl. as follows: "The case of *Simmons v. Cornell*, 1 R. I. 519, held this doctrine to the extent of

denying the right to gain title to a highway by encroachment; but it did not pass upon the question of an exclusive possession of the whole way. We are unable to see upon what sound principle the right can be denied in one case, and not in the other. True, it may be said that an entire possession of the way furnished a presumption of abandonment which does not apply to a partial possession; but it may also be said that, if a public right cannot be extinguished in the whole layout when enough is left unincumbered for convenient travel, the reason is stronger that the right cannot be extinguished altogether." This decision has been approved in *Matteson v. Whaley*, 20 R. I. 412, 41 Atl. 754, and is, as we have said, in accord with the weight of authority. "The rule best supported by reason and by weight of authority is that the 'common right of highway' cannot be lost by the attempted adverse possession of a private individual." *Elliott on Roads and Streets*, § 883, p. 969. Our conclusion, therefore, must be that the highway as laid out by the committee of the General Assembly, and, as shown on their plat, is still a public way, and that the alleged trespasses of the defendant are justified by his plea to that effect.

Judgment for the defendant for costs.

(25 R. I. 319)

FIELD & SLOCOMB v. CONSOLIDATED MINERAL WATER CO.

(Supreme Court of Rhode Island. July 8, 1903.)

MECHANICS' LIENS—RIGHTS OF ARCHITECT.

1. Under Gen. Laws 1896, c. 206, § 1, providing that, whenever any building shall be constructed, it shall be liable for all the work done and the material used in the construction which have been furnished by any person, the architect is entitled to a lien both for the labor of supervision and of preparing plans.

Petition by Field & Slocumb against the Consolidated Mineral Water Company for a mechanic's lien. Granted.

Argued before STINESS, C. J., and TIL-
LINGHAST and DOUGLAS, JJ.

R. E. Lyman, for petitioner. Barney & Lee and Van Slyck & Mumford, for respondents.

DOUGLAS, J. The petitioners, as architects, prepared plans and specifications for, and supervised and directed, the construction of certain buildings and fixtures therein for the respondents, and claim therefor the lien provided for in chapter 206 of the General Laws of 1896. The parts of the statute which are material upon the question presented read as follows: "Section 1. Whenever any building * * * shall be constructed * * * such building * * * together with the land * * * is hereby

¶ 1. See *Mechanics' Liens*, vol. 24, Cent. Dig. §§ 41, 42.

made liable and shall stand pledged for all the work done in the construction, erection, or reparation of such building * * * and for the materials used in the construction, erection, or reparation thereof which have been furnished by any person," etc.

The great weight of authority, under substantially similar statutes, gives the lien to supervising architects both for the labor of supervision and the labor of preparing plans. *Knight v. Norris*, 13 Minn. 473 (Gil. 438); *Gardner v. Leck*, 52 Minn. 522, 54 N. W. 746; *Wanganstein v. Jones*, 61 Minn. 262, 63 N. W. 717; *Von Dorn v. Mengedohrt*, 41 Neb. 525, 59 N. W. 800; *Phoenix Furniture Co. v. Put-in-Bay Hotel Co.* (C. C.) 66 Fed. 683; *Mulligan v. Mulligan*, 18 La. Ann. 20; *Mutual Benefit L. I. Co. v. Rowand*, 26 N. J. Eq. 389; *Arnoldi v. Gouin*, 22 Grant's Chan. (Ottawa) 314; *Johnson v. McClure* (N. M.) 62 Pac. 983 (where the cases are reviewed); *Stryker v. Cassidy*, 76 N. Y. 50, 53, 32 Am. Rep. 262. In Pennsylvania an architect employed to make plans, and supervise the construction in accordance therewith, is entitled to a lien (*Bank of Penn'a v. Gries*, 35 Pa. 423); but one who furnishes plans alone, and does not supervise, is not entitled (*Price v. Kirk*, 90 Pa. 47; *Rush v. Able*, 90 Pa. 153). In Nebraska a lien is given for merely furnishing plans. *Henry & Coatsworth Co. v. Halter*, 79 N. W. 616, 619. In Iowa it has been held that an architect has no lien for furnishing plans if they are not used. *Foster & Libbie v. Tierney*, 91 Iowa, 253, 59 N. W. 56, 51 Am. St. Rep. 343. In Illinois and Ohio it is doubted whether the lien will apply for plans if there is no supervision. *Taylor v. Gilsdorff*, 74 Ill. 354; *Phoenix, etc. v. Hotel Co.* (C. C.) 66 Fed. 683. In *Mitchell v. Packard*, 168 Mass. 467, 47 N. E. 113, 60 Am. St. Rep. 404, the court allowed an architect for the labor of supervising, but not for the labor of preparing the plans. The Massachusetts statute allows the lien for "labor performed or furnished * * * and actually used in the erection," etc. We think this construction stricter than the spirit of our statute requires. The statute is intended to afford a liberal remedy to all who have contributed labor or material towards adding to the value of the property to which the lien attaches. *Parker v. Bell*, 7 Gray, 432. The plans of the architect are written directions to the workmen, and contribute to the building as much as the verbal directions of the overseer. Indeed, the main task of the superintendent is to enforce compliance with the working plans. If the same plans may be preserved and used again elsewhere, so may the scaffolding which supports the builder at his work; but no one could doubt that the work of putting together such temporary adjuncts to the permanent structure should entitle the builder to his lien therefor. In a case like the present, where the architect draws the plans, and uses them as his tools in the supervision of

the work, we think he is entitled to a lien for the labor expended both in the drawing and the supervision. While the title of the statute reminds us that it was primarily intended to secure the mechanic only, its terms now include the materialman, who does no work, and the drawing of plans is both mental and manual work.

(25 R. I. 284)

TILLINGHAST et al. v. BROWN UNIVERSITY et al.

(Supreme Court of Rhode Island. Providence. June 27, 1903.)

COEXECUTORS — FUNDS — MISAPPROPRIATION — LIABILITY OF OTHER EXECUTORS — RELEASE — CONSTRUCTION — PREMATURE ACTIONS.

1. Where, after a coexecutor had died insolvent largely indebted to the estate, which had been settled except that final distribution had not been made to the residuary legatees, the latter executed a written release to the surviving executors discharging them from all liability to the estate, "excepting whatever claim there may be, if any, against such executors on account of any loss that may come on the claim" against the estate of such deceased coexecutor, which was then not finally administered, such release discharged the coexecutors from liability for such deceased executor's defalcation, except for the balance remaining unpaid on final settlement of his estate, and hence no action could be maintained against them to recover such sum until such final settlement.

Action by Brown University and others against James Tillinghast and others. On petition for a new trial. Petition denied.

Argued before TILLINGHAST, DUBOIS, and BLODGETT, JJ.

Edwards & Angell and William R. Tillinghast, for appellants. John O. Pegram, for appellees.

DOUGLAS, J. This is an appeal by the two surviving executors of the will of John Wilson Smith, late of Providence, deceased, from a decree of the municipal court of the city of Providence, entered September 13, 1901, requiring these executors to file an inventory of said estate and to settle their account with the said estate. Their coexecutor, Henry C. Cranston, died insolvent May 27, 1896, having in his possession at that time the sum of \$8,901.95 belonging to the estate. It is agreed that this sum is the property of the appellees, who are residuary legatees under the will, all previous claims under the will having been satisfied.

The only question, therefore, before the court is whether the surviving executors ought to account to the residuary legatees for the money which was in Cranston's hands at his death.

This claim is resisted upon four principal grounds: First. That by a certain agreement made by and between the residuary legatees and the surviving executors, June 25, 1897, the residuary legatees released these executors from all claims excepting a dis-

puted liability to account for and make good any ultimate loss which should accrue on the final settlement of Cranston's estate, i. e., for so much of the amount in Cranston's hands at his death as his estate should not pay when it should be finally wound up. Secondly. That by an agreement between the parties made in April, 1893, the residuary legatees released these executors from any further management of or responsibility for the assets of the estate, and appointed Mr. Cranston their agent in the premises, and that the moneys left in Cranston's hands came to him as such agent for the residuary legatees, and not as coexecutor with the appellants. Thirdly. That the balance left in Cranston's hands consisted of proceeds of sales of real estate and rents, for which an executor is not accountable in a probate court. Fourthly. That, under the provisions of the will and the statute law of Rhode Island, these executors are not liable to file an inventory or render an account such as is here ordered.

The first defense is in the nature of a plea in abatement, and, if tenable, requires that the decree ordering an accounting at the present time shall be reversed. The appellants urge, and the testimony shows, that the Cranston estate is not fully distributed. Two dividends have been paid to the creditors, and more may be expected. On the 25th of June, 1897, these executors, "having paid all the special legacies bequeathed by said will, and having otherwise fully settled said estate, except the final distribution thereof," in fulfillment of and in accordance with an agreement of distribution executed by the residuary legatees upon the same day, conveyed to these residuary legatees all of the estate then actually in their hands or under their control, and at the same time rendered to said residuary legatees their accounts with said estate, and thereupon the said residuary legatees executed and delivered to these executors the receipt and agreement on which they now rely, in the words and figures following: "Know All Men by These Presents, that Brown University, the Providence Public Library and the Rhode Island Hospital, three corporations duly established under the laws of the state of Rhode Island, and being the three residuary legatees under the will of John Wilson Smith, late of Providence, in said state, hereby acknowledge to have received from James Tillinghast of said Providence, and Richard H. Dana, of Cambridge, in the county of Middlesex and commonwealth of Massachusetts, the surviving executors and trustees under said will, all the residue of the estate under said will, and hereby also, being hereunto duly authorized, discharge and release said Tillinghast and Dana, their heirs, executors and administrators from all legacies, claims, debts and demands of any nature whatever, excepting whatever claim there may be, if any, against the said Tillinghast and Dana

on account of any loss that may come on the claim of \$8,949.00 against the estate of Henry C. Cranston, late of Providence, and lately the managing executor and trustee under said will, and said corporations are to have to November 1st, 1897, to examine and approve the accounts of said executors and unless notice in writing before November 2nd, 1897, is given to said surviving executors of exception to said accounts, said accounts will then be held as approved excepting as to said possible claim before mentioned. Neither the said Tillinghast nor Dana admit, by accepting this receipt and discharge, or in any other way, the validity of said claim against them, but on the contrary they both deny the same and the said Dana hereby constitutes and appoints the said Tillinghast his attorney to accept service for him in any proceeding at law or equity said corporations may bring against him on account of said claim, depositing with said Tillinghast the sum of \$1.00 and the said corporations further agree that in using the names of said executors or either of them in prosecuting any claim assigned to them from said estate they will hold the said Tillinghast and Dana free from any costs. In witness whereof said Brown University, Providence Public Library and Rhode Island Hospital have caused their corporate seals to be affixed hereto and these presents to be signed in their names and behalf, by the undersigned officers duly authorized this 25th day of June, 1897. Brown University, by Arnold B. Chase, Treasurer. [Seal.] Providence Public Library, by Thomas Durfee, Treasurer. [Seal.] Rhode Island Hospital, by John W. Danielson, Treasurer. [Seal.] Richard H. Dana. [Seal.]"

The time limited in this agreement for the examination of these accounts elapsed, and neither during that time nor since have the residuary legatees made any objection to them. It is therefore undisputed that the only item open to controversy between the parties is the claim against the estate of Cranston, and the only question not settled by the parties is whether or not these executors are responsible for that claim.

Whatever may be finally decided as to the responsibility of these executors in the premises, I think the obvious meaning of the agreement is that such responsibility shall be limited to make good to the estate any loss that may finally accrue to the estate of John Wilson Smith upon the complete settlement of the estate of Henry C. Cranston, and that, consequently, these executors cannot be required to account further until the amount of such loss can be ascertained.

The language of the receipt, it seems to me, can bear no other construction. The claim excepted from the release is not "whatever claim these legatees may have to hold these executors responsible for the sum of money belonging to the estate which was deposited with the late Henry C. Cranston at

the time of his death," but it is "whatever claim there may be, if any, against the said Tillinghast and Dana on account of any loss that may come on the claim of \$8,949.00 against the estate of Henry C. Cranston, late of Providence, and lately the managing executor and trustee under said will." In releasing these executors from everything except accountability for loss, the residuary legatees have released them from accounting until such loss can be ascertained.

It hardly requires a citation of cases to support the proposition that it is within the power of the only persons interested in the estate to release the executors from a liability to account, or from any other liability owed solely to themselves. The cases cited by the appellants, however, fully sustain this doctrine. *In re Pruy's Will* (N. Y.) 36 N. E. 595; *In re Wagner's Estate* (N. Y.) 23 N. E. 200; *Harlan's Estate*, 16 Pa. Co. Ct. R. 51; *Murrel v. Murrel* (S. C.) 49 Am. Dec. 664. Having arrived at this conclusion, I cannot consider the other defenses, as any decision of the questions raised would be premature at this stage of the proceedings.

The decree ordering an inventory and account must be reversed.

PER CURIAM. The court is of the opinion that the construction which Mr. Justice DOUGLAS put upon the release given by the appellees to the appellants, who are the surviving executors of the will of John Wilson Smith—which release is set out in the record—is the natural and proper construction to be put thereon, and hence that the decision of Mr. Justice DOUGLAS was right.

The release was evidently intended to be a full discharge of the appellants from all liability until the estate of Cranston should be settled and the loss from that estate ascertained; and, as that estate is not yet settled, the loss "that may come" therefrom cannot now be determined. The proceeding before us, therefore, is premature, as held by Mr. Justice DOUGLAS, and we adopt his decision as the opinion of the court.

Petition for new trial denied.

(25 R. I. 213)

BLIVIN v. WHEELER.

(Supreme Court of Rhode Island. July 7, 1903.)

INFANTS — EMANCIPATION — LIVING AS MEMBER OF ANOTHER'S FAMILY — RECOVERY FOR SERVICES.

1. There is no emancipation of a child by her mother where she goes to live with others as their child by arrangement of the mother, she not relinquishing her control, but visiting her occasionally, to see how she was getting along, and to inquire about her duties and situation, remonstrating about her work, receiving her at her home, and returning her to them when she left them, and claiming wages for her service within six months after she finally left them.

2. There is no emancipation of a child, so as to allow her to sue for her services to persons

with whom she was put by her mother, though thereafter her mother remarries.

3. Where a child, by arrangement of her mother, goes to live with others as their child, there cannot, in the absence of express contract, be any recovery for her services, though excessive work is required.

Assumpsit by Flora Blivin, pro am, against Joanna B. Wheeler. Defendant petitions for a new trial. Judgment for defendant.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

A. B. Crafts, for plaintiff. Thomas H. Peabody, Edward M. Burke, and Frank L. Hanley, for defendant.

STINESS, C. J. The plaintiff, a minor, whose father is dead, and who sues by her next friend, went to live with the defendant as her child, under an arrangement made with the plaintiff's mother. The plaintiff sues to recover for services rendered while she lived with the defendant, which she claims were of a character not to be expected of one of her age, and beyond what properly belonged to her in her relation to the defendant. The plaintiff was nine years old when the arrangement was made, and living with her mother, a widow, who, being unable to provide for her entire family, desired to find a home for her daughter. The plaintiff lived with the defendant about seven years, when she left, and shortly after was married. Assuming from the verdict that improper work was required of the girl, amounting to a breach of the contract, the question still remains whether the plaintiff can maintain this action for services. The contract was made with the mother. She was supporting her child at the time, and was entitled to her earnings. *McGarr v. National Mills*, 24 R. I. 447, 53 Atl. 320.

The plaintiff claims an emancipation by her mother, but this is not shown. The mother did not relinquish her control of her child, but, on the contrary, continually showed her retention of it by visiting the defendant's house once or twice a year, to see how the girl was getting on, to inquire about her duties and situation, remonstrating on occasions about her work, and within six months of the time when the plaintiff left claiming wages for the girl's services. On previous occasions when the girl left, she received her at her house, and returned her to the defendant. Emancipation is not presumed except from facts showing a renunciation of parental rights, and these do not appear in this case. *Schouler's Dom. Rel.* (4th Ed.) § 267a. The conduct of the mother strongly rebuts an inference of emancipation.

It is further claimed that the remarriage of the plaintiff's mother, after the contract, operated as an emancipation. The cases cited by the plaintiff in support of this point do not tend to establish an emancipation, so much as the inability of a married woman to contract and to sue and be sued, in connection with the fact that a stepfather supports

the children. Thus, in *Hollingsworth v. Swedenberg*, 49 Ind. 378, 19 Am. Rep. 687, the court held that a mother who had remarried could not maintain an action for the services of a minor child, because the contract was not a contract to pay the mother. In the opinion of the court is the dictum that they had found no case where the mother after marrying again had been held entitled to the services and wages of children of a former marriage, earned after the marriage. But the court also added that if there had been "an express promise by the defendant to pay the wages to the mother proved, which the court found had not been proved, perhaps the rule would have been different." The case does not strongly support the plaintiff's position. In *Whitehead v. St. L., I. M. & S. Ry. Co.*, 22 Mo. App. 60, the reason given by the court was that of the inability of a married woman to make a contract. This reason does not apply to the case at bar, because here the mother was a widow when the contract was made; and we know of no provision of law that abates a woman's contract upon a subsequent marriage. The effect of a remarriage, however, is of no consequence in this case, for the reason that another principle controls it, which is that no recovery can be had in such cases where there is no contract to pay. The contract in this case was for a home, care, clothing, and schooling. In *Strong v. Marcy*, 38 Kan. 109, 5 Pac. 366, it was held that a minor, under a contract similar to the one in this case, could recover damages upon the breach of the contract by the defendant. In that case there was a written relinquishment by the father of all control over the child. It does not touch the question in this case, but a subsequent case in Kansas does. In *Wiley v. Bull*, 41 Kan. 206, 20 Pac. 855, the court said: "Where a person lives with a relative as one of the relative's family, neither has a cause of action against the other for compensation, for wages on the one side, or for board, lodging, etc., on the other side, or for anything else furnished by one to the other as a member of the family, except where an express contract is shown to exist between the parties, requiring that one or the other shall have compensation. When it is shown that the parties, though strangers to each other, have nevertheless lived together as one family—as parent and child, for instance—and that no express contract was made for compensation to either party, none on the one side for wages, and none on the other side for board, lodging, clothing, schooling, spending money, etc., then the same rule will apply as though the parties were near relatives. It was, therefore, wholly immaterial as to which—the plaintiff or the defendant—was at fault at the time when the plaintiff and the defendant severed their relations with each other, and when the plaintiff ceased to further reside with the defendant. While they lived together, they did so as

parent and son, being mutually beneficial to each other, and neither expected any additional compensation, and neither can now recover any additional compensation." In other cases cited by the plaintiff there was an express promise to pay for the minor's services by the defendant. The statement of the law, substantially as we have quoted it above, is fully sustained in many cases. In *Neal's Ex'r v. Gilmore*, 79 Pa. 421, Judge Sharswood said: "If the parties lived together with the understanding that the Neals assumed the place and duty of parents—if the boys lived with them as their children, and members of the family—the jury ought to have been instructed that the plaintiffs could not recover." In *Graham v. Stanton*, 177 Mass. 321, 58 N. E. 1023, Holmes, C. J., said: "It would be a strong thing to say that an actual contract to pay for services could be inferred from the conduct of one who takes a child into his household under the name of daughter. The fact of his calling her so implies that he is not purporting to enter into relations with her on a business footing." This language is expressly significant, in view of the plaintiff's claim that the defendant had falsely represented that he had adopted her as his daughter. In *Kirchgassner v. Rodick*, 170 Mass. 543, 49 N. E. 1015, the court held that where the plaintiff entered a family as a member, she was not entitled, as matter of law, to recover for services. To the same effect are *Thorp v. Bateman*, 37 Mich. 68, 28 Am. Rep. 497; *Ormsby v. Rhoads*, 59 Vt. 505, 10 Atl. 722; *Smith v. Johnson*, 45 Iowa, 308; *Windland v. Deeds*, 44 Iowa, 98; *Appeal of Fross*, 105 Pa. 258; *Lunay v. Vantyne*, 40 Vt. 501; *Hammond v. Corbett*, 50 N. H. 501, 9 Am. Rep. 288, a very fully considered case; *Armstrong v. Stone*, 9 Grat. (Va.) 102.

The plaintiff invokes the doctrine that the law is tender in regard to infants, and that courts will look closely to their protection. We fully concur with this statement, which shows, at the same time, the principle upon which the right of action in cases of this kind is denied. Infants, deprived of a home by the death, misfortune, or vice of parents, stand greatly in need of sheltering care in a private home, rather than be sent as paupers to a poorhouse. But people would be very shy in so taking children if they were to be liable afterwards to an action for services if the children thought, or were led to think, that they had not been properly treated. Without doubt there may be cases where a child will be unkindly used, and excessive work required. So there are such cases between parents and children. The remedy, however, is not in an action for services. In the case before us, the plaintiff could have been removed from the defendant's house at any time if her treatment was not satisfactory. At the times when she left, she returned voluntarily, and with the consent of her mother, and after her marriage she and her

husband went to live with the defendant—a fact well-nigh incredible, if she had been treated by the defendant as she now claims.

We are therefore of opinion that the plaintiff neither had the right to sue, nor did she show a cause of action. In view of this conclusion, a new trial would be useless, and the cause is remitted to the common pleas division, with direction to enter judgment for the defendant.

(206 Pa. 35)

CITY OF PHILADELPHIA v. PHILADELPHIA TRACTION CO.

(Supreme Court of Pennsylvania. May 11, 1903.)

TAXATION—RAILROAD PROPERTY—TRACTION MOTOR COMPANY.

1. A legislature has authority to impose a tax on the property of railroad corporations, the superstructure of the road and water stations alone excepted, and to delegate its authority to do so to municipalities.

2. Act April 21, 1858 (P. L. 385), providing that depots, offices, carhouses, and other real property of railroad corporations situated in the city of Philadelphia—the superstructure and the water stations alone excepted—shall be subject to taxation for city purposes, applies to a traction motor company which leases and operates street railways in such city.

3. The words "railroad" and "railway," as used in the statutes of Pennsylvania, are synonymous, and apply to both steam and street railways, unless the context clearly shows a different intent.

4. When a traction company operates a railroad, and leases the franchises of various railway companies, and operates them on its own account, it is exercising the franchises of a street railway company, as it is authorized to do, and enjoys the privileges granted to, and becomes subject to the liabilities imposed by law on, such companies.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the city of Philadelphia against the Philadelphia Traction Company. From an order making absolute a rule for judgment for want of a sufficient affidavit of defense, defendant appeals. Affirmed.

The defendant filed an affidavit of defense, the material portion of which is as follows: The defendant is a traction motor company, duly incorporated under the act of assembly of the commonwealth of Pennsylvania, entitled "An act to provide for the incorporation and regulation of motor power companies for operating passenger railways by cables, electrical, or other means," approved March 22, 1887 (P. L. 8), for the purpose of "constructing and operating motors and cables for supplying motive power to passenger railways, and the necessary apparatus for applying the same." Prior to the year 1896, the defendant had, in pursuance of powers expressly granted to it under said act, entered into certain contracts and leases with passenger railways in the city of Philadelphia. Said railway companies were engaged in the business of carrying persons from place to place along the various streets of the said city, and,

under and by virtue of said contracts and leases, it became and was the duty of the defendant to operate the cars over the lines of said various railways, and to provide facilities and buildings necessary for such purpose. In order to carry out these objects, and the duty which it owed to its said lessors and the public in the premises, it became necessary for the defendant company to acquire real estate, and to erect thereon buildings for the housing, storage, and handling of cars when not in use and overnight. It accordingly purchased, with a portion of the money representing its capital stock, premises situate on the east side of Sixteenth street, from Jackson to Wolf, in the Twenty-Sixth Ward of the city of Philadelphia, described in the lien, and constructed thereon the building mentioned in the scire facias, which is a car barn, for the housing and care of its cars, as aforesaid. The building is used for the storage of cars overnight, which cars otherwise would have to stand upon the public streets. A small portion of it is used as the office and headquarters of the superintendent, who is actually in charge of the business at said car barn, looking after the said cars, and dispatching them upon their various trips. Said property was purchased and used for the purposes aforesaid, and was indispensably necessary to the operation of said defendant company's public franchises, and was used for no other purposes whatsoever. As said property represented part of defendant's capital stock, it was liable to pay, and has paid, to the commonwealth of Pennsylvania, a tax for said year upon the said property, as part of such capital. Said property was and is part of the public works of defendant, and used as such only, was essential to the carrying out of the public purpose for which it was incorporated, as aforesaid, and defendant received no profit or income therefrom by way of rental or otherwise. Defendant is advised, and therefore avers, that such being the case, the local authorities of the county are without power to impose the tax aforesaid, not only because it would result in double taxation upon the same property, contrary to the intent of the acts providing for the levying and collection of taxes, but because, if such property was subject to seizure and sale piecemeal, the defendant would be crippled in the exercise of the public functions required of it, and that such power has not been conferred upon the local authorities. The court made absolute a rule for judgment for want of a sufficient affidavit of defense.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Ellis Ames Ballard and Rufus E. Shapley, for appellant. Mayne R. Longstreth, John L. Kinsey, City Sol., and James Alcorn, Asst. City Sol., for appellee.

FELL, J. The city's claim for taxes is based on the act of April 21, 1858 (P. L.

385), which provides that "the offices, depots, car houses, and other real property of railway corporations situate in said city, the superstructure of the road and water stations alone excepted, are and hereafter shall be subject to taxation by ordinance for city purposes." The power of the Legislature to impose this tax, and to delegate its authority to do so to the municipality, has been settled by our decisions. *Penna. R. R. Co. v. Pittsburgh*, 104 Pa. 522; *Jermyn v. Fowler*, 186 Pa. 595, 40 Atl. 972. Nor is this case within the class of cases in which it has been held that, in the absence of an express declaration, it will be presumed that the Legislature did not intend to subject to taxation as real estate the property of a corporation that is essential to the exercise of its franchises, and has once been taxed as a part of its capital. The power to tax and the intention to tax are clear, and the single question to be considered is whether a traction motor company, which leases and operates street railways, is within the provision of the act of 1858. The act subjects to taxation for city purposes "the real property of railway corporations situate in the city, the superstructure and water stations alone excepted." It is argued that the exception of the "superstructure and water stations" indicates that steam railroads only were meant, since they are the only roads owning their right of way or having water stations. That the word "railway" is used is of little or no importance in construing the act. The words "railway" and "railroad" have been used indiscriminately by the Legislature, and have no strict technical meaning in our statutes. A number of passenger railways were incorporated about the time of the passage of the act of 1858, and some of them in the special acts of incorporation are designated as "railway companies" and some as "railroad companies." The rule established by our decisions is that these words used in the statutes will be considered as synonymous, and either will be held to apply to both kinds of roads, unless there appears from the title of the act, its purpose or its context, something to indicate that a particular kind of a road is intended. *Hestonville, etc., Railroad Co. v. Philadelphia*, 89 Pa. 210; *Gyger v. Phila. City Pass. Ry. Co.*, 136 Pa. 96, 20 Atl. 399; *Cheetham v. McCormick*, 178 Pa. 186, 35 Atl. 631; *Old Colony Trust Co. v. Rapid Transit Co.*, 192 Pa. 596, 44 Atl. 319. The exemption from taxation of the superstructure and water stations clearly indicates that steam railroads were included, but it does not follow that passenger railway companies were excluded. The word used applies to both kinds of roads, and we see no ground on which it can be held that either is exempted from the operation of the act. An act similar to the one under consideration was construed in *Penna. R. R. Co. v. Pittsburgh*, 104 Pa. 522. This act provides that "all real estate situated in said city owned or possessed by

any railroad company shall be and is hereby made subject to taxation for city purposes, the same as other real estate in the city." Act Jan. 4, 1859 (P. L. 828). It was held that the act applied to both steam railroads and passenger railways, and that under it the land, buildings, and improvements thereon of the companies were liable to taxation for city purposes, although they were essential to the exercise of corporate franchises in the operation of the roads. There is no real distinction between these acts.

It remains to determine whether, for the purpose of this inquiry, there is a distinction between passenger railway companies and traction motor companies. Companies of the latter class are incorporated under the act of March 22, 1887 (P. L. 8), and the grant of power is to enter upon streets upon which passenger railways have been constructed, with the consent of the railway company, and to construct, maintain, and operate thereon motors, cables, electrical and other appliances for the traction of the cars of the passenger railways. They are given power to "lease the property and franchises of street passenger railways which they may desire to operate, and to operate said railways." By the Acts of May 15, 1895 (P. L. 63, and P. L. 64), they are authorized to buy and own the franchises of street passenger railways, to lay out new lines, and to operate their different lines as a general system. A traction company whose business is confined to the construction of appliances for street railway companies, or to the operation of motors, cables, electrical or other appliances for the traction of the cars of such companies, has but little resemblance to a street railway company, and more to a construction or power company. But when, as in this case, it operates a railway, and leases the property and franchises of various railway companies, and operates them on its own account, it is exercising the franchises of a street railway company, as it is authorized to do, and it enjoys the privileges granted to, and becomes subject to the liabilities imposed by law upon, such companies. This view is in harmony with all of our decisions touching the subject. *Rafferty v. Central Traction Co.*, 147 Pa. 579, 23 Atl. 884, 30 Am. St. Rep. 763; *Reeves v. Phila. Traction Co.*, 152 Pa. 153, 25 Atl. 516; *Old Colony Trust Co. v. Allentown, etc., Rapid Transit Co.*, 192 Pa. 596, 44 Atl. 319.

The judgment is affirmed.

(205 Pa. 632)

SAUNDERS v. J. R. T. SAMARREG CO
(Supreme Court of Pennsylvania. May 11, 1903.)

WILL—EXECUTION—SIGNING.

1. Where testatrix, after signing and executing a will, on a subsequent day added an additional clause, appointing an executor, but did not sign it, such clause will be disregarded and insufficient, either as a revocation of the will

or as an appointment of an executor, and the will will be deemed signed at the end thereof.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Albert Saunders against the J. R. T. Samarreg Company for specific performance and to remove a cloud on title. Decree for plaintiff, and defendant appeals. Affirmed.

Plaintiff had contracted to sell certain real estate to the defendant. To this real estate plaintiff derived title from Mary W. Grant. Defendant claimed that the title was not marketable, owing to the alleged fact that Mrs. Grant had not signed her will at the end thereof. The will in question is as follows:

"169 S. Carolina Avenue. Atlantic City, N. J.

"January 26, 1894.

"I, Mary W. Grant, being in health and of sound mind, do make this my last will and testament, revoking all other wills by me made.

"Item: I wish all my funeral expenses and just debts to be paid.

"Item: I will and bequeath to the Spring Garden Unitarian Society, Broad and Brandywine Streets, Phila., the sum of Five Hundred Dollars (\$500) to be paid in cash, without any deductions, as soon as possible after my death.

"Item: The rest and residue of my estate, real and personal, I will and bequeath to my nephew, Albert Saunders, unconditionally, in case of his death before inheriting my estate, I will it to his child, or children, the above mentioned real and personal estate; if there should be no child or children of his, I wish all my convertible property turned into money and given to the above mentioned Unitarian Society to be used according to the best judgment of said Society. My clothing I wish given to the deserving poor, according to the judgment of my executor.

"To this my last will and testament I set my hand and seal this 26th day of January, 1894.

"Mary W. Grant. [Seal.]

"169 S. Carolina Ave.

"Atlantic City, N. J.

"As executors of this my last will and testament I appoint J. Pemberton Ellis and Albert Saunders.

"In witness of this will and testament of Mary W. Grant we, the undersigned, do sign our names.

"Howard Humpton,
"Marion E. Humpton."

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Alfred D. Wiler, for appellant. G. Heide Norris, for appellee.

PER OURIAM. The court below found on competent evidence that the words ap-

pointing executors were not on the will at the time it was executed by the testatrix, but were added at a later date. Disregarding these words, therefore, we have a will in due form, signed by the testatrix at the end thereof, as required by the act of 1833 (P. L. 249). Such a will can be revoked, under the express words of the statute, only by "some other will or codicil in writing, or other writing, declaring the same executed, and proved in the same manner, * * * or by burning, cancelling," etc. Act 1833 (P. L. 250, § 13). The object of the statute was to secure evidence in the instrument itself of the completed intent of the testator, and that, having been fully shown by the signature at the end, is not to be revoked except by equal evidence of a subsequent completed change of intention. The evils under the former system of accepting a signature in any part of the instrument, or even unsigned memoranda, as a valid will, are forcibly stated by Strong, J., in *Heise v. Heise*, 31 Pa. 246. The words added in the present case do not indicate any intention to revoke the will, but rather to make a codicil supplementary to its provisions. But the intent, whatever it was, being incomplete for want of the testatrix's signature, is not operative for either purpose.

Decree affirmed.

(306 Pa. 64)

In re MANSFIELD'S ESTATE.

(Supreme Court of Pennsylvania. May 11, 1903.)

GUARDIAN—REMOVAL.

1. Where a management of the trust property by a guardian has been adverse to the interests of the minor, and a feeling of hostility has been engendered, which may prove embarrassing and injurious to all parties, the petition for the removal of the guardian will be granted.

Appeal from Orphans' Court, Philadelphia County; Ashman, Judge.

In the matter of the estate of Charles C. Mansfield. From decrees dismissing a trustee and guardian, Job R. Mansfield appeals. Affirmed.

The minor, Edith Mansfield, filed two petitions, one praying the removal of the respondent as trustee, and the other his removal as guardian.

The opinion on the first petition was as follows: "Without going into any elaborate review of the testimony, or into any criticism of motives, it is quite clear that the respondent has mismanaged the minor's estate. He was surcharged by the auditing judge, whose decision was affirmed by the Supreme Court, with three years' rent of premises, which had been lost through imprudent indulgence to the tenants; he resisted a suit by which the sum of \$1,413 was found to be in his hands, belonging to the estate of a sister of the minor, in which the minor had an ultimate interest; and he made

no attempt to invest the sum of \$1,175, belonging to his ward, but with which he had erroneously debited himself in his account as trustee. After having been ordered by the court to transfer the amount to his account as guardian, he denied before the examiner that he was accountable in that capacity. He used his position as trustee in prejudice of the interests committed to him as guardian, and thereby subjected the estate of the ward to risks which will be avoided by his discharge. The petition is granted."

The opinion on the second petition was as follows: "The same reasons which have led to the discharge of the respondent as guardian must prevail in this proceeding for his dismissal as trustee. His management of the trust property has been adverse to the interests of the minor, under his care, as her guardian, and a feeling of hostility has been engendered in the minds of the cestui que trust, which, if continued, may prove embarrassing and injurious to all parties. The petition is granted."

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Wm. H. R. Lukens, for appellant. John Weaver, for appellee.

PER CURIAM. Decree affirmed on the opinion of the court below.

(206 Pa. 21)

JENNINGS v. UNION TRACTION CO.

(Supreme Court of Pennsylvania. May 11, 1903.)

STREET RAILROAD—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

1. Where a passenger on an open electric car signals the conductor to stop at a crossing before and after it had reached it, and the conductor does not heed the signal, and the passenger stands at the edge of the car with his face to the rear and an arm around a stanchion, and again signals the conductor when the car is in the middle of the block, and the car is then suddenly stopped with a jar, and the passenger is thrown out, he is guilty of contributory negligence barring recovery for the injuries received.

Mestrezat, J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Michael Jennings against the Union Traction Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Thomas Leaming and Russell Duane, for appellant. John A. Ward, for appellee.

POTTER, J. From the testimony of the appellee in this case we learn that on September 19, 1897, between 6 and 7 o'clock p. m., he was riding as a passenger upon an open summer car of the defendant company. The seats ran crosswise of the car, and he

was seated at the extreme west side, as the car was running north on Eighth street, Philadelphia. Desiring to get off at Pine street, he attempted to signal the conductor to stop the car before it had reached the crossing of that street, and again after it had crossed. The conductor either did not see or paid no attention to his signals, and the car did not stop, but continued at a rapid rate on its way northward. Then the appellee rose from his seat, stood upon his feet at the extreme edge of the car, so close to it that he could put his right arm around the post or stanchion at the edge, and turned so as to face the rear of the car, and, standing in this position, called to the conductor to stop the car. It had entered upon the block, and the motorman did not stop until about half way through, when he stopped opposite the gate of the Pennsylvania Hospital. At or about the moment when the car stopped, the appellee fell from the car to the street, and sustained serious injuries. He claims that his fall was caused by an unusual jar or jolt in the stoppage of the car, and that this constituted negligence, upon which he based his action. The evidence upon the part of the plaintiff was that of himself and three passengers who were upon the car at the time of the accident. The plaintiff said that the car "stopped suddenly"; "stopped there very suddenly, and knocked me right over"; "he stopped the car very suddenly, and that is what knocked me off." Anthony Morley said that the car was running at a moderate rate of speed, but on cross-examination he said that the car might have run a car length and a half after the motorman began to slow down; also that "it was a very sudden stop." "He did not see any one inconvenienced or discommoded besides Mr. Jennings, and was not hurt any himself, although he was standing up." Louis Berger said that the plaintiff was thrown or fell off, and that the stopping of the car moved witness a few inches out of his seat. He did not see any one else who fell or was inconvenienced in any way except plaintiff. Henry McGinnis said that the car was going "pretty rapid." "The bell was rung very sudden, and the car stopped very sudden." "It stopped with a jar; a very heavy jar." Plaintiff fell off the car. The stopping of the car jolted witness. His head went forward about six inches. The stop was "very sudden," "right sudden," "pretty sudden." After the brakes were applied, the car might have run half its length, or a little more. Some passengers complained about the sudden stoppage.

This was the substance of the entire testimony to sustain the plaintiff's allegation of negligence. We leave out of consideration the testimony on the part of the defendant, which was strongly to the effect that there was no unusual shock or jar in the stopping of the car, and that the appellee got down on the running board, and stepped off backward, before the car came to a stop. But,

turning solely to the evidence on behalf of the plaintiff, does it disclose any negligence on the part of the defendant company? The plaintiff urgently requested the conductor to stop the car at once when he saw it had crossed Pine street. To emphasize his demand, he stood up. If he had remained sitting in his seat, and had been thrown from it, or from the car, or had been injured by the sudden stop while on the car, he would undoubtedly have had a good cause of action. Or if the car had been crowded, and there had been no vacant seat, he would have been justified in standing. But there was plenty of room. He had the whole seat to himself. Instead of remaining in it until the car stopped—as the notices and rules of the company, with which he was familiar, required him to do—he rose, and stood upon his feet at the extreme edge of the car. True, he put his arm around the post, but the result showed that his hold was insecure, and afforded him no protection. In response to his imperative demand to stop the car, the conductor obeyed, and gave the signal, and the very thing which the appellee demanded was done, and the car was stopped; but, as he says, suddenly, and with a heavy jar. But he had demanded an unusual thing—the immediate stopping of the car in the middle of a square; and, while other passengers may not have anticipated any such thing, yet he, having demanded the stopping of the car then and there, was bound to expect that the car would, in consequence of his emphatic demand, stop with some celerity. However sudden the stoppage was, it was not sufficient to injure any of the passengers who were seated, or even a passenger who was standing with his face towards the front of the car. If the jar of the stoppage caused the fall of the plaintiff, as he testified, it must have been because he was not seated, as he should have been at that particular time and under the circumstances, but was standing with his face to the rear of the car, and at the extreme edge of it, at the moment when, in response to his repeated and urgent requests, and when as he knew, or ought to have known, the car was about to be brought to a standstill. Can the motorman be said to be guilty of negligence for bringing his car quickly to a stop in response to the demand of the appellee because his doing so disturbed the balance of a passenger who was standing with his back to the front of the car, and upon its extreme edge? We do not see that the motorman had any reason to anticipate that any passenger would place himself in such a position. Unless it is the duty of a street railway to stop its cars in such a manner that persons standing up and riding backwards shall not be jolted off their equilibrium, there is no negligence shown in this case. It is common knowledge that the momentum of a heavy moving car cannot be quickly overcome, as the appellee required should be done in this case, without produ-

cing something of a jerk. It is for the purpose, among others, of guarding passengers against danger from this cause, that the notices are posted requesting passengers to keep their seats until the car stops.

We are unable to see in the undisputed facts of this case any cause for the very regrettable accident to the appellee, other than his exposure of himself to an entirely needless risk. Under this view we are of opinion that the defendant was entitled to a binding instruction in its favor, as requested in its third point for charge.

The specification of error is sustained, and the judgment is reversed, and is now entered for the defendant.

MESTREZAT, J., dissents.

(206 Pa. 11)

SCHOALES v. ORDER OF SPARTA.

(Supreme Court of Pennsylvania. May 4, 1903.)

BENEFIT SOCIETIES—DEATH CERTIFICATE—CHANGE OF BENEFICIARY.

1. A member of an unincorporated benefit society named his wife as beneficiary in his certificate. She died after 18 years. When the contract was made, the member had a right to change his beneficiary, and after the death of his wife substituted the name of a person described as his nearest friend as his beneficiary, in accordance with the rules of the order, which change was approved by the officers. *Held*, that on his death the fund was payable to the person whose name had been substituted, and that his sister had no right to the proceeds as heir at law.

2. Act April 6, 1893 (P. L. 7), limiting the payment of death benefits by beneficial societies to certain persons named, does not affect the rights of holders of certificates issued before such act was passed.

3. An heir at law of the holder of a benefit certificate, who is a member of a class from which the insured might have selected a beneficiary, under the act of April 6, 1893 (P. L. 7), is without standing to question the validity of the designation of a beneficiary by the deceased; she not having been indicated by the insured as his choice.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Susan Schoales in her own name against the Order of Sparta. From a judgment sustaining a demurrer, plaintiff appeals. Affirmed.

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

George Bradford Carr, for appellant. Leo Belmont, for appellee.

POTTER, J. The Order of Sparta is an unincorporated association, organized in Philadelphia on November 18, 1879, "to unite fraternally men," etc., for the purpose of paying a death benefit of \$2,500 to its members. Francis H. Watt became a member of the order on May 26, 1882, his certificate number being 1,059. His wife, Sarah A. Watt, was made the beneficiary in the certificate,

and remained such during a period of 18 years, when she died. At the time when the contract was first made with the association, the member had the right to change the beneficiary, and designate another. After the death of his wife, Francis H. Watt did change the beneficiary as named in his certificate, and substituted the name of William Graham, as his "nearest friend." This change was made in accordance with the rules of the order, and was approved by its officers. On July 15, 1902, Francis H. Watt died. Immediately thereafter his sister, Susan Schoales, gave notice to the Order of Sparta that she claimed the proceeds of the certificate upon the life of her brother, as his only surviving heir at law. Thereupon the Order of Sparta, upon its petition, was allowed to pay the money into court. An issue was framed by agreement between the respective parties, to ascertain which of them was entitled to the fund. Susan Schoales, as plaintiff, filed her statement, to which William Graham, as defendant, filed a demurrer. The court below sustained the demurrer, and afterwards directed the money which had been paid into court to be paid to William Graham. Appeals were taken by Susan Schoales, both from the judgment of the court below in sustaining the demurrer, and from the order directing payment of the fund to William Graham.

It is contended here on the part of appellant that, as William Graham was not related to Watt by blood or marriage, and was not dependent upon him, he could not be properly designated as a beneficiary, by reason of the provisions of the act of April 6, 1893 (P. L. 7). This act limits the payment of death benefits by beneficial societies to "families, heirs, blood relatives, affianced husband or affianced wife, or to persons dependent upon the member." And it is further contended that the appellant, being the sister, heir at law, and blood relative of Francis H. Watt, deceased, and within one of the classes of persons designated in the act of assembly, is therefore entitled to receive the proceeds of the certificate, less the payments made by Graham for dues and assessments, with interest thereon, paid to keep Watt in good standing until the time of his death. But to give to the act of 1893 any such effect as would take from the member the right which he clearly had prior to the passage of the act, to change the beneficiary, would be to give it a retrospective effect. Such a construction is not to be adopted, unless the legislative intent to give the statute such operation is clear. The superior court said in reference to this act, in *Wolpert v. Knights of Birmingham*, 2 Pa. Super. Ct. 564: "The language of this statute is too plainly prospective in its operation to admit of any doubt." And again, in *Thomeuf v. Knights of Birmingham*, 12 Pa. Super. Ct. 195, it is held that this act does not deprive a member of a beneficial association of the right which

he had before its passage to designate or change the beneficiary.

We agree with the view that the Legislature did not intend by the act of April 6, 1893, to affect the rights of holders of certificates issued prior to that time. In any event, the appellant here would seem to be without standing to question the designation of a beneficiary by the deceased. It is true that she is within a class from which the member might have made his selection, had he seen fit to do so. But he did not indicate her as his choice. In the exercise of the right for which he had contracted with the association in 1882, almost 11 years before the passage of the act of 1893, he, after the death of his wife, designated his "nearest friend," William Graham, as beneficiary in her stead. The association raises no question as to the rightfulness of his action in so doing, and we do not think the appellant has any standing to complain. Her mere relationship as sister is not sufficient, and she has nothing more.

The assignments of error are overruled, and the judgment is affirmed.

(206 Pa. 7)

SMITH v. MUNCY CREEK TP.

(Supreme Court of Pennsylvania. May 4, 1903.)

BRIDGES—REPAIRS BY COUNTY—FAILURE TO INSPECT—NEGLIGENCE.

1. Under Act March 30, 1859 (P. L. 309), extended by Act March 12, 1880 (P. L. 144), to Lycoming county, it is the duty of the supervisors and street commissioners to keep in repair all bridges built by the county.

2. It is negligence for the supervisors of a county to fail to inspect a bridge under their control, where its floor timbers have not been renewed for 55 years.

3. Where a traction engine broke through a county bridge, and the fireman of the engine fell into a stream below, the question whether or not the injuries with which he suffered three months after the accident, and his physical condition at the time of the trial, were the direct consequences of his injuries, were a question for the jury.

Appeal from Court of Common Pleas, Lycoming County.

Action by Harry M. Smith against the township of Muncy Creek. Judgment for plaintiff, and defendant appeals. Affirmed.

The plaintiff was the fireman on a traction engine, and while it was crossing over a bridge, the floor broke through, and the engine was precipitated into the water of the stream below; the plaintiff falling with it. No physician attended the plaintiff until three months after the accident, when he was seized with a violent hemorrhage of the stomach, which physicians, called at the trial, attributed to the result of the accident.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

¶ 2. See *Bridges*, vol. 8, Cent. Dig. § 103.

Robert K. Reeder and W. O. Gilmore, for appellant. N. M. Edwards, G. B. M. Metzger, and C. E. Sprout, for appellee.

FELL, J. The bridge that broke under the weight of the traction engine on which the plaintiff was riding was built by the county commissioners in 1844, and from that time to the time of the accident, in 1899, the floor timbers had not been renewed, nor inspected by boring. The main question of law at the trial was whether the township was liable for the failure of its supervisors to keep a county bridge in repair. The act of April 13, 1843 (P. L. 221), relieves townships from the duty of making ordinary repairs to county bridges, and imposed the duty on the county commissioners, except in certain counties which were exempted from the operation of the act, among which was Washington county. By the act of April 28, 1850 (P. L. 615), the provisions of the act of 1843 were extended to Washington county. The special act of March 30, 1859 (P. L. 309), relating to Washington county, was extended by the act of March 12, 1860 (P. L. 144), to Lycoming county, and made it the duty of supervisors and street commissioners to keep in repair all bridges built by the county. In a recent case (*Whitmire v. Township of Muncy Creek*, 17 Pa. Super. Ct. 399), which grew out of the same accident as that in which the plaintiff was injured, the sixth section of the act of 1859 was construed, and it was held that the township's supervisors were not agents of the county commissioners in making repairs to a county bridge, and that the duty of repairing, and consequently of inspecting, was primarily on the township. The construction given the section is clearly right, and nothing can profitably be added to what is said on the subject by the learned president of the superior court.

There was no evidence to sustain the contention that the original construction of the bridge had been defective. The bridge was built in the manner in which bridges were commonly built at that time, by mortising the timbers. Greater strength and durability is now secured by the use of angle blocks, but their use was then unknown. The strength of the bridge was ample until the timbers were weakened by decay, and were subjected to a severer strain by the use of traffic engines. As there was the duty of inspection, the deterioration of the timbers should have been known to the supervisors. They had knowledge that the use of traction engines in the township had become general, and that their transportation had been for many years an ordinary use of the roads of the township. They should have provided against dangers from this ordinary and reasonable use of the bridge.

To what extent the plaintiff was injured, and whether his physical condition at the time of the trial was the direct consequence of his injuries by the accident, were questions

for the jury. They were carefully submitted in a charge that fully protected the defendant's rights.

The judgment is affirmed.

(205 Pa. 645)

SMITH et ux. v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. May 4, 1903.)

EMINENT DOMAIN—WITNESSES—COMPETENCY.

1. In condemnation proceedings, witnesses who were familiar with the tract for 34 years, and knew the character of the land and the improvements upon it, and who testified that they knew the value of the land in the community, acquired by knowledge of sales of the land, were competent to testify as to the damages.

Appeal from Court of Common Pleas, Chester County.

Action by David L. Smith and wife against the Pennsylvania Railroad Company. From the judgment, defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

John J. Pinkerton, for appellant. Wilmer W. MacClere and Joseph H. Baldwin, for appellees.

MESTREZAT, J. The only question in this case requiring consideration is the competency of Frank Russel and Clarence Hope, two witnesses called by the plaintiffs to establish the value of the land before and after the construction of the defendant's railroad over it. It is contended by the defendant that these witnesses did not show sufficient knowledge of the property and of the values of land in the neighborhood to qualify them to place an estimate on the plaintiffs' land. This contention is supported by the excerpts from the testimony of the two witnesses quoted in the defendant's brief, but it is not sustained by the whole of their testimony. One of the witnesses had lived in the neighborhood of the land and had known it for 34 years; the other witness, all his life. They were familiar with the entire tract during this time, knew the character and quality of the land and the improvements upon it at the time a part of it was appropriated by the defendant company in the construction of its railroad. They also knew the manner in which the railroad passed through the land, and its proximity to the buildings. They visited the premises frequently, and passed them several times each year. In addition to the thorough knowledge they possessed of the land and its improvements, they each testified they knew the value of the land in the community in which the property was situated. This information was acquired by a knowledge of sales of land, and what it was held at by the owners. It is true they knew of very few sales, but, as was disclosed by defendant's witnesses, this was because there

¶ 1. See Evidence, vol. 20, Cent. Dig. § 2217.

had been very few sales of recent date in that neighborhood. Both witnesses lived in a village of a few hundred inhabitants near the land, and, as appears by the testimony, they heard the value of this and other lands discussed in the places of business there. One of the witnesses said that when a sale of property took place in the community it was "the principal topic of conversation" in the village.

We are satisfied that the witnesses disclosed sufficient knowledge to qualify them to place an intelligent estimate on the land of the plaintiffs injured by the construction of the defendant's road, and therefore the judgment is affirmed.

(205 Pa. 648)

SHIMER v. EASTON & N. ST. RY. CO.

(Supreme Court of Pennsylvania. May 4, 1908.)

EMINENT DOMAIN—WITNESSES—VALUE—COMPETENCY—DAMAGES.

1. In an action to recover for damages to land, caused by a trolley road on a highway running through it, a witness who did not know the property prior to the construction of the trolley line was not competent to estimate the damages sustained by reason of its construction.

2. In an action by a landowner for damages caused by the construction of a trolley road on a highway, the jury cannot charge him, in diminution of his damages, with the general appreciation of property caused by such construction.

Appeal from Court of Common Pleas, Northampton County.

Action by William L. Shimer against the Easton & Nazareth Street Railway Company. From the judgment for defendant, plaintiff appeals. Reversed.

The plaintiff owned a farm on both sides of a public road leading from Easton to Nazareth, upon which the defendant company had constructed its railway, and had endeavored to enjoin the construction of the defendant's road, but the court dismissed his bill, and required the defendant to give him a bond to secure such damages as he might recover in an action at law.

Argued before MITCHELL, DEAN, BROWN, and MESTREZAT, JJ.

Russell C. Stewart and Aaron Goldsmith, for appellant. E. J. Fox and J. W. Fox, for appellee.

MESTREZAT, J. The fifth assignment of error, which complains of the admission of W. T. Bissell as a witness, must be sustained. Bissell is a real estate speculator in the city of Easton, and was called as a witness by the defendant company to testify to the damages sustained in the construction of its trolley line on the public highway passing through the plaintiff's premises. From his preliminary examination, it appeared that he

had no knowledge of the plaintiff's farm or its value prior to the construction of the railway, and since that time he had only passed along the highway intersecting the property. Bissell testified: "Q. Have you been on the farm or just along the road since the construction of the trolley line? A. Just along the road; I looked at the land as I passed." The plaintiff's counsel objected to the competency of the witness, on the ground that he did not know the farm before the construction of the railway, and that he had not shown that he was familiar with the value of farm land in that community. The learned trial judge overruled the objection and admitted the testimony. Immediately after this ruling the witness was thus examined: "Q. Now, Mr. Bissell, will you tell us whether there has been any change in the value—selling value—of the land of Mr. Shimer by reason of the construction of the trolley road on the highway adjoining? A. In most every instance it increases the value of property, in my estimation." Bissell, having admitted he did not know the farm prior to the construction of the trolley road, was not competent to give an estimate of the damages sustained by the plaintiff by reason of its construction. A responsive answer to the question propounded to the witness required him to know the property and its market value before, as well as after, the construction of the trolley line; otherwise, he could not tell whether there had been "any change in the selling value of the land by reason of the construction of the trolley road on the highway adjoining." Without a knowledge of the farm, it logically follows he could not know its market value. He must know the land, its character and quality, and in a general way, and to a reasonable extent, have in his mind such other data as will enable him to properly estimate its market value. *Pittsburgh, Virginia & Charleston Ry. Co. v. Vance*, 115 Pa. 325, 8 Atl. 764. Unless in possession of such information prior as well as subsequent to the construction of the trolley road, Bissell was clearly incompetent as a witness, and should not have been permitted to testify. As said in *Gallagher v. Kemmerer*, 144 Pa. 509, 22 Atl. 970, 27 Am. St. Rep. 673: "The witness might, perhaps, have been competent to testify as to the value of the land after the injury, but it is plain by his own statement that he knew nothing of its nature and character before the injury. How was it possible, therefore, for him to testify as to the value of the land free from the injury complained of?"

In view of the fact that the case goes back to be tried again, we need not consider the other assignments. It may be suggested, however, that the jury should have full and explicit instructions as to the measure of damages, and should be told that the plaintiff is entitled to any increase in the value of his land by reason of the general apprecia-

† 2. See *Eminent Domain*, vol. 12, Cent. Dig. § 290, 55 A.—49

tion of property in the neighborhood because of the construction of the trolley road. We are inclined to think, from an examination of the testimony, that some of the witnesses, as well as the jury, overlooked this fact in estimating the plaintiff's damages, and charged him with the general appreciation of property in that neighborhood.

The fifth assignment of error is sustained, the judgment is reversed, and a *venire facias de novo* is awarded.

(206 Pa. 15)

CROASDALE v. VON BOYNEBURGK.

(Supreme Court of Pennsylvania. May 4, 1903.)

TENANCY IN COMMON—OWNERSHIP OF TUG-BOAT—MANAGING OWNER—RIGHTS AND LIABILITIES—APPEAL—RECORD.

1. Where a tugboat is owned by several as tenants in common, the managing owner cannot claim a salary for his services as such, where no salary was ever paid to the managing owner of the boat, and such managing owner had employed agents, who were compensated for their services in keeping an account of the boat's receipts and expenditures, and soliciting and obtaining business for the boat and taking general charge of it.

2. Where one of several tenants in common of a tugboat acts as managing owner, he has no authority as such to institute a prosecution against one of his co-owners, alleged to be a defaulter, and charge his co-owners with the expense of the criminal prosecution.

3. Where the managing owner of a tugboat fails to account, and is compelled to do so by legal proceedings, he is personally liable for the costs.

4. Equity rule 92 requires appellant to file in the court below a brief statement of the errors made by the order or decree appealed from. Sup. Ct. Rule No. 11 requires him to specify in writing the particular errors which he assigns, and file the same in the prothonotary's office in the Supreme Court. *Held*, that an appeal will be non prosed where such rules are not complied with.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Olney Croasdale against F. Albert Von Boyneburgk for an accounting. Decree for plaintiff, and defendant appeals. *Affirmed*.

On exceptions to the report of the master, the court (McCarthy, J.) filed an opinion in part as follows:

"The first question raised is, should the credits claimed by the accountant for disbursements in connection with the criminal prosecution of Stotsenberg for alleged embezzlement of moneys belonging to the owners of the John Reese be allowed? The learned master finds as matter of law that the credits should be allowed, because the accountant, 'as managing owner of the tugboat, was morally bound and legally authorized' to detect and prosecute a co-owner for embezzlement of the owners' money, and to charge the owners with the expense thereof, including fees of counsel, detectives, expert accountants, clerks, etc.; and the subsequent abandonment of the proceedings does not re-

lieve them, such efforts being in the interest of justice and for the special benefit of the owners. He cites no authority, nor does he offer any reasoning in support of this novel view of the duties of a managing owner.

"The Supreme Court of Pennsylvania has affirmed the decision of this court that the owners of the John Reese are tenants in common of a chattel. It is an incident of such ownership that common consent is necessary to common enjoyment of the property, and the prior consent of each owner is necessary to bind him to any use of the chattel or expenditure on account of it. In case of vessels, however, the employment of which is deemed by commercial nations a matter of public benefit, after the consent to the appointment of the managing owner is established, the consent of all the owners to his duly authorized acts will be presumed, and they will be bound by all contracts made by him on their behalf within the scope of his authority. *MacLachlan, Merchant Shipping* (4th Ed.) 190. This extends to whatever concerns the employment of the ship—as appointing its master and officers, seeing that the ship is properly repaired, equipped, and manned, employing tradesmen to furnish supplies and repairs, procuring freights, preserving the ship's papers, making necessary entries, adjusting freights and averages, disbursing and receiving moneys, keeping and adjusting the accounts between the parties interested, and the like. *Abbott, Merchant Ships* (14th Ed.) 130; *MacLachlan, Merchant Shipping* (4th Ed.) 186. The institution of proceedings at law, however, is not within the authority of a managing agent, being foreign to the purpose of his employment, and it has accordingly been held that he cannot pledge the credit of the co-owners for the expenses of a lawsuit. *Abbott, Merchant Ships, supra*, citing *Campbell v. Stein*, 6 Dow. 116; *The Belcaira*, 5 Asp. M. C. 582. A fortiori, it is not within the scope of his authority to institute a criminal prosecution, and the consent of the owners to such action on his part cannot be presumed from the fact of his employment as managing owner. The consent of each must be shown to justify charging him with the incidental expenses. The learned master finds that the criminal prosecution against Stotsenberg was instituted and prosecuted without the authority or consent of his wife, or of the plaintiff, her assignee. He also finds that the prosecution was abandoned. It was, therefore, of no benefit to the owners, who could only have been benefited by it, as members of the community, through the conviction and punishment of the offender, not in their private capacity as owners; and, the case not having been brought to trial, there is nothing to show that the proceeding was founded upon any proper cause. Under such circumstances, there is no reason in law or equity why any part of the expenses incur-

red in connection with this criminal prosecution should be imposed upon Mrs. Stotsenberg or the plaintiff. The master finds the total of these expenses to be the sum of \$409.60. Credits claimed for all the items aggregating this total must be disallowed to the accountant as against the plaintiff.

"The second question raised by the exception is, should the credits claimed by the accountant for the payment by him after August 17, 1897, of bills contracted on account of the employment of the John Reese prior to that date, be allowed? The plaintiff contends that these credits should not be allowed, because 'from that time, namely, August 17, 1897, the interest in said vessel changed,' and he should not be charged with expenses of the boat 'contracted prior to the time he became entitled to share in the profits.' This, however, is an error in fact. The interest was not changed until the plaintiff purchased Mrs. Stotsenberg's share on December 19, 1898. The date of August 17, 1897, is that upon which the accountant became the managing owner, and is fixed by the decree as the date when the accounting should begin, because it is his own stewardship of which he is required to render an account, and not that of another. The plaintiff, in acquiring the ownership of Mrs. Stotsenberg's share in the John Reese, acquired also the net earnings or dividends accrued upon that share to the date of his purchase. In determining what the net earnings are, the accountant is entitled to credit for any due and proper application of the earnings of the tugboat received by him. The payment of a valid and subsisting indebtedness of the owners legitimately incurred in connection with the employment of the boat is a due and proper application of her earnings, and it is a matter of no moment when that debt was contracted. Here the validity of the debts is not questioned. The accountant has actually paid them as justly due by the owners, and he is entitled to credits for such payments, as the learned master has properly found. On the other hand, the decree requires the defendant, Von Boyneburgk, to account for all sums of money which have been received and collected by him as managing owner from August 17, 1897, on account of the use and hire of the said tugboat, or to the use of her owners. The learned master has found that since the date named the accountant received and has failed to account for \$400 belonging to the owners of the tugboat, and accordingly has surcharged him properly with that amount.

"The third question raised by the exceptions is, should the credits claimed by the accountant for his salary as managing owner be allowed in addition to the credits claimed by him for commissions paid to agents? The master finds as matter of fact that at a meeting of the owners of a majority of interest in the John Reese, held in August, 1897, it was agreed that the accountant, as managing

owner, should receive \$50 per month for his services, and as matter of law that the owners of a majority of interest were authorized to enter into an agreement to pay the managing owner whatever salary they might agree upon, and that Mrs. Stotsenberg and the plaintiff, as her assignee, are bound by the action of the majority. He does not find that Mrs. Stotsenberg was present or represented at the meeting referred to. The testimony shows she was not. He does not find that the action of the meeting in fixing a salary for the managing owner was communicated to her, or that she ever had actual knowledge of it. There is nothing in the evidence from which such knowledge can be inferred. Supposing her to have had access to the managing owner's accounts, she could have gathered from them no knowledge of this matter, for his first entry of credit for salary bears date March 1, 1899, the item reading, 'By accountant's wages, August 17, 1897, to March, 1899, eighteen and a half months, at \$50, \$925.' This entry, according to its date, was made about two months and a half after Mrs. Stotsenberg had sold out her interest to the plaintiff, and ten days after the plaintiff had filed his bill in the present action praying for an account.

"It has been sufficiently shown before that a majority of the owners in common of a chattel cannot bind the minority nor any single owner without his consent. It may be that consent will be presumed in the absence of knowledge. There is nothing in the evidence on which to base any presumption that either the plaintiff or his assignor had any knowledge of this claim before the actual stating of the account before the master.

"The learned master finds as a fact that no salary was ever paid to any other managing owner of said tugboat. In the absence of knowledge and consent on her part to a change in the arrangement, it would be inequitable and unjust to hold Mrs. Stotsenberg and her assignee, the plaintiff, to any different arrangement from that with which she was familiar, which had her consent, and which appears to be the usual and customary arrangement in this business, namely, that the managing owner should serve without charge, and the agents of the boat should be paid a percentage upon such gross receipts as resulted from their agency. The learned master finds as matter of fact that the accountant employed Walker, and afterwards Reynolds, as his successor, 'merely as assistants or employés of the owners' at a commission of five per centum upon their gross collections; and, as matter of law, that he was authorized to employ them, and that his selection is presumed to have been ratified by the other owners, as no objection was made; and hence he is entitled to credit for the payments made to them. The master nowhere finds the facts upon which he bases his conclusion that the persons named were

merely assistants, nor does he find the facts showing the nature of their employment and duties, or the character of the work carried on by the managing owner. To ascertain these facts we must look into the evidence, and that shows that Walker, at the time he was employed about the business of the John Reese, was in business as a tugboat agent, and had charge of several other tugboats besides the Reese; that he attended to his duties as agent for the Reese in the same manner as he attended to like duties for other boats; that the business of the boat was carried on in his office, the managing owner not having any office; that Walker kept accounts of her receipts and expenditures, paid the crew, paid some of the bills, hustled to get work for the boat, and had general charge of her, and was paid for his services a commission of five per centum upon the gross receipts. Reynolds, his successor, performed the like duties. He acted in the same capacity to this particular boat as he did in connection with other boats which he had charge of. He was paid also a commission of five per centum, which he testified is a fair commission for the work. The accountant had a general superintendence of the business, and directed Walker and Reynolds in their work. He also seems to have assisted in getting employment for the tugboat, and to have paid some of the bills; but the character, amount, and extent of work done by him independently of his agents does not clearly appear in the evidence.

"There is no magic in a name. The facts show that whether Walker and Reynolds were what are technically known in the business as 'agents' of the tugboat John Reese, or were merely the assistants or employes of the owners' of that vessel, as found by the master, they discharged such duties as are ordinarily performed by tugboat agents, and were compensated in the usual way by commissions upon the gross sums they handled. These commissions having been paid, it would be inequitable, as already found, to charge what would virtually be a second compensation for the same services against the plaintiff, neither he nor his assignor having ever consented thereto. The credits claimed for all payments of salary, which appear from the account filed to aggregate the sum of \$1,575, should therefore be disallowed as against the plaintiff.

"The fourth question raised by the exceptions is, should the costs of this suit be paid by the defendant, Von Boyneburgk, in his individual capacity, or in his representative capacity as managing owner of the John Reese? The master finds as matter of law that the accountant is liable for all costs by reason of his failure to account until compelled to do so by the order of this court; and that the plaintiff should be relieved from contribution to the costs of this proceeding, as it would be inequitable to tax him, as he is free from blame, and was compelled to

seek redress in court. He also affirms the eighth request for findings of law to the effect that all costs in this case shall be paid by the accountant, 'but with the modification that the costs shall be paid by the said F. Albert Von Boyneburgk as managing owner, but exclusive of the right of said managing owner to charge the plaintiff with any proportion thereof.'

"As already stated, one of the cardinal duties of the ship's husband or managing owner is to keep and adjust accounts between the parties interested. The owners have a constant right to inspect his accounts, 'and if they are driven by his refusal or delay to seek an account in a court of equity, he will be visited with the costs, and with interest on any balance of money retained in his hands, for this neglect of his duty.' MacLachlan, Merchant Shipping (4th Ed.) 139. It was, therefore, Von Boyneburgk's duty to account. His neglect or refusal to do it caused this suit. For this dereliction of duty he should be punished by imposing upon him all the costs and interest upon the amount retained, to be paid out of his own individual pocket. To permit him to pay these penal charges out of the funds in his hands as managing owner, would be to inflict upon each of his codefendants, who had no duty to account, and are not in the least default, the same punishment with the wrongdoer, and thus confound the innocent with the guilty. The master justly finds it would be inequitable to tax the plaintiff with any of the costs, as he is free from blame. It would be just as inequitable to tax them upon such of the other owners as are equally blameless."

The court entered a decree that the defendant F. Albert Von Boyneburgk pay to the plaintiff \$2,317.68, and that the defendant personally pay the costs. Defendant appealed.

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Thomas Diehl and J. Warren Coulston, for appellant. E. Cooper Shapley and Edwin C. Nevin, for appellee.

MESTREZAT, J. The facts found and the authorities cited by the learned trial judge in his opinion disposing of the exceptions to the master's report are ample to sustain the decree entered by the court below. The owners of the tugboat John Reese held the property as tenants in common. Croasdale v. Von Boyneburgk, 195 Pa. 377, 46 Atl. 6. It appears from the evidence, and was found as a fact by the master, that no salary was ever paid any managing owner of the John Reese. The accountant, as managing owner, employed two agents of the tugboat, who performed the duties as such, and were compensated by commissions upon the gross sums they handled. The business of the boat was carried on at the office of one of the agents, the

managing owner having no office. The agents kept the accounts of the boat's receipts and expenditures, paid the crew, paid some of the bills, solicited and obtained business for the boat, and had general charge of her. It was found as a fact that it was the usual and customary arrangement in the business that the managing owner should serve without charge, and the agent of the company should be paid a percentage upon such gross receipts as resulted from the agency. It thus appears that under the facts disclosed by the evidence and found by the court below the duties of the managing owner were not performed by Von Boyneburgk, but by the agents, who received the commissions to which he claims he is entitled for attending to the affairs or the business of the boat.

The above-recited facts would clearly preclude the accountant from claiming a salary for his services as managing owner. He relies, however, on an alleged agreement by the owners of a majority in interest in the tugboat as the basis of his claim for compensation for his services. The evidence shows that neither Mrs. Stotsenberg nor her assignor, the plaintiff, was represented at any meeting when the alleged agreement was made, nor that they, or either of them, had any knowledge that such an agreement had been entered into with Van Boyneburgk. It is equally clear that neither the plaintiff nor his assignor acquiesced in the agreement, or consented that Von Boyneburgk should receive a salary for his services as managing owner. But, if it be conceded that the majority interest agreed to compensate him for his services, and that the minority interest could be bound thereby, the managing owner, however, would be compelled to perform those services before he would be entitled to the compensation. This, as we have seen, he did not do. The two agents conducted the business, and they were paid by commissions upon the gross sums they handled. As said by the court below, these commissions having been paid, it would be inequitable to charge what would virtually be a second compensation for the same services against the plaintiff, neither he nor his assignor having ever consented thereto. It is quite obvious that the appellant did not regard himself as entitled to, nor expect, compensation for his services from the fact that his account shows that he made no charges for them against the boat until more than 18 months after he assumed the management of the boat, and after Mrs. Stotsenberg had sold her interest, and this proceeding had been instituted. This, taken in connection with the fact that an agent performed the duties, and was compensated in the manner in which the managing owner would be paid were he to receive compensation, is convincing proof that the appellant's right to claim payment for services did not occur to him until the appellee compelled him to

account for his management of the business of the boat.

The authorities cited by the trial judge sustain him in holding that it was not the duty, nor within the authority, of the appellant, as managing owner, to institute a criminal prosecution against Stotsenberg; and hence, as against the nonassenting owner of an interest in the vessel, he is not entitled to a credit in his account for the costs expended in the litigation. We can see no force in the suggestion of the master that the appellant, as managing owner, was morally bound to detect and prosecute a co-partner for an alleged embezzlement which occurred some time prior to the date when the affairs of the boat were placed in the hands of the appellant. The purpose of a criminal prosecution is to punish the offender for violating the laws of the commonwealth, and not to enforce the payment of money, nor, as in civil proceedings, to restore to the owner the property of which he has been defrauded. The criminal process of the court should not be invoked for any such purpose. While the appellant, like any other person, could have instituted the prosecution against Stotsenberg, it was clearly not his duty, as managing owner, to do so. The scope of his employment did not include a duty nor the authority to prosecute at the expense of the boat owner a delinquent or defaulting owner of a minority interest for the violation of the criminal laws of the state. Such action might be most commendable in him as a citizen who is looking after the morals of the community, but as the managing owner of a tugboat his employers would doubtless prefer that he should not consider it a part of his employment to institute criminal prosecutions against them, or, if he did so, that they should not be compelled to reimburse him for such services, or protect him against costs he was properly condemned to pay. The costs of this proceeding were properly disposed of by the court below. It was clearly the duty of the managing owner to account not only to the plaintiff, but to all the owners, and when he failed in the performance of this duty, and was compelled by legal proceedings to render an account, he should be visited personally with the costs.

No assignments of error were filed in this case, and the appellee would have been entitled, on motion, to a judgment of non pros. under rule 11. The learned counsel for appellant misapprehended the purpose of rule 92, which requires the appellant to file in the court below "a brief statement of the errors he alleges to have been made by the order or decree appealed from." This, however, does not relieve the appellant from his duty under rule 11 to "specify in writing the particular errors which he assigns, and to file the same in the prothonotary's office" of this court. On an appeal we can consider only such errors in the record as have been prop-

erly assigned under the last-mentioned rule. A failure to observe either of these rules may, at the instance of the other party, or on the court's own motion, impose on the offending party the penalty of having his writ non prossed.

The decree is affirmed.

(205 Pa. 573)

**NORTH PENNSYLVANIA R. CO. et al. v.
INLAND TRACTION CO. et al.**

(Supreme Court of Pennsylvania. May 4,
1903.)

**STREET RAILROADS—RIGHTS OF ABUTTING
OWNERS—CONSENT TO USE OF STREET
—RAILROAD CROSSING.**

1. A landowner is entitled to an injunction to protect his own land to the center line of the road from the burden of street railroad tracks, though his neighbors on the opposite side have consented to the use of their lands by such company.

2. A street railroad company obtained the consent of a turnpike company and of the township authorities to use the turnpike road and of the abutting owners on one side of the road. *Held*, that an owner on the other side of the road, who had not consented, and whose property was not touched, could not enjoin the construction of the railroad.

3. Where the tracks of a railroad company are crossed by an overhead bridge, such company has no standing to enjoin the construction of a street railway, where the street railroad company offers to rebuild the bridge so as to make it strong enough for the passage of its cars, though the railway company owns the land on which the foundations of the bridge rest, and originally erected the bridge.

4. A railroad company cannot enjoin the construction of a street railroad on a public road which crosses its track and on which lands owned by it abut, under the provisions of Act June 19, 1871 (P. L. 1360), where none of the rights or franchises of the railroad company are injured or invaded.

Appeal from Court of Common Pleas, Montgomery County.

Bill by the North Pennsylvania Railroad Company and another against the Inland Traction Company and another. From a decree, plaintiffs appeal. Affirmed.

The court below (Weand, J.) filed the following opinion:

"The plaintiffs by this bill seek to restrain the defendants from building their street passenger railway in front of plaintiffs' lands, which abut on a turnpike road, and from crossing an overhead highway bridge where plaintiffs' road intersects said highway.

"Findings of Fact.

"(1) The North Pennsylvania Railroad Company is a duly chartered corporation, leased to and operated by the Philadelphia and Reading Railway Company.

"(2) The North Pennsylvania Railroad Company is the owner in fee of several tracts of land abutting on the east side of Chestnut Hill and Springhouse Turnpike Road south of the point where the railroad crosses said turnpike, and is also the owner of land where the railroad crosses said turnpike.

"(3) The turnpike was built and in operation many years before the construction of the North Pennsylvania Railroad.

"(4) The railroad, as it crosses the turnpike, runs through a deep cut, over which is erected a bridge built by the railroad company, and which is part of the turnpike, accommodating its travel.

"(5) The Philadelphia & Lehigh Valley Traction Company, into which the Inland Traction Company and the Lehigh Valley Traction Company were merged, has fixed and determined its route, beginning at Mountville, Lehigh county, Pennsylvania, to the dividing line between the county of Montgomery and the county of Philadelphia at Chestnut Hill Park. Part of its route is on the said turnpike.

"(6) Said defendant company has obtained consent of the townships and municipalities through which it has located its route, and also the consent of the Chestnut Hill and Springhouse Turnpike Company.

"(7) The defendant company does not propose to lay, construct, maintain, or operate its road on that side of the turnpike road on which plaintiffs' property abuts, except where it crosses plaintiffs' right of way.

"(8) The owner of land in front of which defendants' road is proposed to be located have consented thereto; i. e., the abutting owners on the opposite side of the highway to plaintiffs' property have consented to the construction of the road as proposed by defendants.

"(9) Part of defendants' road as located is an extension from the borough of Lansdale to the terminus of the road at Chestnut Hill, a distance of about twelve miles, all of which extension is actually constructed, save about one and three-quarters miles.

"(10) The construction of the road as proposed opposite plaintiffs' property will be wholly beyond the center line of the turnpike, and on no part of plaintiffs' land.

"From the above findings of fact we conclude as a matter of law:

"(1) The defendants are lawfully engaged in the construction of their road.

"(2) That plaintiffs have no standing to object, as no part of their property is taken or encroached upon. Their ownership of the fee extends only to the middle of the turnpike, and defendants have the consent of the owners of the land on the opposite side, and also of the township authorities and of the turnpike company, which gives them the rights claimed.

"(3) That plaintiffs' bill must be dismissed, with costs.

"The only standing plaintiffs have to contest is by virtue of their ownership of land along the proposed route of defendants' company. Their rights, however, are not superior to those of the opposite owners, and therefore, when a passenger railway is proposed to be built so as not to touch or en-

croach upon A.'s land, it is difficult to see why he should object when his opposite neighbor is willing to have it upon his land. Apart from his ownership, plaintiffs have no greater rights in the road than the rest of the community, and, if they sustain no peculiar damage, their right to object does not exist. In *Penna. R. R. Co. v. Montgomery County Pass. Ry. Co.*, 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659, the court said (and this is the keynote of all subsequent rulings upon subject): 'It is not easy to see how such a company can protect itself in the use of country roads, except by contract with every owner of property along the roads they wish to occupy.' We adhere to that ruling, but decide that plaintiffs are not owners of property which defendants wish to occupy.

'Electric passenger railways in the country have become a public necessity. They have increased the value of property, built up villages and towns, afforded conveniences otherwise not obtainable, and are a benefit especially to those whose means do not admit of other methods of travel. The law should, therefore, be liberally construed in their favor, without infringing upon the rights of others. Where captious, technical, or other objections are made for reasons not based upon equitable or strictly legal principles, a court should not restrain what appears to be a great public improvement. What injury can be done to plaintiffs' property which is owned for railroad purposes it is difficult to see, but these are matters to be decided hereafter. We are fortified in our conclusions by the opinion of Judge Yerkes in *Phila. & Trenton R. R. Co. v. Phila. & Bristol Pass. Ry. Co.*, 6 Pa. Dist. R. 487, and *Minnich v. Lancaster, Mechanicsburg & New Holland Ry. Co.*, 24 Pa. Co. Ct. R. 312.

'The bridge over the railroad is part of the public highway, no matter by whom erected or maintained, and, if the defendants can occupy the turnpike, they can also occupy the bridge as part of the highway. They have expressed a willingness to reconstruct and strengthen it, and, unless they do so before using it, application can be made for an injunction. The question may also arise as to whether the bridge should not be widened, but this is a matter to be determined when the plans are submitted for approval. So far as the crossing of plaintiffs' right of way is concerned, we refer to *Penna. R. R. Co. v. Greensburg, etc., Street Ry. Co.*, 176 Pa. 559, 35 Atl. 122, 36 L. R. A. 839, where it was said, 'In respect to a mere crossing, a railroad company is not an abutting landowner to a passenger railway.'

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Charles Heebner, Montgomery Evans, and James Boyd, for appellants. N. H. Larzelere and R. E. Wright, for appellees.

BROWN, J. Part of the route of the Philadelphia & Lehigh Valley Traction Company, the real appellee, is on the Chestnut Hill & Springhouse Turnpike Road. The North Pennsylvania Railroad Company is the owner in fee of several pieces of land abutting on the east side of the said turnpike road, and owns the land where its railroad crosses the turnpike, which was built and in operation long before the construction of the railroad crossing it. At the point of crossing the railroad runs through a deep cut, over which there is a bridge, erected by the railroad company as a part of the turnpike for the accommodation of travel. This bill was filed by the appellants, as owner and lessee, respectively, of the land at the bridge crossing and of the lots abutting on the turnpike, to enjoin the construction of the electric passenger railway on it. The traction company did not propose to construct its road on the east side of the turnpike, on which the lots of the North Pennsylvania Railroad Company abut, but on the west side, beyond the middle of the way, and had obtained the consent of the owners of the fee on that side to do so. Except where the railroad crosses the turnpike, its face extends no further than to the center of the road. Though the appellees are styled traction companies, the court below regarded them as street railway companies in determining the questions before it, and on this appeal the appellants so treat them. Their charters are not before us, but it is conceded by counsel for appellants that whatever rights and franchises they possess were conferred by the general street railway act of May 14, 1889 (P. L. 211). It may be—as can fairly be gathered from the ninth paragraph of the answer of the defendants—that the rights and franchises which they are exercising were originally conferred upon a street railway company or companies, and passed to them as their successors. Be this as it may, we must, under the circumstances, regard the appellees as possessing and undertaking to exercise the rights and franchises of a street railway company.

By section 17 of the act of May 14, 1889 (P. L. 217), it is provided that: "Any passenger railway company incorporated under this act shall have, and is hereby granted, power by its officers and servants to ascertain and define such route as they may deem expedient, over, upon and along any turnpike or turnpikes, not however exceeding sufficient width for two tracks to be laid down on, over and along such turnpike or turnpikes, and thereupon, on, over and along such turnpike or turnpikes, to lay down, construct and establish a track or tracks for its use in the transaction of its business, and thereupon to use the same in its general business: provided, that before such passenger railway company shall enter upon and use any such turnpike or turnpikes in the laying of tracks and use of the same, it shall make

compensation to the owner or owners thereof for such occupation and use of said turnpike or turnpikes, in the mode provided in section fourteen thereof." The right to occupy the turnpike having been given to the appellee, the compensation to which the turnpike company was entitled was evidently amicably adjusted, for the finding of the learned court was that the turnpike company had consented to the construction of the passenger railway on its road. But, as it is settled by *Pennsylvania R. R. Co. v. Montgomery Co. Pass. Ry. Co.*, 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659, and *Penna. R. R. Co. v. Greensburg, etc., Street Ry. Co.*, 176 Pa. 559, 35 Atl. 122, 36 L. R. A. 839, that the laying of railway tracks on a country road is an additional servitude on the fee, which cannot be imposed upon it against the will of the owner of the land, the appellants insist that the same rule should protect them as owners of land abutting on a turnpike which is occupied by a street railway company with its tracks. Assuming this to be true, the answer is that the statute gives the appellee the right to occupy the turnpike, and in occupying it the property of the appellants has not been affected. There is no evidence of any obstruction to plaintiffs' ingress and egress to and from their property, or of the slightest interference with their enjoyment of it. No additional servitude has been imposed upon their land, which extends only to the middle of the highway. The route of the appellee along the turnpike is over the lands of others, who have consented to its location there. In the case of the occupation of a township road maintained by supervisors the rule goes no further than that while an injunction, if applied for in time, will issue at the instance of an abutting owner to protect his own land from an additional burden on it, it is none of his concern that his neighbors on the opposite side of the road consent to the use of their lands by a passenger railway company, so long as, from such use, no injury results to him. The protection by injunction to which each landowner is entitled is confined to his own property.

Though the appellants are landowners on each side of the turnpike where their railway crosses it, they are not at that point abutting landowners having a right to complain of the appellee's imposition of an additional servitude upon their land. The crossing of the turnpike by their tracks made the bridging of a deep cut necessary, and the bridge became a part of the highway; but the railroad company is not, at that crossing, "an abutting landowner to the passenger railway, as the plaintiff was in *Penna. R. R. Co. v. Montgomery Co. Pass. Ry. Co.*, supra." *Penna. R. R. Co. v. Greensburg, etc., Street Ry. Co.*, 176 Pa. 559, 35 Atl. 122, 36 L. R. A. 839. In view of the expressed readiness and willingness of the appellee "to so reconstruct and strengthen the said bridge as that it shall be amply safe for the transportation

and carriage of the traffic of the respondent and its cars over and across the same," the only objection that the appellants could make to the use of the turnpike at that point disappears.

Under his findings of fact, the learned judge below properly concluded that the defendants were "lawfully engaged in the construction of their road." Even if they were not, the act of June 19, 1871 (P. L. 1360), is not intended for such a case as the appellants present, and cannot be invoked by them, for none of their rights or franchises are injured or invaded. The decree can well be affirmed upon the learned court's second conclusion of law: "Plaintiffs have no standing to object, as no part of their property is taken or encroached upon. Their ownership of the fee extends only to the middle of the turnpike, and defendants have the consent of the owners of the land on the opposite side, and also the township authorities and of the turnpike company; which gives them the rights claimed."

Appeal dismissed, and decree affirmed, at appellants' costs.

(205 Pa. 530)

In re MCGEE'S ESTATE.

Appeal of WILHELM.

(Supreme Court of Pennsylvania. May 4, 1903.)

ADMINISTRATION—FEES OF ATTORNEYS.

1. Certain heirs agreed in writing for the employment of two attorneys as to litigation of the estate, and on one declining to act, another, who did not know of the agreement, was employed, with the knowledge of the administrator. Under the written agreement, the attorneys were to receive 25 per cent. of the amount realized for the estate. At the audit of the estate, the attorney whose name was in the agreement claimed the entire 25 per cent. Held, that an allowance of 12½ per cent. to each attorney was proper.

Appeal from Orphans' Court, Schuylkill County.

In the matter of the estate of Patrick McGee, deceased. From the judgment William Wilhelm appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

MacHenry Wilhelm, William Wilhelm, and George Dyson, for appellant. J. W. Moyer, for appellee.

FELL, J. The only assignment of error to be noticed relates to the surcharge of the accountant with one-half the amount paid by him to an attorney for services rendered the estate. The heirs of the decedent agreed in writing to the employment of two attorneys to whom the whole management of the litigation in which the estate was involved should be given, and who were to receive for their services 25 per cent. of the amount realized for the estate. One of the attorneys selected declined to act, and another attorney was employed by the heirs, with the knowledge

of the administrator, to assist in the litigation. He acted in conjunction with the attorney first retained, but did not have a knowledge of the agreement that had been made until after the litigation was ended. At the audit an allowance was made him based on the value of his services. The court refused to allow the whole of the 25 per cent, agreed upon as compensation for two attorneys, to the one who acted under the agreement mentioned, but allowed him one-half thereof. It was not denied that the agreement was fairly made, and that the compensation was reasonable, in view of the protracted litigation in which the estate became involved. The only question was whether the attorney who acted under the agreement was entitled to the whole of the 25 per cent, or to only half thereof.

The conclusion reached by the learned court we think is correct. The understanding of the parties to the agreement evidently was that 25 per cent. was to be paid to the two attorneys for all services to be rendered. The place of the one who did not act under the agreement was supplied by one who was not a party to it. The one who did act was allowed all he had stipulated for. Presumably he was given the same assistance that he would have received if the agreement had been carried out, and he was entitled only to his share of the compensation agreed upon.

The order of the court dismissing the exceptions is affirmed.

(205 Pa. 624)

ENGLISH v. FREE.

(Supreme Court of Pennsylvania. May 4, 1903.)

PHYSICIANS—MALPRACTICE—DEGREE OF CARE REQUIRED.

1. A surgeon in the treatment of a case is bound to employ such reasonable skill and diligence as is ordinarily exercised in his profession; such degree to be determined by the state of the profession at the time.

2. Evidence in an action against a surgeon to recover for malpractice held insufficient to convict him of negligence, though he might have been mistaken in his diagnosis.

Appeal from Court of Common Pleas, Clearfield County.

Action by J. E. English against S. M. Free. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

W. C. Pentz and F. R. Scofield, for appellant. W. O. Arnold and A. L. Cole, for appellee.

PER CURIAM. Plaintiff, while working in the shops of the Buffalo, Rochester & Pittsburg Railroad Company at Dubois, Pa., in March, 1901, met with a serious accident. A car body fell upon him, crushing him to

the ground, and seriously, if not permanently, injuring the hip joint. He was taken to the office of defendant, a practicing surgeon, who examined the injury, gave him morphia, and had him sent to his home. He continued to treat the injured man for about four months. Two other surgeons during that time were also called in to see the patient. At the end of that time, Dr. Free told him he could do nothing more for him, and ceased his attentions. As his hip was not well, and the leg shorter than the other, English went to Pittsburg, and entered Mercy Hospital, where Dr. Stewart examined him. He diagnosed the injury as a dislocation of the hip joint, and treated it as such. The patient in about two weeks recovered, and returned to his home. He claims, however, and offered evidence tending to show, that there had not been a complete restoration of the limb to its normal condition, and that this result is owing to an incorrect diagnosis of his injury by Dr. Free, and who, as he alleges, did not treat it as a dislocation, which it subsequently proved to be. The court below nonsuited the plaintiff, and he appeals; arguing that the question was one for the jury to determine whether defendant brought to the treatment of the case reasonable professional skill and diligence.

It is settled law in this class of cases that "a surgeon undertakes to possess, and in the treatment of a case to employ, such reasonable skill and diligence as is ordinarily exercised in his profession; and in judging of the degree of skill, regard is to be had to the advanced state of the profession at the time." *McCandless v. McWha*, 22 Pa. 261. Taking this to be the law, the burden was on plaintiff to prove, at least by the weight of the evidence, that defendant failed to treat plaintiff with reasonable professional skill. We think the plaintiff failed in this proof. Defendant beyond question was a skilled surgeon, in good repute; he gave attention to the case; he called in to aid him two other competent surgeons. It may be that Dr. Free was mistaken in his diagnosis. The undisputed testimony of quite a number of surgeons, called as witnesses, is that this injury is such that it is very difficult to detect its exact character. Dr. Stewart, of the hospital, called by plaintiff, who, after putting English under the influence of an anesthetic, correctly diagnosed the injury as a dislocation, then reduced it, then by careful treatment practically cured him, testifies that in the early stages of the injury it is sometimes exceedingly difficult, and almost impossible, to detect the exact character of the injury; that he has known such injuries to be only correctly diagnosed by the use of X-rays. And such is substantially the testimony of all the reputable surgeons called on either side. Taking plaintiff's testimony in its most favorable aspect, it only shows, not that Dr. Free did not bring to the treatment of the case reasonable skill and dili-

¶ 1. See *Physicians and Surgeons*, vol. 20, Cent. Dig. § 24.

gence, but that he may have been mistaken in not finding out its exact nature. To hold him answerable for not exercising more than ordinary professional skill is imposing upon him a burden heavier than the law has yet put upon the professional man's shoulders. A surgeon is not an insurer of his patients. We think the court below was right in entering a nonsuit. All the assignments of error are overruled, and the judgment is affirmed.

(205 Pa. 619)

SNYDER v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. May 4, 1903.)

DEATH OF RAILROAD EMPLOYE—NEGLIGENCE OF FELLOW SERVANTS—FAILURE TO FENCE TRACK.

1. Evidence in an action to recover for the death of a locomotive fireman killed by the derailling of the locomotive examined, and held to show that the negligence of the engineer, and not the failure to have air brakes on the train, was the cause of the injury.

2. Act April 9, 1868 (P. L. 779), requiring railroads in a certain county to fence their right of way, and imposing a penalty on railroads failing to so fence where cattle are injured by such failure, does not affect the liability of the railroad for injuries to an employé, caused by a locomotive being derailed by cattle on the track at a part of the track which the railroad company had neglected to fence.

Appeal from Court of Common Pleas, Centre County.

Action by Minerva B. Snyder against the Pennsylvania Railroad Company. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Thomas J. Sexton, A. O. Furst, and James A. B. Miller, for appellant. Edmund Blanchard and John Blanchard, for appellee.

PER CURIAM. David W. Snyder was a fireman in the employ of defendant company. On October 21, 1900, he was serving as a fireman on a locomotive drawing a train on the Bald Eagle Valley Branch of defendant's road between Lock Haven and Tyrone. The train left Rock Haven about 12 o'clock noon on Sunday, the day above noted, reaching a point near Howard's Station in about an hour, where it ran over two cattle upon the track. The locomotive dragged the cattle about 160 feet when it left the track and was wrecked. Snyder was killed. His widow brings this suit for damages, averring that the negligence of defendant caused his death: (1) In that it had not, although engaged in interstate commerce, equipped its cars with automatic air brakes, as prescribed by the act of Congress of March 2, 1893, c. 196, § 5, 27 Stat. 531. (2) In that it had neglected to fence and maintain fences along the line of the road where the accident occurred, as pro-

vided by the special act of Pennsylvania of April 9, 1868 (P. L. 779).

It is argued that, if defendant had complied with the requirements of the act of Congress as to air brakes, the train could have been stopped after the cattle were seen; or, if it had complied with the special act requiring the fencing of the track they would not have been upon it. The learned trial judge was of the opinion that the accident was caused by the negligence of the locomotive engineer on whose engine Snyder was serving as fireman. He states the facts from the evidence thus: "The train was moving at a rate of about sixteen miles an hour—not an unusual rate of speed—and was under the control of the engineer and engine. The engineer's attention had been called to the cattle alongside the track some distance before he came to them. He took no measure to check the speed of the train in case of any probable collision with the cattle. He ran on relying on the uncertain instinctive action of the cattle, rather than exercise a proper precaution provided the uncertain instinctive action of the cattle should differ from his judgment as to what they would likely do." He is of opinion, therefore, that on the undisputed facts the equipment of the cars with the air brake could not have prevented the accident, or, rather, that the absence of such equipment in no way contributed to it, and therefore that negligence in that particular cannot be imputed to defendant so as to fix a liability in this case.

Further, as to neglect to fence, there was evidence that the fence along the track was out of repair. It was not in such condition as would exclude cattle from the track. The act, as before stated, is a special act, only applicable to this railroad in Centre county. The penalty for its nonobservance shows plainly its purpose, thus: "And in case any company owning or operating said road or roads shall refuse or neglect to perform the duties herein imposed, the company or companies so offending shall be answerable to the owner or owners of any horses, cattle, sheep or swine, to the full value of such property injured upon such road, in consequence of such neglect." The court was of opinion that this act imposed no other penalty than payment by the railroad company for the cattle injured; that it did not go further, and by implication impose a penalty for damages to third persons, occasioned by neglect to maintain fences. On this view of the law he directed a nonsuit, and we have this appeal by plaintiff.

We decline at this time to pass any opinion on the effect of the act of Congress requiring air brakes upon cars of railroads engaged in interstate commerce, because such opinion is not necessary. Whether the Constitution of the United States authorizing Congress to regulate interstate commerce extends so far as to compel the adoption of an air brake on traffic wholly within the state

§ 2. See Master and Servant, vol. 24, Cent. Dig. § 213.

carried on in obedience to its charter and strictly within state laws, may become a question where the cause of the accident is attributable to a neglect of the provisions of the act of Congress. But that is not this case. Under the facts here, the absence of the automatic air brake was in no sense the cause of the accident, and consequently has no part in the decision of the cause.

As to the special act requiring fencing, there is no doubt, on the authorities cited, that in those states having general laws requiring all railroads to fence their right of way a very different degree of responsibility would be imposed, because there the fencing is required for the protection of the general public from injury; but here the special act is to provide for the payment to the owner of cattle his loss from neglect to fence. As was aptly said in *Carper v. Receivers of Norfolk & Western Railroad Co.*, 78 Fed. 94, 23 C. C. A. 669, 35 L. R. A. 135, as to a Virginia statute: "So far as the owner of stock is concerned, the remedy is plain and adequate. Had the Legislature intended to provide an additional liability on railroad companies for injuries to persons brought about by the failure of such companies to construct fences at the places designated in the statute, it would certainly, concerning a matter of such universal importance, have used apt and unequivocal language."

There is nothing in any of the assignments of error requiring further notice. They are all overruled, and the judgment is affirmed.

(206 Pa. 25)

**DOCHKUS v. LITHUANIAN BEN. SOC.
OF ST. ANTHONY.**

(Supreme Court of Pennsylvania. May 4, 1903.)

**RELIGIOUS SOCIETIES—CONTROL OF REALTY—
EVIDENCE.**

1. Where a congregation worships according to the forms and rites of the Roman Catholic Church, but is not connected with the ecclesiastical body known as such church, and has never placed itself under the power of the head diocese, and where it is alleged that the archbishop of the diocese refused to permit the congregation to purchase property for a church, and, in opposition to his refusal, it bought the property, and paid for it, and employed a pastor, without any knowledge that he had been assigned by the archbishop, and paid him the salary he demanded, and acted independently of the authority of the Roman Catholic Church in every respect, the court is without authority to decree that a trustee holding title to the church property for the use of the congregation shall convey it to the archbishop of the diocese.

2. Where a church has been endowed in connection with some ecclesiastical organization and form of church government, it cannot unite with some other organization, or become independent.

3. In a bill to compel a trustee holding title to property of a religious congregation to convey it to the archbishop, it was alleged that a majority of the members of the congregation desired the title conveyed to the archbishop of

the diocese, and this allegation was denied in the answer. *Held* error to exclude testimony of the secretary of the congregation as to the number who favored retaining the title in the name of the trustee.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Thaddeus Dochkus against the Lithuanian Benefit Society of St. Anthony to compel conveyance of the church property to the Archbishop of Philadelphia. From a decree for plaintiff, defendant appeals. Reversed.

In the year 1893 the members of the congregation of the Church of St. Anthony purchased a church edifice in Philadelphia. At the time of the purchase of the property the congregation requested permission from the Archbishop of the Catholic Church of Philadelphia to locate in the property, and to purchase the same for the use of the congregation. Permission to purchase was refused, but permission was granted temporarily to locate in the building until the congregation could find a more suitable location. The members of the congregation proceeded in the purchase of the church edifice, and, not being able to place the title in the name of the archbishop, selected the Lithuanian Benefit Society of St. Anthony, a benefit society made up of members of the congregation, as trustee to hold the legal title. On September 3, 1900, the congregation received a letter from the archbishop commanding that the title to the property should be placed in his name. Members of the congregation objected to complying with this request, and a bill was filed by members of the congregation averring that a majority of the members desired to comply with the request of the archbishop setting out the refusal of the trustee to comply therewith, and praying for a decree directing the trustee to convey the legal title to the premises to Patrick John Ryan, Archbishop of Philadelphia. The court (Wiltbank, J.) entered a decree in accordance with the prayer of the bill.

When Charles C. Unick, secretary of the congregation, a witness called by the defendants, was on the stand, he was asked the following questions: "Q. How many members of the congregation favor the title remaining in the name of the St. Anthony Society? (Objected to. Objection sustained. Exception noted for the defendants.) Q. How many of the congregation desire to conduct an independent church? (Objected to. Objection sustained. Exception for defendants.) Q. How many of the 350 members are still in favor of conducting an independent Catholic church? (Objected to. Objection sustained. Exception for defendants.) Q. Will you kindly tell me where the congregation wants the title to the property to be placed? (Objected to. Objection sustained. Exception for defendants.)"

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

¶ 2. See *Religious Societies*, vol. 42, Cent. Dig. §§ 76, 77, 146.

Harry A. Mackey and James Gay Gordon, for appellant. John W. Speckman and Anthony A. Hirst, for appellees.

MESTREZAT, J. The determination of the issue raised by the pleadings in this case required the court below to pass on two questions: (1) Had the congregation worshipping at St. Anthony Church placed itself under the ecclesiastical authority of the Roman Catholic Church as represented by the Archbishop of Philadelphia? (2) If it had not done so, did a majority of the congregation desire to have the church property transferred to the archbishop, to be held by him for the Roman Catholic Church? The learned trial judge, as well as both parties, tacitly conceded that these were the questions to be considered and determined by the court below. In passing on the questions, the trial judge fell into an error in assuming that "the congregation of St. Anthony was a Roman Catholic congregation," and that it adhered to the Roman Catholic Church. On this assumption the court held that the congregation was necessarily connected with, and subject to the authority of the archbishop of this diocese of the Roman Catholic Church. As stated by the archbishop in his testimony, congregations "may hold Catholic doctrines just as other denominations hold Catholic doctrines, but ecclesiastically, and in sight of the Roman Catholic Church, they have no existence; they are not recognized by the papal authority." That is unquestionably correct, and is so conceded by the appellants, whose contention is that the congregation of St. Anthony, while holding Catholic doctrines, has no existence "ecclesiastically and in the sight of the Roman Catholic Church." Hence the appellants deny the right of the church to compel a conveyance to it of the property acquired by the congregation of St. Anthony as a place of worship.

The error in assuming that, as the St. Anthony congregation was a Roman Catholic congregation, it was, therefore, subject to the authority of the Roman Catholic Church, affected the entire proceeding in the court below, and resulted in the erroneous rulings by the trial judge on the admission of testimony covered by the assignments of error. The appellants concede that the congregation worships according to the forms and rites of the Roman Catholic Church, but they deny, what the trial judge assumed to be a fact, that the congregation adhered to and was connected with the ecclesiastical body known as the Roman Catholic Church, or had ever "placed itself by any voluntary act of its own under the power of the head of the diocese" of the church. They allege that the archbishop of the diocese refused to permit the congregation to purchase the property now in dispute; that in defiance of and in opposition to his refusal it bought the property, and paid for it with money of the

congregation; that it employed the pastor without any knowledge that he had been assigned by the archbishop, and paid him the salary he demanded; and that in every respect it has acted independently of the authority of the Roman Catholic Church. If the contention of the appellants be true—and it is solely a question of fact to be determined from the evidence—the congregation is entitled to control the property, and to direct in whom the title shall be placed for its use. On the other hand, if, as claimed by the appellees, the congregation was formed for the purpose of religious worship according to the faith and rites of the Roman Catholic Church, had accepted the pastor assigned to it by the archbishop of the diocese, had placed itself under the authority of the archbishop, and had submitted itself to his authority in all ecclesiastical matters, then the title to the property must be taken and held as provided by the canons of the Roman Catholic Church. The property acquired by the congregation under these circumstances is the property of the church, and is subject to its control, and must be held in the manner directed by its laws. The congregation cannot divorce itself from the church, or form an independent organization, and retain the ownership of the property. As testified by the archbishop, when the congregation renounces its connection with the church it has no longer any existence as a Roman Catholic church, and consequently has no authority to direct or control the property. "Whenever a church or religious society has been originally endowed in connection with or subordination to some ecclesiastical organization and form of church government," says Sharswood, J., in *Roshi's Appeal*, 69 Pa. 462, 8 Am. Rep. 275, "it can no more unite with some other organization, or become independent, than it can renounce its faith or doctrine and adopt others."

The only assignments of error which conform to the rules of court and which will be considered here are the third, fourth, fifth, and sixth, and they must be sustained. These assignments allege error in not permitting the appellants to introduce evidence to show that a majority of the congregation objected to placing the title to the church property in the hands of the Archbishop of Philadelphia. The bill averred that of the 1,200 members of the congregation 1,100 were loyal to the Roman Catholic Church, and were desirous of having the title to the property conveyed to the archbishop. The answer denied absolutely this allegation, and, on the contrary, averred that a very large majority of the congregation "are opposed to a transfer or assignment of the title to the church edifice to either the pastor, the said Joseph Kaulakis, or to the Archbishop of Philadelphia." This was, therefore, a material question in the case, and one on which the learned trial

judge made a specific finding, which was in the language of the bill, and adverse to the contention of appellants. The twenty-fifth finding of fact by the trial court is as follows: "The congregation of the Church of St. Anthony is composed of about 1,200 members, of which number 1,100 are loyal to the church, and are desirous of having the title to the church property conveyed to the Archbishop of Philadelphia, according to the laws of the church." The objection to the testimony made by the counsel of appellees was that the witness did not have sufficient knowledge of the subject to qualify him to testify, and, further, that as the witness had admitted that the congregation was Roman Catholic, he could not be permitted to testify that the congregation was acting independently of the ecclesiastical authority of that church. The latter of these objections we have considered, and held to be untenable. Neither is the other objection well taken. The court could not assume that the witness did not know how many members of the congregation favored the title remaining in the name of the present trustee. The witness' knowledge of the fact could have been elicited on cross-examination, or, if the appellees desired, on a preliminary examination. The ruling, as disclosed by the record, therefore, is practically a denial of the right of the appellants to show the fact, rather than the exclusion of the testimony by reason of the incompetency of the witness. If the trial judge was required to ascertain and determine, as he did, the views of the congregation as to the disposition of the church property, it is too clear for argument that it was error to reject the testimony offered by the appellants for that purpose.

The decree is reversed, with a *procedendo*.

(205 Pa. 606)

COMMONWEALTH v. SUTTON.

(Supreme Court of Pennsylvania. May 4, 1903.)

HOMICIDE—INSTRUCTIONS—MANSLAUGHTER.

1. Where on trial for murder there is no room for doubt that the crime is not manslaughter, it is not error to refuse instructions defining such offense.

2. An instruction on a trial for murder that if a crime was committed it was murder, and it was the duty of the jury to determine the degree, whether it was first or second, was not erroneous, where the only defense was that the killing was accidental.

Appeal from Court of Oyer and Terminer, Philadelphia County.

George W. Sutton was convicted of murder, and appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

John McClintock, Jr., and Robert B. Kelly, for appellant. Frederick J. Shoyer, Asst. Dist. Atty., and John Weaver, Dist. Atty., for the State.

FELL, J. The only specifications of error that need be noticed are those that relate to the failure of the court to define manslaughter, and to instruct the jury in relation thereto. By the fourth point the court was asked to charge: "Manslaughter is the unlawful and felonious killing of another without malice, either express or implied. Manslaughter differs from murder in this: that although the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting, and the act being imputed to the infirmity of human nature, the punishment is proportionately lenient;" by the fifth point: "Voluntary manslaughter is the unlawful killing of another without malice, on sudden quarrel, or in the heat of passion;" and by the thirteenth point: "Where death results from the unlawful killing of another without malice, on sudden quarrel, or in the heat of passion, the verdict should be manslaughter." The answer given by the court was that the fourth and fifth points were covered by the charge. The thirteenth was declined. This action of the court is alleged as error in the twenty-second, twenty-third, and twenty-fourth assignments.

The facts connected with the killing of Gertrude Gothie that throw any light on the question to be considered are these: She was engaged to be married to the prisoner, but insisted upon his becoming a member of the Catholic Church before their marriage. He had not yielded to her wishes in this regard, and had tried to induce her to marry him without his joining the church. On the 20th of February, 1902, she was confined to her bed by sickness. He called to see her, and was in her room several minutes with her and her mother. Her mother, soon after leaving the room, heard the sound of a pistol shot, and returning found her daughter lying dead on the bed, with three bullet wounds. The prisoner was lying partly on the bed, with a pistol in his hand, and with one bullet wound. The explanation made by the prisoner to the officers who arrested him, and to others at the police station, was that Gertrude had felt the pistol in his pocket, and in a struggle for its possession it had been discharged; that the first shot was accidental, and went through her hand; that being alarmed, and fearing arrest, he had shot her again and shot himself. The theory of the commonwealth was that he had shot her in pursuance of a deliberate purpose to take her life and to commit suicide. There was not the slightest evidence of a quarrel, nor of sudden heat or passion, nor of provocation, to reduce the grade of

¶ 1. See Homicide, vol. 26, Cent. Dig. § 652.

the crime to manslaughter. Under these circumstances, did the court err in declining to charge as requested?

In the general charge the court read the statute defining murder of the first and second degrees, and, after pointing out, briefly but clearly, the distinction between the different degrees, said: "There are other grades of homicide—manslaughter and several others. The court will not instruct you as to them, because there is no evidence in this case of manslaughter and of the other grades of homicide. * * * The first question which you have to determine is whether any crime was committed. Was there an accident? Of course, if there was an accident, no crime was committed, and the defendant is not guilty. If you find that a crime has been committed, it then becomes your duty to consider all the evidence in the case, and determine what was the grade of the crime. If a crime was committed, the crime was murder, and it is your duty to fix the degree of murder. Say whether the first or second degree." Any failure to instruct as to voluntary manslaughter was cured by the more favorable instruction that "if there was an accident, no crime has been committed, and the defendant is not guilty," and by the affirmation of the defendant's fifteenth point: "If the wound which caused the death of Gertrude Gothle resulted from the accidental discharge of a pistol in the possession of the defendant, he is not guilty of murder." In brief, the substance of the whole instruction was that if the killing was accidental, the prisoner should be acquitted; that there was no evidence to warrant a finding of voluntary manslaughter; that if a crime was committed, it was murder, and if the jury so found they were to determine the degree. It is always the duty of the jury to ascertain the degree of murder, and an imperative instruction that takes from them the right to do so is erroneous. But it is always within the province of the court to point out their duty under the law and the evidence, leaving them free to act. *Rhodes v. Commonwealth*, 48 Pa. 396; *Lane v. Commonwealth*, 59 Pa. 371; *Shaffner v. Commonwealth*, 72 Pa. 60, 13 Am. Rep. 649; *McMeen v. Commonwealth*, 114 Pa. 300, 9 Atl. 878; *Commonwealth v. Sheets*, 197 Pa. 69, 46 Atl. 753. The reason for the rule that the jury must always be left free to act in ascertaining the degree, and that it is error to give peremptory instructions on the subject, is that this duty is committed to the jury by the statute. The law is so written. But there is no such requirement in distinguishing between murder and manslaughter, and unless there is something in the testimony to reduce the grade below murder, it is not error to decline to instruct the jury as to manslaughter. In *Brown v. Commonwealth*, 76 Pa. 319, the complaint against the charge was that the court did

not instruct the jury that there might be a conviction for manslaughter under the count for murder. It was held that, as there was no question but that the homicide was murder, the prisoner was not entitled to the instruction. In *Commonwealth v. Buccieri*, 153 Pa. 535, 26 Atl. 228, it was said by our Brother Dean: "The prisoner had a right to instructions on the law applicable to the evidence. As there was no evidence which in the remotest degree pointed to the offense as manslaughter, the court committed no error in not noticing the point." In *Commonwealth v. Crossmire*, 156 Pa. 304, 27 Atl. 40, it was said: "There was no evidence to reduce the homicide to manslaughter, and there was therefore no error in the omission to instruct in regard to it." In *Commonwealth v. Eckerd*, 174 Pa. 137, 34 Atl. 305, the failure of the court to instruct the jury on the law of manslaughter was held not to be error, on the ground that there was nothing in the evidence to reduce the crime to manslaughter. In some of these cases the reason given for affirmance is that the instructions were not asked for, and the prisoner had therefore no ground of complaint. In others instructions were asked for, and the decisions are put upon the ground that the prisoner was not entitled to instructions on a question not legitimately raised by the testimony. In the great caution exercised in the trial of homicides, the instruction as to manslaughter has usually been given, and it is only in clear cases that it can properly be omitted, whether specially requested or not. In this case there was no room for doubt, as the prisoner's statement, and all the circumstances connected with the killing, made it absolutely clear that the crime was not voluntary manslaughter.

The judgment is affirmed, and it is directed that the record be remitted to the court of oyer and terminer of Philadelphia county, for the purpose of carrying the sentence into execution.

(205 Pa. 604)

LEIBY v. CLEAR SPRING WATER CO.
(Supreme Court of Pennsylvania. May 4, 1903.)

EMINENT DOMAIN—DAMAGES—OPINION EVIDENCE.

1. In condemnation proceedings, witnesses called to testify as to the damages, who showed a familiarity with the premises and values of land in the community in which the property was situated, were competent to testify.

2. Where, in condemnation proceedings, a spring is taken on the land of plaintiff, a witness may testify as to specific damages resulting therefrom.

3. An upper riparian owner conveyed certain land, consisting of a mill with its water rights. The deed provided that the vendee should have the right to have the water flow unobstructed through the other lands of the vendor above the mill in its natural channel, and that the

¶ 1. See Evidence, vol. 20, Cent. Dig. § 2217.

vendor would not use the water for improving the meadow ground, nor erect a grist mill on his land. A water company thereafter acquired the mill and its water rights, and condemned the land above the mill. *Held*, that the owner was entitled to have the value of a spring upon her land near the stream considered as an element of damage as affected by the right of the water company to have the water from the spring flow undiminished through the land as the other water did in the channel of the stream.

Appeal from Court of Common Pleas, Lehigh County.

Action by Rebecca S. Leiby against the Clear Spring Water Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The defendant company had purchased a mill property with certain water rights upon lands of other persons, all of which lands affected by the water rights were purchased by it, excepting the land of the plaintiff. In the construction of its dam and works condemnation proceedings were instituted. The water power was supplied from a creek, and part of the water came from a spring on the plaintiff's land. John Deichman had been the common owner of property of defendant and of the land of the plaintiff, and had conveyed the mill property to plaintiff's predecessor in title, the deed for it containing the following provision: "Together with the liberty and privilege to the water in the creek which running through the said John Deichman's other land adjoining the above-described piece, so that the said John Deichman, his heirs and assigns, shall not obstruct or lead the said creek from its present course, or take water out of said creek for the purpose of watering and improving the meadow ground except by the permission of the said Abraham Yellis, his heirs and assigns, and said John Deichman, his heirs and assigns, shall not erect a grist or sawmill on the said creek on the said land owned at present by him."

William Yellis, a witness called by the plaintiff, was asked: "Q. Have you knowledge of springs in this neighborhood? A. I have knowledge of the works I am working at. Q. Do you know of springs that were bought recently in this community? (Objected to by defendant as incompetent and irrelevant.) The Court: We will allow that going to the question of his knowledge. Mr. Dewalt: Now, I propose to ask the witness whether he has a knowledge of the value of the big spring on the Kratzer farm. (Objected to by defendant as incompetent and irrelevant.) The Court: We will admit that, and note an exception for the defendant. Q. What, in your judgment, was the big spring on the Kratzer property worth? (Objected to by the defendant.) The Court: We think, under the ruling in McKelvy's Case, that this is one of the means of finding the damage that the plaintiff has sustained. Of course, the true test is as stated by counsel. (Exception for defendant.)" O. P. Leh, plaintiff's witness, was asked: "Q. Where do you

reside? A. Near Egypt; about one mile north of Egypt. Q. How long have you lived in that section? A. Eighteen years. Q. You are acquainted in that section, are you? A. Somewhat, at least. Q. Do you know this Leiby farm? A. Yes. Q. Have you been on it? A. Yes. Q. You have heard of sales in that neighborhood, have you, in the last two or three years? A. I have. Q. Can you mention any? A. Schadt's sale, Shafer's, Koch's. Q. You know also what you bought? A. Yes. Q. Those sales occurred within a near distance of this Leiby farm? A. Yes. Q. Do you know that there is a spring on this farm? A. I have seen it once; that is, that big spring. Q. That is near the house along the creek? A. Yes, sir. Q. Were you at the spring? A. I was there once. Q. Did you see any limestone quarries there? A. I saw, yes. Q. Have you any estimate upon springs? A. Of course, I can estimate my spring. I have a spring of my own. Q. You say you heard these various sales. From your knowledge of these, can you form an opinion of the fair market value of land in that section? A. Yes, sir. Q. Now, you say there was limestone on the Leiby farm, the spring on it. What, in your judgment, was the fair market value of that farm in 1899? What would it have brought at a fair public sale? (Objected to by the defendant for the reason that the witness has not shown sufficient knowledge of the value of real estate in the vicinity of the land in question. Objection overruled, and bill sealed.) William Frederick, one of the plaintiff's witnesses, was asked: "Q. You live in this neighborhood, do you? A. Yes. Q. How long have you lived there? A. Eleven years, going on twelve. Q. Do you know of property that was sold in that neighborhood? A. Yes, sir; I know some. Q. What properties do you know that were sold? A. They were all mentioned I know of. Of course, I would not like to be examined on the question of price. Q. What properties do you know of that were sold there? Do you know the Kleffer farm? A. Yes, sir. Q. Do you know the Shafer farm? A. Yes. Q. Do you know the Schadt farm? A. Yes. Q. Do you know the Kelchner farm? A. Yes, sir. Q. The Koch farm, do you know that that was sold? A. Yes, sir. Q. And the farm that was sold to the Whitehall Cement Company? A. I don't know much about that. Q. Did you hear the prices at which these other farms were sold? A. Some of them. Q. What did you hear as to the prices of any of these farms? What farms did you hear of? Don't mention the price. A. Shafer's, Koch's. Q. And Kleffer's, did you hear that? A. No. Q. Shafer's, did you hear? A. By hearing. Q. That was farm land—the Shafer farm? A. Yes, sir. Q. How about the Koch farm? Did you hear that? A. Yes. Q. That is farm land, too? A. Yes, sir, limestone. (Plaintiff proposes to ask this witness, from the knowledge shown, what the value of this place was before the 15 acres and 14

perches were taken, at a fair public sale, and what it was worth afterwards. Objected to by defendant, because the witness has not shown sufficient knowledge of the value of real estate in this vicinity; has not shown that he is the owner of real estate.) The Court: Q. From your knowledge of this farm, and from the sale of property in the vicinity, are you able to form an intelligent opinion as to the market value of the farm in 1899—what the actual market value of that farm was? A. It is pretty hard for me, because I am not in the real estate business. Q. Whether it is hard or not, can you do it? A. I could form an opinion. The Court: Objection overruled, and bill sealed for defendant." John Billings, a witness called by the plaintiff, was asked: "Q. Have you known of water power being bought and sold; that is, springs being sold and bought for water power? A. Not that I could remember. Q. Do you know the value of land in this section? A. Well, yes. Q. Do you know this meadow land? A. Yes. Q. What sort of meadow land was that; good, bad or indifferent? A. Good meadow land. Q. About how many acres were there? A. About four acres, as near as I could tell. Q. How many properties do you know that were sold in this community? A. I know some." Cross-examined by Mr. Diefenderfer: "Q. How many properties have you bought and sold within the last five years? A. None. Q. Are you the owner of real estate? A. No. Q. Have you owned real estate within the last ten years in that section. (Objected to by plaintiff as incompetent.) The Court: The criterion is the market value, and a witness can know that without being the owner of real estate, as well as by being an owner. Q. What properties in this vicinity, within a mile of this place, farm land, do you know that have been sold within the last five years? A. Albert Ritter. Q. How far away is that? A. Right at it; adjoins. Q. How many acres was that? A. Twelve acres. Q. What other properties? A. I don't know any more within a mile. Q. What others do you know within a mile and a half? A. Shafer's and Kelchner's, but I don't know whether Kelchner's is sold. I guess not. Q. What others do you know? A. I guess that is all. Q. Have you given any attention to the market value of real estate in this section for the last five years? A. Yes, I was at some places. Q. Have you given any attention to it? Have you concerned yourself at all about sales of real estate, or values? A. I don't understand that. You have to give it in German. Q. Have you made it a business in that vicinity to find out the value of real estate? A. No. Q. Have you given any attention to it at all? A. No. Q. Do you now say that you consider yourself a competent judge of the value of real estate in that section of country to testify as to what real estate there would bring at a fair public sale, taking in all the real estate in the vicinity?

A. I don't." Re-examined: "Q. From your knowledge of real estate in this locality, a mile, a mile and a half, two miles, three miles, or even five miles from this place, or ten miles from this place, that has been sold or bought within the last five years, can you give to this jury an intelligent opinion as to the value of this real estate? A. Yes. Q. The Kratzer and Fisher farm? A. Yes, sir. Q. What was this farm worth before this 15 acres and 114 perches was taken from it? (Objected to by defendant.) The Court: We will allow the witness to answer the question. (Exception for defendant. Bill sealed.)"

The court charged the jury in part as follows:

"Now, as we construe that grant, it simply amounted to this: that it gave to the person who purchased the mill the right to use all the water that flowed in the creek through the premises of John Deichman, and now owned by this plaintiff, when it came upon the lands of Abraham Yellis. It gave to Abraham Yellis no right to go upon the lands of John Deichman for the purpose of conveying that water in any other lines or by any other route than by the natural water course of the creek. And John Deichman granted that it should not be used for irrigating purposes for watering his other lands. He granted and guaranteed to Abraham Yellis and his heirs and assigns that there should be no gristmill or sawmill erected upon his premises—the remaining premises owned by him, and he granted further that the water should be given to Abraham Yellis in the full quantity that flowed there through his premises. Even under the law, if this had not been put in, Mr. John Deichman, after he had conveyed the property below—the property that he owned—could not divert the water course so that it would enter upon the lands of his grantee below him at any different place than through the natural water course. Neither could he use the water in such a way as to appreciably or noticeably diminish the quantity that should flow in the stream naturally. So he might, if he had not entered into this contract, have changed the water course upon his premises so that when it left his premises it left at the same place that the natural water course did. He might have used it for manufacturing purposes so long as he did not interfere materially with the flow of water upon the land of the lower property adjoining the creek. But by this he covenanted that he would not use it for the purpose of irrigating his meadow land, would not use it for the purpose of erecting a grist or saw mill upon his premises. A good deal of evidence has been given as to the value of this spring. Witnesses have testified with a view of establishing what the value of the spring was for the purpose of supplying water to the villages and towns, for the purpose of using it for a mill power, or as a water power

for other purposes. You can readily see, gentlemen, that the question as to whether this spring or this creek is valuable for those purposes is a question that depends upon the rights that a person would have of diverting the water from its natural course, or of using it for such purpose. And under the law, as we interpret it, neither Abraham Yellis nor John Deichman alone, or his grantees, could convey that water so as to deprive the other of the use of it which the law gives them. In other words, this plaintiff bought those premises with that creek—that spring—upon them. Abraham Yellis or his grantees under the deed that they had, while they had the right to receive the full amount of water that flowed through there, had no right to go upon those premises, and take the water above land which they purchased. It is not like something that a person could go upon the premises and remove. The water was there, flowing. It could not be changed; and, while this plaintiff could not part with that water privilege in any way so as to deprive the persons farther down the stream, Abraham Yellis and his successors, grantees, from receiving the water there in its usual flow, and the full quantity of water except what they might want to use for culinary and domestic purposes, they have a right to do that. Every person through whose lands it flows has a right to use all that is necessary for his household; has a right to use it for watering his stock, anything of that kind, and for manufacturing purposes, so long as he does not materially interfere with the flow of the water below him. And so this property had the right to have that stream of water flow through it. Suppose the Clear Spring Water Company had come to them, and attempted to buy that spring from them, they could not have sold to the Clear Spring Water Company so that they could have taken the water as they saw fit, but it must have come down to the property of Abraham Yellis below in its usual flow and quantity. And Abraham Yellis could not have conveyed to the Clear Spring Water Company the right to go upon the property of this plaintiff, Rebecca S. Leiby, and take the water away there—that is, to appropriate the property and take the water so that it didn't flow through its usual course—but plaintiff had a right to have it travel in it the same as it did before."

Verdict for plaintiff for \$8,600.

On a motion for a new trial Dunham, P. J., filed an opinion in part as follows:

"I have very carefully and fully gone over the evidence given in this case, the rulings of the court upon the rejection or admission of evidence, and the charge of the court to the jury, including the answers to the points presented by both parties; and I am free to say I am unable to see wherein such error was committed by the court in any of these matters as would justify my

granting a new trial. The question upon which I had the most doubts at the trial was as to the evidence of William Yellis in regard to the value of the large spring upon the lands taken by the defendant company. I am free to say my first impressions and inclinations were that this was not proper evidence. However, a more thorough and careful investigation of the authorities upon that subject and further consideration has convinced me that the offer was proper and legitimate evidence. Many authorities might be cited that while the true measure of damages in such cases is the value of the property before any portion was taken, as affected by the taking a portion thereof under the right of eminent domain—or, in other words, the difference between the value of the property before any was taken and the value of the remainder of the property after a portion was so taken, as affected by the taking, considering advantages and disadvantages—yet that in arriving at this matter in order that jurors or viewers may know all the circumstances and elements of damage, witnesses may testify to specific elements of damages that enter into the whole question of damages. In support of this proposition the following cases are in point: *D. H. & W. R. Co. v. Gearhart*, *81 Pa. 260; *Pa. & N. Y. Canal & R. Co. v. Madell*, 1 Wkly. Notes Cas. 287; *D. H. & W. R. Co. v. McKelvey*, 1 Wkly. Notes Cas. 338. It is true that a spring flowing out upon lands and through the same upon lands of another is not like a house, garden, or some particular improvement whose value can be properly estimated, and for which the plaintiff alone is entitled to recover for the taking. Still, in view of the fact that by cross-examination the defendant brought out the fact of the rights of other parties in the spring or stream flowing from it, and its value under such circumstances, I think it was proper evidence for the consideration of the jury. Then the court instructed the jury that in determining the damages to the plaintiff by reason of the spring and creek being taken, the whole water power must be considered, taking the value of the whole water power, and dividing the same between the plaintiff and the owners of lands lower down the stream as the jury might find the evidence to warrant. And so I think the jury had the proper information upon which to form a just verdict."

The court awarded a new trial unless the amount of the verdict in excess of \$5,500 was remitted. The plaintiff having remitted all in excess of that sum, judgment was entered for the plaintiff, and defendant appealed.

Argued before MITCHELL, DEAN, MES-
TREZAT, BROWN, and POTTER, JJ.

Thomas F. Diefenderfer, C. J. Erdman, and W. W. Watson, for appellant. A. G. Dewalt and James L. Marsteller, for appellee.

MESTREZAT, J. The four witnesses the admission of whose testimony is the subject of the first, second, third, and fourth assignments, disclosed a familiarity with the premises and values of land in the community in which this property is situated that made them clearly competent to testify to its value, and to estimate the damages sustained by the plaintiff. Yellis' testimony, introduced for the purpose of showing one of the several elements of damages, was properly admitted by the trial court. "It has never been said or held," says the court in *Danville, Hazleton & Wilkesbarre R. Co. v. Gearhart*, *81 Pa. 260, "that the elements of computation are not to be given in evidence as the means of enabling the viewers or the jury to reach a just conclusion upon the whole matter. So to hold would be to contradict the act authorizing the view and assessment." The grant of the water right contained in the deed from Delchman to Yellis was correctly interpreted by the learned trial judge, and his charge relative thereto is not open to objection. The grant gave to Yellis and his assigns the right to have the water of the creek flow unobstructed through the land now owned by the plaintiff and to the grantee's land in the accustomed or natural channel. It did not invest Yellis or his grantee with the right to enter the premises of the plaintiff and take the water. No such authority can be found in the grant. It deprived Delchman of the use of the water for "watering and improving the meadow ground," and prevented him, his heirs, or assigns, from erecting a grist or saw mill along the creek and on the ground now owned by the plaintiff. The trial judge told the jury that such was the effect of the grant and that it gave to the defendant the right to use all the water that flowed through the plaintiff's land and, in the natural channel, entered the defendant's premises. This, of course, included the water that came from the spring on that part of the plaintiff's land now condemned by the defendant company. But, as properly observed by the court, the plaintiff was entitled to have considered as an element of her damages the value of this spring to her land as affected by the right of the defendant company to have its water flow materially undiminished to the company's land in the channel of the creek as the other water did. These instructions as to the interpretation of the grant and the water rights of the defendant under it were as favorable as the defendant company could reasonably ask.

We are not convinced that, as argued by defendant's counsel, the court, in its charge, gave undue prominence to the value of the premises as fixed by the plaintiff's witnesses. The court, after stating that "a good bit of evidence has been given us as to the nature of this property," directed the attention of the jury in a general way to the maximum and minimum values placed by the witnesses of both parties on the premises before and after

the company had appropriated for its use a part of the plaintiff's land. He admonished the jury that they "must consider the evidence of the witnesses themselves and not take it from the court." If, as claimed by the defendant, the plaintiff's witnesses were discredited by their cross-examination, the jury, having the whole testimony before them, with comments of counsel, would, under the charge, be in a position to consider the testimony elicited on cross-examination without special attention being called to it by the court.

The very full and clear opinion filed by the learned trial judge in refusing a new trial relieves us from the necessity of a further discussion of the question raised by the assignments of error.

The judgment is affirmed.

(206 Pa. 59)

HANBEST et al. v. GRAYSON et al.
(Supreme Court of Pennsylvania. May 11, 1903.)

WILL—CONSTRUCTION—POWER OF SALE—RIGHTS OF LEGATEES.

1. A will recited that testatrix had rented certain real estate for three years, and directed the executor, in case of her death before the expiration of the lease, to collect the rents, and to give the tenant three months' notice before the expiration of his term, and authorized the executor to sell said property. In another clause she expressed a wish that her estate might be settled as soon as convenient "after sale has been made of my said property." The executor sold the property to the tenant without having given the three months' notice. *Held*, that the executors were entitled to sell the land without terminating the tenant's possession.

2. Where executors were authorized under the will to sell land of testatrix, and did so for the purpose of paying legacies under the will, an election by the legatees, after the sale, to take the land in lieu of their legacies, came too late.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by John De Haven Hanbest and others against George Grayson and John Kane. From the decree, plaintiffs appeal. Affirmed.

The substance of the pleadings are stated by Willson, J., as follows:

"The controversy turns upon the proper construction to be given to the will of Julia A. Hanbest, who died on December 30, 1900. The will, which was dated November 28, 1900, after reciting that she was the owner of property known as the Blue Bell Hotel, situated on Woodland avenue, in the Twenty-Seventh Ward of this city, contained the following language: 'The hotel I have rented to one John Kane for the term of three years, commencing June 1, 1897, for seventy-five dollars a month, payable in advance, it is my desire that my executor hereinafter named, in case of my death before the expiration of said lease, shall collect the rents of said property as they become due, and, after paying all taxes and legitimate charges upon said premises, to divide quarterly

the net income of said rent equally between John De Haven Hanbest, Hannah A. Hanbest, Naomi J. McCurdy, Catherine Hayes, and Emily Farrell. I likewise direct my said executor to give my said tenant three months' notice before the expiration of his present term, and at said time, and upon the vacation of said property by the said Kane, I authorize my said executor to sell the said property, including said adjoining premises, which rents now for eight dollars a month, either at public or private sale, for the best and highest price that can be obtained for the same, giving him full discretion in this behalf; and upon such sale he shall make good and sufficient deed of conveyance therefor, that shall vest the title in the purchaser or purchasers thereof in fee simple.' The said Catherine Hayes died on February 23, 1901, and the executor of her will, Anthony A. Hirst, represents her interest in this proceeding. One of the defendants in the original bill, George Grayson, was the executor appointed by Julia A. Hanbest in her will, which was duly proved. Without giving any notice to the tenant, John Kane, before the expiration of his lease, and while the said Kane was still in occupation of the premises as tenant, on December 12, 1901, the said Grayson, executor, entered into articles of agreement with the said John Kane for the sale of a certain portion of the real estate which he was authorized to sell by the provisions of the Hanbest will, including the said Blue Bell Hotel, for the sum of \$28,000. The plaintiffs in the original bill allege that the proposed sale to John Kane, contemplated and provided for by the said articles of agreement, was such a sale as the executor had no authority to make. It is contended by these plaintiffs that the provisions in the Hanbest will that the executor should give Kane, the tenant, three months' notice before the expiration of his then present term, and that upon the vacation of the property by said Kane, the executor might sell the same, constituted a condition precedent to the executor having any lawful authority to sell the property. It is also claimed that John Kane, by being allowed to remain in possession of the property, was given an unfair advantage over other persons who might have desired to purchase the property, and that thereby he was enabled to purchase it at a low and inadequate price; and further, that Grayson, the executor, by selling a portion of the property divided from the rest by the middle line of Seventy-Third street, has seriously impaired the value and marketability of that portion of the property which was not sold to Kane. For the reasons stated, the plaintiffs ask that Grayson, the executor before stated, may be restrained from selling said property to John Kane, and that John Kane may be required to deliver up for cancellation the articles of agreement before referred to. The cross-bill filed by Kane against the plaintiffs in the original bill, and

also against Grayson, the executor, sets out the articles of agreement with Grayson, alleges that the agreement was executed by Grayson, with full authority to make the same; that the defendants in the cross-bill, who were the plaintiffs in the original bill, had filed the said original bill, and also, that on or about December 18, 1901, the said plaintiffs in the original bill had executed a certain deed poll or writing, undertaking to elect to take the said real estate in kind, without conversion, and had caused said writing to be filed in the office of the clerk of the orphans' court of this county. It is also averred by the said plaintiff John Kane that the filing of the said deed poll constituted a cloud upon the title to the property. He therefore asks that, upon payment of the balance due under the terms of his articles of agreement entered into with the said executor, George Grayson, the said executor be directed to make proper conveyance of the property to him, the said John Kane, and that the defendants in the cross-bill, who were the plaintiffs in the original bill, be restrained from asserting any right to take the said premises which the said Grayson, executor, had agreed to sell to him, John Kane, and from interfering in any way with the said executor in the sale and conveyance of the said premises." The court entered a decree in favor of the defendants in the bill, and the plaintiff Kane in the cross-bill.

Argued before MITCHELL, DEAN, POTTER, BROWN, and MESTREZAT, JJ.

Henry J. Scott and Anthony A. Hirst, for appellants. Edwin O. Michener and Preston K. Erdman, for appellees.

MITCHELL, J. The will of testatrix, after reciting that she had rented the property in question for three years, directed her executor, "in case of my (her) death before the expiration of said lease," to collect the rents, etc., and then further directed him to give "the tenant three months' notice before the expiration of his present term, and at said time, and upon the vacation of said property by the said Kane, I authorize my said executor to sell the said property," etc. In the next clause she expresses the desire that her "estate may be settled and divided as soon as conveniently and legally may be after sale has been made of my said property." And in the last clause she appoints an executor, and provides: "If I should live beyond the time that I have set for my executor to take charge of the above-named property, I authorize my executor with full power to carry out the above items and bequests at my decease." Under these provisions the intention of the testatrix is not really open to serious doubt. She desired her estate settled up and divided as soon after her death as it "conveniently and legally" could be done, and for settlement the sale of the property in question was necessary. She knew that the ten-

ant could not be deprived of his possession under his lease, and therefore she directed her executor to collect the rents till the end of his term, but to give notice, so that he should vacate possession at that time. She apparently did not desire to sell the property during her own life, but that the executor should sell as soon as might be thereafter. In furtherance of this desire, she added the clause as to what the executor should do if she should live beyond the time she had set for him to take charge of the property, i. e., beyond the end of the tenant's then present term. In that event, he was "to carry out the above items and bequests at my (her) decease"; that is, if the tenant was in possession under a new term, the executor should collect the rents, etc., and give the necessary notice to regain possession at the end. In all this there was nothing more than the recognition of the tenant's rights, and the direction to her executor to terminate them in the legal and orderly way, so that the sale could be made promptly. The termination of the tenant's possession was not a condition precedent or otherwise to the power of sale, but simply the removal of an obstacle which she supposed to stand in the way. As said by the learned judge below, "there was no provision in the will prohibiting a sale being made to Kane. There was nothing to indicate that, if the lease had been terminated by agreement, or in any other way, previous to the expiration of the year, the sale should not be made to Kane." The election of the appellants to take the property as land was not made until Kane's rights had been fixed by the contract of sale. It was, therefore, too late even, if not otherwise ineffectual by the necessity of providing for the payment of legacies, etc.

Decree affirmed at costs of appellants.

(205 Pa. 630)

In re GREASON.

(Supreme Court of Pennsylvania. May 4, 1903.)

HOMICIDE—APPEAL—REHEARING—REMAND.

1. After a conviction of murder was affirmed on appeal, accused presented a petition to the Supreme Court for a rehearing, on the ground of newly-discovered evidence, which threw doubt on the truthfulness of some of the evidence on which he was convicted. *Held* that, though the petition was not in the exact form contemplated by Act April 22, 1903 (P. L. 245), authorizing the Supreme Court to order verdicts and judgments set aside and new trials granted, as it was made to appear that further judicial inquiry should be had, the record will be remitted to the court below with authority, in its discretion, to grant a new trial.

On Petition for Rehearing. Record remitted, with authority to grant a rule for new trial.

For former opinion, see 53 Atl. 539.

Rothermel Bros. and W. H. Sadler, for the petition.

PER CURIAM. Samuel Greason was convicted and sentenced in the court of oyer and terminer of Berks county for murder of the first degree, and the judgment was affirmed in this court November 3, 1902. See 204 Pa. 64, 53 Atl. 539. A petition is now presented, praying a rehearing on the ground of after-discovered evidence. A rehearing, however, would be of no avail. The errors assigned in regard to the trial have been duly considered and adjudicated, and nothing new is now brought forward to change our views on the questions then presented. What is now alleged raises no question of error in the court below on the trial, and it is manifest that the judgment could not be reversed for any matters not then on the record. The depositions now presented here tend to throw doubt on the truthfulness of some, at least, of the evidence on which the prisoner was convicted. Some of the testimony is not really new, as it appears to have been before the court shortly after the trial, and all of it comes from doubtful and discredited sources, and is far from satisfactory or convincing in itself. It cannot, therefore, be accepted without serious question, but it demands investigation in the interest of justice. So much will depend on the personality of the witnesses, their manner of testifying, their standing the test of cross-examination, and the result of comparison with the testimony—their own and others—at the trial, that the investigation should be judicial. In the ordinary course, such investigation would be made on a rule for new trial, but it is met here by the technical objection that the term has expired. It has been suggested that that limitation does not extend to this court, under the greatly enlarged powers to order verdicts and judgments set aside and new trials granted, conferred by the act of May 20, 1891 (P. L. 101). But we are relieved from the necessity of considering this question by the passage of the act of April 22, 1903 (P. L. 245). The present petition, though not in the exact form contemplated by that act, presents, in substance, a case coming within its provisions, and we are of opinion that it has been made to appear that a further judicial inquiry should be had into the guilt of the petitioner.

The record is therefore remitted to the court of oyer and terminer of Berks county, and the said court is authorized, in its discretion, to grant a rule for new trial nunc pro tunc, and to proceed therein in accordance with the act of April 22, 1903 (P. L. 245).

(205 Pa. 586)

JENKINS v. CITY OF SCRANTON.

(Supreme Court of Pennsylvania. May 4, 1903.)

MUNICIPAL CORPORATIONS—COLLECTOR OF TAXES—COMPENSATION—REMOVAL—RES JUDICATA.

1. Where a city appointed plaintiff collector of delinquent taxes, and thereafter the city

Treasurer was appointed to the same office, under the act relating to cities of the second class, and plaintiff was not formally removed by the city recorder, and there was no proof that he was ever notified of his removal, he was entitled to recover the salary of his office.

2. Where plaintiff sued for the salary of a public office, which salary was payable monthly, and did not include a month's salary due at the time the suit was brought, the judgment was conclusive as to the amount then due, and such month's salary cannot be recovered in a subsequent action.

Appeal from Court of Common Pleas, Lackawanna County.

Action by George W. Jenkins against the city of Scranton. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

George M. Watson, City Sol., and C. B. Little, for appellant. J. Wheaton Carpenter and Frederic W. Fleitz, for appellee.

BROWN, J. In *Jenkins v. Scranton*, 202 Pa. 267, 51 Atl. 994, we held that the plaintiff, who is the appellee in this case, was the lawful delinquent tax collector of the city of Scranton, by virtue of his appointment by the recorder of the city on April 1, 1901, and that he was entitled to the statutory salary of \$5,000 per annum. The referee and learned court below properly regarded this to be res adjudicata in the present proceeding, and we cannot understand why counsel for appellant again raise the question of the appellee's title to the office because he had not given a proper bond, and had not performed any of the duties of his office. The solicitor for the city of Scranton on this appeal appeared before us in the same capacity on the former appeal from the judgment on a case stated, in which it was admitted by the city solicitor that Jenkins had taken oath of office, had filed his bond, and, from time to time, had been ready and willing to perform the duties of his office as delinquent tax collector; and the fundamental question submitted on that appeal was whether the present appellee had been legally appointed collector of delinquent taxes. We dismiss the question renewed here without further comment.

The only question to be now considered is, did the appellee continue to be the delinquent tax collector during the period for which, in this suit, he seeks to recover the statutory salary of the office? He was not formally removed by the recorder, and there is neither proof, nor an attempt to prove, that he was ever notified, even informally, by that officer that he had been removed. On the contrary, the only conclusion to be drawn from the testimony, as we read it, is that the recorder had in distinct terms left the appellee under the impression that he would not make any change in the office

of delinquent tax collector until his title to the office had been passed upon. Jenkins, whose testimony on this point is corroborated by Connell, the recorder, testified that the latter said to him: "I have no personal feeling in the matter. We will let the courts decide, and if they say your title to the office is good, I will continue you in office during the term." This uncontradicted statement of Jenkins is corroborated by David J. Davis, who was present at the interview between Jenkins and Connell.

But the appellant contends the notice came to the appellee of his removal from his office by implication, through the appointment of the city treasurer as collector of delinquent taxes. The answer to this is that in the finding of the court below, fully justified by the evidence, the city treasurer did not accept the appointment tendered to him by the recorder; that "he gave no bond, took no oath of office, and made no change in the system of collecting the delinquent taxes." As there is no finding that the appellee knew the city treasurer had been appointed collector of delinquent taxes, there was no notice to him by implication of his removal. With no notice, express or implied, that he was no longer delinquent tax collector, his title to the office continued. "Where an office is held during the pleasure of the appointing power, a removal may be either express—that is, by a notification that the officer is removed—or implied, by the appointment of another person to the same office. But it has been decided that in either case the removal is not completely effected until notice actually received by the person removed." *Com. ex rel. Bowman v. Slifer*, 25 Pa. 23, 64 Am. Dec. 680.

The judgment must be affirmed, except in so far as it includes salary for the appellee for the month of July, 1901. His salary was payable monthly, and it does not seem to be denied that the suit brought to recover his salary (202 Pa. 267, 51 Atl. 994) was instituted after August 1, 1901. He cannot, therefore, in this suit, recover the monthly salary for July of that year. When he sued, in August, 1901, the salary for July was due, and if he did not include it in the statement of his claim against the city of Scranton at that time, he ought to have done so. The judgment which we affirmed on the former appeal ought to have included all that the appellee in that case could have sued for, and he cannot now ask to recover his salary for July, 1901. "A judgment settles everything involved in the right to recover, not only matters that were raised, but those which might have been raised." *Myers et al. v. Borough of So. Bethlehem*, 149 Pa. 85, 24 Atl. 280. We therefore eliminate from the judgment entered in favor of the appellee the salary for the month of July, 1901, and affirm it for \$5,000, one year's salary due him.

† 2. See Judgment, vol. 30, Cent. Dig. § 1117.

(205 Pa. 602)

PERRINE v. KOHR et al.

(Supreme Court of Pennsylvania. May 4, 1903.)

PARTITION—NECESSARY PARTIES—DEFECT.

1. Where a man deserts his wife and child, and marries again under an assumed name while his first wife is alive, and many years thereafter dies leaving real estate, which is sold under partition proceedings instituted by the children of his second wife, of which proceedings the child by his first wife had no knowledge, her interest in such real estate is not divested by the sale.

Appeal from Superior Court, Lycoming County.

Action by Louisa L. Perrine against Matilda Kohr and others. Judgment for plaintiff, and defendants appeal. Affirmed.

From the opinion of the superior court (20 Pa. Super. Ct. 36), among others, the following facts appeared: Stephen Pangburn was married to Sarah Giles in January, 1863, at Plainfield, N. J. On December 31, 1863, a daughter was born, who was called Louisa. She is the plaintiff. Pangburn deserted his family shortly after the birth of the child. He went to Williamsport, Pa., and was there known as W. S. Allen. He died intestate, the owner of the lands in dispute. After coming to Williamsport, on November 11, 1865, he married Sarah Harman, his Plainfield wife being still alive. He had by Sarah Harman four children. He died in 1888. Administration was raised on his estate. On April 24, 1890, a petition in the orphans' court was presented by Edward Allen, a son by the second marriage. The petition recited that W. S. Allen died seised of the lands described, and set forth that he left a widow and four children (naming the family) resident in Williamsport. After the return of the rule to take or refuse at the appraisement, the court made an order of sale, and the property was sold, and the defendants in this ejectment purchased it, and the administrator delivered a deed to the purchasers pursuant to the order of the court. The plaintiff, Louisa L. Perrine, daughter and sole heir of the decedent, had no notice of the partition proceedings. Verdict and judgment for the plaintiff. Defendants appealed. The superior court affirmed the judgment. Defendants again appealed.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

O. La Rue Munson, John G. Reading, James B. Krause, John T. Fredericks, and Addison Candor, for appellants. Seth T. McCormick, for appellee.

FELL, J. The facts that give rise to the question to be considered in this case are fully stated in the report of the case in 20 Pa. Super. Ct. 36. It was conclusively established by the verdict that the plaintiff was the sole heir of the decedent, who died

intestate. She inherited all the real estate. She had no notice of the proceedings in partition, and the parties to that proceeding had no interest in the land. The judgment in partition did not decide the title, nor create a new one. It did not transfer the title from the decedent to the parties to the proceedings, but operated only on the title which they possessed. *McClure v. McClure*, 14 Pa. 134; *Allen v. Gault*, 27 Pa. 473, 67 Am. Dec. 485; *Dresher v. Allentown Water Co.*, 52 Pa. 225, 91 Am. Dec. 150. The plaintiff, in order to establish her right, did not attack this judgment collaterally. The judgment did not stand in her way, as her right had not been adjudged by it. As to her, it was a mere nullity. Her title was complete unless by silence when it was her duty to speak, or by acquiescence in the acts of others to their prejudice, she was estopped. Of this there was not the slightest proof. She knew nothing of her father's death until shortly before she asserted her rights.

The judgment is affirmed.

(205 Pa. 616)

PIFER et al. v. LOCKE.

(Supreme Court of Pennsylvania. May 4, 1903.)

WILL—NATURE OF ESTATE—DEVISE IN FEE.

1. Where testator devised to his daughter a house and lot "for and during her natural life, and at her death I devise and bequeath the same unto her children or issue in fee simple," the daughter takes an estate in fee tail general resolved by the statute into an estate in fee simple.

Appeal from Court of Common Pleas, Center County.

Action by Harriet M. Pifer and others against Blanche M. Locke. Judgment for plaintiffs, and defendant appeals. Affirmed.

The court below (Love, P. J.) filed the following opinion:

"This is a case stated to determine the legal title, or, rather, the character of the title, to a certain messuage, tenement, and lot of ground situate in the borough of Bellefonte, devised to Harriet M. Pifer under the last will and testament of George Livingston, deceased, and which the plaintiffs have sold by articles of agreement to the defendant. The case stated sets forth the location and description of the property in detail; that George Livingston died seised in his demesne of fee of said premises; that he made his last will and testament, dated June 27, 1872, which since his death was duly probated, and recorded in the office of the register of wills for Center county in Will Book C, page 495, etc. By his said will, in item 4, he devised and bequeathed as follows: 'Fourth. I will and devise unto my daughter, Harriet M. Pifer, the house and lot on Allegheny street in Bellefonte (formerly my mansion house), for and during her natural life, and at her death I devise and bequeath the same unto

her children or issue in fee simple. But the same is not to be made liable in any manner for the debts, present or future, of her husband.' The question submitted to the determination of the court upon the case stated is the nature of the estate taken by Harriet M. Pifer under the devise in said will. It seems clear to us that the intention of the testator under the devise in his will was to constitute Harriet M. Pifer and her children or issue the absolute beneficiaries of the premises devised. It is in our judgment unnecessary to discuss or review the authorities as to the meaning of the words 'children' or 'issue' in the devise. It might not be a distorted construction to say they were used in the sense of 'heirs.' We are of the opinion that the devise vested in Harriet M. Pifer an estate in fee tail, and under the act of April 27, 1855, it is an estate in fee simple. We think the following cases sustain this construction: *Haldeman v. Haldeman*, 40 Pa. 29; *Potts' Appeal*, 30 Pa. 168; *Ogden's Appeal*, 70 Pa. 501; *Armstrong v. Michener*, 160 Pa. 21, 28 Atl. 447; *Grimes v. Shirk*, 169 Pa. 74, 32 Atl. 113; *Hiestor v. Yerger*, 166 Pa. 445, 31 Atl. 122; *Boyd et al. v. Weber*, 193 Pa. 651, 44 Atl. 1078; *Shoup v. De Long*, 190 Pa. 331, 42 Atl. 680. In the case stated it is stated that Harriet M. Pifer and her husband and Mary P. Shontz, the only child of Mrs. Pifer and her husband, are ready to execute a deed to the purchaser for said premises. We are of the opinion, in any event, that a deed executed by the said parties named would convey to the purchaser, Blanche M. Locke, a good and valid title in fee simple for the said premises mentioned. It is therefore directed that judgment be entered in favor of the plaintiffs on the case stated against the defendant for the sum of \$2,600, said judgment to be released unless at the time of the execution and tender of the deed the premises are free of liens or other incumbrances; the costs, as per agreement in case stated, to be paid by the plaintiff. Judgment was entered for the plaintiff for \$2,600. Defendant appealed."

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

John Blanchard and Edmund Blanchard, for appellant. A. O. Furst, for appellees.

PER CURIAM. By articles of March 14, 1902, plaintiffs agreed to convey to defendant a title in fee simple to a lot on Allegheny street in the borough of Bellefonte. The lot in question had been devised to Harriet M. Pifer by her father, George Livingston, by his will dated June 27, 1872. The fourth clause of the will contains this devise, as follows: "I will and devise to my daughter, Harriet M. Pifer, the house and lot on Allegheny street in Bellefonte (formerly my mansion house), for and during her natural life, and at her death I devise and bequeath the same unto her children or issue in fee simple."

What estate did the daughter take under this devise? We concede that generally the words "child" and "children" prima facie are words of purchase, and not of limitation. See the many cases cited in Guthrie's Appeal, 37 Pa. 9. But if the remainder even, where these words are used, is to go to the general or lineal heirs as pointed out by law, they are synonymous with "heirs of the body," and, by analogy to the rule in Shelley's Case, the estate for life in the first taker is enlarged into a fee or into an estate tail by implication. Here the devise at the daughter's death is to her children or issue in fee simple, precisely as if he had said to "my daughter and the heirs of her body"; the very ones the law pointed out as the general or lineal heirs of the first taker. See *Potts' Appeal*, 30 Pa. 168, and the many cases cited by Agnew, J., in *Yarnall's Appeal*, 70 Pa. 335. In *Haldeman v. Haldeman*, 40 Pa. 29, and *Simpson v. Reed*, 205 Pa. 53, 54 Atl. 499, almost identically the same language constitutes the devise as here, and they were held to be words of limitation. We think under this devise the plaintiff Harriet M. Pifer took an estate in fee tail general, which the statute of 1855 (P. L. 368) resolves into an estate in fee simple in her.

The judgment of the court below is affirmed.

(205 Pa. 592)

SCHUYLKILL COUNTY v. SHOENER.

(Supreme Court of Pennsylvania. May 4, 1903.)

CLERK OF QUARTER SESSIONS—FEES—STATED CASE.

1. On a case stated between the county and the clerk of the court of quarter sessions to determine whether he was entitled to the fees to be paid under Act July 30, 1897 (P. L. 464), by applicants for liquor licenses, where the question before the court in the last paragraph of the case was whether defendant had the right to retain such money as his special fee in addition to his salary, "under the act of 1876," it is thereby assumed that Act March 31, 1876 (P. L. 13), relating to fees of clerks in counties containing more than 150,000 inhabitants, applied to the defendant, and it is unnecessary for the court to find as a fact the number of inhabitants of the county.

2. The sum of \$5, which an applicant for a liquor license is required to pay to the clerk of the court of quarter sessions under Act July 30, 1897, § 3 (P. L. 469, 470), is a fee of such office, and under Act March 31, 1876 (P. L. 13), belongs to the county in counties containing over 150,000 inhabitants.

Appeal from Court of Common Pleas, Schuylkill County.

Case stated in county of Schuylkill against John T. Shoener, clerk of the courts of Schuylkill county. From the judgment, defendant appeals. Affirmed.

The case stated was as follows:

"And now, November 21, 1901, an action of assumpsit having been entered in the above-stated case, it is hereby agreed by and between the parties to the above-stated action

that the following case be stated for the opinion of the court in the nature of a special verdict:

"(1) That John T. Shoener, clerk of the courts of Schuylkill county, in accordance with section 3, pp. 469, 470 (P. L. 1897), which provides: 'Every person intending to apply for license as aforesaid under this or any other act of assembly in any city or county of this commonwealth, on and after the passage of this act, shall file with the clerk of the court of quarter sessions of the proper county, his, her or their petition, at least three weeks before the first day of the session of the court at which the same is to be heard, and shall, at the same time, pay said clerk \$5.00 for expenses connected therewith; and said clerk shall cause to be published two times in three newspapers designated by him, one of which may be printed in the German language, a list containing the names of all such applicants, their respective residences, and the place for which application is made; and the cost of the publication shall not exceed the usual rates charged by such newspapers; the first publication shall not be less than fifteen nor more than twenty-five days before the time fixed by the court: provided, the amount to be paid for such advertisement shall not, in the aggregate, exceed the \$5.00 provided in this section to be paid by such applicant for expenses,'—collected the said \$5 from every petitioner who applied for license, under the provisions of the said act, to January term, 1901.

"(2) That there were 1,076 applicants, under the provisions of said act, to January term, 1901, and that the said John T. Shoener, clerk, etc., collected \$5,380 from the said applicants.

"(3) That John T. Shoener, clerk, etc., retained said \$5,380, and refused to pay it into the county treasury for the reason that the act of assembly created the money thus collected as a special fund for the expenses of advertising and his own legal expenses incident thereto, and that, after paying all expenses out of the fund made up from the said \$5 paid by each applicant, the balance remained due to him, and was not an earning of the office under the meaning of the salary act of 1876, but was in the nature of a special fee for special services rendered.

"(4) That the commissioners contend that the said sum of \$5,380 realized under the said act of assembly was an earning of the office of the clerk of the courts, and, in accordance with law, the said John T. Shoener, clerk, etc., should have paid the said amount into the county treasury as earnings of the said office, and that all legal expenses as provided for by said act of assembly and appertaining thereto should be paid out of the county treasury, and charged up against the earnings of said office as any other item of expenses arising from said office is paid, and as any other fees earned by said office are made a credit thereof.

"If the court be of the opinion that the said John T. Shoener, clerk of the courts of Schuylkill county, had a right to retain the said \$5,380, he, the said John T. Shoener, paying all expenses for services rendered, advertisements, etc., incident thereto, and had the right to retain the balance as his special fee in addition to his salary under the act of 1876 and its provisions, and that said \$5,380 derived under said act of 1897 was not an earning of the office, and he was not required to pay it into the county treasury, then judgment be entered for the defendant for the sum of \$5,380, but, if not, then judgment to be entered for the plaintiff, the county of Schuylkill; the costs to follow the judgment, and either party reserving the right to sue out a writ of appeal therein to the Supreme Court. This judgment to be subject to such lawful expenses and salaries of the clerk and his deputies as a set-off as have been withheld pending a judicial determination of the question involved."

The court below (Marr, J.) filed an opinion, the material parts of which were as follows:

"Does the act of 1897 modify or change the law as thus referred to? It is true the act designates the clerk as the one who shall receive the \$5 on filing the application, and further designates him as the one who shall select the newspapers in which the advertisements required shall be published; but it further provides that the cost of publication shall not exceed the usual rates charged by such newspapers, and in no event shall in the aggregate exceed the \$5 thus provided. These limitations to the cost of publication are significant, as showing the intent of the Legislature in not permitting contracts for advertising to be made which would be more than usual charges for similar work, and under no circumstances be in excess of the amount paid, and thereby create a claim against the county treasury in excess of the amount collected for such purposes. Evidently the county treasury is to be protected by these provisions, and not the individual clerk; and, if this is true, is not the money collected to be paid to the county treasury, from which amount, thus paid, the expenses referred to in the act are to be cared for under the provisions of the salary act? The act of 1897 places no unusual duties on the clerk, except empowering him to designate the papers in which the license advertisements are to be published, in which respect it differs from former acts; and the reasons for the change may well be imagined, as being for political and revenue purposes of a private character, rather than for any public good. There is nothing in the act which calls upon us to depart from the rule of law relating to the fees of county officers who are salaried officers, as laid down by the decisions referred to. The language of these decisions is clear and explicit, and relates to all fees earned by county officers in discharging the duties cast upon them by law. There is

nothing in the act which fairly can be interpreted as giving the clerk fees in addition to his salary. By paying said fees into the county treasury, and having all legitimate expenses authorized by the act paid out of the county treasury, the money collected and all expenses connected therewith can be appropriated and paid by the proper officers in accordance with the provisions of the salary act, and thus preserve a harmonious system of accounts. To allow that the money thus received belongs to the clerk, a salaried officer, as additional compensation for services rendered, would be contrary to the express language of the Constitution, which says, 'All officers, who are or may be salaried, shall pay all fees, which they may be authorized to receive into the treasury of the county or state, as may be directed by law.' The law regulates the time and manner of the payment, but can it be successfully claimed that the Legislature can pass an act of assembly compensating a salaried officer with fees in addition to his salary, and thereby render of no effect this provision of the Constitution? We are not disposed to depart from this constitutional mandate and the decisions of our courts of last resort unless we are compelled to do so."

Verdict and judgment for plaintiff for \$5.-380.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

William Wilhelm, James B. Reilly, and S. R. Edwards, for appellant. S. H. Kaercher, D. W. Kaercher, and Charles A. Snyder, for appellee.

FELL, J. The first assignment of error was withdrawn at the argument. The remaining assignments may be considered under two heads—those that relate to the form of the case stated, and those that raise the question of the defendant's right to retain as fees of his office the money he received from applicants for liquor licenses. A case stated should contain a clear statement of the facts agreed upon which give rise to the question presented for decision, and nothing should be left to inference. In deciding the case the court is confined to the specific facts stated. Whatever is not distinctly and expressly agreed upon will be taken not to exist, and it is error to base a judgment on facts not set forth. *Ford v. Buchanan*, 111 Pa. 31, 2 Atl. 339; *Muthcler v. City of Easton*, 148 Pa. 441, 23 Atl. 1109; *Loux v. Fox*, 171 Pa. 68, 33 Atl. 190. This rule was not violated in this case. The only question for decision was whether the defendant was entitled to retain money paid him as clerk of the courts of Schuylkill county in pursuance of section 8 of the act of July 30, 1897, by persons applying for liquor licenses, or whether this money was an earning of the office, and belonged to the county, under the act of March 31, 1876. The question put to

the court in the last paragraph of the case stated was whether the defendant had "the right to retain the balance as his special fee, in addition to his salary, under the act of 1876." It was wholly unnecessary for the court to inquire whether the act of 1876 was in force in Schuylkill county and to find the fact that the county contained more than 150,000 inhabitants. That the act of 1876 applied to the defendant was not questioned. It was assumed by the parties, and was a necessary and irresistible inference from the language in the case stated. In *Luzerne Co. v. Glennon*, 109 Pa. 564, relied on by the appellant, the question was whether the defendant was to be compensated according to the act of 1876. This depended entirely upon the population of the county at the time when he assumed the duties of his office. This was not agreed upon nor admitted, and the whole case turned upon it. The agreement as to the population was argumentatively stated, but the fact was left to be ascertained by inference by the court.

The question of the defendant's liability was correctly decided. The act of March 31, 1876 (P. L. 13), was passed to give effect to section 5 of article 14 of the Constitution, which requires that in counties containing over 150,000 inhabitants all county officers shall be paid by salary. The act provides that all fees received shall belong to the county; that all county officers, their deputies and clerks, shall be paid for their services by fixed and specific salaries to be paid from the amounts paid into the county treasury from the office. The fee of \$5 which the act of July 30, 1897, § 3 (P. L. 469, 470), requires an applicant for a liquor license to pay to the clerk of the court of quarter sessions when he files his petition is a fee of the office, and, like all other fees, belongs to the county. The reasons assigned by the learned judge of the common pleas in support of his ruling on this subject are so clearly stated and so conclusive that further elaboration is unnecessary.

The judgment is affirmed.

(305 Pa. 637)

HUGHES v. MILLER.

(Supreme Court of Pennsylvania. May 4, 1903.)

EXECUTION SALE—DEFAULT OF PURCHASER—LIABILITIES.

1. Where a purchaser at a sheriff's sale defaults on his bid, he is liable for the difference between the amount of his bid and the price at which the property subsequently sold.

2. An owner of a house and lot subject to a judgment died, and his wife, out of her earnings, reduced the judgment, and an administrator of the decedent borrowed money on a mortgage sufficient to pay the balance of the judgment. Thereafter the widow became indebted to one M., and the mortgage was foreclosed, and the lot purchased by M. for enough to pay the mortgage and the debt to M. By agree-

¶ 1. See *Execution*, vol. 21, Cent. Dig. § 662.

ment with the widow this sale was set aside, and on a resale the property was purchased for a much less sum by the widow, and M. took a judgment subsequent in lien to a mortgage placed on the property by the widow. Thereafter the sheriff, at the instance of the widow and the guardian of the minor child of the decedent, sued M. to recover the difference in price between his bid and the amount bid by the widow. Held, that the sheriff was entitled to recover such sum for the benefit of the estate of the decedent.

3. Where land of a decedent was sold at execution sale, and purchased by a creditor, and thereafter, by agreement with the widow of the decedent, the property was resold, and purchased by the widow at a much less price, the creditor taking a judgment second to a mortgage placed on the property by the widow, and the estate of the decedent thereafter recovers from the creditor the difference in the amount bid by him and the amount bid by the widow, such difference will be distributed as part of the estate of the decedent, but the portion to which the widow will be entitled will be paid to the creditor.

Appeal from Court of Common Pleas, Blair County.

Action by T. D. Hughes against Frank M. Miller. Judgment for plaintiff, and defendant appeals. Affirmed.

For former opinion, see 40 Atl. 492, and 43 Atl. 976.

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Thomas H. Greevy, Edmund Shaw, and Andrew H. McCamant, for appellant. H. C. Madden and H. T. Heinsling, for appellee.

DEAN, J. This case is now before us for the third time. The facts are somewhat complicated. It appears that James Judge, of Altoona, died in June, 1883, intestate, leaving a widow, Alice Judge, and a minor child, Ella Donithen. He left no personal estate, but was the owner at his death of a house and lot, which was the home of the widow and child. There was an unpaid judgment lien against the property of \$1,600. The widow occupied the property and kept boarders. Out of her own earnings she paid money on the judgment until it was reduced to the sum of \$600. In 1886 an administrator was appointed, who borrowed on mortgage sufficient money to pay off the \$600. The defendant, Miller, kept a grocery, and gave the widow credit for groceries to the amount of \$800, that she might carry on the boarding house. The widow failed to pay the interest on the mortgage given for money borrowed to pay her husband's debts. The mortgage was foreclosed, and the property sold at sheriff's sale for \$2,535 to Miller, who purchased to protect his own debt of \$800. The widow was not satisfied with this result. She wanted the title in her own name, believing she could borrow enough money to pay off all the debts, including Miller's grocery bill. The debts, not including the grocery bill, amounted to about \$1,100, and including it to about \$2,000. After some negotiations between them, she and Miller agreed that the sheriff's sale should be set aside, the property resold, and

be purchased by the widow, who would then borrow on mortgage in her own name enough to pay all the debts except Miller's. For this last she would give him a judgment next in lien to the first mortgage. In accordance with this agreement the property was again put up for sale by the sheriff and purchased for her by her attorney, who afterwards conveyed it to her. Miller, because of the agreement between him and the widow, did not bid at the second sale, nor take any steps to protect himself from liability for the purchase money on the first sale. At the second sale the property was knocked down to the widow at the price of \$1,100. She then borrowed for her necessities, on mortgage, \$1,300, and also gave Miller a judgment for his debt of \$800. After holding the property a short time, she sold it at private sale for a sum more than enough to pay the mortgage and judgment, and they were paid accordingly. It will be noticed that the difference in bids between the first sale at which Miller was the purchaser and the second sale at which Mrs. Judge was the purchaser was about \$1,425. This sum, with interest added, and some other charges, made up a claim for which the sheriff, at the instance of Mrs. Judge and the guardian of the minor child, brought suit against Miller, and obtained a judgment in the court below for \$2,143.66.

It would answer no useful purpose, after this lapse of time, to criticize the proceedings in the court below from the death of Judge down to this judgment—a period of almost 20 years—and point out how, by the mistaken acts of the attorneys, a very long road round was adopted to reach a very plain purpose, at unnecessary expense and trouble to all concerned. The object of both Miller and the widow at first was an entirely honest one. She seems to have wanted to pay her husband's debts. Miller wanted to help her to make money in the boarding house for that purpose; at the same time did not want to lose his debt. He was willing to run very considerable risk to help her. There was no attempt by him to take advantage of her, or even to speculate in the purchase of the property. With her consent—indeed, at her request—he practically surrendered to her his purchase. However, without regard to motive, this is practically an attempt on the part of the widow and child to make him pay dearly for his effort to aid the widow. But he must pay for the consequences of the blundering methods adopted to set aside the first sale. As a purchaser, he is, under the law, clearly liable for the difference between the two bids, the amount of this judgment. That constitutes part of the estate of James Judge. But the widow, by the arrangement with Miller, in effect appropriated all that would otherwise have been coming to her to carry out a scheme adopted for her own benefit. This would, if her claim were allowed, be a gross wrong upon Miller, and cannot succeed. Nevertheless, she could not bargain

away any right of her minor child to the fund. Neither the sheriff nor the common pleas could undertake to apportion this fund. That is a matter for the orphans' court on a distribution of it. The money should be paid by the sheriff to the administrator, who should, on the principles of this decision, distribute the balance. Any sum that should go to the widow would be payable to Miller; any excess would go to the guardian of the minor child. The judgment is affirmed, and the appeal dismissed.

(206 Pa. 1)

In re IRVINE'S ESTATE.

Appeal of APPELEY.

(Supreme Court of Pennsylvania. May 4, 1903.)

WILL—EXECUTION—CHARITABLE BEQUESTS.

1. Act April 28, 1855 (P. L. 332) § 11, requiring a will disposing of estates for charitable uses to be attested by two credible, and at the time disinterested, witnesses, is not complied with where one witness signed as such before testator had affixed her name to the instrument, and the other witness signed it without seeing the signature of the testator, or knowing whether she had signed it or not.

Appeal from Orphans' Court, Wayne County.

In the matter of the estate of Allamanda D. Irvine. From a decree of distribution, Allie L. Appley appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Homer Greene, for appellant. H. Wilson, Alfred Hand, and A. T. Searle, for appellee.

MESTREZAT, J. Mrs. Allamanda D. Irvine, the widow of Charles Irvine, resided in Damascus township, Wayne county, Pa., for many years prior to her death, which occurred January 11, 1901, while she was temporarily in Florida. After her death there was found among her papers her last will and testament, bearing date of August 14, 1896, to which was subscribed the names of Mrs. Louisa T. Brittain and Miss Carrie A. Tyler as witnesses. The will was admitted to probate by the register of Wayne county on the affidavits of the two subscribing witnesses and of three other witnesses that the signature of the testatrix affixed to it was genuine. In the affidavit of Miss Tyler it is said: "Deponent further says that she did not see the said Allamanda D. Irvine sign her name to the instrument, nor does she know when the said name was so signed, and that she does not know whether or not the signature of the said Allamanda D. Irvine was upon the said instrument when she, the deponent, signed her name thereto as a witness." The affidavit of Mrs. Brittain contains, inter alia, the following: "Deponent further says that at the time she, the deponent, signed her name as a witness to the execution of said will, the said will had not yet, as a matter of fact, been either seen or

executed by the said testatrix, nor had the name of the said Allamanda D. Irvine yet been signed thereto; * * * and that at the time she so wrote, prepared, and signed her name as a witness to said will the said Allamanda D. Irvine was at her own home in said Damascus township, and did not see nor execute said will until some time after deponent had subscribed her name to said will as a witness; but how long after the testatrix executed said will, or in whose presence the testatrix signed her name to said will, or where or under what circumstances, the deponent does not know."

The facts regarding the preparation and the execution of the will, as found by the auditor and approved by the trial court, are as follows: "Some time in the first part of August, 1896, Mrs. Allamanda D. Irvine, widow of Charles Irvine, of Damascus township, Wayne county, Pennsylvania, requested Mrs. Louisa T. Brittain to write her will for her. Mrs. Brittain had a few years before this removed to Ridgebury, Orange county, New York, and was now on a visit to W. W. Tyler, her father's home. She called on her old neighbor, Mrs. Irvine, whom she had known from childhood, and while at the home of Mrs. Irvine, when no one else was present, Mrs. Irvine gave Mrs. Brittain directions how she wanted her will made, which instructions Mrs. Brittain reduced to writing. She further requested Mrs. Brittain to sign it as a witness, and return it to her by registered letter, after it was prepared. Mrs. Brittain returned to her home in Ridgebury, and drew the will as instructed, and subscribed as a witness as requested, August 14, 1896, and sent the paper writing to Mrs. Irvine by registered letter, and took a receipt therefor. Miss Carrie A. Tyler, now Mrs. Ellison, who was postmistress, received the parcel in 1896 (she does not remember the exact date), and delivered it to Mrs. Irvine. A few days afterward Mrs. Irvine, who resided only about one-fourth of a mile from Miss Tyler's, came to Miss Tyler with a paper writing, which she said was her will, requesting Miss Tyler to sign it as a witness. She signed as requested. * * * Both of the subscribing witnesses were familiar with the signature of Mrs. Irvine, and recognized it as being her true signature, but neither of the witnesses saw Mrs. Irvine sign her name to the will. Mrs. Brittain knows the name of Mrs. Irvine was not written when she subscribed as a witness, and Mrs. Ellison does not know whether it was there or not. She did not examine the will in any way, she says."

Letters testamentary were granted to Mrs. Allie L. Appley, the only daughter and heir of the testatrix, in February, 1896. She filed an account as executrix in January, 1902, and on the confirmation thereof an auditor was appointed to make distribution of the balance in her hands. After making certain bequests and disposing of some life interests in her estate, the testatrix gave the residue

thereof to the Boards of Home and Foreign Missions of the Presbyterian Church in the United States of America and to the Presbyterian Church of Cochection, N. Y. Before the auditor Mrs. Apply claimed the legacies bequeathed to religious uses, on the ground that they were void by reason of the will not having been executed in accordance with the act of April 26, 1855 (P. L. 328; *Purd. Dig.* p. 2104, pl. 23). The auditor and the learned court below found against the claim, and awarded the fund as directed in the will. The correctness of this ruling is the only question raised by the assignments of error.

Section 11 of the act of 1855 (P. L. 332) provides, *inter alia*, as follows: "No estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic, or to any person, in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible, and at the time disinterested witnesses, at least one calendar month before the decease of the testator or alienor; and all dispositions of property contrary hereto, shall be void and go to the residuary legatee or devisee, next of kin, or heirs according to law." This statute, it will be observed, became a law of the commonwealth 22 years after the wills act of 1833 (P. L. 249). The sixth section of that act requires a will to "be proved by the oaths or affirmations of two or more competent witnesses." Under this act neither subscribing nor attesting witnesses are necessary to give validity to a will. The proof of the signature of the testator by at least two competent witnesses is the only requisite imposed by the statute. This was well understood when the act of 1855 was passed. It relates to and affects the execution of such wills only as bequeath or devise estates for religious or charitable uses. We must assume that as to wills containing provisions for these uses the Legislature intended to change the manner of execution prescribed by the act of 1833; otherwise the legislation would be to no purpose. This intention is clearly disclosed by the language used in the act of 1855. It requires a will disposing of estates for charitable or religious uses to be "attested by two credible, and at the time disinterested, witnesses"; and such wills must be thus executed "at least one calendar month before the decease of the testator." Neither of these requirements, as we have seen, is necessary to the validity of a will under the prior act of 1833. The simple proof of the signature of the testator by two or more witnesses, not necessarily attesting witnesses, is sufficient under the terms of that act. The difference in the language of the two acts shows that the purpose of the latter legislation was to establish a higher degree of proof as to the execution of a will containing a charitable or religious bequest, and also to require such a will to be executed at a time when the testator might be in the full possession of his faculties, and not influenced

by unscrupulous and designing persons when he is in the immediate presence of death.

The statute requires the will to be "attested by two credible witnesses." This language presupposes the existence of a writing signed by the testator at the time of the attestation. The writing does not become a will under the act of 1833 until it is "signed by him [testator] at the end thereof." It requires the signature of the testator to make it his act and to transform the work of the scrivener into the will of the testator. To attest or witness the will, the witness must be present when the writing is signed and thereby becomes a will; or the testator may, after he has affixed his signature, acknowledge it to be his act in the presence of the witnesses. The meaning of the language employed in the statute exacts these requirements, and no other rational interpretation can be placed upon it. Unless the witnesses are present at the execution of the will, or the signature of the testator is acknowledged in their presence, they have not the knowledge to enable them to testify to the date of, or circumstances attending, its execution, which, if in controversy, it was the intention of the statute should be made to appear by those asserting the right to bequests for religious or charitable uses. Mere knowledge, therefore, of the testator's handwriting, or of his signature, by a person, does not give him the statutory qualifications of a witness.

The facts in the case at bar were found by the auditor, and are not in dispute. It does not appear when the will was signed by the testatrix. Neither of the subscribing witnesses saw her sign nor knows when she did sign it. They testify that they do not know when, where, or under what circumstances it was signed. Mrs. Brittain drew the will, and attached her signature to it before the testatrix had signed it. Miss Tyler, the other subscribing witness, says she does not know when the testatrix signed the will, nor whether she had signed it or not when she subscribed her name as a witness. The two witnesses, therefore, had the same, and no other, knowledge of the execution of the will than the three other witnesses had who appeared before the register to prove the will. Although subscribing witnesses, they were not attesting witnesses, and, before the register and auditor, identified the testatrix's signature solely from their knowledge of her writing. This testimony was sufficient proof of the execution of the will under the act of 1833, but did not meet the requirements of the act of 1855. No witness saw the testatrix sign the will, nor did she acknowledge the signature attached to the will to be her signature. There was, therefore, no attesting witness called to prove the execution of the will, and the instrument was necessarily inoperative as to the bequests to religious uses.

The auditor and court below held "that, while the letter of the act of 1855 has not been complied with, the spirit and intent is

in no way violated by the attestation and probate of this will." The auditor found that the testatrix was in perfect health at the time the will was presumed to have been signed, and that no undue influence of fraud, "such as is contemplated in the act of 1855," had been practiced upon her. It should have occurred to the learned auditor that under the facts disclosed these matters were not in issue in this case, and that they did not control the disposition of it. The question for his determination was whether, in the execution of this will, there had been a compliance with the provision of the act of 1855. That was the issue before him and the court below, as it is here. The Legislature having declared the manner in which a will must be executed to carry bequests to religious uses, it was not within the power or authority of the trial court to disregard the legislative mandate, and substitute another mode of execution of the instrument, which to the court might appear equally efficient in carrying out "the spirit and the intent" of the legislative will. "Nothing is better settled," says the court in *Duffie v. Corridon*, 40 Ga. 122, "than that a will, to be good, must be executed precisely according to the statute." When it was found as a fact—as it virtually was conceded to be—that the will of Mrs. Irvine had not been executed in compliance with the act of 1855, the bequests to the religious uses should have been disregarded, and the fund applicable thereto should have been distributed to the parties named in the statute.

The decree is reversed, and the record is remitted to the court below that distribution may be made in conformity with the views expressed in this opinion.

(306 Pa. 47)

IN RE ALEXANDER'S ESTATE.

(Supreme Court of Pennsylvania. May 11, 1903.)

WILL—CONTEST—MISTAKE OF FACT—EVIDENCE—UNDUE INFLUENCE.

1. Where a will is contested on the ground that a provision in it was made under a mistake of fact sufficiently material to require the setting aside of this part of the will, the crucial question is, not whether the alleged fact was or might be actually established to the satisfaction of another person or tribunal, but whether it was a clear mistake on the part of the testator which misled him, or was a conclusion reached by his own judgment, though different from that which the court or a jury might reach on the same information.

2. Evidence in a will contest, where the only question was undue influence of a testator who was 90 years old, but whose faculties were unimpaired, held insufficient to justify the granting of an issue to determine whether undue influence had been exercised on the testator.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of John Alexander, deceased. Appeal of Archibald A. Alexander from a decree dismissing an appeal

from the register of wills admitting the will to probate. Dismissed.

The facts appear by the adjudication of Hanna, P. J., which was in part as follows:

"From the hundreds of pages of testimony, voluminous correspondence, and numerous exhibits it is shown that testator, as early as 1887, executed a last will and testament prepared by his professional adviser from instructions received from him. This was followed by another will, executed in 1891, wherein he charged his two sons, contestants, with certain sums appearing in his ledger, and identified by the pages thereof quoted in the will. No objection is made to its validity. Long prior to the date of this will testator entered into various business enterprises for the benefit of his sons, loaned and advanced them moneys, aided them in real estate investments and by loans and subscriptions to its capital stock, assisted them in the organization and establishment of a national bank at San Antonio, Texas, in which they were interested as stockholders, and of which they became the president and cashier. At the request and solicitation of his sons, testator had numerous financial transactions with the bank, consisting of loans and rediscount of notes discounted by the bank in the course of its business. For some years these financial transactions were profitable and satisfactory to the testator. But eventually he became exceedingly dissatisfied with the condition of affairs. The transactions with the bank caused him much solicitude, and his account for loans and advances to his sons, particularly his eldest son, was so unsettled and unsecured as to render him anxious and persistent that the same should be closed and settled, and the repayment of both the indebtedness of his sons and of the bank secured. The correspondence between testator and his sons in Texas was frequent and continuous in the year 1892. His constant requests for a settlement were met with as frequent promises. Visits were made to the father by the sons, and, although settlement was always urged by him, and as often acquiesced in by them, no promise was complied with, and no result approved by their father accomplished. The dissatisfaction of testator increased, but his former urgent and almost pathetic requests became stern, parental demands. As he failed to procure from his sons a statement of their account and that of the bank with him, he determined to prepare his own account from his books and the evidence of indebtedness in his possession. Testator was remarkably exact and methodical, and his books, with the entries all in his handwriting, display his care, industry, and accuracy to a wonderful degree. He made therein not only accounts with his children, but entries apparently of every investment and financial venture with which he had ever been connected or interested. He accordingly requested his youngest son, who, with his family, and an older daughter of testator,

composed the household, to prepare such an account. The account was accordingly carefully and laboriously prepared by testator's youngest son, and with great minuteness included every item of charge testator claimed to be due him from his sons. This was in February, 1893, and resulted in a visit from testator's eldest son to his father. The account which had been previously prepared was submitted to and carefully examined by him in connection with his youngest brother, and after many hours of scrutiny pronounced and marked by him correct so far as he was individually concerned, with a single charge of interest excepted, and referring the items charged to his absent brother to him for approval. But, notwithstanding this, the settlement which the testator so urgently required was again deferred; any payment of the indebtedness of his sons and of the bank remained unsecured.

"The next fact appearing is that the testator consulted his counsel, who had prepared the will of 1891, and instructed him to prepare another will. Many of the provisions of the prior will were to be included therein. Testator's counsel, in pursuance of these instructions, accordingly prepared no less than three drafts, all of which were submitted to testator before the fourth or final draft met with his approval. And then the engrossed will was sent to testator by his counsel for execution. Testator carefully and minutely examined the will, and was more critical and observant than his counsel. He discovered an error of the scrivener in a single word, and declined to execute the will until it should be corrected. Those who attended as subscribing witnesses were consequently compelled to retire, and the will was returned to counsel. Two days afterwards they again visited testator at his residence with the will corrected. A second time he carefully and leisurely examined the paper. It then met with his satisfaction, and in his own handwriting completed the blank for the names of the executors, signed his name, and declared the paper to be his last will in the presence of the three attending disinterested subscribing witnesses. This was on March 15, 1893. Testator's request to his sons for a settlement with him continued, but without avail. In the summer of 1893 the Texas bank failed, and was forced into liquidation. Testator believed himself to be a creditor of the bank to a very large amount, and so declared himself in what is called a 'proof of claim.' But to his surprise the receiver of the bank declined to recognize his claim for the full amount upon the ground that the books of the bank showed many of the transactions claimed by testator to be between himself and the bank were in reality between himself and his son, the president of the bank. The 'proof of claim' was again prepared, but, meeting with the same objection a third time, was corrected so that the testator's claim against the bank was reduced from over \$17,-

000, as he alleged, to \$8,000, upon which he received a dividend of 50 per cent. Testator, wearied with his vain endeavors to obtain security for the payment of the indebtedness of his son and the importunities of both his sons to obtain further loans, finally placed all his books and papers, including the account prepared by his youngest son, in the care and custody of his counsel, and employed him to effect the settlement he personally was unable to obtain. The sons were represented by counsel, and after months of negotiation a supposed settlement was reached, but at the last moment repudiated. At this very time, by reason of certain financial difficulties involving testator's eldest son, he was induced, to save him from arrest, to agree to advance about \$5,000 additional in order to avert the danger. But testator's youngest son prevented any further depletion of his father's estate, and by his personal effort and assumption of liability effected a compromise and final settlement with his brother's threatening and dangerous creditor. Still testator was unsecured by his son for the payment of his indebtedness. And this led to the execution of the first codicil, dated June 27, 1894, 15 months after the execution of the will. This was also prepared by testator's counsel in pursuance of instructions received from him, and executed in the presence of two of the subscribing witnesses to the will. In this codicil testator recited that in the calculation of the sum of \$115,100, which he referred to in his will, and charged jointly against his two eldest sons, he omitted some amounts advanced by him prior to the date of his will, and accordingly directed they should be charged jointly with the sum of \$121,800, with the same force and effect as if this amount had been written in the will. He further directed that interest be charged on said sum from the date of the codicil at the rate of four per cent. per annum, and in all other respects confirmed and republished the will. And, finally, on February 7, 1895, nearly eight months after the date of the first codicil and twenty days prior to his death, testator executed a second codicil, wherein he revoked a bequest in the third item of his will to his youngest son, to be expended by him in furthering certain social and benevolent reforms. Testator died February 27, 1895, at his residence in this city, having almost reached the age of ninety years. Within one week after his death a caveat was filed with the register by one of his sons against the admission to probate of any last will and testament. On March 21, 1895, the will and codicils were offered for probate. This resulted in a protracted contest and hearing before the register, continuing until July 29, 1895, when the caveat was overruled, petition for an issue dismissed, and the will and codicils admitted to probate. Letters testamentary were thereupon granted to the executors. If their controversy is righteous, and quarrel with their half-brother

Just, the delay of the contestant is inexplicable and unexplained. They waited until the time allowed for an appeal under the act of March 15, 1832, was within one month of expiration, and not until June 29, 1898, two years and eleven months after the decree of the register, admitting the will and codicils to probate, was an appeal taken. In the meanwhile the executors entered upon the performance of their duties, filed on December 13, 1895, an inventory and appraisement, and subsequently their first account, which was audited and an adjudication thereon filed by the court to January term, 1896, unexcepted to and unappealed from. It is true the contestants' right of appeal is reserved to them by the act of assembly, but their further laches and delay until October 8, 1898, before the presentation of their petition for a citation, etc., is somewhat additionally persuasive of a lack of faith in the propriety and justice of the controversy so long allowed to slumber.

"The present contest is most remarkable and unique. While it is alleged in the petition originally filed that testator at the time of the execution of his will and codicils was not of sound disposing mind, memory, or understanding, or capable of making a valid will, and said writing was procured by the undue influence of his youngest son, and prayed for issues to determine the testamentary capacity of testator, and whether the will and codicils were procured to be executed by him by the undue influence of his youngest son, yet at the hearing before the court it was frankly admitted by counsel for the contestants that the testamentary capacity is conceded, and no objection whatever made to the second codicil, executed February 7, 1895, as already stated, twenty days prior to the death of testator. As also stated by counsel, it appears from the supplementary petition presented at the hearing the controversy is limited to the questions whether a portion only of the fourth item of the will, the entire eighth or residuary clause of the will, and the entire codicil of June 27, 1894, were procured to be inserted in the will and added thereto in the codicil by the undue influence of the youngest son of testator and half-brother to the contestants. It was also conceded by counsel, and could not otherwise be than admitted, that testator possessed full power and authority in disposing of his estate to charge his sons with whatever amount he deemed proper by way of an advancement; in other words, convert debts into advancements. And it was also conceded to be the law that the sons cannot be permitted to show that the amount so charged against them is incorrect in amount, or a mistaken calculation by testator. So that it finally resulted in the inquiry whether, through the malign and fraudulent influences exerted by the youngest son of testator over the mind of his father, the latter was induced to include in the fourth item of his

will the portion embraced in the supplemental petition, and to execute the entire residuary clause, wherein he not only bequeathed his residuary estate to his four children in equal shares, and charged against the shares of his two oldest sons the sum of \$115,100, but also in the first codicil with the increased amount of \$121,800. The contestants were the only witnesses examined in their behalf, excepting the youngest son of testator, who was called by them as a witness under cross-examination, and for many hours subjected to the most searching and rigorous examination; while on behalf of the executors and trustees, the proponents, was submitted the testimony of the counsel of testator, who had been for thirteen years his professional adviser, of a domestic servant in the employ of testator at the time of his death, of the youngest son of testator in his own behalf, and of the subscribing witnesses to the will and codicil. Accordingly, confining the inquiry first to the will dated March 15, 1893, the material facts relative to its preparation have already been referred to. And it will suffice to say not a scintilla is shown that the youngest son was instrumental to its preparation, or made any suggestion to his father relative to its provisions, other than he requested as a bequest some specific articles of furniture. There is no evidence he requested his father to insert either the fourth item in his will, the residuary clause, nor the amount therein stated charged as an advancement to testator's sons, nor was he connected in the remotest degree with the preparation of either codicil. And it has some significance that contestants are candid enough to admit the honesty and fair dealing of their half-brother, and concede he was not a conspirator with his father to defraud his brothers, nor a party to the execution of the second codicil revoking a bequest to him of \$1,000 to be expended by him wholly in his discretion. The testimony further shows that the only connection he had with the ascertainment of the amount due testator from his two eldest sons is that at his father's request he laboriously prepared from his father's books and papers a statement of the account between him and his sons, and thus ascertained the sum total of their indebtedness. There is no evidence that testator's youngest son cajoled, instructed, demanded, or solicited his father to insert any sum either in his will or codicil, or influenced him in any manner whatever to charge his two sons therewith. And the uncontradicted testimony of the testator's counsel, a gentleman of eminent ability and reputation, is that all his interviews respecting the execution of the will and codicil were with testator alone, that his son was never present, never gave him either instructions or suggestion, and the amount of the sons' indebtedness was communicated to him by

his client, the testator. Furthermore, the facts show the improbability, if not impossibility, that any one, much less either of his sons, was able to exercise any influence whatever upon the mind and intention of their father. He was a descendant of a sturdy, rugged, and self-willed race. He was tenacious of what he deemed to be his right, determined and self-reliant. He was possessed of remarkable business ability, as shown by his books of account, kept by himself, and containing entries of his numerous financial transactions and investments made by him during a long series of years. Testator lived to be almost ninety years old, was large of stature, and vigorous in health until a few weeks prior to his death. He personally transacted his business affairs, aided to some extent by his youngest son, who resided with him. And as illustrative of the mental and physical vigor of testator in the early winter of 1893, many months after the execution of his will, he journeyed to Pittsburg, and there delivered an address entitled 'History of the National Reform Movement,' before the faculty and students of the Allegheny Theological Seminary, by whom it was afterwards printed for circulation.

"Need it be said that a man possessing such mental characteristics and imperious force of will could not be easily influenced and induced to adopt a course other than he of his own volition had resolved upon, and which he believed to be effective in accomplishing his clearly intended equitable distribution of his estate among his four children? In view of the admitted testamentary capacity of testator, which, as defined by Turnkey, J., in *Wilson v. Mitchell*, 101 Pa. 495: 'It is not so much what was the degree of memory possessed by the testator as this: had he a disposing memory? Was he capable of recollecting the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? To sum up the whole in the most simple and intelligent form: Were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time when he executed the will?'—was followed in the recent case of *McGovran's Estate*, 185 Pa. 203, 39 Atl. 816, where the rule was applied by Stewart, P. J., and affirmed by the Supreme Court, it will require very strong and convincing evidence of undue influence to set aside the will of a testator prepared and executed under such circumstances, and who is admittedly fully cognizant of the nature and character of his testamentary act. And even although the will be executed with the knowledge and active assistance of a confidential friend and adviser, which relation to the testator it is contended was occupied by his youngest son, yet even there the burden of proof is upon the contestant to show undue influence, as was held by this court in *Estate of Mary*

Yorke, Deceased, affirmed by the Supreme Court in 185 Pa. 61, 39 Atl. 1119. And although it is said in *Miller v. Miller*, 187 Pa. 572, 41 Atl. 277, that it is not necessary that the confidential agent of the testator should have been his attorney, 'or that sustaining his filial relation he did not also hold an artificial one under the trust and confidence reposed in him by his father in business affairs,' and from the facts in that case, which was the trial of an issue *d. v. n.*, it appeared the defense of the will rested on the theory, viz., 'that the son was the trusted and confidential agent of his father,' and for years had so faithfully performed his duty in that respect that it amply explained the favor shown towards him by his father, yet, the will being so largely in his favor, the jury should have been instructed that a presumption of undue influence was raised, and the burden was upon him to rebut this presumption. But that case is clearly to be distinguished from the present. As shown in the prior report in *Miller's Estate*, 179 Pa. 645, 38 Atl. 139, 89 L. R. A. 220, an appeal from the refusal of an issue, the testator, not of extreme old age, was addicted to the inordinate use of intoxicating liquors, afflicted with locomotor ataxia, and alleged to be of weakened intellect, the result of dissipation and disease. One of his sons lived in his father's house, 'was his confidant for years, his helper in his physical infirmity, his adviser in his business affairs,' and the recipient by his father's will and codicils of three-fourths of his large estate, besides being appointed one of the executors. Under the facts there proved it was clearly proper to award an issue to determine the question of undue influence, and cast the onus of proof of its absence upon the son who claimed so large a share of the estate. And in reversing the court below and awarding the issue, Dean, J., further said: 'The condition of mind of a testator alleged to have been unduly influenced, although of testamentary capacity, is important in determining whether the act was the result of the fraudulent arts practiced upon him.' How different all the facts in the present case: The allegations of testamentary incapacity abandoned, and request for an issue upon that question withdrawn, both as to will and codicil. The testator, although of such advanced age, clear and vigorous in intellect, of abstemious habits, and of good physical health until a few weeks prior to his death, during all this time transacted his own business, aided but occasionally by his youngest son, who resided with his father, keeping his own books, and conducting a continuous and almost daily correspondence with his sons, located in Texas, relative to his financial business relation with them and the bank with which they were connected. There being no evidence that the youngest son of testator was instrumental in the procurement of the execution of either will or codicil, and claimed no virtue in himself,

nor that the bequest of the equal share of the residue was any reward for his faithfulness to his father's interest nor compensation for past services, and although, under all the circumstances, not bound to rebut any presumption arising from his residence with his father and his occasional services in the management of his affairs, yet, in view of the aspersions cast upon his good name and reputation, the youngest son of testator eagerly availed himself of every opportunity to rebut the slightest presumption of wrong and suspicion of unfair dealing towards his brothers. From his uncontradicted testimony it appeared that the account of their indebtedness was prepared by him at the request of his father. That he was not connected with the preparation of the will or codicil in the remotest degree and was not present at their examination by testator nor at their execution. In this he is fully corroborated by the counsel of the testator and the subscribing witnesses. The contestants failed to produce the slightest proof of any request or solicitation on the part of the youngest son of testator, or that he exerted any influence whatever upon the mind or intention of his father in the preparation of either will or codicil. To sum up the whole matter, it is simply this: That testator concluded his two eldest sons had already been advanced individually or for their benefit a large proportion of his estate, and, in order to work out an equitable distribution of his property and protect the children not indebted to him, they should be charged jointly with the amount loaned and advanced to them, together with a debt of the Texas National Bank, of which they were the officers. He accordingly so directed, clearly and unmistakably, as he had the undisputed right so to do."

Argued before MITCHELL, DEAN, POTTER, BROWN and MESTREZAT, JJ.

Joseph De F. Junkin and M. Hampton Todd, for appellant. George Wharton Pepper and John G. Johnson, for Fidelity Trust Co. Lucien H. Alexander, in pro. per.

PER CURIAM. That the making of the will was the testator's own act was convincingly shown by the preparatory drafts and consultations with his counsel. The directions were his own, and were clearly imparted by himself to counsel, who embodied them in his will. The alleged undue influence, therefore, must have antedated the making of the will, and have been powerful enough to operate in the absence of the influencing party or parties. This is rendered highly improbable by the universal and undisputed testimony as to the strong and masterful personality of the testator, and the court have found that there is not a scintilla of evidence to sustain the allegation.

The only other point on which anything need be said is the testator's charge in the

55 A.—51

will and codicil of a large sum as an advancement against the contestant and another son. The learned counsel for the appellant are too well versed in the law to question the right of a father to dispose of his estate, even as against his children, in such manner as he chooses; but they rest their case on the ground that the provision as to said advancement was made under a mistake of fact sufficiently material and sufficiently shown by the testator's assigned reasons to require the setting aside of this part of his will. The crucial question, however, is not whether the alleged fact was or might be actually established to the satisfaction of another person or tribunal, but whether it was a clear mistake on the part of testator which misled him, or was a conclusion reached by his own judgment, though different from that which the court or a jury might reach on the same information. If the latter, it cannot be assailed, however unreasonable it may seem. The testator was entitled to form his own judgment, and to act upon it, without regard to whether it agreed with that of others or not. The evidence shows that the direction as to the charge of the advancement against both his sons was the result of the testator's deliberate judgment and intention. On this point we adopt the language of the court below: "It is true that in his family book the debt which the will directs shall be charged jointly against two of his sons is charged against one of them only; but that he entertained the idea that there were circumstances which made it proper to charge it ultimately against both is clearly indicated by his letter to them of December 30, 1892. The suggestion that this letter emanated from another son, the half-brother of the two thus jointly charged by the will, is absolutely without support by the evidence. It was copied, at the instance of the testator, by the sister of the older brothers, the copy being sent, and the original, in his handwriting, retained; while the letters of January 13 and January 18, 1893, from the son not charged in the book, expressing his willingness that 'anything that may be coming' to him may be 'pledged as security for any advance' to the other brother, 'in Arizona or Texas,' or 'for any of his personal or the bank's indebtedness,' are a clear recognition of the fact not only that the idea was entertained, but that it was not irrational; or without some substantial basis."

Decree affirmed, at the costs of appellant.

(55 N. J. E. 156)

OCEAN CITY ASS'N v. CHALFANT.

(Court of Chancery of New Jersey. Sept. 4, 1903.)

DEEDS — COVENANTS RESTRICTING USE OF PROPERTY — WAIVER OF EQUITABLE ASSISTANCE.

1. A corporation laid out a tract of land as a seaside resort of a religious character. In all

of its deeds of lots was a covenant that no business should be carried on on Sunday, and nothing should be done that is a desecration of that day. *Held*, that the association had waived its rights to equitable assistance to enforce the covenant against one who, in his drug store, on Sundays sold soda and articles for family and medicinal use; trolley cars, the power house for which was on the grounds, and bathhouses having been run there for years, on Sundays, without objection, except that three years before suit against the drug store keeper the association filed an injunction suit against a bathhouse keeper, but did nothing after a preliminary injunction was refused.

Suit by the Ocean City Association against William M. Chalfant. Bill dismissed.

S. Stranger Izzard and D. J. Pancoast, for complainant. Albert A. Howell and Samuel W. Beldon, for defendant.

REED, V. C. The purpose of this suit is the enforcement of a restrictive covenant in a deed made by the Ocean City Association of lands now in the possession of William M. Chalfant. The Ocean City Association is a corporation, which purchased several thousand acres of land on Peck's Beach, which land it laid out as a seaside resort of a religious character. It incorporated in all its deeds to purchasers of lots a covenant that no building should be used or occupied as a drug store without the written consent of the Ocean City Association; also that no business of any kind whatever should at any time be carried on upon the Lord's Day, commonly called the Sabbath or Sunday; nor should any act, matter, or thing be done that is a desecration of said Lord's Day; and that the land conveyed should be under and subject to the conditions, restrictions, and regulations as may be made to insure the original intention and purpose of said association in securing the whole island as a Christian resort. The defendant, William M. Chalfant, occupies the building on the northeast corner of Eighth street and Wesley avenue, in Ocean City, as tenant under Frederick Rapp, whose title to the same is derived from the Ocean City Association through a deed containing the above-named restrictions. Mr. Chalfant keeps a drug store. He admits that in July and August, 1901, he sold on Sundays, in said drug store, soda water and like beverages from his fountain, and articles for family and medicinal use. He admits that he occasionally sold candies and like merchandise, including a comb and brush, soap, and other things that a drug store is supposed to sell. The defendant's violation of the restrictive covenant is undenied. His defense is that the association has waived its right to enforce this covenant against him, because it has permitted violations of the same covenant by other grantees. The recognized doctrine is that, where a vendor sells off an estate in lots with restrictions upon the use of the lots sold, he will lose his right in equity to enforce the restrictions against one grantee if he has knowingly per-

mitted other grantees to violate the same restrictions, the effect of which violation is to abrogate the purpose of the restriction and alter the general scheme intended to be conserved by it. *Roper v. Williams*, 1 Turn. & Russ. 18; *Peck v. Matthews*, L. R. 3 Eq. 515. This rule is applicable whether the suit is brought by the covenantee or by one of several grantees of land sold in accordance with the general scheme by the original covenantee. It rests upon the equitable ground that, if any one who has a right to enforce the covenant, and so preserve the conditions which the covenant was designed to keep unaltered, shall acquiesce in material alterations of those conditions, he cannot thereafter ask a court of equity to assist him in preserving them. The complainant may be in privity with the defendant, and have his action at law for a breach of covenant, but nevertheless in this situation a court of equity will not assist him. *Duke of Bedford v. Trustees of British Museum*, 2 My. & R. 55. The question of waiver of the right to enforce a restrictive covenant by permitted violations of the covenant is dependent upon the character and materiality of the permitted breach. *Knight v. Simmons*, 2 Ch. Div. 294; *German v. Chapman*, 7 Ch. Div. 271. A permitted limited breach may not conclude for all time in respect to a wider and more important breach. *Lattimer v. Livermore*, 72 N. Y. 174. It may be observed also that a permitted breach may be of one of two kinds of covenants, one class respecting erections upon, or a permanent physical change in, the property subject to restriction; and the other class respecting the use of the property for certain occupations, without any physical changes in the property itself of a permanent character. While the doctrine of waiver applies to both kinds of covenants, the propriety of the enforcement of the doctrine in particular instances may differ in each. This results from the fact that breaches of the first class usually permanently change the conditions which the covenant was designed to perpetuate, while breaches of the second class do not necessarily have that result. It is only when the person in whom the right to enforce the covenant resides has permitted such infringement of its provisions as result in alterations that cannot be corrected, or which it is manifest there is no intention to have corrected, that he is precluded from further enforcing the covenant. When such a person has permitted a covenantor to spend money in the erection of buildings which are violative of the restrictions, he is estopped from successfully suing in a court of equity for a mandatory injunction to restore the status quo, and, the conditions having thus become permanently changed, he cannot sue another covenantor upon a similar covenant. When, however, the known breach consists in introducing upon the property some occupation interdicted by the covenant, and no considerable amount of money has been ex-

pendent in fitting the property for a particular business, or the character of the business is such that it constitutes an inconsiderable alteration of the conditions which the parties had in view, then the waiver of the right to restrain other and more considerable breaches may not result. The first class of covenants are dealt with in the cases of the Duke of Bedford v. Trustees of British Museum, supra, Roper v. Williams, supra, and Peck v. Matthews, supra, and the second class in Knight v. Simmons, supra, and German v. Chapman, supra. In the first three cases it was held that the complainants had waived their rights, but in the last two cases it was held that they had not. The question involved in each case was, however, common to all, namely, whether the complainant had permitted the situation intended to be fixed by the covenant to be materially and permanently altered.

The present case is one, as is perceived by the language of the covenant already displayed, dealing with occupations. The purpose of the covenant was to prevent the transaction of any kind of worldly business on Sunday. It was to put upon each lot owner, by contract, the same restriction in this respect as is imposed by the vice and immorality act. It is proved that on Sundays three bathhouse keepers had for a number of years conducted their business of hiring bathing suits and dressing rooms. It is proved that on Sundays meat and ice cream were delivered; that hacks ran, and livery stables hired out horses and vehicles; that cigar and fruit stores did business, and newspapers were sold on the streets; that trolley lines had run in the streets, and railroad trains ran through the city. Some of these transactions must be put out of sight, because it does not appear that they were violative of the covenant. It does not appear how the railroads, the hackmen, and the paper vendors became subject to the restriction. In some of the other instances the violations were not brought to the knowledge of the officers of the association, and were not so frequent, or of such character, as to raise the inference that they must have known of them. Then, in some instances, it appears that there were attempts by actions at law and by prosecutions to stop acts which were infringements of the covenant. If it appeared that the officers of the complainants had used reasonable diligence in repressing all of these violations of which they had knowledge, although it should appear that such prosecutions may have failed of their object, I do not think the complainant should be held to have waived its right to ask for the assistance of this court. But it appears that the officers have not used reasonable diligence in preserving the character of the association which the covenant was calculated to secure. They may not grant immunity to one and prosecute other infringers of the same covenant. Trolley cars and

bathhouses are undoubtedly attractive and important features of seaside resorts at all times; but, if their operations on Sundays conflict with the covenant, they stand, in respect to the covenant, on the same footing as any other business. It appears that the trolley cars ran with immunity on Sundays. The use of the streets may not have been in violation of the covenant, but the power house, in which the energy which runs the cars is generated, is admittedly upon the land subject to the restriction. Again, the bathhouses have been for years violating the covenant with increasing boldness and publicity. Some three years before the institution of the present suit a bill was filed by the association against Samuel Schurch, one of the bathhouse keepers, to enjoin him from violating the covenant. A preliminary injunction was refused by Vice Chancellor Gray, whose opinion is reported in 57 N. J. Eq. 268, 41 Atl. 914. This case was never brought to final hearing. During these three years, as before, the bathhouse keepers have been conducting a Sunday business without further contest.

In my judgment, the complainants have waived their right to equitable assistance, and the bill should be dismissed.

(59 N. J. L. 481)

FOLEY et ux. v. BRUNSWICK TRACTION CO.

(Supreme Court of New Jersey. Aug. 21, 1903.)

TRIAL—ORDER OF PROOF—EVIDENCE—CROSS-EXAMINATION—PERSONAL INJURIES—EXCESSIVE VERDICT.

1. The order of proof is always discretionary with the trial judge. He may reopen the case on rebuttal if he so wills, if no injury will follow to the defendant by way of surprise or otherwise.

2. An engineer called by the plaintiffs testified that he had made a map of the locality of the accident for the defendant. On cross-examination the defendant produced and the witness identified the map, and stated that it was made from actual measurements made by himself upon the ground, and that it was drawn to a scale. The defendant had the map marked for identification. The defendant did not offer the map in evidence. Upon the defendant's resting, the plaintiffs called for the map, and offered it on rebuttal. The court admitted it. *Held*, that in this there was no error. Nor was there error in the court's allowing the witness to subsequently testify to pertinent questions as to the map itself, and to locate certain points thereon.

3. Where the verdict is clearly excessive, in view of the character of the injury and sufferings of the plaintiff, when injury and sufferings are the only questions submitted to the jury, it may be set aside.

(Syllabus by the Court.)

Action by John Foley and Catharine Foley against the Brunswick Traction Company. Verdict for plaintiffs on motion to show cause why a new trial should not be granted. Granted on condition.

Argued before the CHIEF JUSTICE, and HENDRICKSON, PITNEY, and FORT. JJ.

Willard P. Voorhees and Robert H. McCarter, for plaintiffs. Alan H. Strong, for defendant.

FORT, J. In this case but three grounds were seriously urged for a new trial. The first related to an alleged error of the trial justice in admitting a certain map in evidence; the second was that the verdict was against the weight of the evidence; and the third, that the verdict was excessive. On the plaintiffs' direct case, Asher Atkinson, a civil engineer, was called, and testified that he had made a map of the locality of the accident at a time when he was in the employ of the defendant. On cross-examination the defendant produced a map, which he identified as the one he had so made, and he then testified that it was made from actual measurements upon the ground, and was drawn to a scale. The defendant then had the map marked as "Exhibit D 1" for identification. When the defendant rested, not having offered the map in evidence, the plaintiffs' attorney called for it, and offered it in evidence, and the court admitted it. The plaintiffs then recalled Mr. Atkinson in rebuttal, and he was asked a number of proper questions as to the excavation of the street, the curving of the tracks before and after the changes therein, as also a few pertinent questions as to the map itself. The witness was also allowed to mark certain important points upon the map, and to give some measurements therefrom. It is contended that the admission of this map in evidence, and the testimony of Mr. Atkinson in connection therewith, was improper on rebuttal. The admission of evidence on rebuttal is largely a matter of discretion with the trial judge. He may reopen the case, if he so wills, on the rebuttal, if no injury follows to the defendant by surprise or otherwise. Mr. Justice Collins, in *Hustis v. Banister Co.*, 63 N. J. Law, at page 467, 43 Atl. 651, states the rule correctly when he says: "The other exception was to the admission, on rebuttal, of proof relative to the character of the plaintiff's injuries, that, it is claimed, should have been offered in chief. Without closely analyzing the evidence to see if the claim is well founded, it is sufficient, to deny effect to this exception, that the order of proof is always discretionary with the trial judge. Counsel concede this, but complain of an 'unlawful exercise of the court's discretion,' which seems to me a contradiction of terms. No surprise was pleaded at the trial, nor was time asked to meet the proof." The rule is similarly stated in *Jones on Evidence*, vol. 3, § 809. Not only was this evidence of Mr. Atkinson and the map as admitted unobjectionable, but the trial justice with unusual care restricted the use of the map by the jury. In his charge he said: "The map was only admitted as a correct delineation of the lay of the land at the place of the alleged accident at the time it was made.

It is proven to have been made by the engineer of the defendant, and to be drawn to a scale, and hence to correctly show the present location of the tracks of the Pennsylvania Railroad and the tracks of the defendant company. * * * To aid you in arriving at a result as to where, under the proof in the case, the digging proven in the case was actually done, you may use it. For this, and this alone, it is in evidence. * * * Only use the map, gentlemen, to aid you by scale measurements in determining under the proof in the case where the digging in this case testified to actually was, and for no other purpose." On rebuttal, under the evidence offered by the defendant, the map was clearly competent evidence to the extent, at least, which the court guardedly permitted the jury to consider it. If there was any error committed, it was in the manner in which the trial justice restricted the plaintiffs in the examination of Mr. Atkinson as to the map when he was called on rebuttal. The defendant cannot be heard to complain of that.

Nor do we think that the verdict should be set aside as against the weight of the evidence. This is a second verdict. The first verdict was set aside because of an error in a legal proposition in the charge of the court. *Foley v. Brunswick Traction Co.*, 66 N. J. Law, 687, 50 Atl. 340. If we had been the jury upon this trial, we incline to think, under the proof, we should have found that the weight of the evidence was against any liability on the part of the defendant. The proof of an excavation at the point where the plaintiff alighted from the car was unsatisfactory, as was also the proof that the defendant had failed to take reasonable care to make and keep the place as its terminus, where it discharged the plaintiff, reasonably safe for passengers to alight. But the jury have seen the witnesses, and have found otherwise, and we are not inclined to say that the verdict is so clearly against the weight of the evidence as to justify the court in setting it aside. But we do think that the verdict is excessive, and should be set aside, unless the plaintiff will elect to take a reduction thereof to \$2,500. The plaintiff, Mrs. Foley, was undoubtedly severely injured by the breaking of the neck of the thigh bone, and suffered much pain. But she had been slightly lame in the same leg, owing to a stiff knee, probably produced by rheumatism. It had been stiff for years. She was unable to go upstairs in a natural way. She had to go up one foot at a time and down in the same way. She was about 50 years of age. Her husband was a captain on a boat plying between New Brunswick and New York, and absent each day for a great part of the year. Hence she had been working quite steadily before the accident. She had never earned to exceed \$5.50 per week. Since the accident she testified she has been unable to work as steadily, or at the same employment,

or any employment requiring her to remain long upon her feet, but that she had been employed at work which does not so require, and which is not quite so remunerative. The trial justice limited the damages which the plaintiff was entitled to recover solely to such as would compensate her for the pain and suffering she underwent and for the permanent injury she received. This followed the rule in *Klein v. Jewett*, 26 N. J. Eq. 474; *Jewett v. Klein*, 27 N. J. Eq. 550. For these the jury allowed \$5,500. This amount was, we think, excessive, under the testimony of Dr. Donohue, the plaintiff's physician. From a verdict of \$2,500 she would, for the remainder of her life, receive an income equal to one-half, at least, of her previous income, and still, at the end of her life, have the principal fund. We think a verdict for \$2,500 would be reasonable compensation for the pain and permanent injury which the plaintiff suffered. If the plaintiff will elect to reduce the verdict to \$2,500, it may stand; otherwise a new trial will be granted.

(69 N. J. L. 365)

SMITH v. COLLOTY.

(Court of Errors and Appeals of New Jersey.
July 20, 1903.)

APPEARANCE—MECHANIC'S LIEN—JUDGMENT IN PERSONAM—EVIDENCE.

1. In an action brought under the mechanic's lien law (P. L. 1898, pp. 547, 548, §§ 23, 24), where "legal service" of the summons has been made upon a nonresident builder, and such builder then appears generally in the action, or makes defense upon the merits, he thereby submits himself to the jurisdiction of the court, and, if the verdict goes against him, the resulting judgment is to be a "general" judgment, binding upon such builder in personam.

2. The language of section 24 of the mechanic's lien law (P. L. 1898, p. 549), to the effect that, "when only legal service of the summons has been made," the judgment against the builder shall be "specially for the debt and costs to be made of the building and lands in the declaration described," prevents a judgment in personam (called in the section a "general judgment") against the builder only in case of judgment by default, where the jurisdiction of the court over his person depends alone upon the service of process; and not in cases where such builder has appeared generally to the action, or has made defense upon the merits.

3. Where a contract is made for lathing and plastering, to be done at a specified rate per square yard, it is error to permit the jury to ignore the measured area of the walls and ceilings lathed and plastered, and to estimate the area according to the number of laths used in the work, where the evidence shows that the number of laths bears no definite relation to the area.

(Syllabus by the Court.)

Error to Circuit Court, Atlantic County.

Action by Wesley A. Smith against Eugene M. Colloty and another. Judgment for plaintiff, and the above-named defendant brings error. Reversed.

G. A. Bourgeois, for plaintiff in error.
Thompson & Cole, for defendant in error.

PITNEY, J. This is an action upon a mechanic's lien claim. The defendants are Eu-

gene M. Colloty, as builder, and Mary Colloty, as owner. The declaration sets up an indebtedness due from the builder to the plaintiff, and concludes with an averment that the debt is a lien upon the building and lands in question by virtue of the mechanic's lien act of 1874. That act was repealed in 1898 (P. L. p. 553) long prior to the transactions that gave rise to this suit. But, as the statutory provisions on which the lien was rested were re-enacted in the revised mechanic's lien law of 1898 (P. L. p. 538), the error in the averment of the lien as contained in the declaration was harmless. If this averment were material in the present state of the record, an amendment would be allowed. But, as the record discloses a judgment against the builder only, the averment respecting the lien is now immaterial.

The declaration recites the manner in which the builder and owner were served with the summons, and discloses that what is called in the statute "legal service" was made upon both defendants; that is, copies of the summons were fixed upon the building in question and were mailed to the respective defendants at their post-office addresses in the city of Philadelphia, in the state of Pennsylvania. Both defendants appeared generally in the action, and pleaded to the merits. The builder (now plaintiff in error) pleaded the general issue only. The owner pleaded the general issue and the statutory plea that her building and lands were not liable to the alleged debt. At the trial a nonsuit was granted with respect to the action against the owner on the ground that the provisions requisite to constitute the debt a lien upon her building and land had not been complied with. This ruling is not now under review. The trial proceeded with respect to the plaintiff's claim against the builder, and at the close of the evidence a motion was made for the direction of a verdict in favor of the builder on the ground that, since the summons was served upon him "legally," the only judgment authorized by the act was a special judgment for the making of the debt and costs out of the building and lands in the declaration described; and that, since the building and lands were shown not to be liable for the debt, no judgment could be entered against the builder. The motion was overruled, and an exception thereupon sealed, and this ruling is assigned for error. The jury having rendered a verdict in favor of the plaintiff as against the builder, a general judgment was entered against him for the recovery of the amount found by the verdict to be due. It is assigned for error that, since the summons was served "legally," no judgment other than a special judgment could be entered against the builder.

These two assignments alike raise the question whether, in case the builder is a nonresident, and is served with summons in the manner that the statute describes as "legal service," and then appears generally in the

action, and makes defense upon the merits, and is defeated, the plaintiff is confined to a judgment special in form, limited to the making of the debt and costs out of the building and lands of the owner, described in the declaration. It is entirely obvious that, for practical purposes, if a recovery against the builder is to be made, not out of his property, but out of the property of the owner, while at the same time the owner's lands have been shown not to be subject to the debt, the judgment record will be not only absurd, but entirely nugatory. Section 23 of the mechanic's lien law prescribes the form of the summons and the mode of its service. Section 24 prescribes the proceedings in the cause from the filing of the declaration until the entry of judgment. An examination of these sections will show that the distinction therein made between "actual service" and "legal service" is carried into effect only with respect to the form of the judgment against the builder, for the form of the judgment against the owner is to be special in any event. As to the builder, the action is in personam. As to the owner, it is quasi in rem. A "general" judgment is a judgment in personam; a "special" judgment operates in rem. Section 23, after providing that, when a claim is filed agreeably to the provisions of the act upon any lien created thereby, it may be enforced by suit in the circuit court of the county where the building is situate, and, after prescribing the form of summons, proceeds as follows: "And the said summons shall be directed, tested and made returnable, and may be served and returned in the same manner as other writs of summons; and such summons may be served upon the defendants, or either of them, in any county of this state, by the sheriff thereof, and for this purpose the same or a duplicate thereof, may be issued to such sheriff; and if any defendant cannot be found in this state, it may be served upon him by affixing a copy thereof upon such building, and also by serving a copy on such defendant personally, or by leaving it at his residence ten days before its return, which shall be deemed actual service, or in case such defendant resides out of this state, by affixing a copy on such building and sending a copy by mail, directed to him at the post office nearest his residence, or in case his residence is not known to the plaintiff, then by affixing a copy to such building, and by inserting it for four weeks, once in each week, in some newspaper of this state, published or circulating in the county where such building is situate, either of which shall be legal service; and when an affidavit shall be made and filed of the facts authorizing and constituting any such service, not made by a sheriff or officer, the suit may proceed against the party so served as if such summons had been returned served by the sheriff." Section 24 should be quoted in full, except the final clause, which is not pertinent. It enacts that: "The

declaration in such case shall, after reciting that the owner and builder and other defendants were summoned, and how served, and why such other defendants were made defendants, be against the builder, and in the same form as in other actions upon contract, and shall conclude with an averment that said debt is, by virtue of the provisions of this act, a lien upon such building and lot, describing the same as in said claim; and to said declaration a schedule may be annexed, and the practice, proceedings and pleadings thereon shall be conducted and the judgment entered, as in suits in said circuit court to recover money due on contract; and all or any of said defendants may, jointly or severally, have any defense or plea to the same that might be had by the builder to any action on said contract without this act; and in addition thereto, the owner or mortgagee may plead that said building or land are not liable to said debt, and in such case it shall be necessary for the plaintiff, to entitle him to judgment against the building and lands, to prove that the provisions of this act, requisite to constitute such lien, have been complied with; and any defendant mortgagee may have a further plea that said lien claim is subject to such mortgagee's lien, and the judgment in any such case shall determine the priority of the liens of the plaintiff and each of said defendants; and any judgment or proceeding under the same shall not affect the lien of any of said defendants whose lien shall be determined to be paramount to that of the plaintiff; and in case a verdict be rendered or judgment be given against the builder only, judgment shall be given for the landowner, with costs against the plaintiff; and in case judgment be given for the plaintiff, it shall be entered against the builder when he was actually served with the summons, generally, and with costs as in other cases; and when only legal service of the summons has been made, judgment against the owner and also against the builder, shall be specially for the debt and costs, to be made of the building and lands in the declaration described; and in case no general judgment is given against the builder, such proceedings or recovery shall be no bar to any suit for the debt, except for the part thereof actually made under such recovery."

If we were called upon in this case to decide concerning the precise meaning of the term "actual service" in section 23, and to determine the reason for the discrimination that is made in section 24 with respect to the form and effect of the judgment, as between a builder "actually" served and a builder "legally" served with the summons, it would be important to recall that the provisions above quoted (so far as they relate to the mode of service and the form of judgment) originated in the year 1853, when our first general mechanic's lien law was enacted, and have been continued without change in the successive revisions since made. P. L.

1853, p. 440, §§ 8, 9; Rev. St. 1874, pp. 454, 455, §§ 18, 19; Gen. St. p. 2066, §§ 18, 19; Revision 1898, P. L. 1898, pp. 547, 548, §§ 23, 24. Repeated decisions have established that in such cases the statute speaks as of the time of its original enactment. In re Thomas Murphy, 23 N. J. Law, 180; Clement v. Kaighn, 15 N. J. Eq. 47, 56; Freehold Mut. Loan Ass'n v. Brown, 29 N. J. Eq. 121; State v. Anderson, 40 N. J. Law, 224, 226; Union Nat. Bank v. Poulson, 40 N. J. Law, 284; Marts v. Cumberland Mut. Fire Ins. Co., 44 N. J. Law, 478, 480; State v. Raymond, 53 N. J. Law, 260, 263, 21 Atl. 328; Pomeroy v. Mills, 37 N. J. Eq. 578; Smith v. Began, 54 N. J. Law, 167, 171, 23 Atl. 1012; Carter v. Mayor of Rahway, 57 N. J. Law, 196, 199, 30 Atl. 863. The last three cases are decisions of this court. As Beasley, C. J., said (speaking for the Supreme Court) in Knight v. Freeholders of Ocean, 49 N. J. Law, 485, 12 Atl. 625, at page 487, 49 N. J. Law, page 626, 12 Atl.: "The incorporation of the existing laws into the body of the revised laws in an unmodified form does not give to such re-enacted laws the force of original laws passed at the date of the revised laws. Such laws were re-enacted with no purpose of giving to them any new efficacy, but simply to the end of bestowing upon their rearrangement a legislative sanction. The laws so adjusted are not to be deemed to have acquired any different efficacy from that possessed by them in their original condition." So viewing the provisions of the mechanic's lien law referred to, we are reminded of the general state of the law as it stood at the time of their original enactment with respect to subjecting nonresident parties to a judgment in personam upon notice of the suit served upon them in a foreign jurisdiction. At that time it was commonly held that a personal judgment, effective within the territory of the state, could be rendered by a state court against a nonresident defendant who did not appear and submit himself to the jurisdiction of the court, provided notice of the suit had been served upon him in the state where he resided, or had been published in the state within which the court was situate, pursuant to the provisions of a local statute. At the same time such judgment was denied any extraterritorial effect. Afterwards, by the fourteenth amendment of the Constitution of the United States, it was provided that no state should deprive any person of life, liberty, or property without due process of law; the effect of which, as declared by the Supreme Court of the United States in *Pennoyer v. Neff*, 95 U. S. 714, 733, 24 L. Ed. 565, is to render a personal judgment devoid of any validity, either within or without the territory of the state in which it is given, if it be rendered by a state court in an action upon a money demand against a nonresident who is served by a publication of summons, but upon whom no personal service of process within the state is made,

and who does not appear to the action. The same rule applies where the summons is served personally upon the defendant, but beyond the limits of the court's jurisdiction. *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. Ed. 372; *Sugg v. Thornton*, 132 U. S. 524, 10 Sup. Ct. 163, 33 L. Ed. 447; *Wilson v. Seligman*, 144 U. S. 41, 12 Sup. Ct. 541, 36 L. Ed. 338. As was said by Chief Justice Beasley (speaking of an action in personam) in *Elsasser v. Haines*, 52 N. J. Law, 15, 18 Atl. 1097: "Formerly a judgment entered in the way provided by the statute of a state was sometimes held to be enforceable in such state, even though the court officiating were not possessed at the time of jurisdiction over the defendant according to the general principles of law and justice, as where such defendant was a nonresident, and no process had been served upon him, and no notice had been given except by way of public advertisement; at the same time it being conceded that such judgment would not be recognized extraterritorially. But now, by force of the addition to the federal Constitution just adverted to [the fourteenth amendment], such judgment could be of no legal avail either at home or abroad"—citing *Pennoyer v. Neff*. See, also, *Hess v. Cole* (1851) 23 N. J. Law, 116, 123; *Mackay ads. Gordon* (1870) 34 N. J. Law, 286, 291; *Mutual Life Ins. Co. v. Pinner*, 43 N. J. Eq. 52, 10 Atl. 184; *Kirkpatrick v. Post*, 53 N. J. Eq. 591, 597, 32 Atl. 267.

Viewing the sections above quoted from our mechanic's lien law as having been enacted in 1853, in view of the general rule of law then prevailing, section 23 may be construed as prescribing three different modes of service of the summons, viz.: (a) Ordinary service, to be made by the sheriff of any county in case the defendant can be found in the state to be served therewith in the manner that other writs of summons are served; and (with respect to such defendants as cannot be found in this state) as prescribing two other modes of service, viz., actual and legal, it being required in each of these modes that a copy of the summons be affixed upon the building; the remaining steps to be taken in order to insure the receipt of the summons by the defendant being dependent upon the question whether he has a known place of residence abroad, or can be found personally within or without the state, and (in the case of such defendants as have a known residence abroad) upon the question whether the plaintiff is willing to go to the expense of reaching him by a service personally or at his residence; that is to say: (b) "Actual service" to be by serving a copy on such nonresident defendant personally or by leaving it at his residence 10 days before its return; (c) "legal service" to be made (in case such defendant "resides out of this state"; (that is, at some known residence), by sending a copy by mail directed to him at the post office nearest his resi-

dence, or, in case his residence is not known, then by publishing the summons in some newspaper of this state. This reading, of course, treats the practice act and the attachment act as in pari materia (Rev. St. 1847, p. 981, § 17; Id. p. 48, § 1, etc.), and treats the term "residence" as equivalent to the "dwelling house or usual place of abode" at which a summons could be served by the sheriff. In default of such a place of abode in this state, the sheriff (notwithstanding the casual presence here of the defendant in person) might return the writ "Not found," and the defendant would be one who "cannot be found in this state" within the meaning of the act. *Perrine ads. Evans*, 35 N. J. Law, 221; *Stout v. Leonard*, 37 N. J. Law, 492; *Baldwin v. Flagg*, 43 N. J. Law, 495; *Mygatt v. Coe*, 63 N. J. Law, 510, 44 Atl. 198; *Camden Safe Deposit Co. v. Barbour*, 66 N. J. Law, 103, 48 Atl. 1008.

According to this construction, the explanation of the distinction between "actual" and "legal" service is that these kinds of service were intended only for defendants who have no known place of abode in this state at which the summons could be served by the sheriff, and that the Legislature made the discrimination in the form and effect of the resulting judgment in view of the probability or improbability, according to the circumstances, that the nonresident defendant would receive actual notice of the suit. That is, although the builder were a nonresident, yet, if he were served personally within or without the jurisdiction, or if a copy of the summons were left at his residence so that he would be practically certain of receiving it, it might be deemed consonant with justice to give a personal judgment against him (efficacious within this state), although he did not appear; while, if the plaintiff were not willing to go to the pains and expense of serving the builder personally or by leaving the summons at his residence in a foreign jurisdiction, but should content himself with mailing the summons, or if the defendant's residence were not known, so that the only effort that could be made to reach him with notice of the suit was by affixing it to the building and publishing it in a newspaper in this state, in either case it would be so probable that the defendant might not actually receive the notice that the Legislature deemed it unjust to render a personal judgment against him in his absence. It is obvious, of course, that, so far as the act provided for a judgment in personam against a nonresident builder who was "actually" served with process out of the state, and who did not appear and submit himself to the court's jurisdiction, the act was repealed by the fourteenth amendment as construed in *Pennoyer v. Neff*, and that a nonappearing nonresident builder served without the jurisdiction can now be no more bound by "actual" service than by "legal" service.

Another view of section 23 is that which

treats the term "actual service" as including the ordinary service made by sheriff, and treats "legal service" alone as applicable to nonresidents.

We mention these different views, but without amplifying the arguments that support them respectively, in order that it may be clear that we have not omitted to make a close scrutiny of the statutory scheme, and a careful examination of the act from the historical standpoint. But for the purposes of the present case we do not feel called upon to decide what is the precise meaning of the term "actual service" in sections 23 and 24 of the act, nor to come to a definitive conclusion as to the reasons that actuated the Legislature in drawing the distinction between "actual" and "legal" service, and discriminating with respect to the form of the judgment to be entered against the builder in the one case and in the other; for, in any point of view, it is quite manifest that the reason for the distinction between the different modes of service disappears the moment that the defendant enters a general appearance in the action, or puts in a defense upon the merits. The power of the court over him then depends, not upon the mode in which notice was sent to him, but upon the fact that he received it, and chose to respond to it, and availed himself of his rights under the act by voluntarily appearing and contesting the plaintiff's claim. As between two defendants, each pursued in an action founded on a personal liability, where one is served with process in a manner that entitles the court to render a judgment against him in his absence, and the other is notified of the suit in a manner that does not entitle the court to render a personal judgment against him in his absence, there is reason in saying that, in the absence of appearance, the former defendant shall be subjected to a binding personal judgment, and the latter defendant not. But where both defendants have appeared, and have equally enjoyed the opportunity of litigating the claim made against them, each with the prospect of a conclusive determination in his favor in the event of success, there is neither sense nor reason in saying that, in the event that they both defend unsuccessfully, the one shall be subjected to a judgment binding in personam and the other shall not.

The rule that defects in the form of process and the manner of its service are waived by making appearance and defense upon the merits is not a technical rule, or a rule of mere practice or convenience. It is a rule of jurisprudence, grounded upon the fundamental idea that courts of justice exist for the purpose of hearing and conclusively determining disputes between litigants, from which it results that he who voluntarily comes (whether as plaintiff or defendant) before a court of competent jurisdiction over the subject-matter, and there submits to a trial and determination of the merits of his

controversy, is bound by the determination that he has thus invoked. The rule has been uniformly enforced in this state, not only in ordinary actions at law (*McCracken v. Richardson*, 46 N. J. Law, 50) and in equity (*Crowell v. Botsford*, 16 N. J. Eq. 458; *Newark Savings Institution v. Jones' Ex'rs*, 35 N. J. Eq. 406), but in the small-cause court (*Dare v. Ogden*, 1 N. J. Law, 91; *Budd v. Marvin*, 4 N. J. Law, 248; *Murat v. Hutchinson*, 16 N. J. Law, 48, and cases there cited; *Drake v. Berry*, 42 N. J. Law, 60), in statutory proceedings (*Clifford v. Overseer of Frankford Tp.*, 37 N. J. Law, 152), and even in penal actions (*Dallas v. Hendry*, 8 N. J. Law, 973; *Hageman v. Van Doren*, 6 N. J. Law J. 310). The same principle has been applied in this court with respect to an imperfection appearing in a writ of error. After joinder in error it was held too late to object. *Hinchman v. Rutan*, 81 N. J. Law, 496, 502. It must be taken for granted that the Legislature granted the mechanic's lien law in view of this well-known rule, and of the principle that underlies it, and that there was no intent to abrogate either; unless such intent is clearly expressed in the language of the act. It is insisted that such an intent is manifested in the language of section 24. Some significance is attributed to that part of the section that requires the declaration to contain a recital that the defendants were summoned, and how they were served. But this is substantially the old familiar requirement of the common law that the statement of the cause of action in the declaration shall be preceded by a recital of the mode in which the defendant became subject to the jurisdiction of the court. That recital forms a part of the record (the writ itself does not), and, where the validity of the record depends upon the mode in which the defendant is notified of the suit, the recital is important, since it then constitutes the only record evidence that subjects the defendant to the force and effect of the judgment. But, if the defendant appears, his appearance is entered upon the record, and the validity of the proceeding no longer depends alone upon the mode of his notification. It then depends upon the fact of his appearance. This is a general rule, universally applied at common law, and we are unable to see any evidence that the Legislature in this statute intended to abrogate it. Misnomer of the defendant, misnomer of the plaintiff, misstatement of the character in which a party sues or is sued, misstatement of the mode in which a party is served with process, the statement of a mode of service insufficient to bind the party, misstatement of the form of action—these and all similar matters, although they appear upon the face of the record, and show non-conformity of the declaration with the recital of process and service, or show that the defendant was not required to answer the declaration, yet they must be availed of,

even at common law, by motion to set aside the writ of its service, or by plea in abatement of the writ. None of them could be availed of by demurrer to the declaration or by plea to the merits. All were and are waived by a general appearance. 1 *Ohlt. Pl.* (13th Am. from 6th London Ed.) pp. 244-255, 281-283.

Section 24 declares that "the practice, proceedings and pleadings thereon shall be conducted and the judgment entered as in suits in such circuit court to recover money due on contract; and all or any of said defendants may jointly or severally have any defence or plea to the same that might be had by the builder to any action on said contract without this act." It is impossible to give any force or effect to this clear and emphatic language unless it means that a defendant who makes a successful defense shall have the full benefit of his success by the rendition of a judgment conclusive against the plaintiff, and, on the other hand, that, if the defense be unsuccessful, in whole or in part, the plaintiff shall have the benefit of that for which he prevails, by the conclusive judgment of a court of record. The statute, in declaring that judgment shall be entered as in suits in the same court to recover moneys due upon contract, means that the judgment shall constitute a conclusive determination of the merits of the case, if they were submitted to the adjudication of the tribunal.

Stress is laid by counsel for the plaintiff in error upon the circumstance that section 24, after providing generally for the practice, proceedings, pleadings, and judgment, goes on to say that: "In case a verdict be rendered or judgment be given against the builder only, judgment shall be given for the land owner with costs against the plaintiff; and in case judgment be given for the plaintiff it shall be entered against the builder when he was actually served with the summons, generally, and with costs as in other cases; and when only legal service of the summons has been made, judgment against the owner and also against the builder shall be specially for the debt and costs to be made of the building and lands in the declaration described." But, as already remarked, it is, in our opinion, quite irrational to attribute to the Legislature the purpose to establish, in the form and effect of the judgment, where that judgment follows after a trial upon the merits, a discrimination that is dependent solely upon the mode in which the defendant received notice of the suit. The discrimination (as we have already observed) applies solely to the builder—the very person who, according to the averments of the declaration, sustained by the verdict of the jury upon a trial had in presence of both parties, is the person who contracted the debt for which the plaintiff sues. A special judgment against the builder, so far as his personal liability is concerned, is no judg-

ment at all. It would require strong language to justify us in attributing to the Legislature so unjust a purpose. In our view, the argument that, after a general appearance and defense the judgment against the builder shall be special, not only overlooks entirely the general spirit and purpose of the act and the language of that part of section 24 which renders the proceedings conformable to those in an ordinary action upon contract, but also overlooks the force and effect of the word "only" in the clause declaring that, "when only legal service of the summons has been made," judgment against the builder shall be special, etc. This word "only" cannot have been intended to make the phrase mean "when only legal, and not actual, service has been made." It is not within the fair contemplation of the act to suppose that a single defendant would be served twice—once actually and once legally. The phrase must mean, therefore, that the special judgment against the builder (that is, the denial of a judgment in personam) shall apply only when the force of the judgment depends upon the method of service; that is, when there has been no appearance, defense, or other submission to the court's jurisdiction.

It can hardly be seriously claimed that a builder served "legally" with the summons, who then appears and makes his defense upon the merits, is not, in the event of his success, to have the benefit of a judgment conclusively establishing as against the plaintiff the nonexistence of the debt sued for. If we deny to him this benefit, we take away at once the principal, if not the sole, motive for appearance. How, then, can it be argued that, in case the same defendant be unsuccessful in his defense, the plaintiff shall have no judgment conclusive upon the defendant personally? Common justice requires that estoppel shall be mutual. And the legislative intent to prevent any unilateral estoppel is clearly evinced by the language of section 24, which declares that, "in case no general judgment is given against the builder" (that is, if the builder is not estopped by the record), "such proceedings or recovery shall be no bar to any suit for the debt, except for the part thereof actually made under such recovery" (that is, the plaintiff is not to be estopped by a special judgment against the builder).

One or two simple illustrations will, we think, demonstrate the unjust, and even absurd, consequences that would flow from adopting the construction of this act with respect to the entry of judgment that is contended for by the plaintiff in error. Suppose a nonresident builder to be sued in a mechanics' lien suit, and to be served "legally" with the summons. He is, of course, under no obligation to appear and make defense. He believes that he has a defense upon the merits to the whole or a part of the plaintiff's claim. He comes into court and de-

fends because he is satisfied with the tribunal, and hopes to prevail in the action. If he succeeds in overthrowing the plaintiff's claim in toto, and obtains a verdict in his favor, he has a judgment that is conclusive against the plaintiff in all jurisdictions. On the other hand, if the plaintiff succeeds wholly, he has no judgment binding the builder personally, but only a declaration that the debt thus established is a lien upon the lands of a third party; or, if the lien fail, then the plaintiff has no judgment effective for any purpose. This result is highly unjust to the plaintiff. Or suppose the same builder makes defense for the purpose of disputing a part only of the plaintiff's claim. He succeeds to the utmost of his contention, and reduces the demand, let us say, from \$10,000 to \$5,000, and for the latter amount a verdict goes against the defendant, who has thus accomplished the very purpose of his making appearance. Yet in this event neither the plaintiff nor the defendant is to be given the benefit of an adjudication conclusive upon the controversy; for (according to the construction contended for) the judgment against the builder is to be special, because of the circumstance that he received his summons by mail instead of personally. And by the very terms of section 24, there being no general judgment against the builder, "such proceedings or recovery shall be no bar to any suit for the debt, except for the part thereof actually made under such recovery." Thus the plaintiff is at liberty to make the part recovered out of the lands of the owner, and then to pursue the defendant builder in this or any other jurisdiction, and litigate anew the excessive claim that he has once unsuccessfully made. Of course, it is not to be expected that either the plaintiff or the defendant would proceed with an action that, after a fair trial of the merits, was to result in such a "lame and impotent conclusion." And so the consequence of adopting the construction contended for by plaintiff in error would be a pro tanto nullification of the statute.

Upon the whole matter, therefore, we are of the opinion that so much of section 24 as prescribes a special judgment against the builder when only legal service of the summons has been made upon him must be construed as referring alone to cases of judgment entered by default, where the force and effect of the judgment depends upon the service of process, and not at all to cases where the defendant has entered a general appearance to the action, or has made defense upon the merits.

Nor is there, so far as we have observed, any reported decision in this state to the contrary. Such cases as we have noticed tend to support the construction above declared. In *James v. Van Horn*, 39 N. J. Law, 353, the builder did not appear, and the sole controversy was between the plaintiff and the owner. In answering the owner's insistent

that the trial judge had erred in not requiring proof of the manner of service of the summons, Mr. Justice Reed, speaking for the Supreme Court, treated this question as immaterial so far as the owner was concerned, because as to him the judgment was to be special in any event; that is, it simply established that the debt, if proved, constituted a lien upon his lands. In stating that the question whether the service of the summons was effected in one or the other of the modes mentioned in the statute was important only in determining the form of the judgment against the builder, the learned justice of course referred to such a case as the one then presented, where the builder had not appeared or pleaded. And in discussing the fifth assignment of error, which alleged the declaration to be insufficient because it contained no recital of the mode of service of builder and owner, Mr. Justice Reed said: "If this was a material averment as to the owner, I think the objection should have been raised by demurrer. After plea interposed it was too late to raise the question on the trial, and the verdict would cure the defect in error." And in the same case it was held that a summons in a lien claim suit may be sealed by the attorney, such being the practice in ordinary actions at law.

In *Cornell v. Matthews*, 27 N. J. Law, 522, the summons was in violation of section 8 of the act of 1853 (section 23 of the act of 1898), because it described the defendant as builder only, whereas the declaration, after proceeding against him as builder, according to the act, concluded with an averment that the debt was a lien on defendant's interest in the land. Defendant pleaded non assumpsit, payment, and the statutory plea of land not liable. The Supreme Court held, on error, that the defendant, by appearing to the suit generally, and pleading the plea appropriate to the owner of the land, waived the informality of the summons.

In *Ennis v. Eden Mills Paper Co.*, 65 N. J. Law, 577, 48 Atl. 610, the defendant was a corporation sued as builder and owner, and it appeared upon the face of the record that the summons was served by delivery to the secretary, without its appearing that the president could not be found and had no dwelling house in this state at which process might be served. After judgment by default, application was made to the circuit court to open the judgment, but upon other grounds. That court denied the application, whereupon a writ of error was sued out, and this court sustained the judgment of the circuit court, holding that its decision was correct upon the question that was presented there, and that the other question (the defective service of the summons) was waived because not presented below in the application to open the judgment. The same disposition, and for the same reason, was made of defendant's objection that the declaration

was defective in not showing the manner in which the process was served. Upon the question that was contested in the circuit court there was some difference of opinion in this court, but upon the question of waiver of the objection to the service of the summons and of the objection to the declaration there was no dissent. In short, this court in that case treated the defendant as it would have treated any defendant in any action upon contract, requiring no more certainty in the recital concerning service of summons than would have been required in any case, and holding that the defendant had waived the objection to the mode of service by making an application to open the judgment upon grounds that were not jurisdictional.

In the case now under review those assignments of error that attack the entry of a general judgment against the plaintiff in error must be overruled for the reasons above given.

But we find in the record certain trial errors that are evidenced by bills of exceptions and pointed out by assignments of error. These all relate to the instructions of the trial judge to the jury with respect to the measure of damages, and they turn upon a single question. Plaintiff's action was brought to recover the amount due for lathing and plastering the building in question under a contract made between him and the defendant builder, which provided compensation for the plaintiff at the rate of 25 cents per square yard. The making of the contract on those terms, and its performance by the plaintiff, were not disputed. As to the quantity of work that had been done, the plaintiff's evidence tended to show that there was a local custom under which the area of walls and ceilings lathed and plastered was estimated according to the number of lath that were used, 1,000 lath being treated as equivalent to 60 square yards. Whether in fact 1,000 lath would cover 60 square yards, or more or less, depended according to the evidence upon the width of the lath, the spaces left between them as laid, and upon other contingencies. The defendant introduced evidence tending to show the actual number of square yards that were lathed and plastered. Upon this showing, the amount due for the work was materially less than would result from adopting the plaintiff's method of estimation. The trial judge left it to the jury to determine which method of measurement was more accurate, and permitted them to base their verdict upon either method that they might adopt. In this, we think, there was manifest error. The agreement was to pay for the lathing and plastering at a specified rate per square yard. This, by its terms, meant the measured area of the walls and ceilings lathed and plastered. There was no ambiguity in the contract that would admit of the use of a local custom to explain or vary its terms.

Because of these trial errors the judgment of the circuit court should be reversed, and a venire de novo awarded.

The court voted upon three queries as follows:

First. On such proceedings as were had in the circuit court, could that court legally render a general judgment against the builder?

Yes—GUMMERE, C. J., and HENDRICKSON, PITNEY, SWAYZE, BOGERT, VREDENBURGH, VOORHEES, and VROOM, JJ.

No—MAGIE, Ch., and VAN SYCKEL, DIXON, GARRISON, and FORT, JJ.

Second. Was error committed in the trial with regard to the measure of damages?

Yes—All.

Third. Shall the judgment be reversed?

Yes—All.

(30 N. J. L. 341)

CULVER v. LIEBERMAN.

(Court of Errors and Appeals of New Jersey.
July 20, 1903.)

ERROR—PRESUMPTIONS—MECHANICS' LIENS—SINGLE DEBT—ENFORCEMENT—PRIORITIES.

1. On error it will be presumed that a court of general jurisdiction had the authority to enter the judgment which it did, unless the contrary appear in the record.

2. When a single debt exists for work done or materials furnished in the erection of several buildings, the liens therefor are to be enforced by a single lien claim and a single declaration, in which the debt is to be apportioned among the buildings and curtilages according to their respective liability. On this point *Johnson v. Algor*, 47 Atl. 571, 65 N. J. Law, 363, is overruled.

3. The rights of the builder and the several owners and mortgagees in proceedings under the mechanic's lien act (P. L. p. 538), are to be settled in a single suit, by the judgment in which the priorities of the liens of the plaintiff and each of the defendants are to be settled.

(Syllabus by the Court.)

Error to Circuit Court, Hunterdon County.

Action by Mulford B. Culver against Mathias Lieberman. Judgment for plaintiff, and defendant brings error. Affirmed.

H. B. Herr, for plaintiff in error. George H. Large, for defendant in error.

FORT, J. This is a suit upon a mechanic's lien claim. The lien claim, as filed, stated that the work had been done on separate buildings, which were separately described, with their curtilage, and the contract price for the whole work was specifically apportioned to each building, pursuant to statute. A single summons issued in the case, and but one declaration was filed therein, with the same apportionment to the respective buildings as in the lien. The declaration set forth that there was actual service of the summons, and the defendant pleaded the general issue only thereto. The lien claim, summons, and declaration all declare against the defendant as both builder

and owner. The writ has brought up the lien claim and pleadings and the bills of exception only. Neither the summons nor its return as to service was offered in evidence, and hence is not in the record.

The first exception upon which error is assigned is to the refusal of the court to charge the following request: "It appearing by the affidavit of service of the summons and declaration, and also by the testimony offered in the cause, that the defendant was a nonresident of this state at the time the lien claim was filed, and had been a nonresident ever since, counsel for the defendant requested the court to charge the jury that no personal judgment could be rendered against the defendant." This request to charge was rightly refused. The fact that the defendant was a nonresident of the state when the lien claim was filed, and had been a nonresident ever since, in no way excludes the possibility of personal service upon the defendant within this state, under which service, by the express provision of the statute, a general judgment may be entered. This court will presume authority in a court of general jurisdiction to enter the judgment which it did, unless the contrary appears. But in this case the defendant appeared and filed a plea of the general issue. This of itself will give the court authority to enter a general judgment, irrespective of how the service was made. *Smith v. Collyty* (June Term, 1903), 55 Atl. 905.

The other assignment of error is based upon an exception to the ruling of the trial court in giving leave to the plaintiff to amend, if necessary, by filing a separate declaration for each building, and allowing separate verdicts thereon on the consolidation of the suits for trial. The course pursued by the learned trial justice was in conformity with the practice pointed out by the Supreme Court in *Johnson v. Algor*, 65 N. J. Law, 363, 47 Atl. 571. Under the decision of the Supreme Court in that case, the plea of the defendant was held to deprive him of the right to object to any defect in the form of the summons, but not to the fact that separate declarations had not been filed in the suit reciting the claim against each building. We are unable to agree with the conclusion reached in *Johnson v. Algor*, supra, that separate summons and declarations are necessary in a suit upon a mechanic's lien claim filed against two or more buildings and the curtilages whereon the same stand. We think a single summons against all the defendants is sufficient. We also think a single declaration only is required. The statute clearly contemplates the filing of but one lien claim for labor or materials, or both, for the erection and construction of two or more buildings by the same builder. Section 22 of the act (P. L. p. 546), seems to make this clear. By section 24 of the act (P. L. p. 548), it is provided that the declaration in a lien

1. See *Mechanics' Liens*, vol. 34, Cent. Dig. §§ 173, 179, 259.

suit shall recite "that the owner and builder and other defendants were summoned and how served, and why such other defendants were made defendants." After this is done, the statute declares the declaration shall "be against the builder and in the same form as in other actions upon contract, and shall conclude with an averment that said debt is, by virtue of the provisions of this act, a lien upon such building and lot, describing the same as in such claim; and to such declaration a schedule may be annexed." By section 22 it is provided that, where but one lien is filed, but it covers two or more buildings, where such buildings "are built and constructed by the same person or persons" (this means the same builder, and has no relation to whom the owner or owners may be), it shall be lawful for the person or persons furnishing labor or materials "to divide and apportion the same among the said buildings in proportion to the value of the material furnished to, and the labor performed for, each of said buildings, and to file" with the lien "a statement of the amount so apportioned to each building in lieu of the bill of particulars required by the sixteenth section of the act." The statute then proceeds as follows: "Which said lien claims, when so filed may be enforced, under the provisions of this act, in the same manner as if said materials had been furnished and labor performed for each of said buildings separately." P. L. 1898, pp. 543, 548, 549, §§. 16, 22, 24.

A careful reading of all these sections makes it evident that there should be but one suit upon a mechanic's lien claim. In that suit (to use the language of the statute) the declaration is to "be against the builder." It is the debt of the builder, and whether the material or labor or both be furnished to one or ten buildings, so far as the builder is concerned, it is a single debt. The owner or owners, mortgagee or mortgagees, are made defendants, not that they are to answer for the debt, nor because they have contracted it, but to give them notice that for the whole or some apportioned part of the debt the land which they own, or assert a mortgagee's lien upon is claimed to be specially liable to the plaintiff, by virtue of the statute, for the whole or some part of the debt sought to be established against the builder in the action. This construction seems to be made all the more clear by the clause in section 24 of the act which declares: "and the judgment in any such case [that is, in a lien case where owners and mortgagees both are defendants] shall determine the priority of the liens of the plaintiff and each of said defendants, and any judgment or proceeding under the same, shall not affect the lien of any of said defendants, whose lien shall be determined to be paramount to that of the plaintiff." The intent of the statute was to give one suit against the builder arising out of a sin-

gle indebtedness for labor or materials, and to bring into that suit by the lien, summons, and declaration all persons who have any interest in the property against which the special judgment is sought, and in that suit to determine, first, the debt for which a general judgment may pass against the builder; second, against which buildings, respectively, if any, the plaintiff is entitled to a special judgment, as against the owner, for the amount of his lien claim as apportioned; third, what mortgage incumbrance is upon each piece of property, and the priorities between the mortgagees, and the plaintiff's special judgment as to each building and its curtilage. Many reasons suggest themselves why but one suit, under such circumstances, should be given. Where several pieces of property are involved, owners and mortgagees may overlap and make it impossible to adjust the equities and establish the priorities in separate suits; certainly without a consolidation of the actions. In one suit all rights can be adjusted and a judgment roll be made up, with a general judgment against the builder for the whole debt, and a special judgment against each building for the specific amount of the general judgment found to be a lien upon it, with a statement of the priorities of the mortgage liens, if any, thereon. It would not seem to be difficult to frame a declaration upon a lien claim, in which an apportionment is made of the debt alleged to be due from the builder on two or more buildings. The summons and declaration are each required to state in what relation each defendant stands to the suit—whether as builder, owner, or mortgagee. The land and building of each owner, and upon which the mortgagee's claim exists, must, in any event, be specifically set out. The defense is single. All defendants may plead the general issue—that the builder does not owe. Each owner may plead in addition the statutory plea of land not liable, and each mortgagee that the lien, if it exists, is subject to his mortgage. Under the pleadings the court is to try out the whole case, and all the issues, and to settle the priorities.

This conclusion leads to a disapproval of the construction put upon the statute by the Supreme Court in *Johnson v. Algor*, supra. No amendment of the declaration filed was necessary in this case, as the rights of the litigants and the priorities of the parties were all to be settled in the suit as instituted, and under the single declaration as filed.

The judgment in the record before us shows that the plaintiff did not take advantage of the permission granted by the court to amend and file separate declarations, but entered a single judgment generally against the builder for the whole debt, and a special judgment against each building for the amount apportioned to it in the lien and declaration. The judgment in the record being in that form, it is affirmed.

(69 N. J. L. 612)

PHILLIPS v. CROSBY.

(Supreme Court of New Jersey. Aug. 22, 1903.)

SALES — CORPORATE STOCK — WARRANTIES — REPRESENTATIONS AS TO CORPORATION'S PROPERTY — BREACH — COMPLAINT.

1. A declaration alleged breach of a warranty in a sale of oil stock, consisting of false representations as to the land of the company, number of wells in active operation, and dividends that were being paid. It further averred that defendant represented himself to be a director, and familiar with the affairs of the company, and that plaintiff purchased the stock relying upon such representations, which were wholly false, and that the stock was wholly without value, and the consideration paid therefor was wholly lost to plaintiff. *Held* that, while such declaration did not disclose facts sufficient to sustain a cause of action for deceit or for the recovery of money had and received, it was sufficient as an action to recover damages for breach of warranty.

2. In an action for breach of warranty in the sale of oil stock, it was not necessary, in order to sustain the action, that complainant had made a previous offer to return the stock.

3. Representations of fact as to the property of an oil company, its productiveness, and other conditions relating to the value and desirability of its shares as an investment, are proper elements of a warranty in the sale of the stock, and are not objectionable, as relating to property other than the thing sold.

Action by Arvine H. Phillips against George W. Crosby. On demurrer to the declaration. Demurrer overruled.

Argued February term, 1903, before GUMMERE, C. J., and FORT, PITNEY, and HENDRICKSON, JJ.

John J. Crandall, for plaintiff. Thompson & Cole, for defendant.

PER CURIAM. The action is on contract, and the declaration sets forth a breach of warranty in the sale of certain shares of the capital stock of the Ohio Oil Company, of the par value of one dollar per share. The warranty consisted of representations as to the lands of the company, the number of oil wells then in active operation thereon, their producing capacity, the output therefrom, the dividends that were being paid out of the income, and as to the value of the stock, which was alleged to be greatly in excess of the par value. It was further averred that defendant represented that he was a director of the company, and familiar with its affairs; that, relying upon the representations thus made, the plaintiff paid the consideration price agreed upon for the shares, which he thereupon received, and still holds; that the representations are wholly untrue, and that the shares of stock were and are wholly without value; that thereby such consideration money was wholly lost to the plaintiff, to his damage, etc.

The defendant filed a general demurrer, and contends in its support that the declaration does not set forth an action of tort for deceit, nor for the recovery of money had and received, after returning, or offering to

return, the property sold; these being the remedies pointed out in *Byard v. Holmes*, 33 N. J. Law, 19, where the sale has been procured by means of false and fraudulent representations. It is true that the declaration does not disclose the facts necessary to sustain an action of the form and character of either of those thus named, but it does disclose, as we think, allegations of fact suitable to an action upon contract for breach of warranty; and in order to sustain such an action, no previous return, or offer to return, the thing sold need be made.

The demurrant further contends that the declaration is not sufficient to support an action on contract for breach of warranty because the facts alleged, except as to the value of the stock, do not relate to the thing sold, which was the stock, and that the alleged representation as to the value of the stock was a mere expression of opinion. But the question whether such a representation amounts to a warranty, or is a mere expression of opinion, is usually a question for the jury. Under the facts pleaded in this case, we think the question is one for the jury.

Nor do we think that the other representations of fact as pleaded may be disregarded as not relating to the thing sold. Representations of fact as to the property of the company, its productiveness, and other conditions, having relation to the value or desirability of its shares as an investment, may be regarded as proper elements in a contract of warranty in the sale thereof. This principle is illustrated in the cases of *Blake v. Watson*, 45 Conn. 323, 29 Am. Rep. 683; *Callahan v. Brown*, 31 Iowa, 333; *Humphrey v. Merriam*, 46 Minn. 413, 49 N. W. 199.

The demurrer is overruled, with costs.

(69 N. J. E. 475)

In re DRIES' WILL.

(Prerogative Court of New Jersey. June 30, 1903.)

WILLS — GIFT TO SUPPOSED WIFE — FRAUD.

1. A will in favor of testator's supposed wife is not void on the ground of her fraud, though she had not been divorced from a former husband, still living, he having told her that he was divorced, and she knowing that he was living with another woman, by whom he was having children, and she having told these facts to testator.

Appeal from Orphans' Court, Essex County.

In the matter of the probate of the will of Philip Dries, deceased. From a decree refusing probate thereof, appeal is taken. Reversed.

Abner Kalisch (Samuel Kalisch, of counsel), for appellants. Frederick C. Pressel, for appellee.

REED, Vice Ordinary. Philip Dries died, leaving a will, in which he said in item 2: "I give, bequeath and devise, a house and lot of land known as No. 201 Belmont Ave-

nue in the City of Newark, where I now reside, together with the furniture therein contained, to my beloved wife, Louisa Dries, to be used and enjoyed by her during the term of her natural life—that is to say: so long as she remains single. In case she should marry, and from and immediately after her death, I give, bequeath and devise to all my surviving children, their heirs and assigns, forever, both real and personal, to be divided share and share alike.” This will seems to have been executed on the 20th day of November, 1899. This will was denied probate in the orphans’ court, because, in the opinion of that court, it was executed by Philip Dries in the belief that Louisa Dries was his legal wife, when in fact she had, at the time of her marriage with him, a living husband, known to her to be living, and of which fact she failed to inform the testator. There can be no-doubt that if a woman, at or before a marriage ceremony, represents herself to be competent to marry, or conceals the fact that she was not so qualified, and thereafter her supposed husband makes a will in her favor because he believes her to be his wife, and it turns out that she had, and knew she had, another husband living when she married the testator, such testamentary disposition will be held void. To avoid a will upon this ground, however, the representation or concealment should be fraudulent, and it should appear, not necessarily that they were made to induce the execution of a will, but that they did induce its execution. In *Wilkinson v. Joughin*, L. R. 2 Eq. Cas. 317, the misrepresentation by or silence of the supposed wife was willful. In *Kennell v. Abbott*, 4 Ves. 802, a man had, in the language of the Master of the Rolls, falsely assumed to be the husband of the testatrix, he having a wife living at the time of his marriage with testatrix, and this alone could be supposed to be the motive of her bounty. In the present case I am inclined to believe that the woman herself was deceived, and that she thought she was free to marry Mr. Dries. It appears that in 1875 she had married a miserable fellow named Meyer. He abused her. She had him arrested, and before the magistrate it appears they signed separation papers of some kind. When they separated does not appear, but the separation appears to have occurred some time before the year 1888. She thereafter lived alone up to September, 1888. Her first husband was then living with another woman, by whom he had two children. In September, 1888, she married a Mr. Heiberger, who seems to have died in 1893. On August 1, 1897, she married Mr. Dries, the testator. She says that, in addition to her knowledge that her first husband was living with a woman as his wife, Meyer himself told her that he had a divorce. Meyer denies that he did so tell her, but he is so entirely despicable that his word goes for very little. I incline to the belief that he did tell her that he was di-

vorced. A person with more knowledge of the world would not have relied upon the facts which she details, but would have had the records of the appropriate court searched to ascertain the truth of Meyer’s assertion. But she is an ignorant woman, little acquainted with our language and our customs. The fact that Meyer was living with another woman, by whom he was having children, of which she says she was informed, would not be unlikely to lead her to the belief that she was free to marry. Again, she says she told Mr. Dries, before her marriage with him, that she had had a husband, who was living. The learned judge who heard the case before did not believe this, because it was unlikely that Mr. Dries would knowingly become a bigamist. This conclusion rests upon the assumption that she told Mr. Dries the bald fact that she had been married to a man named Meyer, who was still living. I think it probable that she not only told Dries that she had been married to a man still living, but that she told him substantially what she has told the court about her relations with him. After telling of the trouble which the daughters of Mr. Dries made when they learned of his intention to marry her, she says that they (the daughters) told him all kinds of stories about her. She was asked, “Did they tell him anything about you?” She said: “They said I got another man. That is what they said. He told them I told him all about it; he know it. I told him right away. He says I was foolish to live so long with a man like this, like he is.” Again, she was asked on cross-examination, “You say you told him you were a married woman at the time he married you, did you?” She said, “Yes, sir; I did. Q. Was that before you married him? A. Before I married him I told him all about it. Q. (By the Court.) Well, where was it that you told him that—that Meyer had been your husband? A. He came over to my house on Sunday to see me. Q. This was before you were married? A. Yes, sir. Afternoon the youngest one, or one that is going on nineteen now, he got her with him on same day. She was over, and had been with me, and then, after dinner she wanted to go off, and he stayed until supper time, and then he go back home.” Again, she says: “I told him I had a man, Mr. Meyer, and he is married, and then I was a widow and all. He has children. And then I married Heiberger, and I am now over three years a widow from Heiberger, when he died. He says, ‘That it is all right.’ Q. Did you tell him that Meyer was living? A. Yes, sir; he knew it, I told him. Q. You knew it then, too? A. I told him on account— I says he has got a wife and children already. He knew all about it.” She does not say that she told Mr. Dries that Meyer had told her that he had a divorce. She does say that she told Mr. Dries “all.” It is not improbable that the “all” included the story of Meyer’s visit to

her, and statement that he was divorced. However that may be, I have no doubt that she talked with Mr. Dries about the existence of Meyer, and that Mr. Dries knew that Meyer had been her former husband, and was still living. The witness says that Mr. Dries told her that his daughters had told him that she had a husband, named Meyer, living. One of the daughters admits that she knew it. She says that she cut a scrap from a newspaper. She denies, however, of telling her father about it. But, taking into account the inimical feeling towards this witness, it is in the highest degree improbable that, if the daughters had knowledge of such a fact, they did not promptly communicate it to their father. The daughter says that she got her information about three years ago—she was speaking in January, 1902. She was so informed, therefore, 10 months before the will was made; and if she communicated her information to her father within that time, testator knew of it, and had probably discussed the matter with his supposed wife, before executing his will. The daughter is not certain of the date when she heard of the existence of Meyer, and it is as likely that she learned of it while her father was proposing to marry as it is that she learned of it afterward. Mr. Dries was probably little less ignorant than she, and accepted her account as sufficient to entitle her to marry him. I am constrained to the conclusion that it has not been proved that the will was the product of the woman's fraud, and that the will should be admitted to probate.

(69 N. J. L. 666)

C. B. COLES & SONS CO. v. BLYTHE.

(Court of Errors and Appeals of New Jersey.
July 20, 1903.)

**CERTIORARI—REVIEW OF FACTS—CERTIFYING
FACTS FOUND.**

1. Where a writ of certiorari is used as a writ of error to review the action of a lower court, not a special statutory tribunal, the Supreme Court and this court will not review findings of fact, if there is any evidence to support the findings.

2. Proper practice requires that the lower court should be called on to certify the facts found. If it is unable to certify the facts, depositions may be taken to determine what facts were found.

3. It is improper, in such a case, to bring up all the evidence taken in the lower court.

(Syllabus by the Court.)

Error to Supreme Court.

Action by C. B. Coles & Sons Co. against Kirk Blythe. Judgment for defendant (54 Atl. 240), and plaintiff brings error. Reversed.

George H. Pierce and Wm. D. Lippincott, for plaintiff in error. John J. Crandall and Ulysses G. Styron, for defendant in error.

SWAYZE, J. On November 26, 1901, a writ of attachment was issued out of the

Atlantic circuit court in favor of C. B. Coles & Sons Co. against Kirk Blythe as a non-resident debtor. Money due to the defendants was attached, and the auditor received the sum of \$846. On March 5, 1902, Blythe confessed judgment to Edwin Smith. Execution was issued thereon, supplemental proceedings were had, and a receiver appointed May 1, 1902. On the same day, upon the petition of Smith, the judgment creditor, the court ordered that the plaintiffs in the attachment suit show cause why the writ of attachment should not be quashed, upon the ground that Blythe was a resident of the state of New Jersey at the time the attachment was issued. Testimony was taken upon this rule on both sides, and on July 2d the application to quash the writ was denied, and the rule to show cause discharged. The conclusions of the circuit court, printed with the case, show that the justice holding the Atlantic circuit found as a fact that at the date of attachment the defendant was resident in Pennsylvania. On July 17, 1902, the proceedings were removed by certiorari to the Supreme Court. That court, at February term, 1903, reversed the order of the circuit court. 54 Atl. 240. The opinion states that the evidence is uncontradicted that at the time the attachment was issued Mrs. Blythe was at the house formerly occupied by herself and her husband in Atlantic City, and the Supreme Court concluded that that house was the defendant's dwelling house and usual place of abode, and that summons might have been served upon him there. A writ of error issued out of this court on March 13th, and upon an allegation of diminution in the record, a writ of certiorari was issued, to bring up "the writ of certiorari and return thereto, and the judgment thereon of the Supreme Court of the state of New Jersey, together with affidavit for attachment, writ of attachment, return of attachment, judgment of Edwin Smith, petition for discovery, examination on discovery, order appointing receiver, petition of judgment creditor, rule to show cause, order discharging rule to show cause, conclusions in the circuit court, reasons for reversal, the testimony taken under the rule to show cause issued out of circuit court of the county of Atlantic why the attachment in this case should not be quashed together with all things touching and concerning the same." In pursuance of this, all the proceedings have been printed. The writ of certiorari issued by the Supreme Court to the circuit court brought up the judgment, order, and proceedings dismissing the rule to show cause.

The practice adopted by counsel for the defendant in error in taking to the Supreme Court the evidence upon the rule to show cause was improper. The proper practice is clearly indicated in *Bisbee v. Bowen*, 55 N. J. Law, 69, 25 Atl. 855; *Stafford v. Mills*, 57 N. J. Law, 570, 31 Atl. 1023; *McAdam v. Block*, 63 N. J. Law, 508, 44 Atl. 208. In the

¶ 1. See *Certiorari*, vol. 9, Cent. Dig. § 182.

last case, the present Chief Justice, in a careful opinion, citing the cases, clearly stated that upon a writ of certiorari to review a decision of a lower court in a case of this kind, the review will be confined to errors in law. Proper practice requires that the court below should be called on to certify the facts found by that court. If, for any reason, the court is unable to certify the facts found by it, a rule may be granted by the Supreme Court to take depositions to ascertain the facts upon which the determination of the court below was made, as was done in *Stafford v. Mills*. Upon the facts found by the court below being certified, or ascertained by means of depositions, as the case may require, the Supreme Court determines whether or not any error in law has been committed. The writ of certiorari in cases of this kind takes the place of, and has the function of, a writ of error, and the Supreme Court cannot be required to review the evidence, to determine whether or not the findings of the lower court were correct. If there is any evidence to warrant the findings of the lower court, its conclusions upon the question of fact cannot be set aside, and the judgment can only be reversed for error in law. If that course had been pursued in this case, no difficulty could have arisen, for the circuit court found as a fact that the residence of Blythe was in Pennsylvania at the time the attachment was issued; and the testimony of at least two witnesses, if believed, justifies this finding. The Supreme Court fell into the error of overlooking this testimony. It appears to have been misled by the manner in which the case was presented. In the printed book, as presented to us, this testimony appears on pages 7 to 19. On pages 21 to 23 appear notices of taking affidavits, and on page 24 further depositions taken in the cause begin. All the subsequent pages to page 111, inclusive, are taken up with these depositions. It is quite apparent to us that the court assumed, from the manner in which the record was presented, that the testimony on pages 24 to 111, inclusive, was all the testimony in the case, and this error was a very natural one.

Since we find evidence supporting the finding of the circuit court, it is unnecessary, and, strictly speaking, improper, for us to consider the weight of the testimony; but as the practice in this class of cases has been somewhat unsettled until the recent cases above cited (none of which are in this court), we have reviewed all the testimony, and are satisfied that the conclusions of the circuit judge are correct, and that at the time of the issuing of the attachment, the defendant had no usual place of abode in this state at which a summons could be served. It is immaterial, under our decisions, whether or not his legal residence was in New Jersey. *Stout v. Leonard*, 37 N. J. Law, 492.

It was urged that the assignments of error in this case failed to present the question with definiteness, because they failed to point out the testimony which justifies the inference of the circuit court judge; but it is not the function of an assignment of error to state evidence. The error of law is clearly stated in the assignments.

The judgment of the Supreme Court should be reversed, and the rule to show cause discharged. The plaintiffs in error are entitled to costs in both courts.

(64 N. J. B. 599)

PUSTER v. PARKER MERCANTILE CO.

(Court of Chancery of New Jersey. March 10, 1908.)

SUBPOENA—MOTION TO SET ASIDE—FOREIGN CORPORATION.

1. Motion to set aside service of a subpoena, made on the president of defendant while casually in the state on private business, on the ground that defendant is a foreign corporation, not subject to the court's jurisdiction, will be denied; the service doing no harm.

Suit by Henry Puster, receiver, against the Parker Mercantile Company. Defendant moves to set aside the service of a subpoena. Denied.

Robert M. Boyd, Jr., for applicant. Robert S. Hudspeth, for receiver.

STEVENS, V. C. This is a motion to set aside service of a subpoena, on the ground that defendant is a foreign corporation, not subject to the jurisdiction of this court. The practice here adopted is that which prevails in the courts of the United States. *Goldrey v. Morning News*, 158 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517. It does not appear to have the sanction of the courts of this state. In *Kirkpatrick v. Post*, 53 N. J. Eq. 592, 32 Atl. 267, motion was made to set aside an order of publication as against two absent defendants who were nonresidents. The motion was denied both in the court of chancery and on appeal (53 N. J. Eq. 641, 33 Atl. 1059), on the ground that, being a mere notice to the defendants of the pending litigation, and thus affording them an opportunity of coming in and taking part in it if they saw fit, it could not be the subject of complaint, as it could do them no harm. In that case, there had been an order of publication. A notice of this order had not only been sent through the mail, but had actually been received. In the case in hand, the subpoena was served upon the vice president of the corporation while casually in the state on private business. The situation in both cases is substantially the same. If in the one case the service could do no harm, neither could it in the other. It gave in both actual notice of the pendency of the suit, and an opportunity to come in and defend on the merits, at the option of the person sued. In neither case, to use the language of the Chief Justice in the case cited, is it to be assumed

that the court of chancery would pronounce a decree, founded on process of this character, that would be illegal and contrary to the Federal Constitution. If the fact be truly set out in defendant's affidavits, it was not at the time of attempted service within the state for any purpose whatever, and consequently no better served and more subject to the jurisdiction of this court than was the defendant, Post, in the case cited. As a matter of practice, it seems to me that it would be most illogical to hold that in the case of publication, followed by service out of the state, the motion to vacate should, on the ground stated, be denied, while in the case of service within the state, equally ineffective, of itself, to bring the defendant within the jurisdiction, the motion to set aside the service should be allowed. The case principally relied on was the case of the Camden Rolling Mills Co. v. Swede Iron Co., 32 N. J. Law, 16, but that case came up on demurrer to a plea to the jurisdiction, the plea being sustained. The case is an authority for the position that if defendant pleads and proves the facts set up in his affidavits, the court will dismiss the bill for want of jurisdiction to adjudge the merits. It is not an authority for the propriety of this method of procedure. In *Moulin v. Insurance Co.*, 24 N. J. Law, 234; *Id.*, 25 N. J. Law, 57, there was also a plea to the jurisdiction. I do not think that the service has been proved to be fraudulent.

The application should be denied.

(65 N. J. E. 161)

MARVEL v. FRALINGER et al.

(Court of Chancery of New Jersey. Sept. 4, 1903.)

ANSWERS TO INTERROGATORIES—AFFIDAVIT—EXECUTION OF CONTRACT—EVIDENCE.

1. Defendant answered interrogatories concerning a contract he was alleged to have executed that he had never seen it, and that it was never executed. *Held*, that his affidavit to the truth of his answers "to the best of" his "knowledge and belief" was an assertion that he, using his best recollection, was unable to recall such an occurrence; the fact being one concerning his own act, of which he must have had knowledge had it existed.

2. The circumstances adduced in a suit to compel specific performance of a contract *held* to support the positive testimony of complainant that the contract was signed, and to overcome the negative testimony of defendants in their sworn answers to interrogatories.

Suit by Philip I. Marvel against Nettle Fralinger and others. Decree for complainant.

G. A. Bourgois and Thompson & Cole, for complainant. S. H. Grey and E. Cooper Shapley, for defendants.

REED, V. C. This bill is filed to compel the defendant Nettle Fralinger to specifically perform a contract to convey a one-fourth interest in a certain tract of land in Atlantic City. This property appears to have been

owned by Nettle Fralinger, John L. Young, Stewart McShea, and the complainant, Dr. Marvel, each owning a one-fourth interest. There was a mortgage upon the property of \$43,000. The alleged facts upon which the complainant's suit is based are these: Prior to August 24, 1899, there was a parol agreement between Dr. Marvel and the three other owners by which these three were to convey their interest to Dr. Marvel. On the evening of August 25th the parties met, confirmed the terms of sale, and Dr. Marvel gave a certified check for \$10,000 as part of the consideration for the purchase. This check was dated August 24th, and was made payable to the order of Dr. Marvel himself, and was indorsed by him. A receipt was given for the check by Mr. Young, one of the owners, in which it was stated that the check was given on account of the purchase of the tea property, this being admittedly the property in question. A formal agreement in writing was later prepared by Walter McShea, a lawyer, and a son of Stewart McShea, one of the owners. This agreement was signed by Mr. Stewart McShea, by Young, and Mr. and Mrs. Fralinger, and presented to Dr. Marvel by Walter McShea. Dr. Marvel refused to accept this agreement because it recited that the consideration for the property was \$200,000 and the mortgage of \$43,000. Mr. Walter McShea then prepared another agreement, dated August 25, 1899, which he presented to Dr. Marvel, and which Dr. Marvel refused to accept because it recited that the consideration was \$182,250 and the assumption of the mortgage of \$43,000, while the real consideration for the three-fourths interest to be conveyed was \$150,000, including the mortgage. Then a third agreement was prepared, which was explanatory of and supplemental to the last-named agreement. This agreement was signed by Mr. and Mrs. Fralinger in their store, in the presence of Dr. Marvel and Mr. Cole. Dr. Marvel, upon the reception by him of the explanatory agreement, accepted also the second agreement, which second agreement, as already remarked, stated the consideration to be \$182,250 and the assumption of the \$43,000 mortgage. The explanatory agreement recites that whereas, the agreement of August 25, 1899—the second agreement, just mentioned—fixed the consideration to be paid for the interests of McShea, Young, and Fralinger by defendant at the sum of \$182,250, and whereas, the said parties have given a receipt to Dr. Marvel for \$32,250, which sum has not in fact been paid, but was given for services rendered, according as agreed to as a benefit to said Marvel, whereas \$10,000 was paid at the time of signing the second agreement: Now, this agreement witnesseth that the true consideration for the transfer of the property is the sum of \$150,000, and not \$182,250, as stated in said agreement, and that upon the settlement under the terms of said agree-

ment, only the sum of \$150,000, less the mortgage, is to be paid. Dr. Marvel's explanation why he accepted the second agreement with the explanatory agreement, instead of having the true consideration put in a single agreement, is this: He had entered into an agreement to sell a one-half interest in the property to a Mr. Hamburg at the rate of \$243,000 for the entire interest in the property or \$121,500 for one-half, and he wished it to appear that in purchasing the property he (Marvel) had paid at the same rate. His purpose in doing this, he says, was that, in case he should die before the transaction with Mr. Hamburg was consummated, the latter could not say that this agreement was to buy at the same rate that Dr. Marvel had purchased, and then rely upon the agreement for sale to Dr. Marvel as evidence that the doctor had really bought at the rate of \$200,000 for the whole property, or \$100,000 for a half interest. It may be remarked here that the sum of \$182,250 is made up of three quarter interests at the rate of \$200,000 for the entire property and three-fourths of the \$43,000 mortgage, namely, \$38,250.00. Dr. Marvel's claim is that the true consideration is shown by the explanatory agreement, which he says was signed by Fralinger. This agreement is not produced. Dr. Marvel explains its nonproduction by saying that after it was signed he handed it to Mr. Young, who placed it in his safe, and that subsequent search has failed to discover it. The pivotal point in the case is whether this supplementary agreement was ever signed by Mr. and Mrs. Fralinger. Dr. Marvel swears that an agreement, a copy of which is attached to the answer, and known in the case as "Exhibit C3," was signed by Mr. and Mrs. Fralinger. Neither Mr. nor Mrs. Fralinger, the defendants, were sworn as witnesses upon the trial. There were attached to the bill, however, certain interrogatories propounded to them, which they have answered under oath. The answers to these interrogatories, so far as they are responsive, by the statute have the force of a sworn answer. To the interrogatory respecting the execution of the explanatory agreement styled in the interrogatories "Exhibit B" the defendants answer that they have no knowledge of its existence; that it was never seen by them, or either of them; and they aver that it was never executed. The truth of the answers to the interrogatories is sworn to "to the best of the knowledge and belief" of the affiants. The phraseology used by the affiants, it is contended, deprive their answers of the force which they would have had had they positively sworn that the explanatory agreement was never executed. It is insisted that the answers have no greater force than if they were sworn to on information and belief. The strength of the affidavit sworn to in this language must depend upon the fact which is the subject of the

affidavit. Where the fact is one concerning which the affiant may have had no knowledge, the affidavit amounts to no more than one made upon belief only. Where, however, as in this case, the fact is one concerning the affiant's personal act, of which he must have had knowledge had it existed, the affidavit is an assertion under oath that the affiant, using his best recollection, is unable to recall such an occurrence. The attitude of the parties, then, is this: Dr. Marvel swears to a positive act occurring in his presence, and the defendants swear that they have no recollection of such an act, after using their best endeavors to recall it. Assuming, however, that the answer of the husband and wife has the strength of a single sworn answer, which throws upon the complainant the burden of supporting his testimony by that of another witness, or by some corroborating circumstance, the query remains whether the complainant is so supported.

That an agreement similar in language to the explanatory agreement was actually drawn, is supported by the testimony of Judge Thompson. Judge Thompson testifies that about the time mentioned he was one day about leaving his office, when Walter McShea, who was seated, trying to dictate an agreement, called to Judge Thompson, and told him what he was doing. The result was that Judge Thompson himself sat down and dictated an agreement. Upon being shown what purports to be a copy of the explanatory agreement, Judge Thompson said, "I have examined this paper, and I believe it to be the paper that I dictated at Walter McShea's suggestion to my stenographer about that time." That a paper (which paper Dr. Marvel says was the explanatory agreement) was about that time signed by Mr. and Mrs. Fralinger at their confectionary store in Atlantic City is proved beyond doubt by the testimony of Mr. Cole. He tells of Dr. Marvel's calling upon him and asking him to go with the doctor to the Fralingers to witness a paper; that a writing was produced by Dr. Marvel; that Mr. Fralinger was there, and Mrs. Fralinger was sent for, and in his (Mr. Cole's) presence and in the presence of Dr. Marvel Mr. and Mrs. Fralinger signed the paper. Was this paper the explanatory agreement which Judge Thompson dictated? Dr. Marvel says it was. No other witness supports him directly in that assertion. I think it may be assumed, however, that the paper then and there signed must have been either the second agreement of August 25th or the explanatory agreement. There is nothing to show that there was any written dealing between Dr. Marvel and the Fralingers except in connection with the sale of this property. It does not appear at what place the Fralingers signed the first-mentioned agreement. The Fralingers were asked this question in the first interrogatory propound-

ed, which was this: "When and where and by whom Exhibit A was executed?" The defendants answer that: "Exhibit A was executed in September, 1899, as a final agreement between the parties. After execution, a copy was delivered to each party." This answer, it is perceived, leaves unanswered that part of the interrogatory which asked for information as to where it was signed, as well as by whom it was signed. If it had been signed at Fralinger's store, by the Fralingers, it is highly probable that Mr. Fralinger, at least, would have recalled that fact; and, if he had recalled it, he would naturally have insisted that the complainant and Mr. Cole had confused the execution of Exhibit A with the supposed execution of the explanatory agreement. If Exhibit A was not signed when Mr. Cole visited the Fralingers, some other agreement certainly was signed, and the strong probability is that it was the explanatory agreement.

Another circumstance may have some significance. Dr. Marvel visited the Fralingers in company with Judge Thompson on a later occasion, to make a tender to Mr. Fralinger of the amount due to Mrs. Fralinger under the terms of the explanatory agreement. He told Mr. Fralinger the purpose of this visit, and asked him to call his wife. Mr. Fralinger said that was not necessary; that he would act for her; but, upon Judge Thompson insisting, she was called, and in her presence Judge Thompson began to count out the amount due, as they supposed, under the explanatory agreement. Judge Thompson said that Mr. Fralinger remarked that he would not require the money to be counted, but would acknowledge that there was that much money there. The judge then presented a deed to be signed, and Mr. Fralinger said that he wanted to consult his solicitor, and did so over the telephone, after which he declined to sign the deed. The reason then assigned by Mr. Fralinger for his refusal was that Mr. Young, who had agreed to sell his interest in the property in concert with McShea and Fralinger, was not acting squarely with them, and did not intend to sell. Now, the amount tendered was less by several thousand dollars than the amount due under the terms of the first agreement, and no objection seems to have been raised by the Fralingers on that account. It must be admitted, however, that the force of any inference to be drawn from this fact is blunted by the consideration that Mr. Fralinger's mind, being intent upon a refusal of the tender upon the other ground, may have paid no attention to the amount.

There is another circumstance. Dr. Marvel says that the terms of the purchase were agreed upon at a meeting held on the evening of August 25th. At that meeting Fralinger was undoubtedly present with Young and McShea. At that meeting Dr. Marvel says the question of giving a receipt for the \$32,250 part of the consideration of \$182,250, was

discussed, and some one (he thinks Fralinger) was opposed to giving a receipt for money that was not paid. It was at this meeting that the check for \$10,000 in part payment of the three interests of the three vendors was handed to Mr. Young, for which Mr. Young at that time gave a receipt dated August 25th. This receipt states for what the check was given; that it was given in consideration for part payment of this property, the full amount, including the mortgage to be \$200,000. This meant undoubtedly that the property was sold upon that basis for the whole interest. It was undoubtedly understood that Mr. Young received this check for himself and the three other selling owners. He had the check cashed or placed on deposit to his credit, and he paid McShea and Fralinger each one-third of its amount. He gave this receipt and memorandum as a part of the transaction which occurred on the evening of August 25th, and I have no doubt it represents the general understanding of the parties at that time. Mr. McShea conveyed his one-fourth interest for the consideration mentioned. While this receipt would not control the terms of a different subsequent agreement, it is significant upon the question whether Fralinger would be likely to execute the explanatory agreement, which alone created a written contract in accordance with the terms of the receipt. I am of the opinion that all the circumstances support the positive testimony of Dr. Marvel that such an agreement was signed, and overcome the negative testimony of the defendants in the sworn answers to the interrogatories.

I will advise a decree that the Fralingers specifically perform the contract as its terms appear in the two mentioned agreements.

SEELBY v. ADAMS et al.

(Court of Chancery of New Jersey. Sept. 4, 1903.)

JUDICIAL SALE—AGREEMENT TO PURCHASE AND HOLD SUBJECT TO REDEMPTION—FRAUD—EVIDENCE.

1. Complainant, the owner of land on which were several mortgages and the liens of judgments, and which defendant bought in at the sale on foreclosure of the first mortgage, alleged that defendant orally promised that he would buy in the property, negotiate a mortgage sufficient to cover the purchase price and complainant's other indebtedness to defendant, and then convey the property to complainant or his appointee. Defendant denied the agreement. *Held*, that complainant's only ground of relief was fraud by which defendant obtained the property at an inadequate price under such an agreement; and that the theory of fraudulent conduct was refuted by complainant's delay of three and a half years after the sale and a year after being apprised of defendant's intention to deal with the property as his own before bringing suit to redeem, coupled with the facts that the placing of the mortgage to clear off the debts was impossible, that the amount of defendant's claims was near the market value of the property, that foreclosure was inevitable because the rents were insufficient to keep down interest or incumbrances and to pay taxes and

insurance premiums, and that complainant could not buy, and defendant had to buy to protect himself.

Suit by Silas S. Seeley against I. G. Adams and another. Bill dismissed.

William I. Garrison, for complainant.
Thompson & Cole, for defendants.

REED, V. C. The purpose of this suit is to get a decree that Israel G. Adams and Clement J. Adams bought in a property owned by the complainant, and which was sold at a foreclosure sale, under an agreement that said defendants should hold the said property as security for moneys owed them by the complainant, and that the complainant should have the right to redeem the property by paying the amounts paid by the defendants for and on account of said property, together with the amount owing to defendants and secured by mortgage upon the same at the time of the sale.

The complainant, in October, 1898, was the owner of a piece of ground on the corner of Arctic and Connecticut avenues, in Atlantic City. This property was incumbered by a first mortgage of \$15,000 and interest, held by Loeb and Straus, executors of Daniel Straus, deceased. This mortgage will be styled the "Straus mortgage." There was a second mortgage, held by Leo Loeb, for \$1,100, which will be styled the "Loeb mortgage." There seems also to have been two judgments—one the Harrity judgment, for \$95.45, and the other the Dunham judgment, for \$40.77—the liens of which were antecedent to the Loeb mortgage. Then there was a mortgage held by Israel G. Adams, dated January 28, 1897, for \$3,501, and still another mortgage held by Mr. Adams, dated January 24, 1898, for \$1,083.25. Somewhere between the Loeb mortgage and the last Adams mortgage, but exactly when does not appear, the lien of three judgments were fastened upon the property. One was for \$800 in a suit by the Atlantic Lumber Company against Mr. Seeley; another a judgment for \$203.97, owned by Daniel K. Donnelly; and another for \$359.56, owned by George W. Coles.

The bill sets out that Israel G. Adams, a real estate agent, had been the financial agent of the complainant, and as such had collected rents from the cottages upon the property, and had paid creditors, and distributed the money received in various ways. He had also secured loans for the complainant. The bill charges that Mr. Adams permitted the interest upon the Loeb mortgage to remain unpaid, which induced Loeb to file a bill to foreclose that mortgage; that Adams promised complainant that he would buy in the property at the foreclosure sale, and hold the same for the complainant, or such member of his family as should be named by him, and that he (the defendant) would negotiate a mortgage upon the premises sufficient to cover the purchase price, together

with the unsecured indebtedness of the complainant to Adams; and that upon the making of said mortgage Adams should convey the property to the complainant or his appointee. It charges that Adams bought in the property, and thereafter refused to recognize his agreement with the complainant, but instead claimed to hold the property as absolute owner. Such an agreement Mr. Adams denies.

The admitted facts are these: The defendant Israel G. Adams is a real estate agent in business in Atlantic City. He was in business with Clement J. Adams. He had negotiated the transaction which resulted in placing the Straus mortgage upon the Seeley property. He had also placed the Loeb mortgage upon the same property. This mortgage, Mr. Adams said, was originally made to a Mr. Wolf, and Mr. Adams agreed with Mr. Wolf that he (Wolf) should lose nothing by making the loan. Mr. Wolf having died, the mortgage came into the hands of Mr. Loeb as executor. Mr. Adams also indorsed the notes of Mr. Seeley, and to secure him against liability on account of such indorsements the two mortgages already mentioned were made to Mr. Adams. Mr. Adams also collected the rents from the cottages at a commission of 5 per cent., and paid them out on account of interest upon the incumbrances upon the property. In 1899, Mr. Loeb, the interest upon his mortgages being unpaid, began a suit to foreclose his mortgage. At the sale the property was bought in by Mr. Adams' solicitor, and title was taken in his own name. The sale occurred March 20, 1899, and the sheriff's deed was executed April 3d following. There was a double store and four cottages on the plot. Mr. Seeley had occupied the largest cottage and the store before the sale. After the sale he continued to occupy the cottage and the store. But he occupied the store under a lease made to him by Mr. Adams soon after sale for the term of one year at the rent of \$600. The cottage was occupied, Mr. Adams says, under an agreement that Mr. Seeley should stay in it until they could get a tenant, with the promise that he (Mr. Seeley) should move out as soon as a tenant could be procured. In 1902 Mr. Seeley procured a tenant, to whom he rented the cottage for \$400 for the season, receiving \$100 down. Mr. Adams, as soon as he learned of this transaction, demanded the rent, and, according to Mr. Adams' testimony, Mr. Seeley refused to turn over the \$100 unless it was understood that he (Mr. Seeley) should go back into possession in September. An action of ejectment was then brought by Mr. Adams, which ended in the dispossession of Mr. Seeley on January 18, 1902. Previous to this summary proceedings were instituted in the district court of Atlantic City to dispossess Mr. Seeley of the store for nonpayment of rent according to the terms of his lease, and he was dispossessed on June 4, 1901.

The ground upon which a purchaser at a judicial sale can be compelled to specifically perform a parol agreement to buy in and hold property for another is entirely settled. It is settled that the complainant cannot rest alone upon such a promise if the contract is denied, or the statute of frauds is invoked by the defendant. To entitle a complainant to relief, it must be upon the ground of fraud or oppression on the part of the purchaser, by means of which he has obtained the property of the debtor at an inadequate price under the assurance of a contract to reconvey the property to him, or to hold same subject to future redemption. *Merritt v. Brown*, 21 N. J. Eq. 401; *Walker v. Hill's Ex'rs*, 2 N. J. Eq. 513. It is obvious that the policy which supports the stability of judicial sales requires that such a parol agreement should be proved in clear and unmistakable terms. I have no doubt that there was a colloquy between Mr. Seeley and Mr. Adams respecting the purchase of this property. Mr. Adams says that he had the property bought in to protect himself as the holder of mortgages subsequent to the one under foreclosure. He admits that all he wished to get out of the property was the amount which the property had cost him, together with the amount which Mr. Seeley owed him. I think it very likely that the possibility of placing a mortgage upon the property large enough to pay off the other incumbrances, including those of Mr. Adams, was discussed. It is, however, quite clear that a mortgage of the amount required could not be placed upon the property. As already remarked, there was upon the property a mortgage for \$15,000. Then there were the *Harry and Dunham* judgments, and then the *Loeb* mortgage of \$1,100. The foreclosure sale cut out the subsequent incumbrance. Of these incumbrances there were two mortgages owing to Adams. The amount due to Mr. Adams for the moneys paid on account of prior incumbrances and notes afterwards paid by him was \$7,824.45. This amount, as I understand it, includes interest paid upon the *Straus* mortgage. The amount to be paid, therefore, out of the mortgage to be placed was at least \$22,824.45. But, to make it possible to reconvey the property to Mr. Seeley, so that it in his hands would be free from incumbrances, it would have been necessary to pay the *Donnelly*, the *Coles*, and the *Atlantic Lumber Company* judgments. There are incidentally mentioned other judgments subsequent to the *I. G. Adams* mortgages. Unless these were paid, they would, of course, again become a lien upon the property the moment it was conveyed to Mr. Seeley. If the arrangement contemplated the conveyance back to Mr. Seeley himself, the amount to be raised by the mortgage would greatly exceed the sum already mentioned. If the arrangement was to convey to some other one than Mr. Seeley, but for his benefit, the arrangement would seem

to be voidable as a fraud upon his creditors. Regardless of any judgments subsequent to the *Adams* mortgage, the amount required to be raised is stated to be \$24,466.51, or, eliminating the *Donnelly* judgment, which Mr. Seeley says he paid, the amount is \$24,252.54. Now, the value of the property was stated in a certificate signed by Mr. Adams at \$35,000, but that this was far above the market value is shown by the bid at the foreclosure sale, by the fact that no one has been able to turn the property to profitable account for \$24,446.51, and by the fact that it has been sold since for much less than \$35,000. Mr. *Weisenthal* thinks that the property was worth \$28,000. In April or May, 1892, a fire occurred, which injured the property, and Mr. Adams received \$5,470.85 insurance money. In May of the present year he sold the property for an express consideration of \$23,000. He says he received for the consideration an interest in a second and third mortgage, and that the amount he would realize would depend on what he got out of these mortgages. Apart from the insurance money received, it seems that the receipts from the property have been insufficient to pay the interest upon the incumbrances, the taxes, and the expenses of reparation, etc. Mr. Seeley occupied the store and the largest cottage until evicted therefrom, leaving three other rentable cottages. The receipts from the property from April, 1899, to June 15, 1903, were \$4,624.36, and the expenses, which include interest paid, taxes, insurance premiums, etc., were \$7,982.12, leaving a balance of accrued indebtedness chargeable to the property during that period of \$3,357.76. This, with the \$22,824.45, makes up a total of \$26,182.21 required to pay the *Straus* mortgage and the amounts paid by Mr. Adams on account of the property. This sum, I think, was close to the market value of the property before and after the foreclosure sale.

A comparison of the agreement with Mr. Adams as stated in the bill with the same agreement as stated in Mr. Seeley's examination in chief and his restatement on his cross-examination, discloses that Mr. Seeley has only a general recollection of a conversation with Mr. Adams, in which Mr. Adams promised to buy in the property, and put a mortgage upon it, for negotiating which he would charge no commission, and the mortgage should be large enough to pay all incumbrances and indebtedness due from Mr. Seeley to Mr. Adams. What probably occurred was a conversation in which Mr. Adams said he would buy in the property to protect his own mortgages, and that he thought a mortgage might be placed upon the property large enough to pay himself, and that all he wished out of the property was his own debt. Under the circumstances, that was a conversation likely to occur; but it is in the highest degree improbable that Mr. Adams bound himself to negotiate such

a mortgage for such an amount, and then to reconvey the equity of redemption to Mr. Seeley. After the foreclosure sale it is obvious that Mr. Adams would have been glad to dispose of the property to Mr. Seeley, or for his benefit, in any way to secure his own indebtedness. It is quite clear that Mr. Seeley himself was endeavoring to interest others in bringing about that result, and that at his instance two parties applied at the office of Mr. Adams to ascertain the amount necessary to clear the property. The certificate given by Mr. Adams on July 20, 1899, respecting the value of the property, was evidently intended to be used for that purpose. That purpose seems not to have been attainable. Now, assuming that the circumstances were such as in equity would permit Mr. Seeley to redeem this property upon paying to Mr. Adams the amount of his advances, it is quite clear that this right could not exist indefinitely. Three years and six months elapsed between the date of Adams' purchase and the filing of this bill. Mr. Seeley had been apprised of the intention of Mr. Adams to deal with this property as his own at the time when the rent for the large cottage was demanded. Mr. Seeley had been dispossessed of the store in June, 1901, and of the cottage in January, 1902. The delay in bringing this suit, coupled with the facts that the placing of the mortgage for an amount sufficient to clear off the debts was impossible; that the amount of the debts of Mr. Adams was near the market value of the property; that the foreclosure sale seems to have been inevitable because the rents were insufficient to keep down the interest upon the incumbrances and to pay taxes and insurance premiums; that Seeley could not buy, and Adams had to buy in the property—refutes the theory of fraudulent conduct on the part of Adams, and deprives the complainant of a right to relief. The person who now holds title to the property, not having been brought in as a party, of course would not be bound by any decree made against Mr. Adams.

I think the bill should be dismissed, but without costs.

(80 N. J. L. 614)

DUYSTERS v. CRAWFORD.

(Supreme Court of New Jersey. Aug. 25, 1903.)

EVIDENCE—LETTERS—SELF-SERVING DECLARATION.

1. Plaintiff's letter to defendant's attorney, purporting to show that he and defendant had theretofore agreed on a certain settlement, is not admissible in his favor as evidence of such settlement, though accompanied by the answer of the attorney that he had no information from defendant of the settlement.

Error to Circuit Court, Hudson County.

Action by George F. Duysters against Theron C. Crawford. Judgment for plaintiff. Defendant brings error. Reversed.

See 54 Atl. 823.

Argued June term, 1903, before GUMMERE, C. J., and FORT, PITNEY, and HENDRICKSON, JJ.

Theo. Rurode, George W. Flaacke, Jr., and Frederick R. Kellogg, for plaintiff in error. George T. Vickers and George S. Hobart, for defendant in error.

PER CURIAM. This suit was brought upon the common counts to recover a claim for legal services rendered during a period of three years and three months terminating about April 1, 1896. The bill of particulars consisted of a single charge for these services, \$2,000. There was also a credit on account of \$500. There was a verdict and judgment for the plaintiff below in the sum of \$1,996. This judgment has been removed into this court by writ of error.

The plaintiff below based his right to recover the amount of \$2,000 on the ground that it was an account stated, and the result of a parol agreement of settlement made between him and the defendant at a personal interview which took place at the office of the latter's attorney in New York City. In addition to his other evidence, the plaintiff offered in support of this contention a letter, written by himself to the defendant's attorney, dated March 23, 1896, purporting to show that he and the defendant had agreed upon the amount of the former's fees, and also to set forth the terms of the agreement. It further appeared that this letter was written and delivered to defendant's attorney four days after the making of the alleged agreement of settlement to which the letter referred. Upon proof of the letter being made, it was offered in evidence. Objection to its admission was duly interposed by the defendant. The objection was overruled, and the letter admitted in evidence. To this ruling exception was allowed and sealed, and error has been duly assigned thereon.

To better understand the character and effect of this ruling, it should be stated that the supposed agreement was not made to settle the amount of an existing indebtedness of defendant to plaintiff for legal services, the value of which had not been fixed by contract. It was rather the result of an effort on the part of the defendant, who was largely interested in certain gaslight companies, to terminate the plaintiff's connection therewith as counsel, and also as the holder of shares in said companies, which had come to him in consideration of his legal services in their organization and management. And an incidental object was to obtain the possession of certain papers and contracts of the companies then in the plaintiff's hands as such counsel. This appears from the plaintiff's statement of the agreement in his testimony. He says: "We

agreed that I should surrender all the papers in my possession, together with my contract which I had with him for stock, and for a ten per cent. interest in all the foreign patents, and release him absolutely and in full for all claims and demands whatever for the sum of \$2,000." The defendant was in England at the time of the trial, but his deposition had been taken, and was in evidence. In his testimony he denied making the agreement in question, or any agreement to pay more than had been already paid to the plaintiff by the defendant or his attorney. It is unnecessary to further review the evidence on either side.

From the foregoing it must appear that the use of the letter referred to in corroboration of the plaintiff's testimony was likely to have weight with the jury in prejudice of the defendant's rights. The letter, in addition to indicating that the amount had been agreed upon, also declared that upon receipt of the amount named, which was stated to be \$2,500, he (the plaintiff) was to turn over to defendant's attorney the stock and sign receipts in full. In order to give further effect to this letter in the plaintiff's behalf, the latter was afterwards permitted, over objection and exception, to refer to the terms of this letter, and to explain its contents, and to account for the discrepancy in the amount by saying that: "On the 20th of March he agreed to pay me \$2,500. Subsequently, in April, he withdrew that offer, and only offered \$2,000, which was the agreement." There is no question here of assent to or acquiescence in the statement of the letter by the defendant, for the plaintiff also offered, in connection with the letter to the defendant's attorney, the latter's reply, which was to the effect that he had no information from the defendant as to any agreement fixing the amount of the fees, and that the writer was in doubt whether the plaintiff's bill was against the company or against the defendant. That such a self-serving declaration is inadmissible as evidence unless it constitutes a part of *res gestæ*, or is made in the presence of the opposite party and is acquiesced in by him, is a principle so elementary as not to require any citation of authority in its support. The defendant in error has not cited any authority in support of the admission of this evidence. The only semblance of justification offered is that the answer to the letter was put in with the letter itself. But the answer, as before stated, was offered by the plaintiff also, and therefore could not possibly have the effect suggested by the plaintiff. We think the admission of the letter was injurious error, and, since the result must be a reversal of the judgment, the other assignments of error need not be considered.

The judgment will be reversed, and a venire de novo issued.

(25 R. L. 321)

THOMPSON et al. v. DYER.

(Supreme Court of Rhode Island. July 13, 1903.)

CHattel Mortgages—Recording—Validity Between Parties—Mortgages in Possession—Replevin—Verdict.

1. B. contracted to build cars for M., and received pay therefor. At the time for completion they were not done, and, M. demanding security, B. gave him a bill of sale thereof, which M. transferred. *Held*, that there was consideration therefor, and so, even if it was in effect a mortgage, it was as between the parties and the transferee in possession, and so against the sheriff, attaching the property for B. in a suit against M., valid, though unrecorded.

2. B. contracted to build cars for M., and received pay therefor. At the time for completion they were not done, and, M. demanding security, B. gave him a bill of sale thereof. M. obtained possession, and gave it to T., who had furnished the money for the payment, and assigned the bill of sale to him as mortgagee. *Held* that, the property being attached by a sheriff, at suit of B. as the property of M., T., being a mortgagee in possession, could maintain replevin therefor, and was not required to apply for an order of sale.

3. A verdict in replevin, finding that the property was in plaintiff, is sufficient, though there was a plea that it was in a third person, and there was no specific finding that it was not in him.

Replevin by John P. Thompson and others against Thomas Dyer. Defendant petitions for a new trial. Denied.

Argued before STINESS, C. J., and DOUGLAS and BLODGETT, JJ.

James J. McCabe and Edwards & Angell, for plaintiffs. Warren R. Perce, Barney & Lee, and Howard A. Lamprey, for defendant.

STINESS, C. J. The plaintiffs sue in replevin for certain property taken by the defendant, as deputy sheriff, on attachment as the property of James McEwen, in whom the defendant pleads title. The substantial facts are that McEwen had a contract with the Baldwin Motor Company to make carriages for him, doing business as the Porto Rico Transportation Company. These carriages were to be shipped to Porto Rico, to be used under a franchise secured by McEwen. The money for the enterprise was furnished by the plaintiffs, who held mortgage bonds of McEwen. The time for the completion of the work having expired, or nearly so, McEwen demanded security of the Baldwin Company for the money he had paid. A bond was talked of, but it was finally agreed that the Baldwin Company should give him a bill of sale of all the property pertaining to the contract, and it did so, specifying the separate parts. The bill of sale was dated September 13, 1901. McEwen transferred this bill of sale to the plaintiffs, as mortgagees, September 20, 1901. On September 17, 1901, McEwen brought suit against the Baldwin Company, attaching its property, and on Sep-

¶ 2. See Replevin, vol. 42, Cent. Dig. § 265.

tember 21, 1901, he removed the property covered by the bill of sale to a shop in Olneyville, which the plaintiff, Thompson, who was acting as trustee for the bondholders, had secured. The Baldwin Company attached the property now in suit, covered by their bill of sale, September 28, 1901, and on the same day this suit in replevin was brought. A verdict having been rendered for the plaintiffs, the defendant asks for a new trial, mainly on the ground that the plaintiffs have not shown title.

The facts, as stated above, show that the plaintiffs were the equitable, if not the legal, owners of the property in question, having furnished the money for it; and that McEwen was the agent in having the carriages built, though the contract was in his name. Also that they had apparently paid probably full price for what the Baldwin Company had done, as their payment, according to checks and receipts produced and admitted, amounted to \$5,255. These payments show a consideration for the bill of sale given to McEwen by the Baldwin Company, the same that attaches to any mortgage which is given as security for a debt. The payments had been made. The work was not completed. Security was demanded and given. As between the parties—and none others are involved in this litigation—it was valid. It was a delivery pro tanto of what the Baldwin Company had agreed to furnish. The defendant claims that it was, in effect, a mortgage. We do not see that this is necessarily so. While it was given as security, it was security by predelivery, so that it might not be taken for the debts of the Baldwin Company. It was upon a new consideration, that the company might go on and finish the work. But, if we take it to be a mortgage, no substantial right is changed. The defendant claims that under Pub. Laws 1899, c. 614, it was void as to third parties. The statute provides that an unrecorded mortgage is good as between the parties, and the party in whose suit the property was attached by the defendant was the maker of the bill of sale or mortgage. A sheriff making an attachment is not a party within the meaning of the statute, but the party at whose suit property is attached is the one to be considered. As a mortgage, therefore, it was good as against the Baldwin Company. It was transferred to the plaintiffs before the attachment. The plaintiffs at that time were mortgagees in possession. No fraud or improper conduct on their part is shown. No such issue is made by the pleadings. There is no condition in the bill of sale that the Baldwin Company should retain possession for completing the work. On the contrary, the bill of sale implies the contrary by giving the grantees the "use of all drawings and patterns, and the use of all patent rights necessary for the completion of the three busses," etc. It is true that there was an oral agreement that the Baldwin Company should fin-

ish the work, but this was not done. McEwen attached the shop of the company, and, finding the articles specified in the bill of sale, he turned them over to the plaintiffs. It is argued that this attachment was a scheme on his part to get possession of the property now in suit. If the question was in any way raised at the trial, we must infer from the verdict that it was not so found. If it was not so raised, it cannot be raised on this petition. In either view, the plaintiffs appear to be the mortgagees in possession. Certainly, McEwen was not the owner, and the plea of title in him fails. The property was clearly in the possession of the plaintiffs, and could not be attached as the property of McEwen. When so taken, the plaintiffs had the right to replevy it. The defendant was not entitled to the request for instruction, made by him and granted, to the effect that the mortgagee cannot take from the attaching officer mortgaged personal property attached as the mortgagor's property under the statute, but should apply for an order of sale according to the statute. Other requests to the same general effect were made and granted. These requests, however, overlook the fact that the statute applies only to property in the possession of the mortgagor. The charge was more favorable to the defendant than he was entitled to ask. The verdict of the jury was not contrary to, but according to, the evidence. The right of possession was shown to be in the plaintiffs, and not in McEwen.

The defendant takes the point that the verdict was not responsive to the plea of property in McEwen, because it stated that it was not in defendant (Dyer). It does not appear that any objection to the form of the verdict was taken at the trial. It was a finding that the property was in the plaintiffs. That was enough to cover the issue, and was responsive to a material part of the defendant's plea. The converse of the finding—that the property was not in McEwen, as set up in the plea—while customary, is not so important as to vitiate the verdict, otherwise rightly given.

Other objections are made, but, as the controlling point in the case was rightly decided, we need not refer to them.

The petition for a new trial is denied.

(25 R. I. 302)

In re BURKE.

(Supreme Court of Rhode Island. July 1, 1903.)

BANKS—PROCEEDINGS TO WIND UP—DIVIDENDS—DEBTS OF BANK.

1. In a special proceeding under Gen. Laws 1896, c. 178, § 42 et seq., to wind up a bank through a receiver, the equity rule, allowing dividends to a secured creditor on the full amount of his claim, obtains, and not the insolvency rule (chapter 274, § 29), allowing dividends only on the part of the claim in excess of the value of the securities; chapter 240, § 1, providing that statutory proceedings shall fol-

low the course of equity so far as it is applicable, and the insolvency law being suspended by the national bankrupt law.

2. The debt of a bank to a creditor who holds its note, and, as collateral, notes indorsed by it, as regards the creditor's right to dividends, in a proceeding under Gen. Laws 1896, c. 178, § 42 et seq., is the bank's note only.

Petition by John C. Burke, receiver, for instructions. Instructions given.

Argued before STINESS, C. J., and DU-BOIS and BLODGETT, JJ.

John C. Burke, in pro. per. Barney & Lee, for Bowling Green Trust Co. Edwards & Angell, for Western Nat. Bank.

STINESS, C. J. As to the claim of the Bowling Green Trust Company of New York, the question is settled by *Allen v. Danielson*, 15 R. I. 480, 8 Atl. 705, and *Greene v. Jackson Bank*, 18 R. I. 779, 30 Atl. 963, which held that the settled rule in equity allows dividends to a secured creditor upon the full amount of his claim; the security being regarded as something collateral, which does not reduce the debt, but only secures the creditor pro tanto in case the debtor or his estate cannot pay the debt in full. See, also, *People v. Remington*, 121 N. Y. 323, 24 N. E. 793, 8 L. R. A. 458; *Third Nat. Bank v. Haug* (Mich. 1890) 47 N. W. 33, 11 L. R. A. 327; *Assignment of Meyer* (Wis.) 48 N. W. 55, 11 L. R. A. 841, 23 Am. St. Rep. 435; *Chemical Bank v. Armstrong*, 59 Fed. 372, 8 C. C. A. 155, 28 L. R. A. 231. The receiver argues that these decisions should not apply, because since then a more comprehensive insolvency law was enacted in this state (Gen. Laws 1896, c. 274), which, in section 29, provides that claims of secured creditors may be allowed to the extent of the debt due over and above the value of the securities. We think that this statute is not controlling in this case, for two reasons: (1) This proceeding is not under the insolvency law, but it is a special statutory proceeding under Gen. Laws 1896, c. 178, § 42 et seq. Under Gen. Laws 1896, c. 240, § 1, "statutory proceedings, so prescribed by statute, shall follow the course of equity so far as the same is applicable." Gen. Laws 1896, c. 178, § 45, provides, referring to the appellate division of the Supreme Court: "Said court shall have the same power and authority over the receiver, his acts and accounts, as is exercised by courts of equity in like cases." It also provides for injunctions in the proceedings. These provisions are equivalent to prescribing that the proceedings shall follow the course of equity. If so, it is also equivalent to prescribing that the acts of the receiver shall follow the equity, and not the insolvency, rule. The equity rule, as above stated, gives the creditor the right to a dividend on his debt. The chapter also directs the receiver to pay the debts ratably, if there shall

not be sufficient to pay the whole, and not, as in the insolvency law, to pay on the balance over securities. In *Cook County Bank v. United States*, 107 U. S. 445, 2 Sup. Ct. 581, 27 L. Ed. 537, it was held that a bankrupt law had no application to the winding up of a national bank under a separate statute. (2) Since the insolvency law was passed, a national bankrupt act has been adopted by congress, the effect of which, as stated in *Matter of Reynolds*, 8 R. I. 485, 5 Am. Rep. 615, suspends the state legislation on the same subject. If the statute, as a whole, cannot be applied to a case within the purview of the bankrupt act, we see no reason why certain provisions should be picked out of it, and applied to a case under another statute. We are therefore of opinion that the insolvency law has no application to the case at bar, and that the rule in equity as to distribution should be followed. Under this rule the Bowling Green Company is entitled to dividends on its entire debt.

The same rule also applies to the claim of the Western National Bank. This bank holds the note of the insolvent bank, the Merchants' Bank of Newport, for \$9,500, and certain other notes transferred to it, as collateral, by the indorsement of the insolvent bank. It claims that the indorsement constitutes a debt; the notes not having been paid. The question is whether it is entitled to dividends on this liability as well as upon the original debt. We are referred to no cases, and we know of none, which sustain the proposition that a creditor may have dividends on a collateral as well as an original debt; nor can we see, on principle, why it should be so. It is true that the insolvent bank is, in a sense, a debtor by reason of its indorsement; but the debt is the primary obligation, and the collateral is secondary. The bank does not owe two debts, but one. It is on this one debt that it is entitled to its dividend. One does not increase his debt by giving security, although the form of transferring the security may be such as to give a right of action on it. It is still a subsidiary and conditional liability. If an insolvent owed a debt for goods, and gave a note for the amount, that would not discharge the debt, without special agreement. *Wheeler v. Schroeder*, 4 R. I. 383; *Wilbur v. Jernegan*, 11 R. I. 113; *Nightingale v. Chafee*, 11 R. I. 609, 23 Am. Rep. 531. The creditor might sue upon either, yet no one would claim that he would be entitled to a dividend on both because he had a cause of action on each. To do so would be grossly inequitable to other creditors, by giving him a double dividend for one debt; yet it would not be different, in substance, from the claim here made for a dividend on the collateral notes. A creditor is entitled to a dividend only on his debt. If he holds collateral, he may also realize from it what he can, but that is not a debt, within the meaning of the rule in equity, nor one on which he should take divi-

¶ 2. See *Banks and Banking*, vol. 6, Cent. Dig. § 184.

dends to the loss of other creditors. We find these views fully sustained by *Third Nat. Bank v. Eastern R. R. Co.*, 122 Mass. 240, and *First Nat. Bank v. Williamson* (Tenn. Ch. App. 1895) 35 S. W. 573.

We are of opinion that the Western National Bank is entitled to a dividend only on its debt of \$9,500.

(97 Me. 595)

In re STATE TAXATION.

(Supreme Judicial Court of Maine. March 25, 1903.)

TAXATION—EQUALITY.

1. In levying a state tax the Legislature is prohibited by the Constitution (section 8, art. 9) from fixing a higher rate of taxation upon lands outside of corporated cities, towns, and plantations than the rate upon lands within such municipalities.

(Official.)

State of Maine.

In House of Representatives.

Ordered, that the Justices of the Supreme Judicial Court are hereby respectfully requested to give to this House, according to the provisions of the Constitution in this behalf, their opinion on the following questions:

Question One: Assuming that the rate of state tax in cities, towns, and plantations is fixed at two and three-fourth mills on the dollar of their valuation, would the bill entitled "An act relating to taxation of land in unincorporated places," now pending in this House, and a true copy of which said bill is hereunto annexed, if the same should become a law, be in violation of the provisions of section eight of article nine of the Constitution of the state?

Question Two: Assuming as above, would said bill, if the same should become a law, be in violation of any of the provisions of the Constitution of the state?

House of Representatives, Mar. 27, 1903.

Read and passed.

W. S. Cotton, Clerk.

State of Maine.

In the year of our Lord one thousand nine hundred and three.

An Act relating to taxation of land in unincorporated places.

Be it enacted by the Senate and House of Representatives in Legislature as follows:

Section 1. Section sixty-nine of chapter six of the Revised Statutes is hereby amended by striking out all of said section and by substitution make said section, as amended, read as follows:

"Sec. 69. The board of state assessors shall annually assess a tax upon all lands situated in this state in places not incorporated as a town or plantation, and not paying a municipal tax, at the rate of fifteen mills on the dollar upon the valuation as made by

said assessors for the year the assessment is made; and said assessment shall be made and deposited with the Treasurer of State on or before the first day of August in each year."

Sec. 2. Section seventy-one of said chapter six of the Revised Statutes is hereby amended so as to read as follows:

"Sec. 71. When the board of state assessors has assessed such state tax and has deposited the assessment with the Treasurer of State, the Treasurer of State shall within three months thereafter, cause the list of such assessments, with the lists of any county tax so certified to him, both for the current year, to be advertised for three weeks successively in the state paper and in some newspaper, if any, printed in the county in which the land lies. Said lands are held to the state for the payment of such state and county taxes, with interest thereon at the rate of twenty per cent to commence upon taxes for the year in which said assessment is made, at the expiration of one year."

Sec. 3. This act shall take effect when approved.

To the House of Representatives:

The undersigned Justices of the Supreme Judicial Court have considered the question submitted to them by the House of Representatives in its order of March 25, 1903, and above set forth, and give their opinion as follows:

Inasmuch as the state tax imposed upon cities, towns, and plantations is necessarily imposed upon the lands as well as upon the personal estate therein, the question may be correctly stated as follows: In levying a state tax, is the Legislature prohibited by the Constitution from fixing a higher rate of taxation upon lands outside of incorporated cities, towns and plantations than the rate upon lands within such municipalities? We think the Legislature is so prohibited by section 8 of article 9, which is as follows: "All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally according to the just value thereof."

This command of the Constitution is absolute and comprehensive. No exception is allowed for the locality of the land, whether within or without any particular subdivisions of the state's territory. The Legislature can no more discriminate in the rate of taxation between incorporated and unincorporated territory than it can between different sections of incorporated territory. The apportionment and assessment each must be equal throughout the whole state. The criterion established, and hence the only criterion to be applied, is the "just value" of the land wherever situated. The only permissible variation of the amount of the tax is that resulting from the difference in value. The rate must be the same everywhere. Lo-

cality can be considered only so far as it affects value.

Judicial authority for this interpretation of the Constitution is not wanting. The Constitution of Massachusetts provided that taxes should be levied proportionately upon all "estates lying within the commonwealth." A statute imposed a tax upon corporation dividends due nonresidents, but not on those due residents. The statute was held to be in conflict with the Constitution. *Oliver v. Washington Mills Co.*, 11 Allen, 268. The Constitution of Michigan commanded the Legislature to "provide a uniform rule of taxation." The Supreme Court of the United States, in considering this provision, said: "All kinds of property must be taxed uniformly, or be entirely exempt. The uniformity must be coextensive with the territory to which the tax applies. If a state tax, it must be uniform throughout the state. If a county or city tax, it must be uniform throughout such county or city." *Pine Grove Township v. Talcott*, 19 Wall. 666, 675, 22 L. Ed. 227. The Constitution of Wisconsin contained this clause: "The rule of taxation shall be uniform." A statute authorized a city to tax lands within the city limits laid out into city lots at different rates from those not so laid out. Held unconstitutional. *Knowlton v. Supervisors of Rock County*, 9 Wis. 410. The Constitution of Ohio commanded the Legislature to pass "laws taxing by a uniform rule * * * all real and personal property according to its true value in money." The Supreme Court of Ohio said of this clause: "The General Assembly is no longer invested with the discretion to apportion the tax, and to determine upon what property and in what proportion the burden shall be laid. A uniform rate per cent. must be levied upon all property subject to taxation according to its true valuation in money, so that all may bear an equal burden." *Zanesville v. Richards*, 5 Ohio St. 589. In New York was a statute authorizing a taxpayer to deduct his debts from the valuation of his personal property except that of his shares in national banks. This was held to be in conflict with the United States statute requiring such shares to be taxed equally with other moneyed capital. *People v. Weaver*, 100 U. S. 539, 25 L. Ed. 705. The Constitution of Oregon commanded the Legislature to "provide by law for a uniform and equal rate of assessment and taxation," and to "prescribe such regulations as shall secure a just valuation for taxation of all property both real and personal." A statute levied a tax of \$1.25 on each bicycle, without regard to value. Held unconstitutional. *Ellis v. Frazier*, 38 Or. 462, 63 Pac. 642, 58 L. R. A. 454.

It follows that the proposed legislation would be contrary to the Constitution.

Although these questions submitted by the House of Representatives were not received by the Justices until after the adjournment

of the regular session of the Legislature, the question discussed in the answers of the Justices, 95 Me. 564, 51 Atl. 224, as to the propriety and duty of answering questions propounded under somewhat similar circumstances, does not here arise, because of the fact that the present Legislature is to reconvene in September of this year, when it may consider the subject-matter of the questions.

Portland, July 1, 1903.

ANDREW P. WISWELL,
LUCILIUS A. EMERY,
WM. P. WHITEHOUSE,
SEWALL C. STROUT,
ALBERT R. SAVAGE,
FREDERICK A. POWERS,
HENRY C. PEABODY,
ALBERT M. SPEAR.

(97 Me. 590)

IN RE OPINION OF JUSTICES.

(Supreme Judicial Court of Maine. July 1, 1903.)

INSURANCE—STANDARD POLICY—CONSTITUTIONAL LAW.

1. The Legislature is not inhibited by any provision in the Constitution of the United States or of this state from exercising the power of limiting incorporated insurance companies to the issuance of one standard fire insurance policy, even though such standard form contain a clause that there shall be no right of action on the policy until the amount of the loss or damage be determined by three arbitrators, or there be a waiver of such clause by both parties.

(Official.)

State of Maine.

In Senate, March 23, 1903.

Ordered, the Justices of the Supreme Judicial Court are hereby requested to give to the Senate, according to the provisions of the Constitution in this behalf, their opinion on the following questions, viz:

1. Is so much of the Public Law of Maine for 1895, p. 18, § 1, c. 18, constitutional that reads as follows:

"In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of the three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss; but no person shall be chosen or act as a referee, against the objection of either party, who has acted in a like capacity within four months.

"No suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of

law or equity in this state unless commenced within two years from the time the loss occurred."

2. Is section 1, c. 18, of the Public Laws of 1895, constitutional?

In Senate Chamber, March 23, 1903.

Read and passed.

Kendall M. Dunbar, Secretary.

By an order passed on March 25th the Senate requested the Justices to give to the Senate by July 1st their opinion upon the questions submitted in the foregoing order, and stated for their information that his excellency Hon. John F. Hill, Governor of Maine, had submitted to the Legislature during the present session a message touching the subject. The commissioners in Maine for promotion of uniformity of legislation in the United States had reported to the Governor that the statute in question was deemed to deprive insurers of the right of a jury trial upon the question of the extent of loss or damage arising under fire insurance policies; also that the constitutionality of the statute could well be questioned.

Bills were afterwards introduced in both branches of the Legislature giving the right of trial by jury on any question of fact, and these bills are now pending on the files of the Legislature.

To the Senate:

The undersigned Justices of the Supreme Judicial Court give the following as their opinion on the questions submitted to the Justices in the foregoing Senate order of March 23, 1903:

The two questions submitted are practically identical, since they both are as to the constitutionality of the same section of the same statute.

In considering the question we confine ourselves exclusively to the statute cited in the Senate order, viz., section 1, c. 18, p. 14, Pub. Laws 1895. We also confine ourselves to the question of constitutionality, ignoring all other questions. The first clause in that section is as follows: "Section 1. No fire insurance company shall issue fire insurance policies on property in this state other than those of the standard form herein set forth, except as follows." Then follow certain exceptions allowed, none of which affect the questions submitted. In the standard form set forth in this section is the clause, cited in the Senate order, stipulating, in effect, that the amount of the loss or damage under the policy shall be determined by three arbitrators instead of by a jury, unless such stipulation be waived.

We assume as too evident for argument or discussion that the words "fire insurance company" in such a statute and in such connection mean incorporated companies or corporations, and are not to be extended beyond them. Again, it not being otherwise stated in the Senate order, we understand we may assume that in none of the charters of do-

mestic fire insurance companies is there any limitation upon the power of the Legislature "to amend, alter, or repeal" their charters, as reserved in Rev. St. 1883, c. 46, § 23. The question submitted is, therefore, narrowed down to this: Is the Legislature inhibited by any provision in the Constitution of the United States or of this state from exercising the power of thus limiting incorporated insurance companies to the issuance of one standard form of fire insurance policy, even though such standard form contain a clause that there shall be no right of action on the policy until the amount of the loss or damage be determined by three arbitrators, or there be a waiver of such clause by both parties? It may be assumed—arguendo only—that by accepting such a fire insurance policy the assured waives any right to a jury trial upon the question of the amount of his loss or damage; but there is no statutory compulsion on fire insurance companies to issue such policies nor upon property owners to accept them.

We do not find in either Constitution, federal or state, any section or clause in terms inhibiting such an exercise of the legislative power over fire insurance companies. While the individual has existence and consequent rights independent of the Legislature, the corporation or incorporated company derives its existence and rights solely from legislative action. The Legislature may refuse to grant any corporate rights or powers whatever, and even existence, or it may grant one only. Until the Legislature acts, these do not and cannot exist. So the Legislature may by general law or special act "amend, alter, or repeal" any corporate charter or corporate right or existence once granted (except, of course, where it has stipulated not to do so), and in so doing it may cut away the powers of a corporation one after another, and from time to time, and finally destroy the last one and the corporation itself. It cannot, of course, confiscate the property of the corporation once lawfully acquired. It cannot impair the obligation of a contract once lawfully made by a corporation. So far the Legislature is restrained by the state and federal Constitutions. But it can prohibit the acquisition of any more property by the corporation. It can prohibit the making of any new contracts whatever by the corporation, or any new contract except one of a particular prescribed kind and form with prescribed stipulations therein. This power, sweeping as it is in its scope, is necessarily implied and included in the reserved power to amend, alter, or repeal the very legislative acts which gave life, powers, and rights to the corporation. This power is inherent in the Legislature, unlimited by any section or clause in the federal or state Constitution which we have been able to find. *Head v. Providence Insurance Co.*, 2 Cranch, 127, 2 L. Ed. 229; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274; *Miller v. New York*, 15 Wall. 478, 21 L. Ed. 98; *Greenwood*

v. Union Freight Co., 105 U. S. 13, 28 L. Ed. 961; Spring Valley Water Works v. Schotter, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; Norfolk & Western Railroad Company v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394; State v. Brown & Sharpe Manufacturing Co., 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856; Schaffer v. Union Mining Co., 55 Md. 74; State v. Maine Central R. Co., 60 Me. 490, affirmed in Maine Cent. R. Co. v. Maine, 96 U. S. 499, 24 L. Ed. 836.

As to foreign fire insurance companies, those incorporated in other states and countries, they, of course, are equally subject to the legislative power of this state so far as the exercise of their rights or powers, and their presence or existence within this state, are concerned. They are not protected by the interstate commerce clause of the federal Constitution. Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297. The Legislature can wholly exclude them from the state, and hence can impose such conditions and limitations upon the exercise of any rights and powers and business, and even presence, in this state, as it sees fit. Norfolk & Western Railroad Company v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394; Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; Dryden v. Grand Trunk Ry. of Canada, 60 Me. 512.

The statute does not offend against the fourteenth amendment to the Constitution of the United States, since it bears equally upon all fire insurance companies, domestic and foreign, without attempting any discriminations, and does not deprive any person of life, liberty, or property without due process of law.

There is another phase of the question which may be suggested and should be considered, viz., whether the statute infringes any constitutional right of the individual irrespective of its limitation of the powers of insurance corporations. The constitutional right of trial by jury is a right, not a duty, and may be waived by the individual. It is waived by him as to the assessment of his damages if he voluntarily enters into a contract like the statutory standard insurance policy wherein it is mutually stipulated that the damages provided for shall be determined by arbitration. It may be urged, however, that this contract, the terms of which are prescribed by statute, is not voluntary, in that the individual is practically prevented from making contracts for the protection of his property by insurance, except such contracts as require him to waive his right of trial by jury; in that he is practically compelled to enter into that particular contract or go without insurance protection.

But the broad question of the constitutional right of the individual to make and enforce contracts for the acquirement, possession, and protection of property by insurance or otherwise free from legislative interfer-

ence is not presented here. Whatever the extent of the constitutional right of the individual to make insurance contracts with other individuals, or unincorporated associations of individuals, we think it clear from the principles above stated that he has no constitutional right to make any particular insurance contract with a corporation. True, the complete power of the Legislature to limit or destroy the right of a corporation to make contracts necessarily includes the power to limit or destroy the right of the individual to make contracts with it, but this incidental result cannot be held to limit the power of the Legislature over its own creature, the corporation. The Legislature is not required by the Constitution to create corporations for individuals to make contracts with, nor is it prohibited from limiting or dissolving corporations with which individuals may wish to contract.

It follows that the statute cited and inquired about is constitutional, being within the legislative cognizance, and not forbidden by any section or clause of the Constitution, state or federal.

We answer both questions in the affirmative.

ANDREW P. WISWELL.
LUCILIUS A. EMERY.
WM. P. WHITEHOUSE.
SEWALL C. STROUT.
ALBERT R. SAVAGE.
FREDERICK A. POWERS.
HENRY C. PEABODY.
ALBERT M. SPEAR.

(4 Pen. 283)

LEWIS v. WHITE et al.

(Superior Court of Delaware. New Castle.

March 6, 1903.)

JUSTICES OF THE PEACE—JURISDICTION—
RESIDENCE OF PARTIES.

1. Rev. Code 1852, as amended in 1893, pp. 723, 724, c. 340, § 2, giving a justice of the peace jurisdiction in actions where the plaintiff resides in the hundred or adjoining hundred, or in the hundred in which the defendant resides, or adjoining hundred, does not apply to non-residents; and hence, where it appeared that neither plaintiff nor defendant resided within the hundred or adjoining hundred where the suit was brought, the justice had no jurisdiction.

Action by James F. White and another against Evan Lewis. From a judgment in favor of plaintiffs, defendant brings certiorari. Reversed.

This was an action brought in White Clay Creek hundred, before a justice of the peace in and for New Castle county. The record of the justice set forth the parties as "James F. White and H. C. White, trading as White Bros., of Wilmington, Delaware, v. Evan Lewis, of Pennsylvania."

The exceptions relied on were as follows: "That it does not appear that the defendant, Evan Lewis, was a resident of the hundred in New Castle county, and state of Delaware,

adjoining the hundred of the justice of the peace before whom said cause was heard. That it does not appear that the plaintiffs, James F. White and Henry C. White, or either of them, were bona fide residents of the hundred in New Castle county aforesaid, in which the justice of the peace before whom said cause was heard resided."

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Lilburn Chandler, for plaintiff in error.
Charles B. Evans, for defendants in error.

LORE, C. J. The jurisdiction of the justice must affirmatively appear. The record, on the contrary, shows that he had no jurisdiction; such jurisdiction being confined by Act June 8, 1881 (Rev. Code 1852, amended in 1893, pp. 723, 724, c. 340, § 2), to the hundred in which the defendant resides, or to the adjoining hundred, or to the hundred in which the plaintiff has been a bona fide resident for 60 days before suit.

Judgment below reversed.

(4 Pen. 71)

STATE v. PUCCA.

(Court of General Sessions of Delaware. New Castle. May 27, 1902.)

USING CHILDREN FOR PURPOSE OF SEXUAL INTERCOURSE—EXAMINATION OF CHILD BY PHYSICIAN—EVIDENCE—RELEVANCY—WITNESSES—IMPEACHMENT—EVIDENCE OF GOOD CHARACTER OF DEFENDANT—EFFECT.

1. Where, on a prosecution for using a female child of the age of 12 years for the purpose of sexual intercourse, a police surgeon, on behalf of the state, made an examination of the child, and found her condition to be not inconsistent with her statements as to defendant having had intercourse with her, the court, on defendant's motion, will order an examination of the child by a competent physician, and under such circumstances as will insure entire fairness.

2. On a prosecution for using a female child of the age of 12 years for the purpose of sexual intercourse, the child cannot be asked on cross-examination, for the purpose of testing her veracity, whether a third person had not, on a certain date, found her in a privy with two little boys, the question being immaterial and irrelevant.

3. A witness may be impeached by proof that his reputation for truth and veracity in the community in which he lived up to within about two months of the trial was bad.

4. On a prosecution under Laws 1889, p. 951, c. 686, punishing the using of a female child under the age of 18 years for the purpose of sexual intercourse, the jury, in order to find a verdict of guilty, must be satisfied that the prosecuting witness was so used, and that she was then under 18 years of age.

5. The testimony of the previous good character of defendant on trial for crime should be taken, like any other evidence tending to show his innocence, for what it is worth in the judgment of the jury.

Lugi Pucca was indicted for using a female child for the purpose of sexual intercourse. Verdict, "Not guilty."

Argued before LORE, C. J., and GRUBB, J.

Herbert H. Ward, Atty. Gen., and Robert H. Richards, Dep. Atty. Gen., for the State.
Howell S. England, for defendant.

At the trial the state adduced evidence to the effect that the prosecuting witness, Rosalia Emledo, an Italian girl, was 12 years old at the time of the commission of the alleged crime on February 1, 1902; that on said date the prisoner had sexual intercourse with the prosecuting witness in the bedroom of his house at Second and Washington streets in the city of Wilmington; that afterwards he showed her a large knife, and said to her, if she told on him, he would kill her, and thereupon gave her some money, and let her go to her home; that the child did not tell her mother, but, on the contrary, endeavored to conceal the crime from her mother; that finally the latter, suspecting that something was wrong with the child, questioned the latter, and discovered what the trouble was; that afterwards the police surgeon, on behalf of the state, made an examination of the girl's private parts, and as a result thereof found her physical condition to be not inconsistent with the story that she had told.

Mr. England, for the defendant, asked the court to order an examination of the prosecuting witness by a physician other than the police surgeon, stating that he desired this to be done for the purpose of showing that she was not physically capable of sexual intercourse, and that a fair examination of her parts would show that fact, and that, therefore, she had not been used for the purpose of sexual intercourse.

LORE, C. J. We make the order that the prosecuting witness be examined by a competent physician during the noon recess, and under such circumstances as to insure entire fairness. The court understands that Dr. Josephine M. R. White is satisfactory to both the state and the counsel for the defendant. The doctor will, therefore, make the examination under the direction of the court.

Mr. England asked the prosecuting witness, in cross-examination, the following question: "Tell the court whether or not, about the 1st of April of this year, George Shelton did not, in going into a privy near the home of Lugi Pucca, find you in there with two little boys?"

Objected to by the Deputy Attorney General as immaterial.

Mr. England stated that he was not attempting to impeach the moral character of the prosecuting witness, but was only testing her veracity; that, if she denied in her reply that she was there with the two boys on the occasion mentioned, he could prove that she was, and thus contradict her.

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 846.

LORE, C. J. The question being entirely immaterial and irrelevant to this issue, you could not contradict her, but would be bound by her answer. We sustain the objection.

The defendant, Luigi Pucca, was asked, in cross-examination by the Deputy Attorney General: "Why did you take Rosalie into the bedroom?"

Objected to by counsel for defendant as argumentative, and assuming that which the witness had testified he did not do.

Mr. Richards, Deputy Attorney General, contended that the question was in cross-examination; that the defendant had, on direct examination, denied the whole transaction, but the state had not asked him this question before.

GRUBB, J. The state has admitted that the defendant has not said that he did take her into the room, and the question objected to assumes that he did, and is, in my opinion, argumentative, and therefore improper.

LORE, C. J. I do not know of any such limitation in cross-examination. You have the right to test the defendant's knowledge, his accuracy, and put him to the test by asking, "Why did you take Rosalie into the bedroom?" It is not what he said, but what he did. There is a division of the court on this question, and the objection falls.

Counsel for defendant asked one of his witnesses the following question: "Are you acquainted with the general reputation for truth and veracity of Rosalie Emiedo in the community in which she has lived up to within two months of this time, at Natalie, Pennsylvania?"

Objected to by the Attorney General as irrelevant, the proper form of the question being whether the witness knows the reputation of the prosecuting witness in the community in which she now lives.

LORE, C. J. Do you propose to follow that up, and connect it with the present time?

Mr. England: Yes, sir. These people have just come to town, and it was impossible to get anybody that knew of them here. This witness has known this prosecuting witness for years at Natalie, Pa., the town from which they moved to Wilmington some time in January of this year.

LORE, C. J. We think it is admissible, but bring it within a month or two of the present time.

The witness then testified that he knew the reputation of the prosecuting witness at Natalie, Pa.; that it was bad, and from that reputation he would not believe her on her

oath. The testimony on both sides was then closed.

LORE, C. J. (charging jury). Luigi Pucca, the prisoner at the bar, is charged in the indictment with using, for the purpose of sexual intercourse, on the 1st day of February, 1902, in this county, Rosalie Emiedo, a female under 18 years of age. The charge is brought under the act of assembly passed on March 29, 1889 (Laws 1889, p. 951, c. 686), which provides that "whoever takes, receives, employs, harbors or uses or causes or procures to be taken, received, employed, harbored or used a male or female under the age of eighteen years, for the purpose of sexual intercourse, shall be deemed guilty of a misdemeanor." Under this indictment it is incumbent upon the state to prove to your satisfaction beyond a reasonable doubt that on or about the time alleged in the indictment, in this county, the prisoner, Luigi Pucca, did use this child, she then being under 18 years of age, for the purpose of sexual intercourse. Crimes of this character are not ordinarily perpetrated in the open, but privately and secretly; and they usually depend largely upon the testimony of the two participants in the offense, if any such was committed. This is a charge which, in common experience, is comparatively easy to prove, but difficult to meet. In order to find a verdict of guilty in this case, you should be satisfied from the evidence beyond a reasonable doubt that in this county, on the day alleged, this prosecuting witness was so used, and that she was then under 18 years of age. And in considering the evidence we would call your attention, as requested by defendant's counsel, to the fact that testimony of the previous good character of the defendant, when offered in the case, is to be taken like any other evidence tending to show the innocence of the accused, and for whatever that testimony is worth, in your judgment, under all the facts and circumstances of the case.

Again, it is incumbent on the state to prove all the material facts of this case—such, for instance, as the minority of the child, the perpetration of the crime in this county, and the actual fact of sexual intercourse—beyond a reasonable doubt; for, if there be a reasonable doubt from the testimony upon any one of these essential elements of the crime, that doubt should inure to the benefit of the accused in a verdict of not guilty. You have heard the evidence in this case, and it is for you to say, upon that evidence, whether the prisoner, Luigi Pucca, is guilty of the crime charged or not guilty.

Verdict, "Not guilty."

(205 Pa. 609)

SANKER v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. May 4, 1903.)

INJURY TO EMPLOYE—ASSUMPTION OF RISK—
CONTRIBUTORY NEGLIGENCE—
APPEAL—RECORD.

1. Where workmen are engaged in repairing a railroad track near a tunnel, they are bound to take notice of the danger and assume the risk of passing trains.

2. Evidence in an action to recover for the death of an employé, killed by a passing train while one of a gang employed at work in a railroad tunnel, examined, and held that he was guilty of contributory negligence.

3. Failure to print the opinion of the court below on a motion for a new trial, as required by rule 19 of the Supreme Court, as amended, is ground for quashing the appeal.

Appeal from Court of Common Pleas, Huntingdon County.

Action by Jennie A. Sanker against the Pennsylvania Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The court below (Baily, P. J.) gave binding instructions for the defendant in the following charge:

"Gentlemen of the jury: On January 29, 1899, Thomas W. Sanker, the plaintiff's husband, being then in the employ of the defendant company as a track repair man, with a number of other employés, was engaged in putting new rails in the northern railroad track of the Gallitzin tunnel, in Cambria county. Traffic over that track was wholly suspended until the work of laying the new rails was completed. The northern track is what is called the west-bound track; the trains westward bound usually use that track. The other, or what is called the southern or east-bound track, was not disturbed during the progress of the work on the northern track. It appears that the work of replacing the old rails with new ones on that track was practically completed and the connection made a few minutes before 2 o'clock in the afternoon of that day, and that track was then put into service. Therefore at that time both tracks in the tunnel were ready for service the same as before the work of renewing the northern track had commenced. Neither the plaintiff's husband nor any of the other of the employés was injured in the tunnel while in the performance of that work. When the connection was made, and that track ready for service, the employés, including Sanker, went to the toolhouse, a short distance west of the tunnel, and got their dinners. It appears that some additional bolts were required in the rail splices, and, after the employés had their dinners, they, or at least many of those who had been at work in the forenoon, including Sanker, were ordered to go to the tunnel and put in these bolts. When they got near to the mouth of the tunnel, a freight train had

just passed through, going westward, on the track which had been renewed before the men went to their dinners. A heavy cloud of smoke was about the mouth of the tunnel when the employés reached it, and they were directed by the foreman not to enter the tunnel until the smoke would clear away. While they were waiting to enter, another train was heard coming through the tunnel, also going westward. Probably believing this train was on the northern or west-bound track, many of the employés, for the purpose of avoiding being struck by it, congregated on the southern or east-bound track. Unfortunately for them, the train was running on that track; and, probably on account of the density of the smoke hanging around the mouth of the tunnel, they could not or did not see that it was on the track on which they were standing, until it struck among them, injuring quite a number, among them the plaintiff's husband, who died the same day in the Altoona Hospital from the injuries he sustained. His widow, this plaintiff, brings this action to recover damages she has sustained by reason of the death of her husband.

"The principal question which arises in this case is whether the railroad company was guilty of negligence in running this train, which was composed of three locomotives and three cabin cars, westward on the east-bound track. In considering this question as a question of law, we must and do assume the truth of the plaintiff's testimony. The facts, as I have related them, prominently appear in it. It also appears that the employés knew, when they went to the mouth of the tunnel after dinner, that both tracks were in service. They were so informed at the toolhouse before they started for the tunnel. They heard the rumble of the approaching train in the tunnel. They saw the smoky condition of the atmosphere at the mouth of the tunnel, which prevented them from seeing into it and ascertaining upon which track the train was running. Unfortunately, they assumed it was on the west-bound track, while in fact it was on the east-bound track. They were not told it was on the west-bound track, but seem to have taken that for granted. Both tracks being in service, the railroad company had a right to run its trains upon them as frequently as, and in whatever direction, it saw fit. The plaintiff's husband, when he entered into the employment of the railroad company, assumed the risk of all dangers incident to his employment, however they may arise, against which he may protect himself by the exercise of ordinary care. On account of renewing the rails of the northern track in the tunnel, it appears that a number of freight trains were halted east of the tunnel, which blocked the approach to it on that track. The train which had passed around this blockade of cars and which struck the employés was desired to be hurried to its destination to relieve a blockade at a point west

¶ 1. See Master and Servant, vol. 34, Cent. Dig. § 521.

of the tunnel. We cannot see upon what principle it can be held for negligence in running a train around this blockade of its freight trains that it might speedily reach its destination to perform the duties to which the locomotives and cabins which composed it were assigned. The mouth of the tunnel was clouded with smoke, so that these employes could not see upon which track this train was running. The ringing of the bell of the locomotive and the lights upon it could neither be heard nor seen by them. They should, therefore, have been more cautious to ascertain upon which track it was running, before voluntarily placing themselves upon either track. There was a place of safety for them alongside of the track, which is called in the testimony the 'ditch.' As the railroad company had a right to use its tracks in such a way as it thought best to conduct its traffic, the sad mistake of these employes to assume that this train would run on a particular track is not to be imputed to negligence on the part of the company. It did not, either expressly or by implication, advise them to be at the place they were at the time they received their injuries. There is no evidence that the company or those in charge of the train knew or had reason to believe that these employes were upon the south track. Their duty did not call them to be there. There is some evidence that Ehrenfeld, the supervisor of the defendant company, and in charge of the maintenance of the tracks through the tunnel, told the employes that there would be no single-track movement of the trains in the tunnel while the employes were at work. There is no evidence that there was any such movement of the trains when the employes were in the tunnel, or until after both tracks were ready for service and the employes had notice of it. While we sympathize with this plaintiff and the employes who were injured upon that unfortunate afternoon, I cannot declare the law different from what I understand it to be. I have put myself clearly upon the record, and if I have erred I have the satisfaction of knowing that my judgment can be reviewed by a higher court, and corrected, if I am mistaken. It is your duty to render a verdict in favor of the defendant."

The court subsequently, on a motion for a new trial, filed the following opinion:

"There was no dispute about any material facts in this case. The question whether they were sufficient to convict the defendant of negligence was for the court. The cases are numerous that upon an undisputed state of facts it is the province of the court to pass upon the question of the defendant's negligence. *Koons v. Western Union Telegraph Co.*, 102 Pa. 164; *Hoag v. Lake Shore, etc., R. R. Co.*, 85 Pa. 293, 27 Am. Rep. 653; *Cogle v. McKee et al.*, 151 Pa. 602, 25 Atl. 115. The notice given to the plaintiff's husband and the other employes at the toolhouse,

before they returned to the tunnel, after dinner, that the tracks were clear, and trains would be run as usual on both tracks, was a countermand of the notice given them earlier in the day that there would be no single-track movement on the south track. After giving this notice, the defendant owed these employes the same, and no greater, duty, it did, as if the first notice had not been given. The defendant reassumed its right to run its trains on both tracks as it saw fit, and it was the duty of the trackmen to keep out of their way. There was no necessity for them to be on the south track. Ample space was provided where they could have escaped injury from passing trains on either track. That they chose to seek safety on the south track was no fault of the defendant. It is well known that the 'usual' way the defendant operates its road is to use all its tracks in such manner as the exigencies or circumstances may require, and that it is not unusual for it to run for a short distance west-bound trains on the track ordinarily used for east-bound trains and vice versa. That the repairing of railroad tracks in or near a tunnel is obviously dangerous when the tracks are in service cannot admit of any doubt or question. The danger is so patent that the employe is bound to take notice of it. *Devlin v. Phoenix Iron Co.*, 182 Pa. 109, 37 Atl. 927. A servant assumes all such risks arising from his employment as he might have known were reasonably incident thereto, and he cannot recover against the master for injuries arising from such patent risks. *Schall v. Cole*, 107 Pa. 1. A track repairer assumes the risk incident to trains passing to and fro at the point of his employment. *Palko v. Central R. Co. of N. J.*, 9 Kulp, 550. Neither duty nor necessity required the plaintiff's husband to be on either track at the time of the accident. He voluntarily chose to be on the south track, evidently for the purpose of avoiding a passing train, which he believed was approaching on the north track. This proved to be an error of judgment on his part. For this the defendant was not liable. It was not guilty of negligence in running its trains as it saw fit on its own tracks after it had given notice to Mr. Sanker and the other employes who had been at work in the tunnel that day that both tracks were clear, and that trains would be run on both as usual. For these reasons the motion for new trial must be overruled."

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

E. H. Flick and H. C. Madden, for appellant. J. D. Dorris, for appellee.

PER CURIAM. Under the uncontradicted evidence in this case, the plaintiff's husband was guilty of contributory negligence. This does not appear solely from the evidence of defendant, but her own case discloses it, as so clearly shown from the opinion of the

learned judge of the court below on the motion for a new trial. We discover on a glance at the record copied in the paper book that on October 14, 1901, the opinion on the motion for a new trial was filed in the court below. This was not printed. But by going to the record in the office of the prothonotary we discover it. The neglect to print is a flagrant violation of the rules of this court. It is a most important paper, bearing directly on the issue and the assignments of error, and, if a motion to quash for this reason had been made by appellee's counsel, it would have been sustained at bar. But from a neglect to make such motion, equaled only by appellant's neglect to print the opinion, we permitted the argument on the merits to proceed. Hereafter, for such palpable disregard of rules, we will, of our own motion, quash the writ.

(206 Pa. 73)

CITY OF PHILADELPHIA, to Use of VULCANITE PAV. CO., v. PEMBERTON et al.

(Supreme Court of Pennsylvania. May 4, 1903.)

APPEAL—INTERLOCUTORY ORDER.

1. Where an affidavit of defense is filed, and plaintiff files a replication to it in a proceeding on a scire facias sur municipal claim, under Act June 4, 1901 (P. L. 364), and defendant moves for judgment in the record, an order dismissing the motion is interlocutory, from which no appeal lies.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the city of Philadelphia, to use of the Vulcanite Paving Company, against Clifford Pemberton, Jr., and Frank Mauran. From an order dismissing a motion for judgment, defendants appeal. Appeal quashed.

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Thomas Ridgway and John J. Ridgway, for appellants. M. Hampton Todd, E. O. Michener, and John G. Johnson, for appellee.

BROWN, J. This is a scire facias under the act of June 4, 1901 (P. L. 364), to enforce payment of a municipal claim. To it an affidavit of defense was filed. The nineteenth section of the act provides: "If an affidavit of defense be filed, a rule may be taken for judgment for want of a sufficient affidavit of defense, or for so much of the claim as is insufficiently denied, with leave to proceed for the residue. The defendant may, by rule, require the plaintiff to reply, under oath or affirmation, to the statements set forth in the affidavit of defense, and after the replication has been filed may move for judgment on the whole record." In pursuance of a rule taken, the plaintiff filed a replication to the affidavit of defense, and the defendants then moved for judgment on the whole record. This motion was dismissed by the court, and the present ap-

peal taken; the errors assigned being the dismissal of the defendants' motion for judgment, and the failure to enter judgment for them on the whole record.

There was no final judgment in the court below, and this appeal must be quashed. The appellants ask us to dismiss the motion to quash, because, by the fortieth section of the act, an appeal lies "from any definite judgment, order or decree, entered by the court of common pleas under any of the provisions" of the act. In different sections of the act, the courts of common pleas are authorized to enter definite judgments, orders, or decrees, and from them an appeal lies under the section quoted. In this case the court withheld its judgment. It did nothing. It entered no judgment, nor did it make an order or decree that could be enforced against either of the parties to the proceedings. After the motion was dismissed, the record stood just as it was before the motion was made. With a replication filed to an affidavit of defense, a defendant may move for judgment on the whole record, and if, from an inspection of the same, it is clear what the judgment ought to be, the court may enter it; but even in such a case there is no requirement in the act that it must be entered. Whether in this case it is evident what the judgment of the court below should have been on the whole record, or whether any could have been entered on the same, we do not decide, for we have not examined the record. We pass now only on the motion to quash the appeal. The order of the court dismissing the motion for judgment settled nothing at all finally, but was purely intermediate, from which there is no appeal, in the absence of a statutory provision giving it.

Appeal quashed.

(206 Pa. 644)

WILLIAMS v. WILLIAMS.

(Supreme Court of Pennsylvania. May 11, 1903.)

APPEAL—REVIEW.

1. Where the question was entirely one of fact, the verdict of the jury will not be disturbed.

Appeal from Court of Common Pleas, Schuylkill County.

Action by John J. Williams against Henry L. Williams. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

George M. Roads and R. H. Koch, for appellant. E. D. Smith, Arthur J. Pilgram, and John F. Whalen, for appellee.

PER CURIAM. Appellant sued as a creditor for money loaned. The defense was that he was a partner. It was not disputed by appellant that he had paid in the money, in

pursuance of an agreement for the purchase of an interest in the business, but he claimed that the interest had not in fact been given to him, and that he had thereupon rescinded the agreement. This was the whole issue in the case, and on it the jury found for defendant. We see no error in the mode of submission, and there is nothing else in the case.

Judgment affirmed.

(206 Pa. 71)

BAINBRIDGE v. UNION TRACTION CO.

(Supreme Court of Pennsylvania. May 4, 1903.)

CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

1. Where evidence in an action for injuries to a passenger on an open electric street car showed that he left his seat, and stepped onto the running board of the car, holding on with his left hand, a bag of tools in the other hand, and was thrown off when the car stopped with a sudden jerk, his contributory negligence barred recovery for the injuries received.

2. A passenger on an electric street car, leaving his seat, and stepping onto the running board of the car while in motion, assumes the risk of his position.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Henry Bainbridge against the Union Traction Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, FELL, MESTREZAT, BROWN, and POTTER, JJ.

Hazleton Mirkil and Horace M. Rumsey, for appellant. Thomas Leaming and Charles Biddle, for appellee.

BROWN, J. The plaintiff below got on a car of the defendant company at Twelfth and Walnut streets, in the city of Philadelphia, and took a seat about the middle of it. When it was approaching Sixty-Third street, of his own motion he left his seat, and stepped down on the running board, holding the rail with his left hand, and having in his right a bag containing tools. While in this position, he says the car stopped with a sudden and violent jerk on the west side of Sixty-Third street, and he was thrown off, sustaining the injuries for which he is seeking compensation.

When the appellant left this seat, where he was safe, and stepped down on the running board of the car, and remained there while it was in motion, he voluntarily put himself in a place of danger, and took upon himself the risk of his position from any cause. *Thane v. Scranton Traction Company*, 191 Pa. 249 43 Atl. 136. 71 Am. St. Rep. 767; *Bumbar v. United Traction Company*, 198 Pa. 198, 47 Atl. 961; *Woodroffe v. Roxborough, etc. Railway Company*, 201 Pa. 521, 51 Atl. 824. With one hand grasping

the rail, and another holding onto the bag of tools, the risk which he took of being thrown from the car, while so standing on the running board, by its sudden stopping, was most imminent, and for his negligence in the assumption of such a risk he alone must bear the consequences. That the appellant stepped down on the running board of the moving car because he intended to get off at Sixty-Third street in no manner excuses his negligence. The speed of the car was slackening as it approached Sixty-Third street; he knew it would stop; he had signaled the conductor to have it stopped, and his signal was heeded; but, instead of waiting for it to stop, he started to get off while it was in motion by stepping down on the running board. The judgment of the court below is sustained by *Hunterson v. Union Traction Company* (this day decided) 55 Atl. 543, in which we have reaffirmed the rule as laid down in *Powelson v. United Traction Company*, 204 Pa. 474, 54 Atl. 282, that to step on or off a moving car, whether the power which propels the car be steam or electricity, is per se negligence, and, if injury results to the passenger, he cannot recover damages.

In view of the negligence of the plaintiff, it is immaterial whether there was any evidence of the negligence of the defendant.

Judgment affirmed.

(206 Pa. 65)

CITY OF WILLIAMSPORT v. WILLIAMSPORT PASS. RY. CO.

(Supreme Court of Pennsylvania. May 4, 1903.)

STREET RAILROADS—PAVING.

1. A charter of a street railway company provided that in constructing its road it should conform to the grades used in the several streets traversed by it, and keep the same in good repair at the expense of the railway company. *Held* that, where it had done so, it could not be required to pay for repaving them with a new kind of pavement adopted by the city.

Appeal from Court of Common Pleas, Lycoming County.

Action by the city of Williamsport against the Williamsport Passenger Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

John J. Reardon and F. P. Cummings, City Sol., for appellant. O. La Rue Munson, Seth T. McCormick, and Addison Candor, for appellee.

BROWN, J. The Williamsport Passenger Railway Company was incorporated by act of April 15, 1863 (P. L. [1864] 1080). It was authorized to construct a railway in the borough of Williamsport, now the city of Williamsport, and to lay its tracks on the streets of the borough. At that time there was no general act relating to the incorporation of street railways, and the powers, privileges,

* 2. See *Carriers*, vol. 3, Cent. Dig. § 1273.

duties; and obligations of each particular company were defined in the act creating it. The right of this company to use the streets of the town was absolute, and depended upon no municipal consent. The only conditions annexed to the power given it to occupy the streets were "that no freight or burden trains, or locomotives, shall be permitted to pass over the same," and "that said company, in constructing said road, shall conform to the grades now used, or hereafter to be by law used, of the several streets, roads and avenues traversed by said road, and keep the same in good repair, at the proper expense of said company." In the construction of its railway the appellee occupied, among other streets, East Third, West Fourth, and Basin. Until the present controversy arose between the railway company and the city of Williamsport, East Third street, from the curb line to the railroad tracks, was paved with what is known as "Telford macadam," and the appellee had the same kind of pavement between its tracks. West Fourth street was paved with a wooden block pavement, except the space between the tracks of the railway company, which was paved with mountain stone, laid on a broken stone foundation; and Basin street had not been paved at all, except between the tracks of the railway company, where, as on West Fourth street, it was paved with mountain stone, laid on a broken stone foundation. In the summer of 1900 the city of Williamsport repaved East Third street from the curb line to the railway tracks with the best quality of vitrified brick laid on a hydraulic cement foundation, and notified the defendant to put in suitable order that part of the street occupied by the railway, and that the engineering department of the city would, upon application, furnish it with the proper grade. This grade was furnished by the city. In order to adjust its tracks to the grade, the macadam pavement between the tracks was removed by the defendant company, the tracks were brought to grade, and the company then proceeded to relay the space between its tracks with a good quality of macadam, which, when completed, as shown by the city's own evidence, would have been done "as well as that kind of work could be done." When the company had completed a portion of the repaving between its tracks with macadam in the manner just stated, the city gave notice to it to stop repaving in that manner, removed the macadam which it had placed between the tracks, and replaced the same with vitrified bricks on a concrete foundation, in conformity to the pavement from curb to curb. During the same summer the city paved Basin street with vitrified brick, and repaved West Fourth street with sheet asphaltum, laid on a concrete foundation. What occurred between the city and the railway company on East Third street was substantially what took place as to these two other streets; and, after the city had repaved the space between

the tracks on the three streets named, this suit was brought against the railway company to recover the cost of doing so.

The appellee raises no question as to its duty, made known to it by the express words of its charter, to keep "in good repair" those portions of the streets occupied by its railroad; but it does insist that, as its declared duty is only to keep them in "good repair," it cannot be required to repave them with a new and different kind of pavement adopted by the city. The streets of the city are occupied by the railway company, not with its consent, but without it. The Legislature, which was supreme in its authority over the streets of the borough of Williamsport, gave to this passenger railway company the right to occupy them. In the grant of that right, and nowhere else, must be found what conditions, if any, are imposed upon it. No power was delegated to the municipality to make conditions, but the Legislature, reserving that power to itself, imposed, as the only conditions, those already stated; and the duty of the railway company is, therefore, manifestly only to keep "in good repair" those portions of the streets occupied by its tracks.

There is no finding that the appellee had failed to keep the space between its tracks in good repair. On the contrary, the findings are that on East Third street the space between the tracks had been paved with Telford macadam paving, and that the railway company was about to repave between its tracks, and to make a paving therein "with macadam of good condition, and as well as it could be done, and equal to the pavement which had been previously laid on that portion of the street," when it was prevented from completing said repairs by the police force of the city of Williamsport, acting under the direction of the mayor; that there was no evidence in the case that the portion of the street between the tracks on Basin street was out of repair, or not in suitable condition; that there had been a pavement on West Fourth street between the tracks of the defendant, and that it was in better condition than the remainder of the street, and that when the railway company was about to repair the said space between the tracks by replacing the kind of pavement thereon in a good and substantial condition it was prevented from doing so by the police force of the city of Williamsport, under the direction of its mayor. The city, however, was not satisfied that the space between the tracks, as maintained up to the year 1900, should be kept "in good repair" by the railway company, but, when it determined to pave one of the streets and repave the other two, it assumed the right to shift from itself to the appellee the burden of paving and repaving those portions of the streets occupied by the railway. As the borough of Williamsport had no right, when the railway company first went upon its streets, to confront it with any conditions, the city of Williamsport, its successor, has

no right to do so now by imposing any burden upon it. The city's sole right is to ask that the railway company be compelled to perform the duty which the Legislature said should rest upon it. Under the findings of the learned court, it has not failed to perform that duty. The measure of its duty, as read in the act, is to keep its portion of the streets "in good repair." The measure that the appellant would mete out to it is not only to repair, but to repave, by substituting for an old pavement that had been kept in good repair a new one, adopted by the city. By this latter measure the duty of the appellee is not to be gauged, and the judgment of the court below was rightly that it had not been in default. Its duty to repair is a continuing one, and hereafter will be to keep in repair the new pavement laid by the city.

There is nothing in the charter of the railway company requiring it to put the streets in repair. The duty is simply to keep in repair. In *Williamsport, to Use, etc., v. Williamsport Pass. Ry. Co.*, 203 Pa. 1, 52 Atl. 51, the judgment of the court below was affirmed on the opinion refusing a new trial, in which it was very properly said: "It must be borne in mind that under the charter of the defendant it is not liable for paving or repaving streets occupied by its tracks, or any portion of them, but only for keeping the streets in repair." *Philadelphia v. Ridge Ave. Pass. Ry. Co.*, 143 Pa. 444, 22 Atl. 695, and *Philadelphia v. Thirteenth and Fifteenth Streets Ry. Co.*, 169 Pa. 269, 33 Atl. 126, are cited in support of the contention of the appellant that the appellee's duty to repair includes the duty to replace an old pavement with a new and improved one; but of these two cases we said in *Philadelphia v. Hestonville, etc., R. R. Co.*, 177 Pa. 371, 35 Atl. 718: "In neither of these cases was the question involved. In the latter case the company was subject to the ordinance of 1857, which expressly required it 'to be at the cost and expense of maintaining, paving, and repairing' the streets occupied by it. The same is true of the former, or *Ridge Ave. Case*. The *Girard College Pass. Ry. Co.* was by the act of April 15, 1858 [P. L. 300], made subject to the ordinance of 1857. It was merged into the *Ridge Ave. Co.* and this provision became a part of the law of the consolidated company, and was held to be binding upon it. The question was presented in *Norristown v. Norristown Pass. Ry. Co.*, 148 Pa. 87 [23 Atl. 1060], and decided in favor of the position of the appellant by the affirmance of the judgment appealed from in a short per curiam." In *Reading v. United Traction Company*, 202 Pa. 571, 52 Atl. 106—another case upon which the appellant seems to place great reliance—the street railway company had placed its tracks upon streets of a city with the municipal consent, and on condition that it pave its right of way, and keep the same in good repair, or that it pave the said right of way in a specified manner superior to the then

construction of the streets, and keep the said paving in good repair. The question raised on this appeal was settled in favor of the appellee in *Philadelphia v. Hestonville, etc., R. R. Co.*, supra, and further discussion of it is not now needed.

Judgment affirmed.

(306 Pa. 87)

HOTTLE et al. v. WEAVER.

(Supreme Court of Pennsylvania. May 11, 1903.)

EVIDENCE—MEMORANDUM—STATEMENTS OF INSANE PERSON.

1. An unsigned memorandum, made by defendant in an action on a note in his book of original entries, is inadmissible as evidence of set-off.

2. Where an action was brought by a committee of a lunatic, statements made by the lunatic after the committee was appointed are inadmissible in evidence, where there was no offer to prove that they were made in a lucid interval.

Appeal from Court of Common Pleas, Bucks County.

Action by Henry Hottle and Daniel M. Landis, committee of Henry Hottle, lunatic, against Milton H. Weaver. Judgment for plaintiffs, and defendant appeals. Affirmed.

At the trial it appeared that Henry Hottle was a lunatic, and that the defendant was a physician, who had attended Henry Hottle and Hottle's deceased wife. The defendant's account against the wife was \$546.50. Elisha H. Weaver testified that at the time one of the notes was given there was an understanding that it was only to be paid in case Hottle administered on his wife's estate. The evidence showed that the wife left no estate. The witness was asked this question: "Q. You said that you were present at the conversation which took place between Dr. Weaver and Mr. Hottle at the time of the execution and delivery of this note, and you had given what you understood to be said at the time. Was there or was there not anything more than a verbal understanding or agreement at that time? A. Yes, sir. Q. What further understanding was there? A. There was an understanding between the two parties, and it was entered on the book. Q. Who entered it there? A. I did myself. Q. Can you turn to the entry that you made? A. I can. Q. Do so, please. A. I have it. Q. What do you find? Is that a written memorandum there? A. Yes, sir. Q. Who made it? A. I did. Mr. Lear: Q. It is not signed by anybody, is it? A. No, sir." Mr. Ross offers the written memorandum in evidence. Mr. Lear objects. The objection was sustained. The written memorandum offered and rejected was as follows: "April 10, 1897. Received of Henry Hottle the sum of \$500 on account of above bill, on condition that if her legal heirs should administer in her estate, then I should collect the above bill of her estate, and pay back the amount

of the note and interest to Henry Hottle in five years after that; the note of \$500 and the same amount of the above bill be paid in full."

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Thomas Ross and George Ross, for appellant. Henry Lear and A. H. Kittleman, for appellees.

PER CURIAM. The memorandum in the defendant's book of original entries was in form a receipt by defendant for a conditional payment by plaintiff on account of the charges in the book against him. As against the note sued on, the condition was in relief of defendant, and, even if the receipt had been signed by him, it would not have been evidence in his favor while being retained in his own possession. A party cannot make evidence for himself in that way. There was nothing, therefore, to take this entry out of the ordinary category of a written memorandum of a conversation or a contract made by the witness at the time, but not signed by the parties, and available to refresh the witness's recollection, but not in itself evidence.

The second and third assignments of error are substantially that the court held the finding of lunacy by the inquisition to be conclusive. But it does not appear that any such ruling was made. A witness testified that he was present at a certain date, and saw the defendant pay the plaintiff money, and was asked what the plaintiff (now a lunatic) said, when objection was sustained; the ground not appearing on the record, but apparently being that the time was within the period covered by the finding of the inquisition. Such finding was *prima facie* evidence of lunacy at the time referred to by the witness, and it does not appear that the court gave it any greater force. In refusing a new trial, the judge said: "The reasons based upon the failure to admit evidence of statements by Mr. Hottle during lucid intervals, fall through their own weakness. There was no offer to prove such statements while lucid, and at the argument for a new trial there was no testimony to show that such evidence could be produced."

Judgment affirmed.

(206 Pa. 32)

BUTTERMAN v. McCLINTIC-MARSHALL CONST. CO.

(Supreme Court of Pennsylvania. May 11, 1903.)

INJURY TO EMPLOYE—NEGLIGENCE OF MASTER—VICE PRINCIPAL—QUESTION FOR JURY.

1. In an action for injuries to an employé, evidence held to show that defendant had not provided safe machinery or a safe place for plaintiff to work, rendering it liable for the injuries received.

2. Where the superintendent of a construction company hires and discharges men, directing them as to the work, he is a vice principal, and his negligence in not providing suitable machinery is the negligence of his employer, rendering him liable for resulting injuries.

3. Where the question of deceased's contributory negligence is to be determined on conflicting evidence, the question is for the jury.

Appeal from Court of Common Pleas, Montgomery County.

Action by Margarette Buttermann against the McClintic-Marshall Construction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

On motion for judgment, Weand, J., filed the following opinion:

"Plaintiff sues for the recovery of damages resulting from the negligence of defendants, which caused the death of her husband. The jury rendered a verdict for plaintiff. The court reserved the question of law, whether there was any evidence to be submitted to the jury upon which the plaintiff was entitled to recover, and defendant has moved for judgment non obstante on the point reserved. John Buttermann, plaintiff's husband, went into the employ of the defendant company on the morning of October 31, 1900, and shortly after dinner was killed by being struck by a falling gin pole. Previous to that time Buttermann had been a confectioner. He only accepted employment with defendants during a strike, had no previous knowledge of the work required of him, and there was no evidence that he had been instructed or was aware of the danger connected with the erection of the gin pole. The defendant company were engaged in the construction of the steel work at the new plant of the Dunmore Iron & Steel Company, at Dunmore, Pa., and on October 31st their employés were engaged in unloading columns, spans, and girders from cars on a siding running from the Erie & Wyoming Valley Railroad into the Dunmore Iron & Steel Company's land. To facilitate the unloading, a pole was erected on the side of the siding, and was supported by four guy ropes, two of which were fastened to the tracks of the siding in such manner that when in place a car could not pass without striking the rope. In order to let a car pass, it was necessary to loosen the rope, and pull it away from the track. A crab or windlass was erected about 50 feet from the track, and by this articles to be unloaded from a car were hoisted and lowered. Buttermann's work was principally at the crab. The defendant company had arranged with the Iron & Steel Company to give notice when cars were to be moved on the siding, so that the ropes could be in position to allow cars to pass in or out. On the day of the accident, two cars were being unloaded at the gin pole by the defendant company, and beyond these, about 30 or 35 feet distant, were two cars of the Iron & Steel Company being unloaded

¶ 2. See Master and Servant, vol. 24, Cent. Dig. §§ 393, 396, 457, 458.

by the employees of said company. It became necessary to move these last-mentioned cars a short distance, and they were placed in motion. Although efforts were made to stop them, they got beyond control, and there being a descent in the tracks, they ran into the cars at the gin pole, broke the rope, thus letting down the pole, which struck Buttermann, killing him instantly. The court submitted the question of the defendant's negligence in not providing for such contingency, and of Buttermann's contributory negligence, to the jury. Defendant's contention is that the court should have given binding instructions for defendants, for three reasons, viz.:

"(1) The proximate cause of the accident was the negligence or act of the Dunmore Iron & Steel Company gang, over whom defendants had no control or power. Admittedly, the fastening of the guy rope to the track made it dangerous, for an accident was inevitable if the rope should be struck by a moving car. Hence defendants' duty to provide against just such a contingency as happened. That this event should have been foreseen and provided against admits of no serious dispute, especially when the way in which the siding was constructed is understood. It is agreed that if not struck, the rope would not break, and hence what caused the accident was the striking of the other cars. The absence of a guard rail alone may not be the cause of an accident, but when a horse becomes frightened, and falls down an embankment because of the absence of the guard rail, what is the proximate cause? The whistle which frightened the horse, or the absence of the guard rail? And why, in such cases, is the township liable? Because it should have foreseen that horses will become frightened. So, in this case, defendants must have foreseen by common experience that cars may get beyond control, or be set in motion by others; sometimes by their own weight when on a descending grade, or by boys, or, as in this case, when not properly managed. The rule on this subject may be stated to be that the defendant is not liable in negligence where no injurious consequence could reasonably have been contemplated as a result of the act or omission complained of, but it is liable where injuries might have been anticipated or foreseen.' 21 Am. & Eng. Ency. of Law (2d Ed.) 486. The defendants knew that precautions were necessary where cars were to be moved over the siding by providing for notice where such moving was intentional, but made no provision for an involuntary movement of cars, or for a movement of cars by any other than the engineer and firemen of a locomotive. They made no provision for accidents, and this was part of their duty. This is a case where the master did not provide suitable safe machinery or a suitable safe place for his employees; and the fact that this dangerous method was the ordinary method does not excuse, but rather increases, the duty to

foresee and provide against accidents such as the one that occurred. 'The result must occur in the natural and probable course of events.' Pittsburgh Southern Railway Co. v. Taylor, 104 Pa. 306, 49 Am. Rep. 580; Vallo v. United States Express Co., 147 Pa. 404, 23 Atl. 594, 14 L. R. A. 743, 30 Am. St. Rep. 741. The true rule is that injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to follow. Pittsburgh Southern Railway Co. v. Taylor, supra.

"(2) That defendants' foreman was a mere fellow workman, and in no legal sense a vice principal, and, being a competent foreman, defendants discharged their full legal duty, etc. Defendants were contractors for the erection of a steel plant at Dunmore, Lackawanna county. Their shops were at Pottstown, Montgomery county, from which place the material was shipped to Dunmore. Frank Straight was employed to superintend the erection of the plant, and no member of defendants' company took any part in the work. Straight says: 'I was sent up there as foreman of the construction of the steel work at the Dunmore Iron & Steel Company's plant.' James Kearny says: 'Straight hired and discharged the men. The work was erected under the supervision of Mr. Straight.' A vice principal, for whose negligence an employer will be liable to other employees, must be either, first, one in whom the employer has placed the entire charge of the business, or of a distinct branch of it, giving him not merely authority to superintend certain work, or certain workmen, but control of the business, and exercising no discretion or oversight of his own; or, secondly, one to whom he delegates a duty of his own, which is a direct personal and absolute obligation, from which nothing but performance can relieve him. Hughes v. Leonard, 199 Pa. 123, 48 Atl. 862. In this case we have the absolute duty resting upon defendants to provide suitable machinery and a suitable place to work. Ross v. Walker, 139 Pa. 42, 21 Atl. 157, 159, 23 Am. St. Rep. 160. They delegated this duty to Straight, who had sole control; he adopted the general method of erecting the pole; he had entire charge of the business; he was the company. He adopted the only means available, which the company knew was dangerous, and which they knew he would adopt, for their own testimony shows it was the ordinary method. Straight, therefore, represented his principals in the discharge of an absolute duty, and became vice principal. 12 Am. & Eng. Ency. of Law (2d Ed.) 946; Lewis v. Selfert, 116 Pa. 628, 11 Atl. 514, 2 Am. St. Rep. 631; Prevost v. Ice Co., 185 Pa. 617, 40 Atl. 88, 64 Am. St. Rep. 659.

"(3) Buttermann's contributory negligence. Defendants' contention is that Buttermann, be-

ing at a place of safety, voluntarily placed himself in a place of danger. The evidence as to Butterman's position when the collision became inevitable was conflicting, and therefore had to be submitted to the jury. James Kearny said: 'Before I saw Butterman struck, and before the car began to move, I do not remember of seeing Mr. Butterman,' and, 'When Mr. Butterman was struck, he was not at the crab. He was within twenty-eight feet of the bottom or base of the gin pole.' Michael O'Horo said: 'Mr. Butterman was alongside of me at the time, and he wanted to get a block to put ahead of the cars, and he just ran in to get the block under the car as it caught the guy rope. The car did not go six inches after he put in the block,' etc. 'Q. And Mr. Butterman left the crab, and ran down to put a block under your cars, to keep them from going against the guy rope, didn't he? A. No, sir. Mr. Butterman was standing right alongside of one. He did not run from the crab at all. He was down there, because after we would get one column off, the men that used to be working at the crab would come down and help to get it out. He was just coming back when the cars struck.' It is also evident that the deceased could not have run 25 feet before the moving cars on a steep downward grade struck the other cars, which could only have been 12 or 18 feet from the moving cars when they started. We left this part of the case to the jury under instructions which are not complained of. We see no reason to disturb this verdict."

N. H. Larzelere, Gilbert Rodman Fox, and M. M. Gibson, for appellant. Montgomery Evans and Jacob V. Gotwalts, for appellee.

PER CURIAM. The judgment is affirmed, on the opinion of the learned judge below.

(206 Pa. 30)

LAUER BREWING CO., Limited, v. CHMIELEWSKI et al.

(Supreme Court of Pennsylvania. May 11, 1908.)

JUDGMENT—OPENING—GROUNDS—APPEAL.

1. Where, on motion to open a judgment rendered on an account for goods sold, it was shown that defendant had received a postal card, with notice of each consignment, and had never complained thereof, but had agreed upon a balance, and paid it at a date subsequent to many of the items to which he objected, the judgment will not be set aside.

2. On appeal from an order refusing to open judgment on a bond, defendant cannot for the first time claim that he was erroneously sued as a purchaser.

Appeal from Court of Common Pleas, Schuylkill County.

Action by the Lauer Brewing Company, Limited, against William D. Chmielewski and others. From a judgment discharging a rule to open judgment, defendants appeal. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

W. D. Seltzer, for appellants. E. D. Smith, for appellee.

PER CURIAM. Appellant petitioned to have the judgment opened, on the ground that he was overcharged, but his evidence failed to sustain his complaint; it appearing clearly that he had received a postal card, with notice of each consignment charged to him, had made no complaint at the times, and had gone over his account at the plaintiff's office, agreed upon a balance, and paid it, at a date subsequent to many of the items he now objects to. In this court he makes the additional claim that he was described in the bond as agent, but that the goods were charged to him as a purchaser, and the debt, therefore, is not within the terms of the bond. The condition of the obligation was that he should "account for and pay * * * the money due and owing to the said brewing company for all sales and shipments made by them and at his request," and as it is admitted that the business between them was all done the same way from the beginning, it is not apparent how merely calling him agent, erroneously or not, in the recital of the bond, can release him from the plain obligation of the condition. But as this point was not made, and therefore not passed upon by the court below, it will be disregarded here.

Judgment affirmed.

(206 Pa. 91)

HINNERSHITZ et al. v. UNITED TRACTION CO. et al.

(Supreme Court of Pennsylvania. May 11, 1903.)

APPEAL—TIME OF TAKING—FILING EXCEPTIONS—STREET RAILWAYS—LACHES.

1. Where a case was heard on bill, answer, and proofs, and an opinion filed on January 6th, and no exceptions were filed, and after 10 days, and before actual entry of a decree appellants moved for leave to file exceptions nunc pro tunc, and the exceptions were then filed, and the opinion of the court dismissing them was filed May 12, 1902, the time of the appeal ran from such latter date.

2. A judge sitting as a chancellor has a discretion to allow exceptions to be filed nunc pro tunc after the expiration of 10 days from the decree nisi.

3. Where a street railway company lays a single track on a turnpike road so as to indicate plainly an intent to build a double track, and the road is operated for two years, and the company then proceeds to lay its second track, abutting owners, after a third of the track has been constructed, are estopped by laches from seeking to restrain the further construction of the road.

4. Act May 14, 1889, § 17 (P. L. 217), giving a street railway company the right to condemn a turnpike road on making compensation to the owner thereof, provides for compensation to the owner of the turnpike, but grants no rights of the abutting property owners.

Appeal from Court of Common Pleas, Berks County.

¶ 2 See Appeal and Error, vol. 2, Cent Dig. § 1078.

Bill by Harrison S. Hinnershitz and others against the United Traction Company and the East Reading Electric Railway Company. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Endlich, J., stated the facts to be as follows:

"(1) In 1894 the East Reading Electric Railway Company, incorporated under Act May 14, 1889 (P. L. 211), in due form and with proper proceedings laid out a railway upon the Perkiomen and Reading Turnpike Road, in the township of Lower Alsace, connecting at both extremities, and at an intermediate point (the intersection of the turnpike and Friedensburg roads), with tracks already laid and to be laid.

"(2) Proceedings instituted under section 17 of the act of 1889 (P. L. 217) to assess damages to the turnpike company terminated in a consentable award of \$8,000 in its favor, and an agreement of April 12, 1897, between the two companies, for the payment thereof, \$1,000 immediately, \$5,500 before the laying of the first track and within two years, and \$1,500 before the laying of the second track and within ten years.

"(3) On October 5, 1894, the supervisors of Lower Alsace duly granted to the East Reading Electric Railway Company the right to lay a double track on the Friedensburg Road (there being no record of previous authorization by the township authorities of the track already there, and the intention being to lay an additional one, and at once to obtain and give municipal sanction for the entire construction), and connecting therewith an electric street railway upon the turnpike road from the limits of the city of Reading, the line of said township, to a point considerably eastward of the same, as well as of the Friedensburg Road.

"(4) The construction thus authorized not having been made but the purpose and intention to make it never having been abandoned, on March 25, 1897, the time for completing it was extended for two years by resolution of the supervisors of the township, which adds a declaration, in effect, that a failure to lay a second track authorized upon the Friedensburg Road should not operate to leave incomplete the construction of the railway upon the turnpike.

"(5) The latter road was projected, and, in the presence of the township supervisors, surveyed and located, as a road of two tracks, the northerly one of which was constructed in 1897, connecting with the track originally laid on the Friedensburg Road, and, together with it, constituting, and being ever since operated as, a continuous line to Stony Creek, a settlement several miles distant in an easterly direction.

"(6) About the same time the second track upon the Friedensburg Road was also constructed, and it has since been used and extended to Carsonia Park, situate about midway between Stony Creek on the east and

the intersection of the turnpike and the Friedensburg Road on the west. This second track connected by means of switches with the original one, some little distance eastwardly of said intersection, and upon the Friedensburg Road, and at Carsonia Park.

"(7) The business, etc., of the East Reading Electric Railway Company having been transferred under various and successive leases and agreements to the United Traction Company, a corporation under Act March 22, 1887 (P. L. 8), the latter company several weeks before the filing of these bills began the laying of a second or southerly track upon that portion of the turnpike which runs, partly at a heavy grade, from the city limits to the Friedensburg Road, thus making the line of railway a double track line all the way to Carsonia Park.

"(8) In the meanwhile proceedings were instituted for the freeing of a certain section of the turnpike road, including the stretch between the city limits and the Friedensburg Road. These proceedings, pending at the time of the filing of these bills, have since been consummated. See *Turnpike Road v. Berks Co.*, 196 Pa. 21, 46 Atl. 98.

"(9) The plaintiff in Nos. 751, 753, to 756 are respectively owners of property fronting upon the south side of said turnpike road between the city limits and the Friedensburg Road, under titles derived from parties owning the land on both sides of said turnpike road.

"(10) Beyond the occupation of such portions of the turnpike road as the respective plaintiffs in Nos. 751 and 753 to 756 presumably own the fee of, subject to the public easement, no injury peculiar to them or to the properties owned by them, respectively, has been shown to result, or to be likely to result, from the acts of the defendant companies complained of in the bills filed.

"(11) The plaintiffs in Nos. 751 and 753 to 756 at no time made any objection to the laying of the first track upon the turnpike road in front of their properties, nor any inquiry from the officers of the defendant companies concerning their intention to lay a second track south of the first; nor was any attempt made by either of said companies to conceal the purpose existing in this respect, or to deceive said plaintiffs concerning the same. On the contrary, the intent to make the road a double-track road was indicated by the original location and survey, as well as by the presence of a double-track line to the eastern limits of the city, and the building of a second track on the Friedensburg Road eastwardly from a point close to its intersection with the turnpike road, thus obviously suggesting both the propriety and the design of connecting these two extremities by a second track south of and parallel with that first constructed.

"(12) Over one-third of the new track had been laid before the plaintiffs' bills were filed."

"(13) The turnpike road, at the time of the filing of these bills, was not opened or graded to its full required width. The inconveniences complained of as likely to result to the traveling public from the occupation of the road by two railway tracks are not to be looked for if and when the road is fully opened and graded, the defendants having complied with the requirements of the order of January 2, 1900, in respect to the paving of the roadbed between their rails."

The court entered a decree nisi dismissing the bill. This decree was entered on January 6, 1902. No exceptions were filed within 10 days. On March 10, 1902, the court permitted exceptions to be filed nunc pro tunc as of January 16, 1902. On March 27, 1902, exceptions were filed. On May 12, 1902, the exceptions were dismissed, and a final decree entered dismissing the bill. On November 10, 1902, an appeal was taken to the Supreme Court.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Cyrus G. Derr and Edward S. Kremp, for appellants. John G. Johnson, C. H. Ruhl, and Richmond L. Jones, for appellees.

MITCHELL, J. Appellees move to quash these appeals on the ground that they were not taken within the statutory limitation of six months. The cases were heard on bill, answer, and proofs, and the opinion of the court filed on January 6, 1902, directing a decree nisi, which was duly entered by the prothonotary, and notice in due course given, but to only one of the appellants' counsel. No exceptions were filed, and after 10 days, but before the actual entry of a final decree by the prothonotary in accordance with equity rule 65, appellants moved for leave to file exceptions nunc pro tunc, which, after argument, was granted. The exceptions were then filed, duly argued and considered, and the opinion of the court thereon, dismissing them, was filed May 12, 1902. These appeals were taken November 10, 1902.

The motion to quash is based on the view that the leave of the court to file the exceptions nunc pro tunc indulged the plaintiffs only as to the filing of such exceptions, and did not extend the statutory limit of six months for taking an appeal. But this contention cannot be sustained. There was no final decree in fact entered before the filing of the exceptions, and from the moment they were put on the record no such decree could be entered until they were disposed of by the court. An appeal prior to that would have been quashed as premature. There was no final decree in the case, therefore, until May 12, 1902, and the time for appeal ran from that date.

The right of the court to allow the filing of exceptions nunc pro tunc notwithstanding the language of equity rule 65, was elaborately considered by the learned judge below, and,

though it is only impliedly challenged here, it may be well to say that it was a matter within his legal discretion. The equity rules were promulgated by this court under the authority of an act of assembly, and it has been said that they "have all the force and effect of a positive enactment." *Cassidy v. Knapp*, 167 Pa. 305, 31 Atl. 638. By this was meant that they were established as rules of equity practice in all the courts of the commonwealth, and must be followed and enforced as such. When they were first published, there was a disposition in some districts to regard them as subject to the approval and adoption of the local courts. This view had to be corrected by the reversal of the decrees in *Chester Traction Co. v. Phila., etc., R. R. Co.*, 180 Pa. 432, 38 Atl. 916, and *Paletthorp v. Paletthorp*, 184 Pa. 585, 39 Atl. 489. But it was not intended to say that they were inexorable under all possible circumstances, or to take them out of the ordinary equitable control of a chancellor in the application of chancery rules to exceptional cases. Such a construction might easily make them more oppressive than mandatory statutes. It was accordingly held in *Brinton v. Hogue*, 172 Pa. 366, 33 Atl. 554, that, although the notice to the defendants to appear was in the old form, and not in accordance with the revised and existing rules, yet as the defendants had in fact appeared and answered without objection, the departure from the rules had done no harm, and would be considered as waived. So, again, in *Barlott v. Forney*, 187 Pa. 301, 41 Atl. 47, and *Wilson v. Keller*, 195 Pa. 98, 45 Atl. 682, it was said that, though the statement of error required by the rules to be filed in the court below is not a mere formality, but is intended to be enforced, yet in exceptional cases, where no hardship will be imposed on the other party, it may, as an act of grace, be permitted to be filed nunc pro tunc.

These illustrations serve to show the scope of the equity rules. They are the rules of all the courts, to be enforced as of course in all of them, and not relaxed or disregarded as matter of mere indulgence or convenience. But, on the other hand, they are, like all other rules of practice, subject to the judicial discretion of the chancellor as to their strict enforcement under circumstances productive of injustice or exceptional hardship. On the substantial questions in the case the court below found, among other facts, that the railway "was projected, and, in the presence of the township supervisors, surveyed and located, as a road of two tracks, the northerly one of which was constructed in 1897, connecting with the tracks originally laid on the Friedensburg Road"; that about the same time the second track upon the Friedensburg Road was also constructed, and it has since been used and extended to a point where it connects with the tracks on the turnpike; that the plaintiffs other than the township are owners of land on the south side of the

turnpike, where the second track now objected to is to be laid, and that the additional servitude to which their right in the soil will be thereby subjected is the only damage shown in the case. He further found that "the plaintiffs at no time made any objection to the laying of the first track upon the turnpike road in front of the properties, nor any inquiry from the officers of the defendant companies concerning their intention to lay a second track south of the first; nor was any attempt made by either of said companies to conceal the purpose existing in this respect, or to deceive said plaintiffs concerning the same. On the contrary, the intent to make the road a double-track road was indicated by the original location and survey, as well as by the presence of a double-track line to the eastern limits of the city, and the building of a second track on the Friedensburg Road eastwardly from a point close to its intersection with the turnpike road, thus obviously suggesting both the propriety and the design of connecting these two extremities by a second track south of and parallel with that first constructed." Plaintiffs' bills were not filed until more than one-third of the new track had been constructed. On these facts the court stated its conclusion that the construction of the double track on the turnpike within the limits of the township in 1897 was clear notice (in addition to the language of the township's resolution) of the construction put by the railway company upon the consent given to it, and, "as regards the other plaintiffs, they are shown to have been confronted in 1897 with unmistakable evidence that the road which was projected, and of which the whole northerly track was laid, was in truth a double-track road, but temporarily operated in the condition in which it remained until 1899. With this evidence before their eyes, if property holders along the south side of the turnpike intended to object to the construction of the road as projected in its entirety, it was clearly their duty in fairness to defendants, to given notice of such intention." He therefore held that the plaintiffs were barred by laches from relief in equity. In this conclusion we concur.

The learned judge below, however, was of opinion that the right of eminent domain given by the act of May 14, 1889, to passenger railways as to turnpikes, included the right as to the soil under the turnpike, and therefore as against the abutting landholders. This is too broad a construction of the grant. Section 17, Act May 14, 1889 (P. L. 217), provides that "any passenger railway company incorporated under this act shall have * * * power * * * to ascertain and define such route as they may deem expedient, over, upon, and along, any turnpike or turnpikes, * * * and thereupon * * * to lay down, construct and establish a track or tracks for its use in the transaction of its business, * * * provided, that before such

passenger railway company shall enter upon and use any such turnpike or turnpikes * * * it shall make compensation to the owner or owners thereof for such occupation and use of said turnpike or turnpikes, in the mode provided in section fourteen hereof." The meaning of this is that the railway company may lay its tracks upon the turnpike without the consent of the turnpike company, subject to the condition that it must make compensation "to the owner or owners thereof"; that is, to the owner or owners of the turnpike, to wit, the turnpike company. It is a qualified and limited right of eminent domain as against the turnpike company. The abutting landowners are not owners of the turnpike in any proper sense of the term, but owners of ultimate fee in the soil, subject to the servitude of the turnpike. There is nothing in the use of the double phrase "owner or owners," since the turnpike company as a corporation may be referred to either in the singular or the plural, and further since the preceding phrase naming the owners is also in the duplicate, "turnpike or turnpikes." It is the ordinary language of legislation to cover all the aspects of the case. This construction is fortified by the reference to section 14. Compensation is to be made "in the mode provided in section fourteen hereof." That section gives to the passenger railways a similar right to use portions of "the track of any other company already laid down," but "before such use occurs compensation shall be paid to the corporation owning the track laid." In both sections alike the compensation referred to is to be made to the corporation whose property or franchise is to be interfered with. The opposite view would establish a distinction between turnpikes and ordinary highways as to the rights of abutting landowners, giving the power of eminent domain in one case and not in the other, a distinction for which there is no warrant in the act. The Legislature has not seen fit to confer any general right of eminent domain on passenger railways, and in the two special cases in the act of 1889, where it is given at all it is given only as against other corporations whose rights may be specially interfered with, and whose consent or voluntary agreement presumably could not be obtained.

The decrees are affirmed at the costs of the appellants.

(205 Pa. 40)

COATESVILLE & D. ST. RY. CO. et al. v.
WEST CHESTER ST. RY. CO. et al.
(Supreme Court of Pennsylvania. May 11,
1903.)

BILL IN EQUITY—MISJOINDER OF CAUSES—EXTENSION OF STREET RAILWAY—USE OF STREETS.

1. Causes of complaint, though similar in tendency and result, set out in a bill in behalf of parties complainant, not appearing to be the

§ 1. See Equity, vol. 19, Cent. Dig. § 341.

same, or founded on any joint right, should have been put into separate bills.

2. Under Acts May 14, 1889 (P. L. 211), and June 7, 1901 (P. L. 518), it is a condition precedent to the extension by a street railway company that it file in the office of the Secretary of State an exemplification of the record of the adoption of the extension.

3. Where a street railway company was incorporated subsequent to Act June 7, 1901 (P. L. 518), providing that the consent of local authorities to the use of the streets of a town shall be promptly applied for and obtained within two years from the date of the charter, a street railway company incorporated under such act cannot be disturbed in its exclusive privilege of the highways named in its charters for the two years allowed by the act.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by the Coatesville & Downingtown Street Railway Company and others against the West Chester Street Railway Company and others. From a decree dissolving the injunction, plaintiffs appeal. Reversed.

The complainants averred: That they were duly incorporated under the laws of the state of Pennsylvania on the 10th and 12th days of June, 1901, under the acts of assembly pertaining to street railway companies, approved on May 14, 1889 (P. L. 511), and its supplement of June 7, 1901 (P. L. 518), and that one of the defendant companies, to wit, the West Chester Street Railway Company, was incorporated on August 4, 1890, under the same general street passenger railway act. That on or about May 1, 1902, the said defendant pretended to adopt an alleged extension to its original route. That the said alleged extension was duly recorded in the office for the recording of deeds in and for the county of Chester, and that an exemplification of the said record was offered to the Secretary of the Commonwealth, and was not accepted by that officer. That a large portion of the said alleged extension covers a portion of the routes of each one of the complainants, and that the said alleged extension was not for the purpose of completing a circuit upon its road, or for the purpose of connecting its road with a portion of its own road or with the road of some other passenger railway, but is simply an extension or prolongation of its route, and was for many miles over private right of way without touching any highway, street, or bridge, and that the said extension is a confiscation of the roads, franchises, and properties of the complainants, without due process of law, and is contrary to the provision of the Constitution of the commonwealth of Pennsylvania, and that the said adoption of the said alleged extension and the said building and construction is unlawful, and not authorized by law, and is against the statutory policy of the commonwealth and the provisions of the Constitution and against public policy, and any filing of any exemplification from the recorder of deeds is unlawful, and that, if the proposed construction, maintenance, and operation over the routes set forth in the

said extension be permitted, it would be a continuing trespass and an illegal annoyance, to the irreparable injury of the complainants, from which they would have no adequate remedy at law. The complainants prayed the court, under the provisions of the act of assembly approved June 19, 1871 (P. L. 1360), entitled "An act relating to legal proceedings by or against corporations," to declare the attempt of the said West Chester Street Railway Company to adopt, build, and construct over the alleged extension illegal, against public policy, and against the statutory laws of the commonwealth and the provisions of the Constitution, and asked for a preliminary injunction restraining the said defendant from filing any exemplification in the office of the Secretary of the Commonwealth, or from seeking any permission from local authorities to build and operate over said extension, or from doing any work of any name or nature in connection with the said extension. The court granted a preliminary injunction, which it subsequently dissolved.

Argued before MITCHELL, DEAN, FELL, MESTREZAT, and POTTER, JJ.

John G. Johnson and George Quintard Horwitz, for appellants. Thomas McConnell, Jr., and J. Henry Williams, for appellees.

MITCHELL, J. The causes of complaint set out in the bill in behalf of the parties complainant, though similar in tendency and result, do not appear to be the same, or founded on any joint right. They should regularly, therefore, have been put into separate bills. But, as no objection was made in the court below, and the case has been argued here as if upon final hearing, we pass it by with this brief reference, to avoid any inference that we have sanctioned it as correct practice.

The respondents have failed to show any right to build the branches complained of at the time the bill was filed. The extension apparently was regularly adopted by the board of directors, was duly recorded at West Chester, and an exemplification of the record was offered for filing in the office of the Secretary of the Commonwealth, but was refused filing. The reasons of the commonwealth for this course do not appear, and it is stated in appellees' paper book that the court of common pleas of Dauphin county has since issued a mandamus to the secretary commanding the filing of the exemplification. With this we have at present nothing to do. Section 4 of the act of May 14, 1889 (P. L. 212), originally and as amended by the act of June 7, 1901 (P. L. 518), requires that the exemplification shall be filed, and expressly provides that "no right to actually construct the same shall vest until after thirty days from the filing of said exemplification." The filing was, therefore, a condition precedent, with which the defendants had not complied at the date of this bill, and

the acts sought to be enjoined were without any legal authority. Under the act of June 19, 1871 (P. L. 1360), this objection could be raised by any party whose rights are injured or invaded.

We come, therefore, to the question on which the court below apparently decided the case, and on which it has been mainly argued here—the standing of the complainants to invoke the assistance of a court of equity. In *Larimer & Lincoln Street Railway Co. v. Larimer Street Railway Co.*, 137 Pa. 533, 20 Atl. 570, it was decided that, as the municipal consent was under the Constitution a condition precedent to the occupation of its streets, a street railway which had not obtained such consent had no standing to question the rights of another company on the streets. The court below held that that decision governs the present case. This depends on the construction of the act of June 7, 1901, amending the general street railway act of 1889 (Act May 14, 1889; P. L. 211). By the act of 1889, which was the law under which the decision in *Larimer & Lincoln Co. v. Larimer Co.* was made (section 1), companies were authorized “for the purpose of constructing * * * a street railway on any street or highway upon which no track is laid or authorized to be laid, or to be extended, under any existing charter.” This, it will be observed, gave an exclusive privilege to the first company not only to tracks laid and in use, but to mere paper routes authorized, but not built, and perhaps not intended to be built, but only adopted to close the streets to rival companies. This was a fraud on the public, whose accommodation by the use of the line was the consideration for the grant of the franchise. By the amendment to this section under the act of 1901 (P. L. 516) companies were authorized to lay tracks on any street “upon which no track is laid under any existing charter, and in constant daily use for the transportation of passengers at the time of the application by another company for a charter to use such street.” The omission of the words in the original act, “authorized to be laid,” and the insertion of the words, “and in constant daily use,” etc., in the amended section, at once cut off the exclusive privileges of mere “authorized” or paper routes, and opened the streets not already actually occupied to new companies as well as old. This change of the law dealt primarily with existing companies. But it was foreseen that as to future charters difficulties would be likely to arise, such as produced the case of *Homestead Street Railway Co. v. Pittsburg, etc., Electric Street Railway Co.*, 166 Pa. 162, 30 Atl. 950, 27 L. R. A. 383, where a company with a later charter endeavored to cut under and supplant an older one authorized to use the same streets by activity in being the first to secure the municipal consent. This court, in order to prevent the subversion of the intent of the statute, was obliged to hold that the

first company had an implied right to a reasonable time (in that case about five weeks) in which to get consent, and, having got it in that time, it should prevail over a consent previous in time, but given to a company with a later charter.

With a view to such difficulties, the amended section 1 under the act of 1901, after the provision above quoted authorizing the use of streets on which no tracks were actually operated under existing charters, continued: “But whenever a charter after the approval of this act shall be granted to any corporation to build a road as provided by this act, no other charter to build a road on the same streets, highways, bridges or property shall be granted to any other company within the time during which, by the provisions of this act, the company first securing the charter has the right to commence and complete this work: provided, that the consent of the local authorities shall be promptly applied for, and shall have been obtained within two years from the date of the charter.” This excepted future companies, under charters granted after the date of the act, from the danger of having their privileges taken away before they could get their tracks actually laid, and restored, during the period of two years allowed for building, the exclusive privileges on the streets named that tracks “authorized to be laid” had under the original act. It was a fair and proper provision, without which the necessary period required for building would have been but a vain and deceptive privilege, liable to be destroyed at any time without fault of the company by the superior activity or wealth or influence of a junior rival. And for the same reason—the substantial protection of the franchise granted, and to prevent such interferences as were shown by *Homestead Railway Co. v. Pittsburg, etc., Railway Co.*, supra, to be probable—the time for obtaining municipal consent was enlarged to the time allowed for building, and made an absolute right. Under this section, if municipal consent has been promptly applied for, the want of it cannot be taken advantage of in any way to the prejudice of the company until the two-year limit has expired. To this extent the principle of *Larimer & Lincoln Railway Co. v. Larimer Railway Co.*, supra, must be modified in its application to companies chartered since the act of 1901.

It is urged by appellees that the power to make extensions is given in a different section of the act (section 4, Act 1901; P. L. 518), and is without limit other than that it shall not be used to cover streets on which tracks are already laid and in daily use. But this restriction is in the same terms as that in section 1 in regard to charters, and cannot have any wider application. The provision as to charters granted after the date of the act is separate and different, as already discussed, and gives the companies under them two years in which to get their road

built and tracks laid. During that time their franchise on the streets so authorized to be occupied can no more be interfered with by later charters or later extensions than they could under the original act of 1889. Commonwealth ex rel. v. Uwchlan Street Railway Co., 203 Pa. 608, 53 Atl. 513. This construction is apparently not in entire accord with the case of Coatesville & D. St. Ry. Co. v. Uwchlan St. Ry. Co., 18 Pa. Super. Ct. 524. But in that case the applications for municipal consent were made at the same time, and that of the junior corporation only was granted. The court treated this as, in effect, a refusal of the other. Whether the two-year period in which to procure consent, allowed by the act of 1901, will be shortened or terminated by a positive act of refusal on the part of the municipality, or whether the full period may still be available for an opportunity to overcome objections, is a question that does not arise in this case, and therefore we express no opinion upon it.

Another question presented by appellants—whether a street railway may build a substantial portion of its route over a private right of way, not on any street or highway—we also leave for consideration when it shall necessarily arise. The present case does not call for a decision upon it.

The decree is reversed, and an injunction is directed to be awarded, in accordance with the views expressed in this opinion.

May 20, 1903, it being made to appear that the opinion heretofore filed in this case was in part founded on misapprehension of an agreement between counsel, the said opinion is hereby modified by striking out the first paragraph thereof, and by adding at the end thereof the paragraph following:

This opinion is based on the statutes of the case as it appears in this court at this time, and is not to be taken as limiting the court below, in the hearing on the merits, in regard to finding the facts as to the filing of the exemplification of the extension in the office of the Secretary of the Commonwealth, or as to the actual interference of defendants' routes with the routes of any of the complainant companies.

(206 Pa. 116)

BLACK v. BLACK et al.

(Supreme Court of Pennsylvania. May 11, 1903.)

PARTITION—AGREEMENT BETWEEN PARTIES—OBJECTIONS—WAIVER—VALIDITY—PARTITION SALE.

1. A master appointed to partition land reported that it was agreed by all the parties that the land could not well be divided. When the proceedings were almost at the close, one of the parties present, after many meetings, and after the expiration of six months, first objected to the plan of division, and denied the agreement reported by the master. *Held*, that the objection cannot be considered, though the agreement was not in writing.

2. The rule of court that an agreement between attorneys will not be considered unless in writing, does not apply to an agreement made before a master during the trial of the cause.

3. An objection to the manner in which the bidding was conducted at a partition sale will not be considered where not raised by exceptions to the master's report, nor by assignments of error to the order of confirmation.

Appeal from Court of Common Pleas, Delaware County.

Bill by Edgar N. Black and others against Mary K. L. Black and others. From the decree Frederick Black, one of the complainants, appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

Lucien H. Alexander and W. Roger Fronefield, for appellant. Edward H. Hall and N. Dubois Miller, for appellees.

FELL, J. The master appointed to make partition reported that at a meeting of the parties in interest it was agreed by all persons present that the land described in the bill could not conveniently be divided into as many purparts as there were parties entitled. The appellant was present at this meeting. Testimony was then taken by the master to ascertain whether the land could be divided at all, and, if so, into how many purparts. Several plans of division were suggested by the witnesses called. The appellant testified in favor of a division into nine purparts. The master found that the weight of the testimony was in favor of a division into seventeen purparts, and he valued the purparts, and reported: "The master finds, after a personal examination of the premises described in the bill, and after obtaining the opinion of credible persons as to the feasibility of a division thereof, and the value of the same, that the said real estate cannot be parted or divided in such a way as to accommodate all parties in interest without prejudice to or spoiling the whole, but that the same can be parted or divided into seventeen purparts without regard to the number of parties, as heretofore set out, and has described, valued, and appraised the said purparts respectively as follows." Sixteen months after the agreement mentioned was made there was a meeting of the parties in pursuance of a rule to accept or refuse the several purparts at the valuation made, or to offer in writing a larger price therefor, or to show cause why the land should not be sold. At this meeting the appellant demanded that the one forty-eighth portion of the total acreage of the land, being his share therein, should be allotted and set off to him. This demand was refused for a number of reasons stated by the master. One of these reasons—and the only one that need be considered, since it alone is conclusive of the appellant's right—is that the demand was too late. The appellant had agreed with other parties in interest that a division into as many purparts as there were

parties entitled could not be made. He had presented a plan of division into nine parts, and had testified and called witnesses in support of this plan. He had been present at all the subsequent meetings, nine in number, and had made no objection to the course that was being pursued and was now almost ended.

In the written argument presented it is argued that the appellant was not a party to the agreement reported by the master as having been made, and it is claimed that the agreement, if made, was not binding, because it was not reduced to writing. The accuracy of the master's report cannot be challenged in this way. We are without means to determine the facts, since there is nothing on the record that throws light upon it, and we must consider the confirmation of the report by the court as conclusive of this question. A rule of the court provides that: "No agreement of attorneys touching the business of the court will be considered valid unless reduced to writing." This rule does not apply to such an agreement. The object of the rule is to prevent unseemly controversies, and to relieve the court of the embarrassment of deciding questions growing out of a misunderstanding of counsel. It has no application to an agreement made in open court during the trial of a cause, nor to one on which the court at the time is asked by the parties to act. In effect this is what this agreement was. It was made in the presence of the master, and with the intent that he should act upon it in conducting the proceedings.

The questions of practice before the master which have been presented do not require consideration. That relating to the manner in which the bidding should be conducted is apparently an afterthought, as it is not raised by the exceptions to the master's report, nor by the assignments of error to the order of the court. That to the right to vacate an allotment on the failure of a bidder to enter security does not concern the appellant, as he was not prejudiced by the master's action in the matter. We find nothing on the record that would warrant the sustaining of any of the exceptions, and the decree is affirmed at the cost of the appellant.

(206 Pa. 105)

In re WALLACE'S ESTATE.

(Supreme Court of Pennsylvania. May 11, 1903.)

TRUSTEE-REMOVAL.

1. Where, on an application to remove a trustee of an estate, it appeared that at the time he was appointed the beneficiaries were minors, and he was their guardian, though the appointment was irregular, it is not cause for removal.

Appeal from Orphans' Court, Franklin County.

In the matter of the estate of William Wallace. From a decree discharging a rule

to remove the trustee, Hastings Gehr, H. W. Wallace and others appeal. Affirmed.

The following is the opinion of the court below (Stewart, P. J.):

"Had it been brought to the attention of the court when Mr. Gehr's appointment as trustee was asked for that he had been appointed guardian of Elijah W. Wallace's minor children, his appointment as trustee would not have been allowed, except upon his declining or resigning the other trust. The reasons that would then have operated against his appointment as trustee, however, do not now require his discharge. The children of Elijah W. Wallace are no longer minors. Mr. Gehr is not in charge of conflicting interests; he is simply trustee of an estate in which no one is interested who is not sui juris."

Argued before MITCHELL, DEAN, BROWN, and MESTREZAT, JJ.

J. A. Strite, for appellants. Sharpe & Elder and Garnet Gehr, for appellee.

PER CURIAM. Judgment is affirmed, on the opinion of the court below.

(206 Pa. 106)

BROWN v. WHITE.

(Supreme Court of Pennsylvania. May 11, 1903.)

DANGEROUS SIDEWALK—ICE—NEGLIGENCE—DUE CARE.

1. Where, in a suit for injuries received by a fall on ice on a pavement, the evidence showed that the evening before plaintiff had passed over such obstruction, the question whether it was negligent for her to attempt to do so again is for the jury.

2. In an action for injuries caused by a fall on an icy sidewalk, plaintiff is not bound to affirmatively show want of contributory negligence.

3. Whether plaintiff used due care in walking over an icy sidewalk is a question for the jury.

Appeal from Court of Common Pleas, Franklin County.

Action by Annie Brown against Hiram M. White to recover for injuries caused by a fall on ice on defendant's pavement. Judgment for plaintiff, and defendant appeals. Affirmed.

The following were defendant's points: "If the jury believe that there was a noticeable accumulation of ice the evening before at the place where the accident occurred, and that the plaintiff passed over the same the evening before the accident occurred, and knew of the existence of the same, then the plaintiff, in attempting to pass over the same place at the time of the accident, was guilty of contributory negligence, and cannot recover. Answer. I refuse that point. If the jury believe there was a general slippery condition of the pavements, caused by

¶ 2. See *Municipal Corporations*, vol. 33, Cent. Dig. § 1725.

rain and freezing weather, on the morning the accident occurred, then the plaintiff was bound to use more than ordinary caution; and there being no evidence that she did so, the plaintiff was guilty of contributory negligence, and cannot recover. Answer. I refuse to instruct you as requested in the third and fourth points of law submitted by counsel for defendant, for the reason that whether or not the plaintiff was guilty of contributory negligence is a fact to be determined by you from the evidence in the case and the instructions I have given you as to the law. It is not for the court to declare it as a fact, or to determine it. We cannot say, as a matter of law, that an attempt to pass over a noticeable accumulation of ice is negligence per se; nor can we say, as a matter of law, that even though the pavements were generally icy and slippery, plaintiff was guilty of contributory negligence. These are questions to be decided by the jury under the evidence as to the circumstances and the law as we have declared it."

The court charged in part as follows: "Counsel have asked me to direct your attention to some evidence which was given in the case on behalf of the defendant on the night before this accident occurred. Mr. Rinehart, it was—he was the occupant of some rooms on the upper story of the defendant's house—he was called, and testified that that night, having reason to believe the weather would be extremely severe, he turned off the water from the house, so that there could be no flow through the pipes, and his wife testified that the next morning she went to the place where he had turned the water off, and turned it on. If you believe that testimony, it would follow that there was no water in the pipes of that house (I am not speaking of the drainpipe that led from the sink down into the archway) from the time Mr. Rinehart turned it off until his wife turned it on next morning. It was testified by Mr. Rinehart that he had notified the occupants of the Ludwig and Faulkner rooms that they should supply themselves with water; that he was about to turn the water of the house off. Now, you will consider that testimony in connection with the other testimony in the case, and give it whatever weight you think it should have in connection with the determination of the question whether the ice was formed from the water that went down the drainpipe that night. If the ice was formed from water that went down the drainpipe from the sink, it could not have been from water flowing into the sink from the pipes of the house, but the pipe that led from the sink down to the archway was not connected with the water pipes of that house that night."

Verdict and judgment for plaintiff for \$1,554.66. Defendant appealed.

Argued before MITCHELL, DEAN, MESTREZAT, and BROWN, JJ.

55 A.—54

W. Rush Gilman, Gehr & Gehr, and J. A. Strite, for appellant. I. C. Elder and Horace Bender, for appellee.

PER CURIAM. The third point of defendant could not have been affirmed by the judge at the trial. It is not necessarily negligence to attempt to pass over even a "noticeable accumulation" of ice on the pavement. That may depend on the size and shape of the accumulation, the obviousness and magnitude of the danger, the means at hand of avoiding it, and other circumstances. In the present case the plaintiff had passed over the obstruction safely the evening before, and whether it was prudent in her to try to do so again was for the jury.

Nor could the fourth point have been affirmed. The plaintiff was not bound affirmatively to disprove negligence. It was sufficient for her to make out a case of injury from negligence of the defendant without disclosing negligence on her own part. If the evidence showed "a generally slippery condition of the pavements," then it was impossible for her to avoid some risk if she traveled them at all, and whether she used due care under the circumstances was for the jury.

The remaining assignment of error is to a part of the charge in which the judge called attention to some of the evidence favorable to appellant. There was considerable testimony as to the source from which the water came which formed the ice in question. The defendant sought to prove that it could not have come from his premises, and the judge called the attention of the jury to the turning off of the water the night before as tending to sustain that view. He could not have gone further, and charged that that single act was a complete defense, without disregarding the other evidence. He properly directed the jury to consider it all together.

Judgment affirmed.

(206 Pa. 108)

REID v. LINCK et al.

(Supreme Court of Pennsylvania. May 11, 1903.)

NEGLIGENCE—DANGEROUS PREMISES—ELEVATOR SHAFT.

1. Evidence in an action against the owner of a store to recover for injuries sustained by falling into an unguarded elevator shaft held to sustain verdict for plaintiff.

2. Where, in an action by a customer to recover for injuries received by falling into an elevator shaft in defendant's store, defendant testified that he did not consider the place dangerous, he should be asked on cross-examination whether other persons had not fallen down the shaft.

Appeal from Court of Common Pleas, Lycoming County.

Action by David Reid against J. H. Linck and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Defendant presented the following points: "(1) That under all the evidence in the case, the verdict of the jury must be for the defendant. Answer. We refuse this point." "(4) If the jury find from all the evidence that Reid, the plaintiff, was not invited by J. H. Linck, the defendant, or his employes, to enter the oil or storage room, then J. H. Linck, the defendant, owed Reid, the plaintiff, no duty, and was not guilty of any negligence, and the verdict of the jury must be for the defendant. Answer. We answer that point as follows: If the jury find from the evidence that Reid, the plaintiff, was not invited to enter the oil or storage room, or that persons visiting the store on business were not in the habit of going into the said room, or likely to go therein, then J. H. Linck, the defendant, owed Reid, the plaintiff, no duty, and was not guilty of any negligence, and the verdict of the jury must be for the defendant." "(6) If the jury find from all the evidence that Reid was a man of ordinary sense, able to perceive that there was danger if he proceeded along the floor to the north end of the oil or storage room, although he was unable to discern the particular character of the danger, and yet he elected to proceed in such a dangerous course, he was guilty of contributory negligence, and the verdict of the jury must be in favor of the defendant. Answer. It is for the jury to say, if they find the facts as in this point stated, whether the plaintiff was guilty of contributory negligence. If you find that he was negligent, and that such negligence contributed to the injury which he sustained, then your verdict must be for the defendant. (7) If the jury find from all the evidence that after Reid entered the oil room or storage room he found himself in a place requiring precaution, it then and there became the duty of Reid to take the course which he knew to be safe, and return into the storeroom; and if the jury further find from all the evidence that Reid elected to take the questionable or dangerous course, knowing that there was a safe course open to him, then he is guilty of contributory negligence, cannot recover in this case, and the verdict of the jury must be in favor of the defendant and against the plaintiff. Answer. It is for the jury to say, if they find the facts as in this point stated, whether the plaintiff was guilty of contributory negligence. If you find that he was negligent, and that such negligence contributed to the injury which he sustained, then your verdict must be for the defendant. (8) If the jury find from all the evidence that Reid followed Knapp into the elevator or storage room, that Reid lost Knapp, after such loss Reid found himself in a dark place, without sufficient light to discern his path with safety, it then became Reid's duty, under such circumstances, not to proceed any further in his search for Knapp, but to step back into the storeroom by the safe course which he had come; and if Reid knowingly persisted in going for-

ward in the darkness, it was at his own risk, he was guilty of contributory negligence, cannot recover in this case, and the verdict of the jury must be for the defendant. Answer. It is for the jury to say, if they find the facts as in this point stated, whether the plaintiff was guilty of contributory negligence, and if you find that he was negligent, and that such negligence contributed to the injury which he sustained, then your verdict must be for the defendant. (9) However much the defendant may be at fault, if this plaintiff himself was guilty of negligence in going up the elevator or storage room, with which he was not acquainted, and under the conditions which he described, to wit, where it was so dark he could not see Knapp, walked with cautious footsteps, touching the oil flasks as he went along, where he could not see for a distance of 30 feet, and if his negligence contributed in the slightest degree to the injury which he suffered, he cannot recover, and the verdict of the jury must be for the defendant. Answer. If the jury find the facts in this point stated, then it is for the jury to say whether such facts constitute negligence on the part of the plaintiff. With this qualification, this point is affirmed. (10) Negligence is want of ordinary care which a party ought to observe under the peculiar circumstances under which he is placed. That Reid could not or did not foresee the consequences of his negligence does not exempt him from the liability therefor. Answer. Negligence is want of ordinary care which a party ought to observe under the peculiar circumstances under which he is placed. The fact of the plaintiff's negligence, assumed in this point, is a question for the jury under all the evidence."

The court charged in part as follows: "If you find that the elevator room, in which this elevator shaft was situated, was a room into which persons visiting that store on business might reasonably be expected to go, were invited to go, or were in the habit of going, it would then be the duty of the Williamsport Hardware & Stove Company to have so maintained and guarded it as to protect persons likely to pass into the room from falling or slipping therein, in the exercise of ordinary care on the part of such persons. Whether or not this was a room or place into which such persons visiting the store on business were likely to go, be invited to go, or were in the habit of going, is a question of fact for you to determine under all the evidence in the case. If it was not such a room or place, the Williamsport Hardware & Stove Company were not bound to guard the elevator shaft, so as to protect persons who were likely to go into the store or into that place from slipping or falling therein. But if it was such a room or place as persons visiting the store on business were likely to go, or be invited to go, or were in the habit of going, then the Williamsport Hardware & Stove Company were bound to so guard and protect

the elevator shaft that such persons would not slip or fall therein in the exercise of ordinary care."

Verdict and judgment for plaintiff for \$2,350. Defendants appealed.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

H. T. Ames and T. H. Hammond, for appellants. Seth T. McCormick, for appellee.

FELL, J. The defendants were engaged in the hardware and stove business, and occupied a building on the first floor of which was the main storeroom, extending the entire length of the building, and two other rooms known as the stoveroom and the wareroom. In the middle of the store, between the storeroom and the wareroom, was a storage room 8½ feet wide and 50 feet long, which opened into the other rooms. At one end of this room there were stairs leading to the cellar, and at the other end an elevator shaft about 6 feet square. The room was dimly lighted by a window opening into the wareroom. On the morning of the accident, plaintiff went into the store to buy a frame for a stove grate, carrying with him one he had bought at this store two years before. He showed the grate to one of the defendants' salesmen, and asked him for a new one like it. The salesman, after examining it, said: "I think we have a piece like that in the back room. We will go and see." He then turned, and walked into the storage room. The plaintiff followed him. The room was so dark that he lost sight of the salesman, but followed what he supposed to be the sound of his footsteps to the other end of the room, where he fell into the unguarded elevator shaft. There was testimony that it was not unusual for customers of the store to walk through this room in order to reach the storeroom or the wareroom.

Seven of the assignments of error are to the refusal of the court to give instructions that would have withdrawn the case from the jury. This would have been error. The jury were instructed that if the plaintiff was not invited to enter the room, or if persons visiting the store on business were not in the habit of going into the room, or likely to go into it, the defendants were not liable in this action; but that if, in the usual course of business, the room was used by customers as a passageway to other rooms, it was the duty of the defendants to protect the elevator shaft; and it was left to the jury to say whether on the occasion of the plaintiff's injury, what was said by the salesman constituted an invitation to accompany him in search of the article needed. This instruction was correct, and covered the whole ground of the defendants' negligence. The point of the case was whether the plaintiff had been invited, or whether there was an implied invitation, in

view of the fact that the room was generally used by customers as a passageway.

It was not error to allow one of the defendants to be asked, on cross-examination, whether other persons had not fallen down the elevator shaft before this accident. He had testified that he did not consider the place dangerous, and this question was proper to show his knowledge of its dangers, and to affect his credibility.

The judgment is affirmed.

(206 Pa. 100)

GEHR v. McDOWELL.

STRITE v. NORTON.

(Supreme Court of Pennsylvania. May 11 1903.)

WILL—CONSTRUCTION—SALE OF REALTY—TRUSTEES.

1. Testator provided by his will that his real estate should be sold when the youngest child of his son should come of age, and that if a sale was made during the lifetime of the son, a sum should be set aside for the support of his son. *Held*, that the sale would be made on the coming of age of the son's youngest child living at the death of the testator.

2. Testator gave to his executors power to manage and sell his estate as trustees. On the death of the executors, having settled the estate, the court appointed a trustee in their stead. *Held*, that the trustee, and not an administrator de bonis non, was the proper party to make a sale of the real estate under the will.

Appeal from Court of Common Pleas, Franklin County.

Actions by J. A. Strite, administrator of William Wallace, deceased, against J. F. Norton, and by Hastings Gehr, trustee of William Wallace, deceased, against Tench McDowell. From the judgments, Strite and McDowell separately appeal. Affirmed.

The case turned upon the will of William Wallace, deceased, the material portion of which was as follows:

"4th. Upon the arrival at the age of twenty-one years of the youngest child of my said son, Elijah, or upon the decease of my said son, Elijah, if he should die without issue, I order and direct my executor to sell all my real estate, subject however to the charge of the one third or dower interest of my wife, Mary; therein, if she should then be living, and pay over to the child or children of my said son, Elijah, and the lawful issue of any of them who may then be deceased having left such issue, the proceeds of such sale, together with all the balance of my estate, except what is hereinafter reserved, the same to be equally divided between them, such issue of any deceased child or children of my said son, Elijah, however, taking only such share or part as his, her, or their parent or parents would have taken, had he, she, or they been living.

"In case such sale shall be made before the death of my said son, Elijah, I direct that my executor shall reserve and withhold from the distribution above directed the sum of

twenty thousand dollars (\$20,000.00) which said sum I direct shall be invested in good public securities, and the interest thereof, or so much thereof as may be necessary, shall be expended for the support and maintenance of my said son and his family remaining with him, in the manner hereinbefore ordered, and upon the death of the said son, Elijah, the principal sum shall be paid over to his children in the manner as above provided."

Stewart, P. J., filed the following opinion in *Gehr v. McDowell* in the court below:

"It is a primary rule in the construction of wills that effect is to be given to every clause, and each is to be construed in relation to the whole. The contention on the part of defendant that testator meant to include unborn children of his son, Elijah, as beneficiaries in the trust he created would render meaningless and nugatory that clause which provides a maintenance for the son in the event of a distribution of the estate during the latter's life, and which is as explicit and direct as any in the will. Possibility of birth of issue, in contemplation of law, ceases only with the life of the parent, and if unborn children were to be included, it would follow necessarily that no distribution could be made in any event during Elijah's life; whereas, in the plainest way the testator has indicated a different purpose by making what he regarded a suitable provision for the maintenance of Elijah in the event of the distribution occurring before his death. The inference is irresistible that in creating the trust, testator had regard to the children of his son then living, or who might be living at testator's death, and none other. It may have been an omission or oversight not to provide for after-born children, if any there might be, we cannot say; if so, it is too late to correct it now. The will, as written, is anything but obscure; its meaning is plain and obvious. The fact that Elijah has no other children than those who were living at testator's death relieves the case of all appearance of hardship and inequality. Our conclusion is that, the youngest child of Elijah having attained the age of 21 years, the period of sale fixed in the will has been reached, and the real estate of testator is now to be sold. By whom? Is the other question raised in the case stated. The executors of William Wallace, or such of them as survived, had fully settled and accounted for the personal estate, and nothing remained to be done except in connection with the trust he created. Further on, but one of these executors survived. This was the situation when, at the request of Elijah Wallace, and with the assent of the surviving executor, William W. Fisher, Hastings Gehr, Esq., was appointed trustee, not, however, displacing the executor, but as an associate in the trust. What remained at that time to do, was: (1) To invest the remainder of the personal estate, as well as the income and interest therefrom, and the rents and income from testa-

tor's real estate. (2) Out of the rents and income of the real estate to keep the real estate in repair, pay the taxes, keep it sufficiently insured, and pay over to the widow the one-third of what remained yearly during her life. (3) Out of the whole income to provide a suitable support and maintenance for testator's son, Elijah, and his family, and a proper education for his children, leaving it to the executors to determine, in their discretion, how much of said income should in this way be expended. (4) Upon the arrival at the age of 21 years of the youngest child of Elijah, or upon Elijah's decease, to sell the real estate, and distribute the entire estate as follows: In the latter event, to divide the same to and among the said children of Elijah, but if the conversion take place during Elijah's life, then \$20,000 to be withheld from distribution, this sum to be invested by the executors in public securities, and the interest thereof, or so much as may be necessary, to be expended for the support and maintenance of Elijah and his family remaining with him, and upon his death the principal sum to be divided among Elijah's children. Mr. Gehr continued acting with the last surviving executor until the latter's death, and since that time has been acting as sole trustee. It is to be observed that the above provisions in the will are wholly outside the ordinary duties of an executor. The entire balance of the estate, after payment of debts, etc., is given to the executors in trust, to manage, control, and dispose of according to testator's wishes as in his will declared. It is this balance—this trust estate—that we are dealing with, and with this an administration with will annexed can have no relation whatever. 'The transfer of real property,' says Gibson, C. J., in *Ross v. Barclay*, 18 Pa. 179, 55 Am. Dec. 616, 'is governed by the *lex loci rei sitæ*, and no statute of Pennsylvania empowers an administrator with the will annexed to execute a trust of land confided to an executor, by title or by name, for any other purpose than to sell for payment of debts. By force of the act of February 24, 1834 (P. L. 70), relating to executors and administrators, he may execute a power to sell, in order to bring the land into a course of administration, but not to execute a trust for a collateral purpose; for instance, to manage the property, and invest the proceeds for accumulation, or to maintain the widow and children, or to turn the land into money for the convenience of partition, or to exercise any discretionary power confided to his predecessor in the administration for his personal fitness and fidelity. For purposes purely administrative, the thirteenth and fourteenth sections give the devise of a power the effect of a devise of the title, and the sixty-seventh section puts an administrator with the will annexed on a footing with a surviving executor, but not on a footing with a testamentary trustee.' Clearly, the administrator with will annexed in the present case is without au-

thority to convey the real estate. Has Mr. Gehr, the acting trustee, such authority? That depends on the legal sufficiency of his appointment. Was his appointment within the power of the court? This is answered by the act of April 10, 1849, § 2 (P. L. 597). It was under this act that he was appointed, and its language is explicit and unmistakable, giving to the court power to appoint a trustee in place of one of several executors in all cases of trust where any of the executors of the will resign, die, or are dismissed, whether the duties of the trust were to be executed by them by virtue of their office or otherwise. Legally appointed and duly qualified, Mr. Gehr is invested with all the powers committed by the will to the executors, whose successor he is. Included in these is the power and duty to sell testator's real estate at a fixed period, which we have decided was reached when the youngest child of Elijah living at testator's death attained the age of 21 years."

Argued before MITCHELL, DEAN, BROWN, and MESTREZAT, JJ.

Garnet Gehr, for appellant McDowell. J. A. Strite, in pro. per. Sharpe & Elder, for appellee Gehr.

PER CURIAM. These judgments are affirmed on the opinion of the court below in *Gehr v. McDowell*.

(206 Pa. 149)

IN RE MILLIKEN'S ESTATE.

(Supreme Court of Pennsylvania. May 11, 1903.)

TRANSFER TAX—HEIR OF NONRESIDENT.

1. Where a nonresident dies intestate, domiciled in another state, leaving personal property in such state, and two weeks later his sister, who was entitled to a share of his estate, dies in Pennsylvania, where she was a resident, before receiving any of the estate, her share was liable to the collateral inheritance tax of the state of Pennsylvania, under Act May 6, 1887 (P. L. p. 79), providing that all property situated in another state, where the person who dies seised thereof shall have a domicile within the state, shall be liable to the inheritance tax.

Appeal from Orphans' Court, Center County.

In the matter of the estate of Marion L. Milliken. From the decree in case stated to determine liability of collateral inheritance tax, Edward F. Milliken appeals. Affirmed.

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

John Blanchard, Andrew Shiland, and Edmund Blanchard, for appellant. Harry Keller, for appellee.

PER CURIAM. James Milliken died February 4, 1902, intestate, unmarried, and without issue. At his death, his domicile was in the city of New York. He left a large personal estate, consisting of stocks, bonds, and

cash, which at his death was actually in New York, the place of his domicile. He left several collateral heirs, among them a sister, this intestate, whose residence was in Bellefonte, Center county, Pa. There descended to her at her brother's death one-third of his estate, the net value of her share being \$108,244.47. Two weeks after his death, before any part of this had come into her actual possession, she on February 18, 1902, died intestate, unmarried, and without issue. The question under the case stated is whether the sister's share of her brother's estate, his estate having been administered in New York, is subject to the collateral inheritance tax imposed by the laws of Pennsylvania. Our act of May 6, 1887 (P. L. p. 79), enacts: "That all estates, real, personal and mixed of every kind whatsoever * * * and all estates situate in another state, territory or county, when the persons dying seized thereof shall have their domicile within this commonwealth * * * are hereby made subject to a tax of five dollars on every hundred dollars on the clear value of such estate." The moment the brother died, the law cast upon the sister her share in his estate. It is wholly immaterial that the net amount was not yet fixed, and could not be until the final settlement of the administration in New York; her right to the net amount was irrevocably fixed by his death. This is the sum of all the authorities. "An heir is one upon whom the law casts an estate of inheritance immediately upon the death of the owner, and the rights of heirs are considered as arising at the moment of the death of the ancestor." 2 Blackstone, 201; Williams on Executors, 404. It is true, at common law, the word "heir" was strictly applicable only to one who succeeded to land; yet the right of possession in one entitled to personalty, devolving upon him by the death of the ancestor, had always been held to vest immediately on the death of the ancestor, and in the case of personal chattels, the right draws to it the possession. As is said by Sharswood, J., in *Norris's Appeal*, 64 Pa. 275: "Constructive possession is adjudged to be in him in whom is the legal and rightful title." It is conceded that the legal and rightful title to her share was in Marion L. Milliken in Pennsylvania from the moment her brother died in New York. His securities were there deposited in a trust company. They were not in his physical possession; could not well have been. His right to custody over them, to the extent of her share, nominally passed at once to her on his death, subject only to the incident of administration in New York. Her share from that moment was a subject of bargain, sale, or transfer by her in Pennsylvania, subject only to her share of the expenses of administration in New York. For two weeks, then, she was not only in full constructive possession, she was to a degree in actual possession; that is, she could exercise every right of an owner in ac-

tual possession except that of determining the amount of charges for administration; she was the absolute uncontrolled owner, subject to a trifling lien. Whatever may be the rule as to taxation of the personal estate of nonresidents, or as to the taxation of land outside the state, or of the taxation of personal property where there is no immediate right of possession, the tax here was imposed upon the property of a resident, the property which was immediately in her constructive possession, and so remained until her death, and therefore is clearly subject to the collateral inheritance tax imposed by our act of 1887. So the learned judge of the court below rightly decided.

All the assignments of error are overruled, and the judgment is affirmed.

(206 Pa. 146)

KOSSOUF v. KNARR et al.

(Supreme Court of Pennsylvania. May 11, 1903.)

FALSE IMPRISONMENT—LIABILITY OF BURGESS.

1. Where, without complaint on oath, and not on view, a burgess issues a warrant for the arrest of another for violating a borough ordinance, he is liable for nominal damages, at least, for the consequent arrest and imprisonment of the accused.

Appeal from Court of Common Pleas, Clearfield County.

Action by Joseph Kossouf against Henry S. Knarr and George W. Hilliard to recover for false imprisonment. Judgment for defendants, and plaintiff appeals. Reversed.

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Singleton Bell, for appellant. A. L. Cole, for appellees.

MESTREZAT, J. There is but a single question in this case, and that is whether the learned trial judge erred in directing a verdict in favor of the defendant Knarr. It is conceded that the evidence established no liability against Hilliard, the other defendant, and that the court below was right in directing a verdict for him. In July, 1899, Knarr was the burgess, and Hilliard the chief of police, of the borough of Du Bois, in Clearfield county. Kossouf, the plaintiff, contrary to the provisions of an ordinance, began the erection of a cased brick building in the borough. After some progress had been made, the burgess, on the evening of July 20, 1899, told Kossouf that the work must cease, and the building must be torn down, which the

latter agreed should be done. The next day the burgess was absent from the borough, and on his return in the evening he was informed that Kossouf, notwithstanding his promise, was proceeding with the erection of the building. He thereupon, and without any information having been made, issued a warrant for the arrest of Kossouf, and delivered it to Hilliard, the policeman, who arrested Kossouf, and took him before the burgess about 10 o'clock of that evening. The burgess, without a hearing or trial, fined him \$100, the amount fixed by the ordinance for its violation, and in default of payment committed him to the borough lockup, where he remained until 11 o'clock the following morning, when he was released. These facts are not controverted, and they clearly show a case of false imprisonment. The warrant was issued in violation of the constitutional provision that "no warrant * * * to seize any person * * * shall issue * * * without probable cause, supported by oath or affirmation, subscribed to by the affiant." It was also in direct conflict with the provisions of Act June 4, 1897 (P. L. 121), which provides the mode of procedure for the collection of fines and penalties imposed in pursuance of borough ordinances. It is there enacted that actions for fines or penalties may be commenced by warrant or summons before the burgess or a justice of the peace, but it is provided that "no warrant shall issue except upon complaint, on oath or affirmation, specifying the ordinance for the violation of which the same is issued." The right to arrest for the commission of a felony without information or warrant does not arise here. Nor was the plaintiff arrested on view, and hence the subsequent provision of the statute relative thereto has no bearing on the case. There can, therefore, be no question that the arrest was illegal, and without authority of law, and made the burgess liable to an action for false imprisonment.

The right to maintain the action against Knarr having been established, the plaintiff was entitled to at least nominal damages. The question of damages as against the single defendant was not raised or discussed on the trial of the cause, and need not be here. It is sufficient to say that the motives of the defendant (probable cause and malice) may be shown in aggravation or mitigation of damages.

Hilliard, the policeman, can be eliminated from the case by a discontinuance or voluntary nonsuit, and the trial of the cause may then be proceeded with between the plaintiff and Knarr, the burgess, as defendant.

The judgment is reversed, with a venire facias de novo.

¶ 1. See False Imprisonment, vol. 22, Cent. Dig. § 20.

(206 Pa. 75)

CONSHOHOCKEN BOROUGH v. CONSHOHOCKEN RY. CO. et al.

(Supreme Court of Pennsylvania. May 11, 1903.)

TRACTION COMPANY—LEASE OF STREET RAILWAY—RIGHTS ACQUIRED—IN-JUNCTION—LACHES.

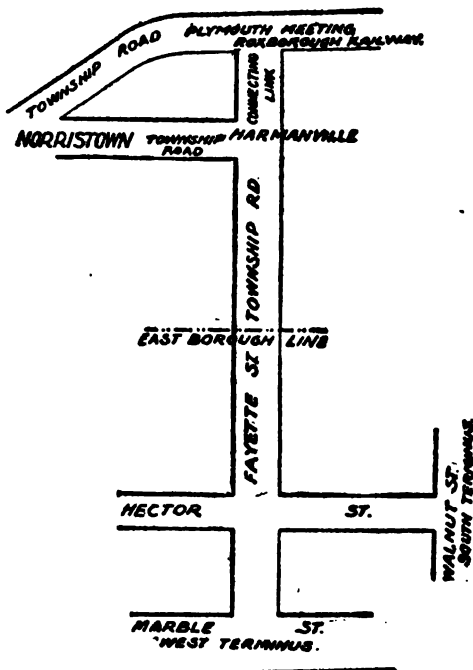
1. A traction company which leases the road of a street railway company which has the consent of the city to use its streets succeeds to the right to such use.

2. A street railway company obtained the right to use the streets of a borough under an agreement to use guard wires over the trolley wire. This condition was not enforced for a long time, when the borough filed a bill to restrain the operation of cars in the streets. *Held*, that a bill filed after some years, and without previous formal demand to enjoin the use of said streets because the guard wires had not been put up, would be dismissed if within a reasonable time the railway company put up the wires.

Appeal from Court of Common Pleas, Montgomery County.

Bill by the borough of Conshohocken against the Conshohocken Railway Company and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The route of the defendant companies can best be understood by the following plan:



The following opinion of Swartz, P. J., was filed in the lower court.

"The borough of Conshohocken contends that the defendant companies cannot legally operate any cars within the borough limits until guard wires are put up as provided in the borough ordinance of January 10, 1894. And the borough further contends that the

Roxborough, Chestnut Hill & Norristown Railway operates its cars upon the streets of the borough without having first obtained the municipal consent to do so, and that such operation without consent is unlawful.

"Findings of Facts.

"(1) The Conshohocken Railway Company, one of the defendants, was incorporated under the act of May 14, 1889 (P. L. 211), to construct and operate a street passenger railway from Conshohocken and over township roads in Plymouth township to the borough of Norristown.

"(2) The Conshohocken Company obtained the consent of the municipal and township authorities, constructed its roadway, and operated its cars in the borough of Conshohocken and township of Plymouth. The ordinance of the borough of Conshohocken granting the consent, provided that the fare for a continuous ride within the borough limits should not be more than five cents. The ordinance further provided 'that two guard wires be placed above said trolley wires to protect the same from other falling wires.'

"(3) The Schuylkill Valley Traction Company was incorporated under the act of assembly of March 22, 1887 (P. L. 8). This company leased the line of the Conshohocken Railway. It also leased other lines, and is operating a general system of passenger railways extending through Norristown, Bridgeport, and Collegeville.

"(4) The Conshohocken Company constructed its line on Fayette street from the borough limits on the east to Marble street on the west. It also laid its tracks from Fayette street southward on Hector street to Walnut street. Hector street is two squares east of Marble street. In addition to this construction within the borough of Conshohocken, a continuous line was built in Plymouth township from the borough limits eastward to Harmanville, and thence northward to Norristown.

"(5) The Roxborough, Chestnut Hill & Norristown Company constructed a continuous line from Chestnut Hill to Norristown, passing through the village of Plymouth Meeting. This company also built an extension from Plymouth Meeting to Harmanville, thereby connecting with the Conshohocken Railway. By this connection the borough of Conshohocken has a continuous railway line to Chestnut Hill, as well as to Norristown, the two routes diverging at Harmanville.

"(6) An agreement was made between the Roxborough, Chestnut Hill & Norristown Company and the Schuylkill Valley Traction Company, whereby the former was to supply cars and men to run from Plymouth Meeting to Conshohocken. This contract provided: 'While said cars are upon the tracks of the Schuylkill Valley Traction Com-

pany beyond Harmanville, and in return thereto, they shall in all respects be subject to the management of the traction company, and the men subject to its rules and discipline.' The receipts on these cars were to be applied to the payment of the motormen and conductors on the cars and to the payment of one-half the interest charges on the original cost of constructing the extension from Plymouth Meeting to Harmanville, and the balance was then to be equally divided between the two parties to the contract.

"(7) Under the agreement just cited the cars of the Roxborough, Chestnut Hill & Norristown Company run over and upon the tracks of the Conshohocken Railway from Harmanville to Marble street, in Conshohocken; that is, they run the whole length of Fayette street, but do not go up and down Hector street, nor do they run to Norristown. They run direct to Plymouth Meeting. The traction company still runs its cars from Walnut and Hector streets to Norristown, but runs no cars from Marble street to Hector street on Fayette, except so far as the Roxborough cars are under its control and management. On cars running to Norristown the fare is five cents, or six tickets are sold for twenty-five cents. On the cars running to Plymouth Meeting there is a straight five-cent fare. No tickets are sold or accepted. Any car will take a passenger over its entire route within the borough limits for a single fare of five cents. In fact, one fare will carry the passenger from the foot of Fayette street to Plymouth Meeting, or from Hector and Walnut streets to the Pennsylvania Railroad beyond Harmanville. A person desiring to go to Norristown from the corner of Fayette and Marble streets can take a car at that point, ride to Harmanville, change cars, and pay an extra fare to the Pennsylvania Railroad, or by walking the distance of two squares he can take a car at Hector street and ride to the Pennsylvania Railroad for a single fare.

"(8) The Roxborough, Chestnut Hill & Norristown Railway has no municipal consent from the borough of Conshohocken to construct or operate a street railway within the borough limits. The same is true of the Schuylkill Valley Traction Company, except so far as the consent to the Conshohocken Railway Company inures to its lessee.

"(9) The Conshohocken Railway Company ratified the agreement made between the Schuylkill Valley Traction Company and the Roxborough Company recited in finding No. 6.

"(10) Neither the Conshohocken Railway Company nor its lessee, the Schuylkill Valley Traction Company, put up guard wires as stipulated in the borough ordinance of January 10, 1894. These defendants express their willingness to put such guard wires in place. The plaintiff was not solicitous about these wires. The road was in operation for some years, and no formal demand was made

upon the defendants prior to the present controversy and the filing of this bill.

"Conclusions of Law.

"(1) Guard wires must be put in place as provided by the ordinance of January 10, 1894. A reasonable time for their erection must be given. Unless they are put in place within forty-five days from this date, the plaintiff is entitled to an injunction restraining the operations of the defendants.

"(2) The Schuylkill Valley Traction Company did not enter upon any streets or highways in the borough of Conshohocken for the purpose of constructing a street railway. It is the lessee of the Conshohocken Railway, and operates, as a part of its system, the road constructed by the Conshohocken Company. As the lessee of the latter company, it may operate the railway without any independent municipal consent. The ordinance of January 10, 1894, contains the municipal consent for all that was done by the Conshohocken Company and its lessee.

"(3) The Roxborough, Chestnut Hill & Norristown Railway Company did not construct a street passenger railway in Conshohocken, nor is the company operating a railway within the borough limits.

"(4) The Conshohocken Company, by its lessee, is using every portion of the tracks located within the borough, and the right to use such tracks is not forfeited by any abandonment. The company has fully complied with the ordinance giving the municipal consent, except as to the erection of guard wires.

"(5) The bill must be dismissed if the defendants will put in place the guard wires within the time above specified; otherwise an injunction will be awarded.

"Reasons in Support of Our Findings and Conclusions.

"That the failure to put up guard wires was not a matter of serious moment to the town council is evidenced by the long delay without any action on the part of the council to enforce this part of the ordinance giving the consent to the Conshohocken Company. The testimony of Mr. Murphy, a member of town council, indicates that the bill in equity was not filed to compel the construction of the guard wires. We think, therefore, that a reasonable time should be allowed to put up these wires before an injunction is awarded.

"The extension down Hector street to Walnut was built by the Conshohocken Railway, and not by the Schuylkill Valley Traction Company. The allegation in the sixth paragraph of the plaintiff's bill to the contrary is not sustained by any evidence.

"That the Conshohocken Railway had the power to lease its road to the Schuylkill Valley Traction Company is clearly established. *Pinkerton v. Pennsylvania Traction Co.*, 193 Pa. 229, 44 Atl. 284. When the borough of

Conshohocken gave its consent to the Conshohocken Railway, the latter received the privilege to build and operate a passenger railway in Conshohocken, and to exercise all the rights and powers of a street railway. The borough could not abridge these powers without the consent of the railway company. One of these powers was the right to lease its road to a traction company. The borough may not destroy this leasing power by demanding a new contract from the lessee. When the traction company leased the Conshohocken road, it succeeded to all the rights the latter held against the borough.

"It is claimed that the Schuylkill Valley Traction Company's lease with the Conshohocken Company is not valid, because the lines of the latter company are not confined to streets, but occupy township roads; that traction companies may not lease passenger railway companies' whose lines are on township roads. Act May 15, 1895 (P. L. 63). It is provided, however, by another act of assembly passed the same day (P. L. p. 65), that a traction company controlling other lines may operate as a general system so much of said different lines as occupy streets. Whatever the rights of the Schuylkill Valley Company may be on the public roads in Plymouth township, we think it is clear that the company, under its lease with the Conshohocken Company, may operate the Conshohocken lines so far as they are within the borough limits.

"The Roxborough, Chestnut Hill & Norristown Company, under its agreement with the Schuylkill Valley Traction Company, is not operating its cars within the borough of Conshohocken. The undisputed evidence is that the cars are under the control and management of the traction company, and they run on the traction company's line. The name of the car is immaterial so long as the fact remains that it is operated by the traction company. The traffic arrangement does not prove that the Roxborough Company operates a road in Conshohocken borough. A Reading Railway car may be carried over the lines of the Pennsylvania Railroad, but in such passage it is not operated by the Reading Company.

"And now, December 23, 1901, the bill will be dismissed if the Conshohocken Railway or its lessee will within forty-five days from the notice of the filing of this opinion erect the guard wires provided for in the ordinance of January 10, 1894; otherwise an injunction will be awarded as prayed for in the first prayer of the bill."

Argued before MITCHELL, DEAN, MES-
TREZAT, BROWN, and POTTER, JJ.

William F. Meyers, for appellant. N. H. Larzelere and H. M. Brownback, for appellees.

PER CURIAM. This decree is affirmed on the opinion of the learned judge below.

(206 Pa. 141)

BLAUVELT v. DELAWARE, L. & W. R. CO.

(Supreme Court of Pennsylvania. May 11, 1903.)

RAILROADS—ACCIDENT AT CROSSING—DUE CARE—PRESUMPTIONS—WRONGFUL DEATH—EVIDENCE.

1. The evidence of plaintiff in an action to recover for death of intestate killed at a grade crossing tending to show that the night was so dark that the engine running backwards could not be seen, that the signals could not be seen, and that it carried no light, and could not be heard by one on the crossing, raised the presumption that the deceased did his duty by stopping, looking, and listening before crossing.

2. In an action by a mother for wrongful death, where the relation between plaintiff and deceased is shown, plaintiff may also show any pecuniary loss suffered by the death of her son.

3. Where the data on which certain general computations were based were in evidence, the exclusion of the computations made by a witness were proper.

4. Where a witness has testified in general as to matters material to the issue, he was properly cross-examined in regard thereto.

Appeal from Court of Common Pleas, Susquehanna County.

Action by Palmira Blauvelt against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

At the trial it appeared that the deceased was a man 30 years old, and that he lived with his mother, and helped to support her. The statement of claim stated the relationship between the parties. When the plaintiff was on the stand the following offer was made: "Mr. Sherwood: We offer to prove, as to this branch of the case, the services which the son performed for his mother at the time he was living there with her and up to the time of his death, and the different characters of the services, for the purpose of showing the amount of damages she has sustained by his death. Mr. Warren: We object to it as incompetent. (Objection overruled. Defendant excepts. Bill sealed for defendant.) A. Why, he done everything; cutting wood and working around and helping me around the house, and everything that he could do; going after the cow and feeding hogs; and everything, when he was around the house, and taking care of the girl that is sick." A witness of the defendant was asked as follows: "Q. If a train were going twenty miles an hour, what would be the number of seconds that it would require to pass over the space from the whistling post at the south to this crossing? (Objected, as a matter of mere computation.) The Court: It seems to me that is a question of mere computation. (Objection sustained. Defendant excepts. Bill sealed for defendant.) Q. Please tell us at what rate of speed—that is, how many feet per second—a train would go on the track at the rate of twenty miles per hour, and also at the rate of twenty-five miles per hour. (Objected

to the same as before. Objection sustained. Defendant excepts. Bill sealed for defendant." Orland Taylor was asked as follows: "Q. Did you have any conversation with him [Miller, the engineer] in which he said that the chimney of this light was smoked up, and that he went out and wiped it off? Mr. Warren: We object that this is not a contradiction on material point, nor as to the time of the accident, and that it is incompetent and immaterial. (Objection overruled. Defendant excepts. Bill sealed for defendant.)"

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

Everett Warren, Warren & Knapp, and A. H. McCollum, for appellant. Paul J. Sherwood and Ralph B. Little, for appellee.

MESTREZAT, J. This case was most carefully and patiently tried by the learned judge of the court below. It was submitted to the jury in a charge impartial, exceptionally clear, and exhaustive. The negligence of the defendant company and that of the deceased were the questions presented for the consideration of the jury, and were determined in favor of the plaintiff. The defendant filed 29 reasons for a new trial, all of which were carefully considered, and dismissed by the learned trial judge in an opinion which fully vindicates his conclusions. We now have this appeal, in which the learned counsel for the appellant company asks us to review practically the same questions determined against it on the motion for a new trial. Notwithstanding the 29 assignments of error, and the exhaustive argument in support of them, we are not convinced that the court below committed any reversible error in the trial of the cause.

The principal complaint of the defendant company is that the court erred in not affirming its first point that "upon the whole case the verdict must be for the defendant." Binding instructions in favor of the defendant would have been manifest error under the testimony in the case. John Blauvelt, the deceased, and his companion, each riding a horse, were struck and killed by a light passenger engine with tender, running backward on a descending grade, about 10:30 o'clock of a very dark night, at a public crossing in the borough of La Plume, in Susquehanna county. No witness saw the men as they approached the crossing or at the time they met their death. The plaintiff contended and introduced evidence on the trial to show that the night was so dark that the engine approaching the crossing could not be seen; that it gave no warning by whistle or bell of its approach; that it carried no lights that could be seen by a person approaching the crossing; and that it ran so noiselessly that it could not be heard by any one on the highway as he came to the crossing. The defendant company claims that the evidence in sup-

port of these negligent acts was of a negative character, and "of little or no probative effect," and should have been withdrawn from the jury. But this is clearly erroneous. An examination of the evidence satisfies us that it was ample, if believed, to sustain the plaintiff's contention, and hence it was the duty of the court below to submit it to the jury.

It is very strenuously urged by the appellant that Blauvelt's death was caused by his own negligence. It is conceded that, in the absence of any evidence showing the contrary, the presumption is that he did do his duty as he approached the crossing by stopping, looking, and listening. But it is contended that the circumstances and facts attending the collision, as disclosed by the evidence, clearly rebut the presumption that he did exercise proper care on the occasion, and that they show that by reason of intoxication, or some other cause, he disregarded or neglected the duty required of him, and thereby caused the collision which resulted in his death. It is claimed by the appellant that the road which Blauvelt traveled ran parallel with and near the defendant company's railroad, and that after he left it and turned to cross the tracks of the railroad his view in the direction in which the engine was coming was unobstructed for a long distance. It is also claimed that there were several lights on the engine and tender, which he could have seen, and presumably did see, if he looked. In addition to these alleged facts, which it is claimed were sufficient warning to Blauvelt of the approach of the engine, it is further urged that, had he exercised his sense of hearing, as he was required to do, he must necessarily have heard the noise of the locomotive as it neared the crossing. These matters, it is argued, conclusively rebut the presumption that Blauvelt performed his duty to stop, look, and listen as he approached the crossing. The difficulty with this contention is, however, that the plaintiff denies the existence of the alleged facts set up by the defendant company in support of its position. The evidence on the part of the plaintiff tends to show that there were no gates or guards at the place of the accident, that the engine approached the crossing noiselessly, and without any lights on it or the tender that could be seen a sufficient distance to warn the deceased of its approach to the crossing. If these allegations were true—and the jury must have so found—there was nothing in the case to overcome the presumption that Blauvelt was in the exercise of due care at the time he was killed. Like the defendant's negligence, this was a question for the jury under the evidence, and was submitted with proper instructions by the trial judge.

It was not error to permit the plaintiff, who was the mother of the deceased, to show what loss peculiarly she had sustained in the death of her son. This was the effect of

the testimony offered for the purpose, and the court charged that that would be the measure of damages. The assignments relating to the exclusion of the testimony offered to show facts ascertainable by mere computation cannot be sustained. The data which the witness had on which the computations were based were in evidence, and the jury could make the calculations as well as the witness.

Miller, a witness for the defendant company, had testified in chief to matters material to the issue, and hence his cross-examination relative thereto was proper. It was also competent for the plaintiff to contradict his answers.

We have not deemed it necessary to consider the numerous assignments of error serially. We are relieved from doing so by the full discussion of the case by the trial judge in his charge and opinion refusing a new trial. As correctly stated in the printed brief of the learned counsel for appellant, "in truth there is not much dispute over legal principles." The jury was the proper tribunal to determine the facts of the case, and having done so under proper instructions and with sufficient evidence to warrant the verdict, we must sustain the judgment entered by the court below.

The judgment is affirmed.

(206 Pa. 152)

IRVINE v. ELLIOTT et al.

(Supreme Court of Pennsylvania. May 11, 1903.)

CONSPIRACY—WHEN ACTION LIES—RELIGIOUS SOCIETIES—JURISDICTION OF COURT.

1. An action will not lie by a priest of the Protestant Episcopal Church against the bishop of his diocese and a member of his congregation for trespass for malicious conspiracy, on evidence that defendants united to charge the priest with violation of church law and forgery, and testified to sustain the same in an ecclesiastical court, which barred the plaintiff from the ministry, though the acts of defendants might to some extent have been influenced by vindictiveness.

2. The proceedings of ecclesiastical courts on matters within their jurisdiction will not be reviewed by the civil courts.

Appeal from Court of Common Pleas, Huntingdon County.

Action by I. N. W. Irvine against Emma D. Elliott and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Henry Budd, Harry W. Petrikin, and William H. Woods, for appellant. C. M. Clement, H. A. Fuller, H. H. Waite, and R. A. Oribson, for appellees.

PER CURIAM. This appellant and plaintiff in the court below, I. N. W. Irvine, was a priest of the Protestant Episcopal Church, and in April of 1898 was in charge of St.

John's parish of Huntingdon, Pa. This was a very old established church of the Episcopal denomination, but at the date mentioned had become somewhat weak numerically and financially, consequently, under the church rules, appellant was sent there first as a missionary, but a year afterwards he resigned as missionary, and thereupon the vestry elected him rector, relinquishing further aid as a mission church. Whatever may have been his exact status under the ecclesiastical law, his real relation afterwards, and down to shortly before the institution of this suit, was that of rector for the parish of St. John. The defendant, Emma D. Elliott, was a member of that congregation. Her husband was not a member, and had no church connection with the parish. Ethelbert Talbot was bishop of the diocese of central Pennsylvania in which St. John's parish was situated, and by the canons of the church had supervision and control of the religious affairs of the diocese, and was the ecclesiastical superior of Irvine. At the end of proper proceedings under the canon law, he had power to discipline, remove, or even excommunicate the rector. From the date of Irvine's installation as rector, there arose between him and Mrs. Elliott much hostility, which was the subject of considerable correspondence between them and Bishop Talbot. There were charges of violation of church law made by Irvine against Mrs. Elliott, and charges by her of immorality and forgery against him. There was a criminal prosecution against Irvine for forgery in connection with the matter, which was heard in the criminal court, and the indictment on his motion quashed on a technical objection. It is very clear, whether Irvine was right or wrong, that the bishop sided with Mrs. Elliott in these accusations. Finally, the trouble culminated in an ecclesiastical court for the trial of Irvine held January 25, 1900, which, after a full hearing, rendered judgment that Irvine had been guilty of conduct unbecoming a clergyman, and that he should be degraded and debarred from the ministry, and Bishop Talbot imposed sentence accordingly. Irvine then brought trespass against the Elliotts and the bishop for a willful and malicious conspiracy to injure him, by depriving him of his reputation and the right to exercise his calling in the ministry. There was a long and careful trial in the court below. The learned judge, with the utmost patience, heard all the testimony which by very liberal rulings had any bearing on the issue. At the close, being of the opinion there was no evidence to sustain the claim of plaintiff, he peremptorily instructed the jury to find a verdict for defendants.

Plaintiff brings this appeal, assigning many errors, but there are in substance only two:

(1) That defendants conspired to have plaintiff unlawfully deposed from the ministry. (2) That they conspired, by unlawful means, to injure his reputation and standing as a Christian minister. In the large mass of

¶ 2. See Religious Societies, vol. 42, Cent. Dig. §§ 93, 157.

testimony adduced the court could find nothing to sustain either charge, nor can we. Undoubtedly, defendants combined to prefer charges against Irvine in the church court, and acted in concert to support the charges by what they and the court considered evidence. This was not unlawful, although their action was tainted with vindictiveness in some particulars. They wanted him deposed from the ministry because they professed to believe him unfit for the office, and they sustained their belief by proof which convinced the court. That they also hated him, and by their course possibly gratified less worthy motives than those which prompt a true Christian to action, is of no moment, except in so far as it might have affected their credibility as witnesses before the court which tried him. There is no law which imposes upon a common pleas jury the duty of passing upon the competency or impartiality of a church court. That court believed the evidence against Irvine; therefore, their judgment, even if not approved by Irvine and his friends, and even though not impartial, is not unlawful. He had full notice of the charges, appeared, and was heard. The proceedings were lawful, and pronounced so by a lawful court. This court, as we have said time and again, is not a court of review of the proceedings of ecclesiastical courts. As remarked in *German Reformed Church v. Com.*, 8 Pa. 282: "Civil courts, if they would be so unwise as to attempt to supervise the judgments of church courts on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which do anything but improve either religion or good morals." Also see *McGinnis v. Watson*, 41 Pa. 9, *Stack v. O'Hara*, 98 Pa. 218, and *Tuigg v. Sheehan*, 101 Pa. 363.

Nor can we see any evidence that defendants conspired by unlawful means to injure the rector in his reputation and standing. They preferred grave charges, supported by evidence tending to establish them. There is nothing to show they manufactured evidence, committed perjury, or suppressed the truth, to bring about a false judgment. It is conceded that the members of the court were men of integrity, and could not have been corrupted. They may have been too credulous, may have been mistaken, as appellant argues. If so, we can do nothing to aid him.

All the assignments of error are overruled, and the judgment is affirmed.

(206 Pa. 135)

GLENN v. PHILADELPHIA & W. C. TRACTION CO.

(Supreme Court of Pennsylvania. May 11, 1903.)

WITNESS — CROSS-EXAMINATION — EXTENT — DISCRETION OF COURT — PERSONAL INJURIES — DAMAGES.

1. The cross-examination of a witness is largely in the discretion of a trial court, and

will not be reviewed unless that discretion has been abused.

2. The cross-examination of a witness should be limited to matters in regard to which he has testified in chief.

3. Where a witness has testified as to part of a conversation, he may be cross-examined as to the rest of it.

4. In an action by a woman against a street railway company for personal injuries, a physician, who examined plaintiff at her request, testified for defendant that, knowing that it was for the purposes of the trial, he concealed from plaintiff the fact that he was the physician of the company, and that thereafter, at his request, plaintiff called on him, and he told her he thought he could get something for her injuries from the company. *Held*, that it was proper to ask him on cross-examination if in such conversation he did not deny to plaintiff that he was the surgeon of the company.

5. Where, in an action for personal injuries, plaintiff testified that she was working for wages, and the amount thereof, and that she was obliged to lay off for a certain number of weeks, an instruction that she could recover for such wages was proper.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Julia P. Glenn against the Philadelphia & West Chester Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The court charged in part as follows: The pain and suffering ought to be considered, and such a lump sum as you think would be proper for the amount of pain and suffering that the person will undergo as a consequence of the injury should be added to any sum that you think is direct compensation for money paid out or wages lost. Verdict for plaintiff for \$4,700, upon which judgment was entered for \$2,000; all above that amount having been remitted by plaintiff.

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

S. Davis Page, for appellant. L. L. Smith, for appellee.

MESTREZAT, J. It is well settled in this state that the cross-examination of a witness should be confined to matters in regard to which he had been interrogated in chief, or to such questions as may tend to show his bias, interest, or relation to the party calling him, or test his knowledge, integrity, and accuracy of statement. A party should not be permitted to establish his claim or to prove his defense by a cross-examination of the witnesses of his opponent. Such is not the purpose for which a witness is cross-examined. While this is the rule, yet the range of a cross-examination must, to a very great extent, be left to the sound discretion of the trial judge, and unless that discretion has been plainly abused, to the injury of the party complaining, it is not ground for reversal. *Bohan v. Avoca Borough*, 154 Pa. 404, 26 Atl. 604. If part of a conversation be given in chief, the rest of it may be elicited on cross-examination.

¶ 5. See *Damages*, vol. 15, Cent. Dig. § 237.

West Branch Bank v. Donaldson, 6 Pa. 179; Stevenson v. Hoy, 43 Pa. 191. In Markley v. Swartzlander, 8 Watts & S. 172, it was held (Sergeant, J.) that a party may cross-examine as to the *res gestæ* given in evidence, though it be new matter. And in Bank v. Fordyce, 9 Pa. 275, 49 Am. Rep. 561, Chief Justice Gibson said that a party is entitled to bring out every circumstance relating to a fact which an adverse witness is called to prove. In Jackson v. Litch, 62 Pa. 451, it is said that the authorities clearly establish that where a witness has stated a fact, he may be asked by the other party to detail all the circumstances within his knowledge which qualify it, even though they may constitute new matter, and form a part of his own case. In that case, Sharswood, J., speaking for the court, says: "I have not been able to find a single case in which this court has reversed on that ground;" leading out new matter on cross-examination, constituting the party's own defense. After a review of the authorities, he continues: "It may be concluded from these authorities that in order to reverse it must be an extreme case, in which discretion has been abused, and in which it is apparent that the party has been injured." In Hughes v. Westmoreland Coal Co., 104 Pa. 207, Trunkey, J., delivering the opinion, says: "This court has rarely, if ever, reversed for an error in permitting a violation of the rules relating to cross-examination which do not result to the prejudice of a party."

The first, second, and fourth assignments allege error in permitting certain questions to be asked the defendant's witness, Thomas, on cross-examination, the third assignment complains of the refusal of the court to strike out Thomas's answer to a question on cross-examination, and the fifth assignment alleges error in permitting the plaintiff, in rebuttal, to impeach the credibility of the witness, Thomas, by denying the truth of his statement on cross-examination. We are satisfied that the cross-examination of the witness was proper, and that it would have been error to exclude it. Thomas was the surgeon of the defendant company, and the plaintiff was taken to his office shortly after she had received her injuries on the night of November 29, 1900, and he prescribed for her. He continued to treat her professionally for some time after the accident. On the trial of the cause, he was called as a witness by the defendant company. Having testified in chief that the plaintiff came to his office that night; that he inquired what the trouble was; that "she made no complaint of tenderness about the hip; in answer to questions of that kind she said there was no tenderness there;" and that he had instructed her to go home, and that he would see her in the morning—he was then asked on cross-examination if the plaintiff did not tell him in that conversation "what sort of a fall she

had." The witness had given a part of the conversation that occurred that evening in his office between him and his patient, and the cross-examination tended to disclose the other part of the conversation. This was clearly competent.

In April, 1901, after the plaintiff had instituted this action, she called on Dr. Thomas for the purpose of having an examination made preparatory to the trial of the cause. She told him the purpose of the examination, but he did not disclose to her that he was the surgeon of the company, of which fact she was ignorant. He at this time made a careful examination, in order that, as he testifies, "I might be ready for anything that might come in the future." He says he withheld from the plaintiff the knowledge that he was the company's surgeon that he might make a settlement of the case. Subsequently to the examination, and in response to his request, she came to see him, and he testifies that he then told her he thought he could get from the company compensation "for loss of time, and that sort of thing." The plaintiff's counsel then asked him if in that conversation he did not deny that he was the surgeon of the company, and that if the conversation, as narrated in the question, did not take place between them. This was admitted under objection by defendant, and he denied that the conversation had occurred. The question was then asked the plaintiff, and she contradicted the defendant, and testified that the conversation did take place. There was no error in either of these rulings. The question was proper cross-examination, as it elicited the balance of a conversation, part of which the witness had given, and also tended to impeach his credibility. From his own testimony, it appeared that he had concealed from the plaintiff, while he was treating her professionally, and, as she thought, as her own physician, that he was surgeon of the company, in order that he might secure information which would place him in a position "to be ready for anything that might come in the future." The cross-examination complained of was "directed to the situation of the witness, his relations with the party calling him, and his zeal or bias as shown by his conduct," and was therefore admissible. Beck v. Hood, 185 Pa. 32, 39 Atl. 842. Where the witness discredits himself in his examination in chief, a liberal cross-examination should be permitted, which tends to attack his conduct and impeach his credibility. Thomas was a very important witness for the defendant. The question put to him on cross-examination tended to impeach his credibility and impartiality as to matters in this case, and his replies were, therefore, subject to contradiction.

The jury were not misled by the remarks of the trial judge, complained of in the ninth assignment of error. They merely elabo-

rated what he had already said in his general charge on the subject, which it is alleged was erroneous.

Nor is there any merit in the sixth, seventh, and tenth assignments, in which exception is taken to certain portions of the charge. While the learned judge presented to the jury the supposed theories of both parties as to how the plaintiff was injured, he left it to them to say "how it did happen." It could not be presumed that the plaintiff was paid her wages when she was "laying off," but rather the contrary presumption would prevail. The testimony having fixed the wages the plaintiff was receiving at the time of the accident, the jury could properly be allowed to consider the loss she sustained by being deprived of them during her enforced idleness.

The judgment is affirmed.

(206 Pa. 128)

NAULTY v. BULLETIN CO.

(Supreme Court of Pennsylvania. May 11, 1903.)

LIBEL—WHAT CONSTITUTES—INNUENDO.

1. Where, in an action for libel, it appears that the effect of the article published by the defendant company was simply to deny the correctness of certain alleged historical facts set forth in a circular letter by plaintiff as secretary of an association, but it did not impugn the motives or the good faith of the writer in any way, it could not be interpreted as meaning that "plaintiff is not qualified for his chosen occupation as an expert in historical matters, and a promoter and manager of historical and patriotic projects."

2. The purpose of an innuendo is to define the defamatory meaning which the plaintiff attaches to the words, but cannot be used to introduce new matter, or to enlarge the actual meaning of the words, and give to the language a construction it will not bear.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Edwin F. Naulty against the Bulletin Company for libel. From a judgment for defendant on demurrer, plaintiff appeals. Affirmed.

The material portion of the plaintiff's statement was as follows:

"And the plaintiff further saith that the Bulletin Company, a corporation conducting and publishing a newspaper called the Evening Bulletin, in the city of Philadelphia, well knowing the premises, and intending to injure plaintiff, and to deprive him of his good name, and further intending to cause plaintiff to lose and to be hurt in his chosen occupation as an expert in historical matters, and a promoter and manager of historical and patriotic projects, did falsely, maliciously, wickedly, and illegally make and publish of and concerning plaintiff, and of and concerning plaintiff as an expert in historical matters, and a promoter and manager of historical and patriotic projects, as aforesaid,

the following false, scandalous, illegal, defamatory, and malicious writing and libel, in substance as follows:

"Vice Presidents are Wanted—Philadelphian Says Harewood was Built by Washington, and Recites Historical Facts Which are Not So—Several Distinguished Men Accept.

"Washington, May 16.

"A distinguished gentleman in Washington, including senators, representatives, army and navy officers, and others, have within the past few days received invitations to become vice presidents of an association formed for the purchase and preservation of an alleged manor house, Harewood, said to have been built and occupied by George Washington. Genuine surprise has been caused by the receipt of these invitations, as there is high authority for the statement that Harewood, as far as George Washington's connection with it is concerned, is a castle in the air. The invitation is in the form of the following letter from the office of the secretary of the association, Edwin Fairfax Naulty, 112 S. 4th St. Philadelphia:

"Esteemed Sir: A number of gentlemen of Pennsylvania and the Virginias have banded together and formed the Washington Manor Association for the purchase and preservation of Harewood, the ancient manor house built by General Washington in 1752-56, near Charlestown, in what is now Jefferson county, West Virginia, but what was then Berkely county, Virginia. An option on the estate has been obtained from Mr. John Augustine Washington, its present owner, and a charter for the organization has been applied for. It is our purpose to raise the necessary money for the purchase of the historic old place by popular subscription, and to preserve Harewood forever for the American people as is Mount Vernon. It is our intention to have our vice presidential board composed of at least twenty of the most representative men in the United States, chosen from every representative calling, and we should like to add your name to the board. Among those who have already accepted are: General Miles; Admiral Dewey; President Elliot, of Harvard; General Joseph Wheeler; Dr. Marcus Benjamin, of the Smithsonian Institute; and General Joseph Breckinridge, Inspector General, U. S. A. Invitations have also been sent to Chief Justice Fuller, United States Supreme Court; President Hadley, of Yale; Bishop Potter; Bishop Coleman, of Delaware; Senators Lodge, of Massachusetts; Daniel, of Virginia; Scott, of West Virginia; Penrose, of Pennsylvania; Depew, of New York; Dolliver, of Iowa; and Fairbanks, of Indiana; the Hon. Seth Low; the Hon. W. O. Whitney, and others. Permit me to recall to your memory some the historical associations of Harewood. It was built in 1752-56 by General Washington, and was afterward occupied by his brother Colonel Samuel Washington. It has been in the possession of the family ever since, and is now owned

¶ 2. See Libel and Slander, vol. 32, Cent. Dig. § 206.

by Mr. John Augustine Washington. Around its gray old walls cling some of the most romantic memories of the Colonies, Revolutionary and early Federal periods. In its great parlor James and Dolly Madison were wed, having journeyed thither from Philadelphia in Thomas Jefferson's coach for the purpose. Its roof sheltered Louis Philippe, afterward King of France, and his two brothers during their exile. There the young son of Lafayette found asylum during the French Revolution. Chief Justice Marshall compiled there part of the "Life of Washington," and Sparks part of his "Letters of Washington." Its halls have echoed to the tread of many a famous beauty and gallant gentleman of the olden time. In the parlor still stands the great black marble fireplace given by Lafayette to Washington, and placed by him at Harewood. Martha Washington planted the box hedge now growing in the garden, and Dolly Madison the famous row of lilacs which crowns the lower terrace of that bower of beauty. Thomas Jefferson said of the view from its upper windows, looking east toward Harper's Ferry and the Blue Ridge, that "it was worth crossing the Atlantic to see." Of the 2,000 acres of land comprising the estate in General Washington's day, only 263 are now left, but these comprise the heart of the place. Mr. Washington, the present owner, has agreed to sell the place for \$500 an acre, manor house, offices, barns, and outbuildings all included. The Washington Manor Association proposes to raise the money by subscriptions of \$1 each, and the issuance of certificates, and we hope to accomplish this within less than two years. Confident that you will join our Board of Vice Presidents, and aid us in this splendid work, I am, dear sir, yours sincerely, Edwin Fairfax Naulty, Secretary.

"Several of the gentlemen who received this invitation courteously accepted it without refreshing their memory, or making inquiries, and are now being advertised as vice president of the Washington Manor Association. Others, more familiar with the Washingtons, studied up the biographies, and investigated the records in the Congressional Library, the State Department, and elsewhere, and are now prepared to say that there is no justification for the existence of this association, because they say Washington never built the alleged Manor House, and that no such place as Harewood has any association with the life of Washington. Moreover, the historians say that President Madison was not married at Harewood, but in a house in Frederick county belonging to Step-toe Washington. George Washington did own land in West Virginia, which he acquired when a young surveyor, but he sold it to his brothers, Charles and Samuel, and never built a house there. He inherited Mount Vernon in 1775, when a young man, and never lived elsewhere except in an official residence. In view of these circumstances, and

especially in view of the statement in Secretary Naulty's letter that \$500 an acre is to be paid for the Harewood property, some of the distinguished gentlemen who have been invited to become vice presidents of the Washington Manor Association have declined in writing, and are inclined to the opinion that this well-meaning society have either been made the unwitting victims of real estate speculators or of their too eager patriotism.'

"That said libel was published in the Evening Bulletin on Thursday, May 18, 1901.

"Plaintiff further saith that the matter contained in the headings to said publication, 'Philadelphian says Harewood was built by Washington, and recites historical facts which are not so' (meaning by 'Philadelphian' this plaintiff); the reference in said libel to the property as 'an alleged manor house, Harewood, said to have been built and occupied by George Washington'; the statement therein 'that Harewood, as far as George Washington's connection with it is concerned, is a castle in the air'; the statements, following the copy of a letter signed by this plaintiff in said publication—all convey the innuendo, and mean, and are meant to mean, that this plaintiff is not qualified in his chosen occupation as an expert in historical matters, and a promoter and manager of historical and patriotic projects, and that in sending out the letter quoted in said libel, and in promoting and acting as secretary of the Washington Manor Association, therein referred to, he is guilty of a fraud and deception on the public, and is engaged in obtaining money from the public under false pretenses.

"And the plaintiff further saith that the charges in said publication and the innuendoes conveyed thereby against him are all false. That each, every, and all of the historical facts contained in the letter signed by this plaintiff as to the property called Harewood, and quoted in said publication, are historically true.

"And the plaintiff further saith that said the Bulletin Company well knew said charges and the innuendoes contained in said libel against this plaintiff to be untrue when made by it.

"Plaintiff further saith that he had made extensive arrangements to lecture on the subject of the project known as the Washington Manor Association for the preservation of Harewood, referred to in said publication, from which both he individually and the said association would have derived large financial profits. That said publication, and the libelous statements contained therein, has and will materially injure and deprive said plaintiff of this source of income and profit.

"And the plaintiff further saith that said publication is a false and malicious libel. Plaintiff denies the truth of all charges and innuendoes so injuriously made against him in said publication. By reason of this libel,

plaintiff has been brought into reproach, said charges have been widely published, and plaintiff has suffered in character and in feelings to an amount which exceeds \$10,000; wherefore he brings suit."

The court sustained a demurrer to the statement.

Argued before MITCHELL, FELL, MESTREZAT, BROWN, and POTTER, JJ.

William MacLean, Jr., for appellant. Charles E. Morgan, Jr., and R. Stuart Smith, for appellee.

MESTREZAT, J. Little need be said to sustain the judgment of the trial court. We cannot agree with the learned counsel for the appellant that the innuendoes set out in the statement are supported by the language used in the publication complained of. No fair or reasonable construction of the words in the objectionable article will warrant the innuendo, laid in the statement, "that this plaintiff is not qualified in his chosen occupation as an expert in historical matters, and a promoter and manager of historical and patriotic projects, and that in sending out the letter quoted in said libel, and in promoting and acting as secretary of the Washington Manor Association, therein referred to, he was guilty of a fraud and deception on the public, and is engaged in obtaining money from the public under false pretenses." The tenor and effect of the article published by the defendant company was simply to deny the correctness of certain alleged historical facts set forth in the circular letter written by the plaintiff as secretary of the association. It did not impugn the motives or good faith of the writer in any way, nor by any fair intendment could it be interpreted as meaning that the "plaintiff is not qualified in his chosen occupation as an expert in historical matters, and a promoter and manager of historical and patriotic projects." The purpose of an innuendo, as is well understood, is to define the defamatory meaning which the plaintiff attaches to the words; to show how they come to have that meaning, and how they relate to the plaintiff. *Price v. Conway*, 184 Pa. 340, 19 Atl. 687, 8 L. R. A. 193, 19 Am. St. Rep. 704. But it cannot be used to introduce new matter, or to enlarge the natural meaning of the words, and thereby give to the language a construction which it will not bear. *Hackett v. Providence Telegram Publishing Co.*, 18 R. I. 589, 29 Atl. 143. It is the duty of the court in all cases to determine whether the language used in the objectionable article could fairly and reasonably be construed to have the meaning imputed in the innuendo. If the words are not susceptible of the meaning ascribed to them by the plaintiff, and do not sustain the innuendo, the case should not be sent to a jury. The learned trial judge sustained the demurrer in this case, and we are of opinion that he committed no error.

The judgment is affirmed.

(204 Pa. 115)

LEHIGH VALLEY COAL CO. v. EVERHART.

(Supreme Court of Pennsylvania. May 11, 1903.)

MINING LEASE—CONSTRUCTION—ROYALTIES—FINDINGS OF COURT.

1. Under a certain mining lease the lessee had a right to mine all the merchantable coal to exhaustion, with certain timber and surface privileges, with no specified limit to the lease. The lessees were to pay 30 cents per ton for the coal mined and removed. A further clause of the lease fixed the same rate per ton, but that the lessee should, during the remainder of the term, pay a fixed minimum cash royalty annually of \$30,000 in quarterly installments, and for such payment could mine and remove in each and every year, as aforesaid, 100,000 tons of the coal. *Held* that, as long as any coal remained unmined, the lessee was liable for the stipulated minimum royalty, though he may have paid an amount in excess of the 30 cents per ton for all the coal under the land mined and unmined.

2. Where counsel requested findings of fact and conclusions of law, it is not sufficient for the court to substantially answer such request by his independent findings, where he does not show what he regards as his answer to each request.

Porter, J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by the Lehigh Valley Coal Company against George W. Everhart. Decree for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

George R. Bedford, Richard C. Dale, and Henry A. Fuller, for appellant. John G. Johnson, S. P. Wolverton, and Francis L. Gowen, for appellee.

MESTREZAT, J. By a contract in writing dated January 1, 1884, the plaintiff and defendants' predecessor in title, each being the owner of the undivided one-half of the premises, for the consideration of the rents therein named and the covenants to be performed by the lessee, "demised, leased, and to mine let" to one Frederick Mercur "all the anthracite coal" in and under a certain tract of land lying in Luzerne and Lackawanna counties, together with the use of such portion of the surface as might be required for mining improvements necessary for the development of the mining operation; and also with the right to cut and use timber on lessors' land for mining purposes during the term of the lease. The contract provided that the lessee should "have and hold the said coal and mining privileges with the surface rights * * * until all the merchantable coal which can be mined and removed by proper, skillful, and workmanlike mining shall be mined out and exhausted." The lessee covenanted, *inter alia*, as follows: That he would forthwith enter into possession of the demised premises, and proceed with due diligence to mine and remove all the merchantable coal; that he would pay

quarterly a royalty of 30 cents per ton for each ton of coal mined and shipped which should pass over a screen of five-eighths inch square mesh, and for all coal which should pass through a screen of five-eighths inch square mesh a royalty proportioned to the prices of the larger sizes; that after the first year he would pay "a fixed minimum cash royalty annually of thirty thousand dollars in quarterly installments as aforesaid, and for such payment may mine and remove in each and every year as aforesaid one hundred thousand tons of coal of the sizes larger than pea coal. * * * And if in any one year the stipulated minimum cash royalty shall be paid, and sufficient coal, at the royalty aforesaid, to equal such minimum, shall not have been mined out and removed, the deficit may be mined out and removed, without charge, in any subsequent year of the term." The contract provided that the payment of the royalty should be suspended if the machinery should be broken or injured, and for certain other enumerated causes. The ninth paragraph is *inter alia*, as follows: "That if at any time any installment of rent, or any part thereof, shall remain unpaid for the period of sixty days, * * * the said lessors may, at their option, declare this lease at an end, and thereupon all rights of the said lessee under this instrument shall absolutely cease and determine; * * * and in case a cause of forfeiture shall arise * * * and shall * * * be waived, the right of forfeiture shall remain and be in force whenever and so often as a new cause of forfeiture by reason of nonpayment of rent or otherwise shall arise." It was further stipulated in the same paragraph that, "to the end that a speedy process may be had for the recovery and the resumption of the possession of the demised premises after forfeiture declared," the lessors might, by a power of attorney therein given, enter judgment in any action of ejectment brought to recover the premises, upon which judgment a writ of *habere facias possessionem* might issue forthwith, and the premises, with all the improvements thereon, be delivered at once to the lessors. For a nominal consideration, Mercur, the lessee, on March 29, 1884, sold and assigned all his interest in the lease to the Lehigh Valley Coal Company, the plaintiff in this suit. No mining operations were begun on the property until November, 1890, but in the meantime the coal company paid the stipulated annual royalties.

This bill was filed January 16, 1902, and it avers, *inter alia*, that up to October 1, 1901, the plaintiff had paid to defendants the full amount of the royalties due them under the terms of the contract for all the coal in and under the land described therein, and that they were not entitled to any further payments or royalties under or by virtue of the terms of the agreement. The bill prayed that it be decreed that the plaintiff has paid the full amount of royalty, that it is required to

pay by virtue of the lease, and is entitled to possession of the demised premises without further payments until it shall have mined and removed the remainder of the coal in and under the premises. A further prayer of the bill was that defendants be enjoined "from declaring the terms of the said mining lease at an end, and from resuming possession summarily of the said premises," and from interfering with plaintiff's possession thereof until it shall have mined and removed the remainder of the coal in and under the demised premises. The answer denied that the coal remaining in the land had been paid for, and also denied that the plaintiff had observed its covenants, and averred a breach of the same, in that it had not paid the minimum amount of royalties payable on January 20, 1902.

The learned trial judge found that the payments made to the defendants up to October 1, 1901, were in excess of the value of their share of the coal mined and removed according to the method of valuation provided by the lease, and was, by the same method of calculation, also in excess of the sum due the defendants for the coal mined and yet to be mined on the premises. He held "that the plaintiff is entitled to mine and remove, within a reasonable time, the unmined portion of the moiety of the coal demised in the indenture mentioned in the bill, for which it has made payment, without the payment of any further royalty, minimum, or consideration therefor," and enjoined the defendants "during said reasonable time" from declaring "the term of the said indenture at an end," and from resuming possession of the coal, or from interfering with the plaintiff company's possession of the same until it shall have mined and removed the coal.

The right of the plaintiff to the relief sought in the bill depends upon the construction of the contract made on January 1, 1884. The intention of the parties must be ascertained from their contract, and, when thus ascertained, it must be carried out regardless of any supposed hardship that may result to either of the parties. When the terms of an instrument are plain and easy of interpretation, there is no necessity for invoking the aid of technical rules of construction to determine the intention of the parties. This frequently leads to the making of another and different contract by the court, and not to the enforcement of the contract of the parties, which is the duty of that tribunal. Here we are not concerned with what the parties should have done, what stipulation they should have inserted in their contract, but our sole duty is to compel them to observe and carry out what they did as evidenced by the instrument in writing which bears their signatures. If either of the parties made a "hard and unconscionable bargain," it is his act, and, in the absence of fraud, accident, or mistake, he cannot invoke the aid of a court to relieve him from

his folly. Such errors have not yet been recognized or regarded as being within the corrective powers of either the legal or chancery side of our courts of justice, and until the authority is conferred or declared to exist, we must decline to exercise it.

By the terms of this agreement, the lessee became entitled to all the merchantable coal within the described premises, together with the use of such portion of the lessors' surface as might be required for airshafts and other mining improvements, and also with the right to cut and use timber on the lessors' lands for mining purposes during the existence of the lease. The coal was not to remain in place, but was to be mined and removed with due diligence by the lessee. No definite time was fixed within which the coal was to be removed, but it was expressly provided that the lessee was to have and to hold the coal and mining privileges with the surface rights and timber privileges "until all the merchantable coal which can be mined and removed by proper, skillful, and workmanlike mining shall be mined out and exhausted." This stipulation defined or fixed the term, though it was indefinite, in which the lessee should remove the coal and exercise the rights conferred on him by the contract. It is, therefore, clear that the intention of the parties as expressed in their contract was that all the coal was leased or granted to the lessee, but that he should proceed with due diligence to mine and remove it until it was "mined out and exhausted." Practically and in effect what the lessee got by the contract was the right to mine all the merchantable coal to exhaustion, accompanied with certain surface and timber privileges on the lessors' land.

The payment of 30 cents per ton for the coal mined and removed, as provided in the second paragraph of the lease, was not the only consideration or compensation for the rights and privileges granted or leased to the lessee. Had it been, the additional provision for the payment of royalty contained in the third paragraph would have been surplusage, and entirely unnecessary. We must presume that the parties had some purpose in view when they inserted the minimum clause in the agreement. It must be read in connection with, and as part of, the provision for the payment of royalty in the second paragraph. By the terms of this paragraph the lessee covenants to pay 30 cents per ton for each ton mined and shipped. By the third paragraph the same rate per ton is fixed, but he agrees to pay during the remainder of the term "a fixed minimum cash royalty annually of thirty thousand dollars in quarterly installments, and for such payment may mine and remove in each and every year as aforesaid one hundred thousand tons of coal." The provisions of the two paragraphs do not conflict, and both are operative, and must be given effect. The rate of 30 cents named in the second paragraph was fixed in view of,

and was controlled by, the fact that the lessee would "proceed and continue with due diligence to mine out and remove" the coal, thereby enabling the lessors to realize promptly upon it. The speedy mining of the coal and the consequent early receipt of the royalties or rentals therefor was doubtless an important consideration with the lessors in fixing the rate established in this paragraph of the lease. They realized, however, that under this clause of the contract they had no protection against delay in the mining operations, and that there was no provision for compensating them for the loss they would sustain should the lessee fail to mine the coal promptly. The parties therefore fixed another rate or consideration for the coal, predicated on the action of the lessee in delaying the payment of the rentals, and thereby prolonging the use and control of the surface rights and timber privileges consequent thereon. Hence followed the third paragraph, which is an absolute and positive covenant that the lessee shall pay to the lessors \$30,000 annually during the remainder of the term. The term is fixed, and continues from the date the lessee begins the operation of mining, immediately after the execution of the agreement "until all the merchantable coal which can be mined and removed by proper, skillful and workmanlike mining shall be mined and exhausted." For the payment of the minimum cash royalty he may mine and remove 100,000 tons of coal. This is at the rate fixed in the second paragraph of the contract. He is also required to pay at the same rate per ton for any coal mined in excess of the amount he is permitted to mine in consideration of the quarterly minimum; and he may, at a like rate, without charge, make up in any subsequent year of the term the deficit in the amount mined in any preceding year. If the lessee had mined and removed the coal with due diligence, 30 cents per ton would have been the full compensation he would have been required to pay for the rights and privileges granted him, as in that event he would have mined in excess of the minimum quantity in each year until the coal had been exhausted and the term had thereby ended. But, having failed to conduct his mining operations with the promptness required by the contract, the lessee subjected himself to the other or alternative mode of compensation provided in the third paragraph of the lease.

It is contended by the learned counsel for the appellee that by this contract a fee-simple estate in the coal was conveyed to and vested in the lessee. But, if this be conceded, it does not follow that the consideration named in the agreement shall not be paid by him. As we have attempted to show, the consideration was fixed by the parties, and was not payable in a lump sum, but in annual installments of not less than \$30,000 per year until the coal was mined out and exhausted. This is the positive stipulation

of the contract, and is not affected by the title or interest which the lessee takes to or in the coal.

The appellee urges that, if it is compelled to continue the payment of the stipulated minimum royalty, it will be in direct opposition to the provision of the lease that the deficit may be mined out and removed "without charge." This is clearly erroneous, and is not supported by the terms of the lease. The third paragraph, wherein this clause occurs, provides that if in any one year there shall not be sufficient coal mined to equal the minimum royalty, "the deficit may be mined out and removed, without charge, in any subsequent year of the term." The appellee, therefore, is not entitled to the benefit of this provision of the lease to make up a deficit "without charge" unless it mines the coal during the continuance of the term. This it can do by complying with the terms of the contract, and thus preventing a forfeiture of the lease.

The appellee also insists that the lessors' construction of the lease will do it great injustice, and require it to pay far in excess of the royalties reserved in the lease. In reply to this proposition it may be said that the parties must abide by the contract they made, whatever it may be, and that, if the rent or royalty paid by the lessee is in excess of 30 cents per ton, it is solely the fault of the lessee, and is strictly within the terms of the agreement. If the coal had been promptly mined, and the lessors had been paid the rent promptly, as required by the contract, they could have used the proceeds of the coal advantageously, and thus realized on what they were entitled to have under the second paragraph of their agreement. Not only has the delay in mining the coal been detrimental to the interests of the lessors, but to permit the lessee to continue in possession of the demised premises without payment of the minimum royalty during the term would allow it to use the surface rights and timber privileges granted in the lease without any compensation whatever. This was not contemplated by the parties under any reasonable interpretation which may be given the contract.

The prayer of the bill recognized the fact that the contract defines the term in which the coal is to be mined and removed, and that the term is still in existence. It asks the court to enjoin the defendants "from declaring the term of the said mining lease at an end." The decree itself gives to the agreement a like construction by enjoining the defendants "from declaring the term of the said indenture at an end." If the term is still in existence, the lessors have a right to the payment of the minimum cash royalty, as by the third paragraph of the lease the royalty was to be paid "for the remainder of the term." The failure to pay it would result in a forfeiture of the lease, and that is the only way in which the term could be

terminated, save by the exhaustion of the coal. The decree, therefore, upon its face is bad, and is in direct contravention of the express terms of the contract made by the parties. It is further violative of the contract, in that it permits and authorizes the lessee to mine and remove the unmined portion of the coal "within a reasonable time" without the payment of the stipulated annual royalties. The provisions of the contract not only forbid this, but make such action on the part of the lessee a cause of forfeiture. The effect of the decree, therefore, is to set aside the lease, and replace it with an agreement whose terms are in direct opposition to it.

We are clearly of opinion that the case at bar cannot be distinguished from that of the *Lehigh & Wilkes-Barre Coal Co. v. Wright*, 177 Pa. 387, 35 Atl. 919. The covenants and stipulations in the contracts in the two cases, while differing in phraseology, are in effect the same. "Royalty" and "rent" are used interchangeably in both contracts. In the contract in each case a fixed sum is to be paid annually in quarterly installments. In this case it was covenanted that the lessee "for the remainder of the term will pay a fixed minimum cash royalty annually." In the *Wright Case* it is provided that the lessee, "whether coal be mined or not, shall pay * * * an annual minimum rental." The phraseology of the two contracts is different, but the language employed in both cases requires the lessee to pay annually a fixed royalty or rental, in default of which the lease may, at the option of the lessor, be forfeited. This is the only fair and reasonable interpretation of which the language in the two contracts is susceptible.

The learned trial judge misconstrued rule 62 of the equity rules adopted by this court as to his duty in answering the requests for findings of fact and conclusions of law. The judge, sitting as a chancellor, "may adopt or affirm these requests, or any of them, or state his findings of fact or of law in his own language"; but this language of the rule applies to each request, and it is the duty of the judge to make a separate and distinct answer to each request as directed by the rule. It is but fair to the trial judge to say that the opinion in this case was filed by him before the decision of *Hoyt v. Kingston Coal Co.*, 203 Pa. 509, 53 Atl. 348, in which our Brother BROWN, speaking for the court, considers the rule in question, and interprets it as suggested above.

We are of opinion that under a proper interpretation of the contract between the parties the defendants have a right to insist on the payment of the fixed minimum royalty as provided in the lease, and that, if the plaintiff fails to make such payment, the defendants may forfeit the contract.

The decree of the court below is reversed, and it is now ordered, adjudged, and decreed that the bill be dismissed at the cost of the plaintiff.

POTTER, J. (dissenting). I dissent from this judgment for the reason that I regard the contract as a sale of the coal in place, to be paid for by the ton; the stipulated annual payment being not as rental, but as so much of the purchase money for the coal. In no event can I see any justification for requiring payment for any more coal than is in existence upon the tract. The full amount of coal in the entire tract has already been paid for at the agreed rate. The effect of this decision will be to compel the purchaser to pay twice for the same property. Such a result could never have been contemplated by the parties to the contract.

(66 N. J. E. 290)

SINGER et al. v. NATIONAL BEDSTEAD MFG. CO.

(Court of Chancery of New Jersey. Sept. 10, 1903.)

BANKRUPTCY — STATUTES — APPLICATION — BANKRUPTCY PROCEEDINGS—EFFECT ON PROCEEDINGS IN STATE COURT.

1. The federal bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) provides a system of bankruptcy for particular cases only, to which it applies; and hence a proceeding in bankruptcy against an alleged insolvent corporation does not supersede a proceeding in a state court under a state statute entitling stockholders and creditors to the appointment of a receiver for a corporation under certain circumstances, which relief could not be granted under the bankrupt act.

Bill by Louis Singer and others against the National Bedstead Manufacturing Company. Decree discharging a receiver and ordering the assets of defendant surrendered to a receiver in bankruptcy.

L. G. Morton, for complainant. William A. Lewis, for defendant Company. Bedle, Edwards & Thompson, for receiver.

STEVENSON, V. O. (orally). I shall advise an order that Mr. Mesereau be discharged from his office as receiver of this court in order that all complications may be avoided, and that the estate of the defendant corporation may be administered under the direction of the bankrupt court. In order, however, to avoid any misapprehension in the future, I mean to express some of the views which I entertain in regard to the present situation and which control me in the action which I intend to take.

The bill in this cause was filed under section 65 of the corporation act (Act April 21, 1896; P. L. p. 298), and the defendant corporation appeared. Upon the summary investigation prescribed by the act, which was made without notice to creditors, the corporation was found to be insolvent, and a decree thereupon was made enjoining it from the exercise of its franchises, and also appointing a receiver. The decree also provided for giving notice to all the stockholders and creditors of a hearing at a future day

upon the question whether the receiver so appointed should be continued or some other person should be appointed in his place. At the time fixed a great majority of the creditors appeared by various counsel, and desired the appointment of Mr. Mesereau as their receiver. Mr. Mesereau accordingly was substituted as receiver, and the one first appointed was discharged. Each of these two receivers gave bond in the sum of \$15,000. After the final decree in this cause was made, and the receiver had been appointed, and had taken possession of the assets, application was made by three creditors to the United States District Court for the District of New Jersey, sitting in bankruptcy, to have the defendant corporation adjudged bankrupt, the petition setting up the appointment of the receiver by the Court of Chancery as the act of bankruptcy. An adjudication of bankruptcy was thereupon made, and an order was also made by the bankrupt court appointing Mr. Mesereau as receiver. This bankruptcy receiver also gave bond in the sum of \$15,000. All the creditors were then brought before the Court of Chancery on an order to show cause obtained by the receiver, Mr. Mesereau, at the request of creditors, with a view to having some proper action taken which would prevent the waste of the assets in litigations growing out of the situation.

The Constitution of the United States (article 1, § 8, cl. 4) provides that Congress may "establish uniform laws on the subject of bankruptcy throughout the United States." The required uniformity, as is stated in an opinion of the Supreme Court of the United States in a recent case, is merely geographical. That is to say; Congress can pass any law on the subject of bankruptcy (and that term is conceded to include insolvency) which it sees fit to pass, however, lacking in uniformity in its operation upon different classes of persons and kinds of property it may be, provided that such a law must operate in precisely the same way in all parts of the United States. Congress is not obliged to establish bankrupt courts for the administration of these uniform laws, nor is Congress obliged to pass a system of bankruptcy laws. Congress can pass one law on the subject of bankruptcy embodied in a few lines, or ten laws, or a "system" of laws. To the extent that Congress covers the field the state laws are suspended. If it covers only a part of the field, the remainder may be occupied by state laws.

It may be that Congress cannot impose upon the state courts the duty of administering any system of bankrupt laws, but if Congress sees fit to pass general laws on the subject of bankruptcy without providing the judicial machinery for their administration all state courts having jurisdiction of bankruptcy or insolvency cases would be obliged to enforce the laws on that subject enacted by Congress, and any conflicting state laws

or any state laws whatever applicable to the cases to which the federal laws applied would be suspended.

A very complete "system" of bankruptcy laws could, I think, be enacted by Congress without creating any special bankrupt courts at all. Such a code would be enforceable by all the courts, state or federal, having jurisdiction of any case to which the code applied, the code being a part of the "supreme law of the land." Of course, Congress cannot extend its power to pass laws "on the subject of bankruptcy" by merely giving names to laws, or by arbitrarily defining certain conduct of natural persons or corporations as acts of bankruptcy. Congress is confined to the "subject of bankruptcy" as that subject was recognized in the jurisprudence of England and America in 1787.

In the present instance Congress has seen fit to provide a more or less elaborate code of bankruptcy laws applicable to certain specified cases, and to erect special tribunals who have exclusive cognizance of those cases, and who have to a large extent exclusive jurisdiction to administer this code or laws. The result is that the state courts lose jurisdiction of those cases, if they ever had any, because state laws which are applicable to them are suspended, and the state courts are not permitted to administer the federal bankruptcy law except to a very limited extent.

A more or less indefinite, and I think misleading, notion has sometimes been expressed that the Constitution has committed to Congress the whole subject of bankruptcy and insolvency for appropriate legislation, and that therefore whenever Congress passes a general bankrupt law, which it has done four times, each time naming it a "uniform system of bankruptcy," all power on the part of the states to legislate upon the subject of bankruptcy or insolvency is immediately suspended. The premise may be deemed to be correct, but it seems to me that the conclusion is entirely erroneous. Congress is not obliged to legislate on the whole subject of bankruptcy; it may deal with only one or several parts. It is the enactment by Congress of a law applicable to a particular case which suspends any state law which otherwise would be applicable to that case. If every case of bankruptcy or insolvency were within the operation of a national bankrupt act, then no possible state law on the subject of bankruptcy or insolvency would have any vigor, but every such law would *ipso facto* be suspended.

When the present bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) was under discussion in Congress, my recollection is that a large and influential body of our national legislators earnestly proposed to enact merely a voluntary law—a law under which debtors could come into a bankrupt court, lay down their assets, and get a discharge. Would anybody seriously argue that if such a "uniform system of

bankruptcy" had been enacted by Congress it would have had the effect to suspend the operation of state bankruptcy and insolvent laws under which insolvent debtors or fraudulent insolvent debtors are brought involuntarily into court and stripped of their assets for the benefit of their creditors?

The present "system of bankruptcy" which Congress saw fit to enact in 1898 does not pretend to cover the whole field of either voluntary or involuntary bankruptcy and insolvency. Corporations are not allowed to become voluntary bankrupts. Large classes of natural persons and corporations are excluded absolutely from the operation of the involuntary system. All corporations as well as natural persons are excluded if their debts do not amount to \$1,000. It would be a most extraordinary state of affairs if transportation companies, insurance companies, and many other kinds of business corporations not within the classes enumerated in the present bankrupt act, and also manufacturing, mercantile, and trading corporations whose debts do not amount to \$1,000, could not be subjected to the operation of our New Jersey statute, which provides a means for winding them up and distributing their assets. The result would be that such corporations when insolvent could not be wound up at all at the instance of their creditors. The bankrupt act (Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3428]) expressly provides that national banks and banks incorporated under state or federal laws shall not be adjudged involuntary bankrupts, the intention plainly being to leave these respective banking corporations to be wound up under national or state statutes particularly applicable to them.

It is perfectly plain that state systems of voluntary and involuntary bankruptcy may remain to-day in full operation upon large numbers of insolvent natural persons and corporations who cannot be brought within the operation of the national bankrupt act under any possible state of facts.

It is also, it seems to me, equally plain that a state system of involuntary insolvency also remains in full operation upon persons and corporations, who are as possible bankrupts within the operation of the national bankruptcy act, so far as the state system deals with cases of which the bankrupt courts under the federal act can obtain no jurisdiction. To state the point otherwise, I may say that to my mind there is no distinction between an insolvent insurance company, railroad company, or laundry company, which owes \$1,000 of debts and has committed an act of bankruptcy, on the one hand, and an insolvent manufacturing, mercantile, or trading company which has committed no act of bankruptcy, or does not owe debts amounting to \$1,000, on the other hand, in respect of the operation of the national bankrupt act and the New Jersey insolvent corporation act. In neither instance is a case

presented of which the federal bankrupt court can take cognizance. Each case, therefore, is within the full and complete operation of the New Jersey statute.

As I read the present bankrupt act, the intention of Congress is that every case of bankruptcy or insolvency of which the bankrupt court has jurisdiction is to be dealt with exclusively by that court. The intention of the act is to supply the law of certain cases, and to supply a special court to enforce that law. All other cases of bankruptcy or insolvency are left to be dealt with as the state legislatures may see fit.

It may be conceded that Congress can provide a law for only a limited number of cases of bankruptcy and insolvency, and expressly prohibit the enactment of any other bankrupt or insolvent laws by the states. For present purposes the concession may be that Congress might pass a voluntary system of bankruptcy, and enact that there should be no other law on the subject of bankruptcy or insolvency, voluntary or involuntary, throughout the United States. Even if this be a sound view, it need not be considered, because the present bankrupt act contains no words prohibiting states from passing insolvent or bankrupt laws which deal with cases which are not within the operation of the national bankrupt act—which are expressly excluded from it. It would be a singular result, indeed, if because Congress has not seen fit to provide a bankrupt law applicable to corporations engaged in operating railroads, steamboats, insurance companies, laundries, livery stables, and large numbers of other business enterprises, the inference must be drawn that Congress did not intend that any bankrupt or insolvent laws should be applied to this class of corporations, but that state insolvency laws applicable to them should be suspended.

So, also, where the corporation might be within the operation of the federal bankrupt act, if it had committed an act of bankruptcy, it remains, it seems to me, without the scope of that act, and within the full operation of state acts in respect of a charge of insolvency which includes no act of bankruptcy as defined by the bankrupt act.

Of course, as I have intimated, it may be admitted that Congress has the power to say in the bankrupt act that no natural person or corporation, subject to its provisions, shall be liable to be involuntarily deprived of his or its property because of insolvency, at the instance of his or its creditors, under any state statute or in any state court. Congress, however, has said nothing of this kind, nor do I think can such an intention be gathered in any way from any or all of the provisions of the bankrupt act.

The difficulty of finding such an intention in the present bankrupt act is certainly greater in the case of our New Jersey legislation concerning insolvent corporations than it is in the case of natural persons un-

der ordinary state bankrupt laws. Our legislation does not provide merely a creditors' suit for the sequestration of the assets of insolvent corporations. The direct object of the suit is to place the corporation under disabilities by an injunction which prevents it from exercising its franchises. The bankrupt act does not undertake to touch the life of the corporation or its permanent capacity to exercise its franchises. It deals wholly with the assets of the corporation. After the bankrupt court has stripped a corporation of its assets, the corporation is amenable to proceedings under our state statute to have it disabled and then dissolved. Our state statute plainly remains at all times in full force for the purpose of affording stockholders as well as creditors the remedy of this statutory injunction, and not only the rights of stockholders, but the safety of the public also, must be recognized and cared for in our statutory suit. Is it possible that any mind can be so astute as to discover in any of the language of the bankrupt act an intent that after the Court of Chancery of New Jersey, under the statute of the state, has disabled one of its corporations from the exercise of its franchises by an injunction in pursuance of the policy of the state, there must be no sequestration of the assets of the corporation by a receiver for the equal benefit of all the creditors, even though the bankrupt court has no jurisdiction to grant the creditors such relief? The mischiefs of such a supposed situation are numerous and manifest.

But if we must suppose that somewhere in the bankrupt act there lurks an intention to prevent creditors of insolvent corporations from maintaining that part of the proceeding under our act which consists in the distribution of the assets of an insolvent corporation among its creditors, it would still seem that all parts of our act, including the provision for a receiver when one is necessary, would be fully operative for the protection of stockholders. If the conclusion could be reached in any way that Congress intends that the creditors of an insolvent corporation shall not be allowed to secure under our statute the distribution of the assets of the corporation through a receiver, it would require, I think, a further and deeper search to find any expression of intention to deprive the stockholders of this remedy of distribution which they now enjoy equally with the creditors. But I shall not pursue this subject further. It has never, to my knowledge, been suggested that our New Jersey statute has been suspended so far as it permits creditors to institute the proceedings which it authorizes against insolvent corporations, while it remains unsuspended so far as it permits stockholders to institute these proceedings.

The whole case, under our statute, against an insolvent corporation, is radically dif-

ferent from any case which can be brought against it under the bankrupt act. Any stockholder as well as any creditor may institute the proceedings—may be the complaining party. Insolvency, without any act of bankruptcy, is the jurisdictional fact, and this insolvency is not the insolvency defined in the bankrupt act, but common-law insolvency of a certain kind and nature which the statute specifies. The direct and necessary decree, if any passes against the defendant, is for an injunction disabling the corporation from the exercise of its franchises. Subsequently an order may be made dissolving the corporation. The appointment of the statutory receiver is not a necessary part of the proceedings, and may not in fact take place. The corporation is first practically put to death, and then, as a necessary consequence, its assets, if there are any, are distributed first among its creditors, and then among its stockholders. The bankrupt court has no jurisdiction of this case or any part of it, and if Congress intended, under its power to pass bankruptcy laws, to enact that in such a state proceeding the defendant corporation shall not be involuntarily deprived of its property for the equal benefit of its creditors, Congress would certainly have made such an extraordinary declaration in unmistakable language. Such an intention cannot be established by remote inferences.

That no part of our New Jersey statute which we are considering has been suspended by the bankrupt act, even in its operation upon those classes of corporations which are enumerated in the bankrupt act and made subject to its provisions, is now quite generally admitted in this part of the country. In the absence of bankruptcy proceedings the jurisdiction of the Court of Chancery under our statute is not perhaps very liable to be questioned. But conflicts of jurisdiction between federal and state courts in insolvency cases have taken place or have been made possible in instances where a case of insolvency has been presented to a state court under a state law, and has been acted upon, and then subsequently an entirely different legal case under the federal bankrupt act has been presented to the bankrupt court and action has been taken in that court. The result is that there are two receivers, as in the instance now before this court, each claiming the assets. It is this situation that I have been leading up to, and which is the important matter to be discussed.

As the bankrupt act stood until the recent amendments, I am unable to perceive how, when the Court of Chancery has acted under the New Jersey statute relating to insolvent corporations—has passed its disabling decree practically extinguishing the corporation, and has then, as a necessary result, appointed a receiver of the corporate assets—a receiver subsequently appointed by a

bankrupt court, i. e., appointed subsequent to the vesting of the assets in the chancery receiver under our statute, or a trustee appointed under a subsequent adjudication of bankruptcy, can acquire any title to those assets.

The title which the trustee in bankruptcy takes is defined in the bankrupt act, and practically includes only the property which belonged to the bankrupt at the time of the adjudication, and property theretofore transferred by him by way of preference or in fraud of creditors.

But it has frequently been said, in a general way, that it is the policy of the bankrupt act to have the assets of bankrupts administered by the bankrupt court. This is true, but only in the cases for which the bankrupt act makes provision. If the bankrupt act makes provision for one case of insolvency, and leaves another case to be dealt with by a state law, the two cases are not related to each other, because they are both cases of insolvency. The case left under the operation of the state law is not recognized as a case of bankruptcy by the bankrupt law. I know of no more reason why the subsequent bankruptcy trustee should take the assets in the course of administration from the prior chancery receiver under our insolvent corporation act than there would be for his taking the assets from a receiver appointed as the result of a judgment in an action of quo warranto. All cases which are not cognizable by the bankrupt act, but which warrant the appointment of a receiver by a state court, seem to constitute one class, and to be indistinguishable from each other with respect to bankruptcy proceedings. I fail to find in the provisions of the original bankrupt act of 1898, which define the title which the bankruptcy trustee takes, or any other provisions of that act, any justification for the proposition that a subsequent bankruptcy receiver or trustee can take possession and administer assets of the bankrupt corporation which, prior to the adjudication of bankruptcy, have been lawfully vested in a receiver appointed by a state court under a state statute which remains unsuspended by the bankrupt act. Nor can I see that it makes the slightest difference whether the case against the corporation cognizable by the state court under the state statute is one of common-law insolvency or of some special statutory insolvency to which no national bankrupt act perhaps could extend, or of forfeiture of franchises for breach of condition, or any other ground for the extinction of a corporation and consequent administration of its assets by a receiver. As I have tried to explain before, it is the case, i. e., the state of facts, presented to the court upon which remedies are prayed for which must be looked at in order to determine what law is to be applied. If the case which the state court deals with is not cognizable in

the bankrupt court, then not only the state statute remains unsuspended by the bankrupt act, but the state receiver appointed under that statute clearly takes a legal title, which is not divested by a subsequent bankruptcy trustee.

An erroneous notion, according to my view, has been expressed to the effect that even though our state statute may remain in full force, yet when bankruptcy proceedings are started in some mysterious way the state act and proceedings thereunder become void as against the bankruptcy act and proceedings. In brief, the state proceedings are considered a fraud upon the bankrupt act when the latter is actually applied to the corporation, which is the subject of the state proceedings, with intent to administer the assets of the corporation. In support of this view reference may be made to the doctrine which was established soon after the passage of the present bankrupt act, that the trustee in bankruptcy takes title to the assets which the bankrupt has transferred to a general assignee without preference prior to the adjudication in bankruptcy. But the bankrupt act made such a general assignment an act of bankruptcy. In the case of natural persons also the bankrupt act provides by its voluntary system of bankruptcy for the very situation presented by a general assignment, and provides remedies for the debtor and his creditors arising out of that situation. The debtor, other than a corporation, who undertakes to make a general assignment of his estate so that the same may be administered under a state law, is deliberately avoiding and evading the provisions of the bankrupt act, and is proceeding in defiance of its policy. He plainly is perpetrating a fraud on the act. It was thought to be an intolerable situation that, while the assignor might be adjudged bankrupt because of his general assignment as an act of bankruptcy, nevertheless the general assignment should stand, and the estate be administered by the assignee selected by the bankrupt, in violation of the spirit and intention of the bankrupt law with reference to the voluntary transfer by insolvent natural persons of their estates for the benefit of their creditors. In dealing with unscientific statutes like the bankrupt act, courts naturally become courageous, and it is not surprising that, notwithstanding the definition of the title which the trustee in bankruptcy takes, contained in the bankrupt act, did not include assets transferred by the bankrupt prior to the adjudication by a general assignment for the equal benefit of creditors, still an intention that such assets should go to the trustee in bankruptcy was derived from a perusal of the whole act.

I think, however, that none of the reasons which led the federal courts to the conclusion which I have stated in regard to general assignments apply to a receivership un-

der our insolvent corporation act. Neither our statute nor proceedings instituted under it at the instance of creditors can, I think, be shown to be in fraud of the spirit or purpose of the bankrupt act, or in any way violative of its policy. In the first place, it may be observed that so far as the corporation may be deemed an actor in the proceedings, or a willing subject thereof, it (the corporation) is not evading the provisions or the policy of the bankrupt act, because the bankrupt act has shut the door of the bankrupt court in the face of the corporation.

But the great point of distinction lies in the fact that the creditors of the insolvent corporation who bring their debtor corporation into the state court for relief have no remedy whatever in the bankrupt court; the door of the bankrupt court is also shut in their faces. The state court, at their instance, has dealt with a case of which the bankrupt court can take no cognizance, and has provided remedies appropriate to that case. By what possible course of reasoning can creditors be charged with committing a fraud upon or violating the policy of the bankrupt act when the bankrupt act does not recognize their case or afford them any remedies for their grievance?

Even if, as a matter of fact, an insolvent corporation has committed an act of bankruptcy, the creditors who bring it, as a mere insolvent into the state court, are not bound to know of the act of bankruptcy, and may in fact not have notice of it, or may not be able to prove it. Their case under the state statute should not be thrown out of the state court, because if they had the requisite amount of information, and the requisite amount of proof, they might bring an entirely different legal case in the bankrupt court, and then that court would give them a part of the relief which they seek to obtain in the state court.

If the bankrupt act remained to-day as it was originally enacted in 1898, I should feel constrained to hold, until the federal courts should speak with authority on the subject, that a receiver under our statute would hold title to the assets of an insolvent corporation against a receiver in bankruptcy subsequently appointed, and against a trustee in bankruptcy appointed by virtue of a subsequent adjudication of bankruptcy. I should hold that there is nothing in the bankrupt act which makes the title of the trustee in bankruptcy reach back of the adjudication so as to take hold of assets lawfully vested in a state receiver appointed under a state statute, and that it would make no difference whether the case presented to the state court in which the receiver was appointed was one of insolvency, violation of a state law, breach of condition, or anything else, provided the case so presented was one of which the bankrupt court could take no cognizance.

But we have not to deal with the original

bankrupt act. Last winter a very peculiar amendment of that act was enacted by Congress. The section of the statute which defines acts of bankruptcy was amended so as to make it an act of bankruptcy committed by a corporation "when because of insolvency a receiver or trustee has been put in charge of its property under the laws of a state, or territory, or of the United States." In the present condition of federal and state legislation, that certainly seems to be a most extraordinary act of bankruptcy, and state courts must necessarily await the exposition and construction of this singular piece of legislation by the federal courts, who are its authoritative interpreters. If the inferior federal courts agree, probably their construction will stand the final test; if they disagree, we may have to wait for years to hear from the Supreme Court of the United States, so as to find out what the real law is.

While I do not intend to attempt to construe this amendment, it may be worth while to consider briefly some of the questions which are presented on its face. The receiver must be put in charge of the property of the debtor "because of insolvency." Now, it may be questioned what is meant by the word "insolvency." The bankrupt act defines the word "insolvent" as something altogether different from a common-law insolvent. The bankrupt act further provides that the words and phrases which it defines shall be taken in the sense so defined excepting where the context shows that another sense is intended. If the definition of the word "insolvent" in the bankrupt act carries with it, as it seems to do, a corresponding definition of the word "insolvency," the proposition appears to be incontrovertible that no receiver is ever put in charge of the property of an insolvent corporation under our statute "because of insolvency" within the meaning of the bankrupt act.

A corporation may be hopelessly insolvent under our statute, and yet be entirely solvent under this definition of the bankrupt act. Insolvency, under this definition, is not the subject of investigation in our statutory suit. Probably it would not be argued that the word "insolvency" would include insolvency as arbitrarily defined by a state statute, but unknown both to the common law and to the bankrupt law. If corporations entirely solvent, able to pay their debts as they come due, were arbitrarily defined as insolvent by a state statute whenever they lost one-half of their capital, and were subjected to insolvency proceedings on that ground, I do not suppose that such a case of "insolvency" would be deemed within the meaning of the amendment which we are considering, if, indeed, Congress would have the power to make the appointment of a receiver in such a case an act of bankruptcy.

It may also be questioned whether a receiver is put in charge of the assets of a

corporation under our statute "because of insolvency" of any kind whatever. The immediate cause of the vesting of the assets of a corporation in a receiver under our statute is not any condition of insolvency, however defined, but the practical suspension of the life of the corporation by the injunction which disables it from exercising its franchises. Our statutory receiver can never be appointed excepting as the result of the final decree disabling the corporation by enjoining it from the exercise of its franchises. The assets of a corporation after judgment of forfeiture are put in charge of a receiver because of that judgment of forfeiture, and not because of the particular ground upon which the judgment of forfeiture was based. The basis of the judgment in a quo warranto case, like the basis of the decree disabling the corporation under our statute, may be deemed the remote, as distinguished from the immediate, cause of the receivership. The receivership is caused by the absence of the active corporation—by a situation which demands a custodian and caretaker of property which otherwise would be exposed to injury and waste. The cause of this situation may be insolvency, or may be a large number of other facts and conditions. There seems to be some room to question whether it was the intention of this amendment of the bankrupt act to set the bankrupt courts inquiring back of the decree disabling or dissolving a corporation, which makes a receivership necessary, into the nature of the grounds upon which not the appointment of the receiver was based, but the decree disabling or dissolving the corporation was based. A man's estate is administered because of his death, while his death is caused by a particular disease. One would hardly say that the administration of the estate is "because of" the particular disease which killed the man.

There are other questions raised by this peculiar amendment of the bankrupt law which are certainly interesting, although they are not presented by the case now before this court. Some of them are liable, however, to come up at any time. It may be doubted whether the temporary putting in charge of the assets of the debtor because of insolvency constitutes this novel act of bankruptcy, or whether such putting in charge must be permanent. Sometimes, upon filing a bill under our statute against a corporation charging it with insolvency, a receiver is at once appointed of all the assets of the corporation, such appointment being made under the general equity power of the court. A receiver appointed in this manner prior to the decree for an injunction does not take title under the statute, but is a mere custodian. Is such a receivership an act of bankruptcy on the part of the unfortunate corporation? If so, in case, upon the return of the order to show cause, a summary investigation results in favor of

the defendant corporation, and the order is discharged, and the receivership vacated, and the assets ordered delivered back to the corporation, is the act of bankruptcy, which consisted in the receivership, vacated or atoned for in any way? After the temporary receiver in such a case has been put in charge "because of insolvency," could any three creditors of the corporation have it adjudged a bankrupt? If so, what would be the effect of an order in the state court vacating the receivership?

Take the case of equity suits in the Court of Chancery of New Jersey, or in the United States Circuit Courts sitting in equity, the object of which is to dissolve a partnership on the ground of insolvency, and secure an accounting and all other remedies incident to a partnership settlement in court. Is the appointment of a receiver in such a case an act of bankruptcy which can result in transferring the administration of the partnership assets to the bankrupt court, while the accounting and other remedies remain to be afforded by the Court of Chancery or the United States Circuit Court in which the equity suit was originally brought?

This court does not intend to struggle with any of the legal questions raised by this curious piece of federal legislation which establishes this novel act of bankruptcy, because the United States District Court for the District of New Jersey, sitting in bankruptcy, has decided that the appointment in this case of a receiver of an insolvent corporation by the New Jersey Court of Chancery, under the New Jersey statute—that is to say, the appointment of a permanent statutory receiver after the decree for an injunction—is an act of bankruptcy as defined by the amended bankrupt act. I do not propose to question the soundness of this decision, which no doubt was based upon a far more careful examination and consideration of the law than I have attempted to give. Conflicts between receivers appointed by different courts, and especially conflicts between federal and state receivers, are to be avoided in every possible way.

Nor do I propose to raise the question whether, assuming the appointment of the receiver by this court to be an act of bankruptcy committed by the corporation, it follows that the bankruptcy receiver and trustee will take title to the assets already vested in the receiver of this court. It certainly does not follow that because a transfer of property is made an act of bankruptcy therefore such property is recoverable by the bankruptcy trustee. There is also a wide distinction between a general assignment, especially by a natural person, and the appointment in invitum of a receiver under our statute, even although both of these things may now be acts of bankruptcy. Still it may be that the federal courts will hold that any transfer, voluntary or involuntary, by or from an insolvent corporation of all its as-

sets, which is made an act of bankruptcy, is void as against the receiver or trustee of the bankrupt court appointed in proceedings based on the transfer as an act of bankruptcy. I refrain from considering this question. A part of the reasoning by which the title of the trustee in bankruptcy was extended to assets transferred under a general assignment for the equal benefit of creditors applies to the case now before this court and a part does not. It is plain that the proceedings in bankruptcy against the insolvent corporation now before this court have been conducted upon the theory that the bankruptcy receiver and trustee would have a title to the assets of the corporation, which would overreach and displace the title which the receiver appointed by this court holds under our statute.

In this situation there is certainly room for litigation. Such a litigation might go to the Supreme Court of the United States before those unfortunate creditors would find out who their administrator in fact was. They do not care whether the assets are collected and distributed by the receiver of this court or a trustee in bankruptcy, and they certainly do not want to have the assets wasted in an expensive litigation to determine this question of the jurisdiction of the two courts.

The appointment of a receiver by the Court of Chancery after the decree has passed placing an insolvent corporation under disabilities is entirely discretionary. The receiver is appointed to protect the creditors and stockholders. If there are no assets no receiver is necessary, and none will be appointed; if the creditors require no protection in respect of the assets through a receiver in a case like this, there seems to be no reason for the appointment or maintenance of a receiver. All the creditors have been brought into court, and no opposition has been made to the discharge of the receiver of this court. Such a course is manifestly greatly to the advantage of all the creditors. Therefore the order of this court will direct that the receiver of this court forthwith present his account and report, that proper allowances to the two receivers of this court be paid, and that the residue of the assets be turned over to the bankruptcy receiver, and that the receiver appointed by this court be thereupon discharged from his office. This order will be made without any attempt on my part to decide any of the questions of conflicting jurisdiction to which I have referred. A situation similar to the one now before this court may justify a test suit to settle the law and ascertain the limits of the two jurisdictions. I merely decide that this is not the sort of a case in which such a test suit should be brought at the expense of this particular set of creditors who are entirely willing to have either the state court or the bankrupt court administer these assets, or, at any rate, are opposed to any litigation over the question.

The attention of the bar of this state might

well be called to the extraordinary condition in which the law relating to insolvent corporations in New Jersey now stands under this recent amendment of the bankrupt act as construed by the United States District Court for the District of New Jersey. In large numbers of cases of corporation insolvency, I think I may say in the majority of such cases, including those especially where the assets are of great value, no act of bankruptcy has been committed by the corporation when the creditors come into this court for relief. What the creditors desire is to prevent acts of bankruptcy, such as fraudulent and preferential transfers. The corporation being insolvent, and incapable of pursuing its corporate objects, it is arrested in the exercise of its franchises, and placed under disabilities, and then its assets are distributed without preference among its creditors. In this situation, the common, every-day situation presented to this court, the creditors have no relief in the bankrupt court whatever. They are obliged, therefore, to come into this court as the only court having jurisdiction of the case which they present. The proceedings under our statute are not comparable with the voluntary making of a general assignment by an insolvent debtor. The creditors of the insolvent corporation start an expensive suit in this court, which oftentimes is contested by the defendant corporation. The litigation between the creditors and the corporation may go to the Court of Errors and Appeals, and may be decided in favor of the creditors or in favor of the corporation. In the course of the proceedings all the creditors, under our practice, are brought into court, and frequently many lawyers are employed to represent the different creditors. The appointment of a receiver is a judicial act, unlike the selection of an assignee by a debtor who makes a general assignment. It may be noticed, also, that first a temporary and then a permanent receiver may be appointed by this court, who will often greatly change the character of the assets, and set in operation plans for the continuation of the corporate business. The creditors also, or stockholders, may take many and expensive steps in the direction of reorganization.

And yet after all the expense to which I have referred has been incurred it seems that any three little creditors of the corporation, whose debts amount to \$500, have the arbitrary right, within four months after the appointment of the receiver, to institute bankruptcy proceedings, and have the administration of the assets of the corporation transferred from this court to the bankrupt court. These three creditors may apply to the bankrupt court because their wishes have not been carried out in the selection of a receiver in this court, or because their attorneys desire to make fees, or other unjustifiable motives

may prompt their action, which can readily be imagined.

In the present case before this court we have four different trustees in line, all of whom have given or will give bonds, and must be paid for their services out of the estate. We have, first, the temporary receiver appointed by this court; we have, next, the permanent receiver appointed by this court; we have, in the third place, the receiver appointed by the bankrupt court; and, in the fourth place, we shall have a trustee to be appointed by the bankrupt court.

It is unnecessary to further deal with the evils of a situation which are so conspicuous. If the construction of this amendment of the bankrupt act adopted by our federal court is correct, the evil to which I have referred would be remedied if Congress would either take a step backward or a step in advance. If the backward step is not to be taken by the repeal of this amendment, then the forward step would be to give the bankrupt courts jurisdiction of all these cases of insolvent corporations of which the Court of Chancery and corresponding courts in other states now have exclusive jurisdiction. The jurisdiction of the Court of Chancery and of the Supreme Court of the state of New York, and in some cases of the United States Circuit Courts, now at the option of three small creditors, is abrogated, excepting that its exercise is made the basis of jurisdiction by the federal bankrupt court. Would it not be far better to give the bankrupt court original jurisdiction, so to speak, i. e., jurisdiction of the case upon which the state court under the state statute is called upon to act? A brief amendment to the bankrupt act, providing that whenever a corporation becomes insolvent, according to the common-law definition, so that it is not able to continue its business with advantage to the stockholders and safety to the public, it may be adjudged a bankrupt at the suit of its creditors, might be so drawn as to suspend the operation of the New Jersey statute upon those classes of corporations which are made subject to the provisions of the bankrupt act. Under such a condition of the law, the entire administration of the assets of the insolvent corporation would be vested exclusively in the bankrupt court. Such a transfer of business from this court to the bankrupt court would certainly be a great relief to this court. The Court of Chancery is occupied a large part of the time in taking care of the affairs and settling disputes that arise in entirely solvent corporations, and many would deem it wise and in accordance with the general policy of the United States to have the administration of the assets of all insolvent corporations of the classes enumerated by the bankrupt act, whose debts amount to \$1,000, committed exclusively to the federal bankrupt courts.

(25 R. I. 369)

STATE v. FLANAGAN.

(Supreme Court of Rhode Island. July 22, 1903.)

PHYSICIANS—PRACTICE WITHOUT LICENSE—INDICTMENT—STATUTORY EXCEPTIONS.

1. Pub. Laws 1896, c. 340, § 7, providing that complaints against persons unlawfully practicing medicine without a certificate shall be made by the secretary of the State Board of Health, does not apply to indictments for violation of such chapter.

2. An indictment for a statutory offense is not insufficient for failure to describe it in the words of the statute, or to refer to the particular sections on which the indictment is based, if it adequately charges the offense set forth.

3. Gen. Laws 1896, c. 165, § 3, declares that it shall be unlawful for any person to practice medicine for a reward without first obtaining a certificate from the State Board of Health; and section 6 declares that the previous section shall not apply to gratuitous services in cases of emergency, to commissioned surgeons in the United States army, navy, or marine hospital service, or to legally qualified physicians of another state, called to see a particular case. *Held*, that the exceptions prescribed in section 6 were matters of defense, and therefore it was not necessary to negative them in an indictment for violation of section 3.

Charles D. Flanagan was indicted for practicing medicine without a certificate. On demurrer to the indictment. Demurrer overruled.

Argued before STINESS, C. J., and DOUGLAS and BLODGETT, JJ.

William B. Greenough, for the State. Herbert Almy, for defendant.

STINESS, C. J. This indictment charges that the defendant "unlawfully did practice medicine for reward and compensation without first having obtained a certificate from the State Board of Health, and without possessing any of the qualifications set forth in Gen. Laws 1896, c. 165, § 3." Section 6 of said chapter provides that nothing therein contained shall apply to gratuitous services in cases of emergency, to commissioned surgeons in the United States army, navy, or marine hospital service, or to legally qualified physicians of another state, called to see a particular case, who do not open an office or appoint any place in this state where they may meet patients or receive calls. Section 7, as amended by Pub. Laws 1896, p. 49, c. 340, provides that complaints shall be made by the secretary of the State Board of Health.

1. The first ground of demurrer to the indictment is that it does not show that the secretary made any complaint. The provision has no relation to indictments, and the demurrer on this ground is without foundation. *State v. Snell*, 21 R. I. 232, 42 Atl. 869.

2. The second and third grounds of demurrer are that the indictment does not charge the defendant with the offense created by the statute, and that it does not charge

that the defendant practiced medicine in violation of the provisions of the chapter; these being the words used in section 8, which provides the penalty. The offense set out in sections 2 and 8 is that of practicing medicine without having a certificate; the words "for reward or compensation" being included in the latter, but not in the former, section. This indictment, however, has all the essential charges of both sections. It is not necessary to use the exact words of the statute, nor to refer to the particular section on which the indictment is based, if it adequately charges the offense therein set forth. *State v. Murphy*, 15 R. I. 543, 10 Atl. 585; *State v. Duggan*, 15 R. I. 403, 6 Atl. 787; *State v. Martin*, 23 R. I. 143, 49 Atl. 497.

3. The defendant argues that, by reason of the exceptions in section 3, the charge in the indictment may be true, and yet the defendant not be guilty of a violation of the statute. It was stated in *State v. Melville*, 11 R. I. 417, that it was sufficient if an indictment so charged an act forbidden by statute as to exclude any assumption that the indictment may have been proved, and the accused still be innocent. While this is undoubtedly true as a general rule in stating an offense, it does not follow that an indictment must negative all exceptions in a statute. The question was fully considered in *State v. O'Donnell*, 10 R. I. 472, *State v. Rush*, 13 R. I. 198, and *State v. Gallagher*, 20 R. I. 266, 38 Atl. 655. In these cases it was held that the test of the necessity of negating exceptions was to be determined by their nature, as a part of the description of the offense, or as a qualification of it. In the *O'Donnell Case*, an exception appeared in the clause constituting the offense, and it was held that it must be negated. In the *Rush Case*, an indictment for the illegal sale of liquor, after a general prohibition of the sale of liquor without a license, special authority was given to pharmacists to sell on physicians' prescriptions, and it was held that this authority need not be negated. See, also, *State v. Duggan*, 15 R. I. 403, 6 Atl. 787. So too in the *Gallagher Case*, an indictment for bigamy, it was held that an indictment charging the offense as stated in the statute, without negating exceptions in a proviso that the act should not extend to cases where one party remarried after seven years' absence of the other, who was not known to be living, and to marriages by a man when under the age of 14 and a woman under the age of 12, was good. These provisions were held not to qualify the crime, but to afford defenses merely. The statute in the present case is similar to these last-named statutes. It is declared to be unlawful for any one to practice medicine or surgery who has not exhibited and registered in the town clerk's office his authority so to do, as provided in the chapter. It then declares that the act shall not apply to United States surgeons of the army and navy, nor

¶ 2. See Indictment and Information, vol. 27, Cent. Dig. §§ 289, 290.

to legally qualified physicians of another state called to a particular case, etc. These exceptions do not limit the offense by description or qualification. They are exceptions for special cases, which illustrate the rule in regard to exceptions very clearly. If a negative averment must be made, it must be proved. It would be impossible for the Attorney General to prove that a defendant is not a surgeon of the navy, for example. There is no record in this state to which he could appeal. He could not compel the attendance of a witness from the Navy Department at Washington, beyond our jurisdiction, and he could not prove it by deposition, because of the constitutional right of a defendant to be confronted by the witnesses against him. To show that a defendant is not a legally qualified physician of another state would require similar testimony from every state in the Union. It would be an unreasonable requirement. It is evident that the exceptions were intended to be matters of defense only.

The defendant also relies on *State v. Mahoney*, 24 R. I. 338, 53 Atl. 124. The distinction between that case and this one is fundamental. It was exactly like the *Rush Case*, supra. It was an indictment under Gen. Laws, p. 461, c. 152, "of medicines and poisons." The first section provides that no person, unless a registered pharmacist, etc., shall retail, compound, or dispense medicines or poisons, except as hereinafter provided. It therefore makes the limitation a part of the definition of the offense, and is very different from a special authority which one may show in defense.

We are therefore of opinion that the indictment is sufficient, and the demurrer is overruled.

(25 R. I. 355)

**RHODE ISLAND HOSPITAL TRUST CO.
v. TAX ASSESSORS OF PROVIDENCE.**

(Supreme Court of Rhode Island. July 15, 1903.)

**TAXATION—FOREIGN CORPORATIONS—STOCK—
LICENSED TAX IN STATE OF
DOMICILE—EFFECT.**

1. Gen. St. N. J. p. 3337, § 4, provides that all corporations incorporated under the laws of such state shall make an annual return to the state board of assessors, stating the amount of their capital stock issued and outstanding, and shall pay an annual license fee or franchise tax graduated according to the amount of stock outstanding. *Held*, that the tax assessed under such section was not a property tax, and hence did not prevent the taxation of the shares of corporations organized in New Jersey, but whose property was located in Rhode Island, under Gen. Laws 1896, c. 45, § 10, providing that no stockholder shall be liable to taxation for shares held in any corporation without the state which is, or the shares in which are, liable to taxation in the state where the corporation is located.

Petition by the Rhode Island Hospital Trust Company for the refundment of certain taxes paid on stock of foreign corporations. Petition denied.

Argued before STINESS, C. J., and TILLINGHAST and DUBOIS, JJ.

Tillinghast & Carr, for petitioners. Francis Coolwell and Albert A. Baker, City Sols., for respondents.

DUBOIS, J. This is a petition in the nature of an appeal from a tax assessment for the year 1902, made by the tax assessors of the city of Providence, by which the petitioner seeks to recover certain money by it paid for said tax upon the ground that the same was illegally assessed. Heard upon the following agreed statement of facts:

"Agreed Statement of Facts and Stipulations.

"It is hereby stipulated and agreed that the above-entitled cause shall be tried to the full court upon the following agreed statement of facts and the following stipulations:

"(1) That the Rhode Island Hospital Trust Company, as trustee for Stella M. A. Wilcox under the will of Walter A. Peck upon June 20, 1902, and within the time posted and advertised by the assessors of taxes of the city of Providence therefor, carried in to said assessors a true and exact account of all ratable property held by it as such trustee, describing and specifying the value of every parcel of the personal estate held by it as aforesaid (there being no real estate in said trust), which account was sworn to by Samuel R. Dorrance, its vice president, before Arthur H. Remington, one of said assessors, in manner provided by the statute in such cases, and included in said account fifty shares of the United Traction & Electric Company and 57 shares of the preferred stock of the American Woolen Company, stating in said account that each of said corporations was incorporated in New Jersey, and claiming therein that each of the shares of stock aforesaid were not ratable under the statute.

"(2) Notwithstanding the claim by said trustee that said shares of stock were not ratable, the said assessors of taxes included said shares at their then market value in the property for and in respect of which they assessed taxes against said trust company as trustee as aforesaid; that is, said 50 shares of the United Traction & Electric Company were valued at \$5,950, the tax upon which, at the rate assessed by the city of Providence, amounted to \$95.20, and said 57 shares of the preferred stock of the American Woolen Company were valued at \$4,250, the tax upon which, at the rate aforesaid, amounted to \$68; and that thereafter, on October 15, 1902, said trust company, as trustee as aforesaid, paid to the city of Providence the taxes so assessed against it in its said capacity, including said amounts of \$95.20 and \$68, protesting that the taxes assessed in respect of the shares of stock aforesaid were wrongfully and illegally assessed.

"(3) That the United Traction & Electric Company is a corporation organized under the laws of the state of New Jersey with a capital stock of \$8,000,000, and has a principal place of business in Jersey City, in said state of New Jersey, as provided in its articles of incorporation; and the American Woolen Company is a corporation organized under the laws of the state of New Jersey with a capital stock of \$50,000,000, of which \$49,501,100 is issued, and has a principal place of business in said state of New Jersey as provided in its articles of incorporation.

"(4) That the following statute has been for several years and still is in force in New Jersey, namely (Gen. St. p. 3337, § 4, and chapter 9, p. 31, of the Laws of 1901): 'All corporations incorporated under the laws of this state, other than those which are subject to the payment of a state franchise tax assessed upon the basis of gross receipts, shall make annual return to the state board of assessors on or before the first Tuesday in May in each year, and shall state therein the amount of capital stock of such corporation issued and outstanding on the first day of January preceeding the making of said return, together with such other information as may be required by said board to carry out the provisions of this act, and shall pay an annual license fee or franchise tax of one-tenth of one per centum on all amounts of capital stock issued and outstanding up to and including the sum of \$3,000,000; on all sums of capital stock issued and outstanding in excess of \$3,000,000, and not exceeding \$5,000,000, an annual license fee or franchise tax of one-twentieth of one per centum; and the further sum of fifty dollars per annum per \$1,000,000, or any part thereof, on all amounts of capital stock issued and outstanding in excess of \$5,000,000.' And the said United Traction & Electric Company has been assessed by and paid to the state of New Jersey in each year, including 1902, under and in accordance with said statute, the sum of \$4,150; and the American Woolen Company has been assessed by and paid to the said state of New Jersey in each year, including 1902, under and in accordance with said statute, the sum of \$6,225.05.

"(5) That neither the United Traction & Electric Company nor the American Woolen Company owns any real estate or tangible property in the state of New Jersey, and neither of said corporations pays any other tax to or within said state of New Jersey.

"(6) That the United Traction & Electric Company was organized for the purpose, among other things, of owning and holding the capital stock of other companies, and owns and holds all of the capital stock of the Union Railroad Company, Pawtucket Street Railway Company, the Providence Cable Tramway Company (except two shares), and the Rhode Island Suburban

Railway Company, all corporations organized under the laws of Rhode Island, and is not assessed for any real estate or for or in respect of its said stock or for any property in Rhode Island or elsewhere, or in other manner except as aforesaid.

"(7) The American Woolen Company owns and is assessed for real estate and machinery taxable to it under the laws of Rhode Island within the state of Rhode Island, and real estate and tangible personal property in several other states, upon which it pays taxes to a large amount.

"(8) The statutes of New Jersey as published in the Gen. Statutes (1709-1895), and all amendments thereto passed since such revision and published in the several volumes of the Session Laws for each year since 1895, including particularly pages 3322 to 3339 of the General Statutes aforesaid, and chapter 9, p. 31, Laws 1901, are to be considered as offered and proved in evidence as laws of a foreign state, and it is agreed that the published decisions of the court of New Jersey, if and so far as they shall be considered by the court relevant to the issue in this appeal, may be referred to to show the construction placed by the New Jersey courts upon any of the said statutes.

"(9) If the tax assessed by the assessors of the city of Providence against all of said shares of stock was rightly assessed, judgments shall be given for the defendants or appellees; if the tax assessed against the shares of either or both of the companies aforesaid was wholly illegal, judgments shall be given for the plaintiff or appellant in respect of the assessment upon said shares and for a return of the amount paid by the appellant to the city of Providence as taxes in respect thereof, with interest at the rate of six per cent. per annum from said October 15, 1902, as provided by law; and in case the court shall find that it is material to determine the amount of taxes paid by the said American Woolen Company either within the state of Rhode Island or any other state than New Jersey, the appellant shall be offered opportunity to obtain and present the facts before final judgment.

"Tillinghast & Carr,

"Attorneys for Appellant.

"Albert A. Baker,

"Attorney for Defendants."

1. The claim of petitioner is that as shareholder in the aforementioned stocks in foreign corporations, for which said tax was assessed, it was exempt from taxation therefor in this state under that portion of the proviso in Gen. Laws 1896, c. 45, § 10, which reads: "Provided, that no stockholder shall be liable to taxation for shares held * * * in any corporation without this state which is, or the shares in which are liable to taxation in the state where such corporation is located," because under the laws of New Jersey, where said foreign corporations are

located, they are liable to taxation and are annually taxed, and annually pay a license fee or franchise tax. Neither of said corporations does business in said state of New Jersey, or owns any real estate or tangible property therein, nor pays any other tax to or within said state. Both of said corporations do business in this state. The United Traction & Electric Company does all of its business herein, and is not assessed for any real estate or personal or tangible property, or for any property, or in any manner other than for that in this proceeding appealed from. The American Woolen Company does own and is assessed in this state for real estate and tangible property. The defendants claim that the tax assessed against and paid by said foreign corporations is not a tax in the strict sense of the word, but that it is a fee paid to insure the annual corporate existence of the said corporations, and that the term "license fee" better describes it than the expression "franchise tax." The words themselves are defined by the Legislature in Gen. St. N. J. c. 257, § 1, on page 3337, as follows: "Shall pay an annual tax, for the use of the state, by way of a license for its corporate franchise." The point in dispute seems to be whether or not this is a property tax; the appellants claiming that it is, and the defendants asserting that it is not. The franchise of a corporation comprises its existence, its activity, and its liability; the right to be, the power to do, and the liability of being acted upon; and these are sometimes called separate and independent franchises. The franchise to be is only one of its franchises. The franchise to do is a combination of independent franchises embracing all things which the corporation is given power to do, and may be denominated its active powers—those powers which, when properly exercised, render it successful and valuable. For the purposes of taxation, franchises to do may go wherever the work of the corporation is done, and, exercised in connection with the tangible property which it holds, create a substantive matter of taxation, to be asserted by every state in which that tangible property is found. See *Adams Express Company v. Ohio*, 166 U. S. 224, 225, 17 Sup. Ct. 604, 41 L. Ed. 965. Can the tax assessed upon the market value of the shares here, where the franchises to do are exercised in connection with the tangible property which said corporations hold, be said to be invalid because they are liable to taxation upon their franchises to be in the state where they are located? We think not. They would be liable to taxation in the state of their location whether they did any business or not; their influence or indigence would neither increase nor diminish their taxable value there. A tax for the franchise to be, arbitrarily fixed in advance, based upon the par value of the stock to be issued, before the success or failure of the business of the corporation can be predict-

ed, cannot be said to be a property tax. On the other hand, the tax on the market value of the shares undoubtedly is a property tax. The assessment and payment of the former in the state where said corporations are located is not a bar to the assessment and collection of a tax upon the latter in this state.

We find, therefore, that the tax assessed for the year 1902 by the tax assessors of the city of Providence against all of said shares of stock was rightly assessed, and deny and dismiss said petition, and give judgment for the defendants for their costs.

(26 R. I. 333)

In re TILLINGHAST'S ACCOUNT.

(Supreme Court of Rhode Island. Providence.
July 14, 1903.)

WILLS—ESTATES TAIL—GIFT OF PERSONALTY.

1. Estates tail being recognised by Gen. Laws 1896, c. 202, § 21, which provides that in a limitation of an estate tail it shall be sufficient to use the words "heirs of the body," chapter 201, § 6, providing that when lands are devised to one for life, and after his death to his "heirs" in fee, the first taker will have an estate for life, with remainder in fee to his heirs, does not embrace estates tail.

2. The use of words in a will in relation to personalty, which if applied to land would create an estate tail, makes the gift absolute in the first taker.

3. Where a will makes gifts in three clauses to one for life, and after his death to the "heirs of his body," the word "heirs" in a subsequent clause, making a gift to him for life, and after his death to his heirs, "if any he have," will be considered as referring to the "heirs of his body."

Case stated for an opinion in the matter of the account of William R. Tillinghast, administrator.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

James Tillinghast, for Allan P. Tillinghast.
John Doran, for guardian ad litem. William R. Tillinghast, in pro. per.

STINESS, C. J. The question arising on this account involves the construction of the fourth, eighth, ninth, and eleventh clauses of the will of Smith W. Pearce. The fourth clause gives to Allan P. Tillinghast, for and during his natural life, the profits and income of 16 shares of the National Bank of Commerce of Providence, and after his death the principal of said stock to the heirs of his body; and, in default thereof, to the children of Robert A. Rice, equally. The eighth and ninth clauses give deposits in savings banks upon similar terms. The eleventh clause gives to said Allan P. Tillinghast the income from stock in the City National Bank of Providence for life, and after his death to his heirs, if any he have, and in default to Carrie B. Rice. This will was made in 1898, and is therefore subject to the provisions of the last revision, called "General Laws." The guardian for the Rice children

claims that the construction of the will should give Allan P. Tillinghast only the income for life, the ownership of the principal to be determined at his death. If he leaves issue at his death, such issue become owners of the funds; if he does not, they go to the Rice children, as directed. The argument is that the bequests would not create an estate tail in real estate. Under our statutes, the creation of an estate tail is clearly permissible. Gen. Laws 1896, c. 202, § 21, provides that in a limitation of an estate in tail, it shall be sufficient to use the words "in tail," or "heirs of the body." This statute not only recognizes an estate tail, but it states what words will create it, and includes the very same words used in this will. Other portions of the statute imply the existence of estates tail. Gen. Laws 1896, c. 201, §§ 5, 9; chapter 192, § 6; chapter 208, §§ 2, 8, 10. The words, then, of this will are such as, applied to real estate, would create an estate tail.

We do not think that the statutes relied on by the guardian to defeat the claim of an estate tail support his position. Gen. Laws 1896, c. 203, § 10, simply limits the creation of an estate tail to the children of the first devisee, and abolishes the rule in *Shelley's Case* in certain cases. It does not purport to abolish an express fee tail. *Bullock v. Waterman*, 5 R. I. 273. Section 11 limits the construction of the word "issue" to children of the life tenant living at his decease, and admits the descendants of other children who have previously died. Gen. Laws 1896, c. 202, § 24, is of the same general import, to prevent an inference of an indefinite failure of issue. Gen. Laws 1896, c. 201, § 6, provides that when lands are devised to one for life, and after his death to his heirs in fee, the first taker will have an estate for life, with remainder in fee to his heirs. This last section comes nearest to sustaining the guardian's position. It is possible to say that it applies to all gifts where a life estate is first given, with remainder to heirs, and, construing "heirs" in the broadest sense of the word, that it includes heirs of the body. So construed, it would embrace estates tail. But such a construction, by vesting the remainder in the heirs, would prevent a barring of the entail under the statute.

We cannot think that the statute was intended to give a right in one section, and to take it away in another. There is very little, if any, substantial difference between an estate tail to one and the heirs of his body, and that of an express preceding life estate, with remainder in tail; for, as Judge Washburn said (2 Washb. Real Prop. [6th Ed.] § 1539): "The statute *de donis* turned the estate of a tenant in tail theoretically into an estate for life," because of lack of power to alienate. To say that the statute applies in one case, and not in the other, when both are practically the same, would be a strange construction: If such was the intention, in

order to give force to the life estate expressed in one case, and not in the other, it would have been easy to make it plain by adding the words "or heirs of the body." In so important a matter, we do not think we should enlarge the operation of the statute by construction. The same reasons apply to the terms of section 24, c. 202, Gen. Laws 1896, which are claimed to operate to prevent an estate tail. The statute must be taken according to its terms in the several cases. In this view, we fail to see how any of these provisions affect the question before us.

The argument of the guardian seems to ignore the distinction between the words "issue" and "heirs of the body," which is carefully preserved in the statute. It is true that the words "heirs of the body" may sometimes be used, as in *Gallagher v. R. I. Hospital Trust Co.*, 22 R. I. 141, 46 Atl. 451, where the will shows that the testator only meant children; yet in that case it is said that when the technical words to create an estate tail in land are used, to wit, "heirs of the body," and nothing appears to show that they were not used with that intent, they create an estate tail. In this case the technical words are used, and we see nothing to qualify their meaning.

We see nothing in the cases relied on by the guardian to lead to a different conclusion. In *De Wolf v. Middleton*, 18 R. I. 810, 26 Atl. 44, 81 Atl. 271, 31 L. R. A. 146, the word used in the will was "issue." In *Swinburne v. Peckham*, 16 R. I. 208, 14 Atl. 850, the words were, "leaving no legal heirs born of their own body," which the court construed to mean, by use of the words "legal heirs," children or issue.

We think it is clear that the testator used words in the first three clauses referred to, which, if applied to land, would create an estate tail, and which, therefore, applied to personalty, makes the gift absolute in the first taker. *Gallagher v. R. I. Hospital Trust Co.*, supra; *De Wolf v. Middleton*, 18 R. I. 810; 26 Atl. 44, 31 Atl. 271, 31 L. R. A. 146; *Cooke v. Bucklin*, 18 R. I. 666, 29 Atl. 840; *Tingley v. Harris*, 20 R. I. 517, 40 Atl. 346. In the eleventh clause of the will the language is a little different. It is: "Unto the heirs of him, the said Allan P. Tillinghast, if any he have." The guardian urges that these words bring the clause within Gen. Laws 1896, c. 201, § 6, giving a life estate to the first taker, and remainder to the heirs in fee. Doubtless this would be so if the testator had simply used the word "heirs." The section is the exact antithesis of the rule in *Shelley's Case*, by making the word "heirs" a word of purchase, instead of limitation. It is intended to effectuate the common intent of giving a life estate only to the first taker, preserving the remainder to his heirs. The testator in this case did not intend to give the remainder to the general heirs, which every one must have, but, by

adding the words "if any he have," he shows that he had in mind a particular class of heirs, whose existence might be uncertain. The bequest to which this clause applies is of the same character as the preceding bequests mentioned above, and there is no reason to suppose that he intended to put this bequest under any different conditions. Having used the words "heirs of the body" in the preceding clauses, and showing in this clause that he had in mind an uncertain class, it is most probable, if not evident, that he had in mind the same class of heirs, and that the omission of the words "of the body" was accidental. We are of opinion that this is the meaning of the clause. It therefore falls under the same construction and rule as the preceding clauses, the result of which is that Allan P. Tillinghast took an absolute gift of the stock and deposits therein bequeathed.

(25 R. I. 361)

JONES v. PROBATE COURT OF EAST GREENWICH.

HENDRICK v. PROBATE COURT OF EAST GREENWICH.

(Supreme Court of Rhode Island. July 17, 1903.)

EXECUTORS AND ADMINISTRATORS—CHARGES AND CREDITS—HUSBAND AND WIFE—JOINT ASSETS—CLAIMS AGAINST ESTATE—WILLS—CONSTRUCTION—EQUITABLE CONVERSION—RENTS—TRUSTS—EVIDENCE—COMMUNICATIONS BETWEEN HUSBAND AND WIFE—PROBATE COURT—JURISDICTION.

1. Where a husband and wife made a loan of \$600, the wife contributing \$100 and the husband the balance, and the wife received during her lifetime a payment of \$200 thereon, it was error for the court to charge the husband, as administrator of the wife's estate, for any further sum paid thereon.

2. Where an administrator claimed that a certain amount was due him from his wife's estate on an alleged agreement between him and his wife relating to the purchase of certain property, but the only proof offered in support of such agreement consisted of communications between him and his wife in her lifetime, the claim was properly disallowed, such communications being inadmissible.

3. Where there was evidence from which a jury might properly find that money found by a husband in his wife's shoe after her death belonged to him, and the jury so found, such money was not chargeable to him as his wife's administrator.

4. Testatrix directed her executor as soon as convenient after her death to sell her interest in certain real estate described, and pay over and divide the fund arising therefrom among certain persons named. *Held*, that such provision operated as an equitable conversion of the real estate into personalty, and impressed it with a trust in favor of the beneficiaries, and hence rents collected from such real estate before sale belonged to the beneficiaries, and was no part of the estate chargeable to the administrator with the will annexed.

5. The probate court has no jurisdiction of rents of real estate devised until the personal property of the deceased is exhausted in the payment of debts and legacies.

Appeal from Common Pleas Division.

Judicial accounting by Charles B. Jones, as administrator c. t. a. of the estate of W. Anna Jones, deceased. From a decree of the probate court settling the accounts, affirmed by the common pleas division, the administrator and Nathaniel G. Hendrick appeal. Modified.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

George T. Brown and Job S. Carpenter, for appellant Jones. Samuel W. K. Allen, for appellant Hendrick.

TILLINGHAST, J. The above-entitled cases are appeals from the decree of the probate court of East Greenwich entered in the matter of the estate of W. Anna Jones, late of said East Greenwich, deceased, and involve the allowance of the account of Charles B. Jones, administrator c. t. a., by said probate court. By agreement of parties the cases were tried together in the common pleas division.

The material facts in the first-named case are substantially as follows: W. Anna Jones died June 25, 1899, leaving a last will and testament, which was duly admitted to probate, and Charles B. Jones, her husband, was appointed administrator with the will annexed of her estate, the executor named in the will having renounced the trust conferred upon him. Mr. Jones duly qualified as such administrator, and entered upon the execution of his trust. Mrs. Jones left both real and personal estate, disposing of the same by her will, a copy of which is on file with the papers, and will be more particularly referred to hereafter. The real estate of the testatrix consisted of an undivided half interest in two parcels of land, one of which is known as the "Homestead Estate" and the other being known as the "Tillinghast Estate," and are both located in the village of East Greenwich. The other moiety of said estates belongs to her husband, said Charles B. Jones, the deeds thereof standing in their joint names.

The first account which Charles B. Jones, administrator c. t. a. of the estate of W. Anna Jones, presented to the probate court of East Greenwich for allowance, was amended by order of said court in the following particulars, viz.: First, by adding to the inventory one-half of the amount paid by Charles G. Hendrick on mortgage note, \$191.12; and, second, by charging him with "money found in shoe, \$40"; which sums, together with the sum of \$343.08, which he admitted to be in his hands under the inventory, amount to the sum of \$574.15. Said account was also amended by the probate court by striking out and disallowing the item of \$1,512.50 paid to Charles B. Jones. The changes thus made in his account as administrator constitute the basis of his appeal in the case now before us.

In support of his claim that said sum of \$191.12 should not be charged to him, he offered evidence to the effect that he and his wife, W. Anna Jones, loaned to Charles G. Hendrick, who was a brother of his said wife, the sum of \$600 on January 17, 1894, and took a note therefor, payable one year after date "to Charles B. Jones or W. Anna Jones"; that he, said Charles B. Jones, furnished \$500 of the money thus advanced, and that his wife furnished \$100 thereof. It further appears that the sum of \$200 was paid on said note to Mrs. Jones during her lifetime by Hendrick, and that, after the death of his (Jones's) wife, the sum of \$300 was paid to him on said note, the balance of \$100 having been retained by said Hendrick at his request and by agreement with the administrator, he saying to the administrator that "that would be so much towards his dowry out of his sister's estate." That is to say, the evidence shows that Hendrick paid the plaintiff \$300 and kept back the remaining \$100 with the understanding aforesaid. As the case stands, then, it appears that out of the \$500 which Mr. Jones advanced on said note he has received back only \$300. Under this state of facts we fail to see how he can properly be charged with any part of this sum in his account as administrator, for, as between him and his wife's estate, he has not only not received anything which properly belongs to the estate, but has apparently allowed said estate the benefit of \$200 which belonged to him. Of course, as between the maker and the payees of said note, either one of said payees could properly have received the full amount thereof, and given a good discharge to the maker. But as between said payees, while perhaps *prima facie* they would each be entitled to one-half part thereof, yet it was clearly competent for one of them to show that the larger part, or even the whole amount thereof, was advanced by him or her, and to settle their individual accounts accordingly. We are therefore of the opinion that said probate court had no right to charge the administrator with any part of the amount received by him on said note, and also that it was error on the part of the presiding justice in this case to direct the jury to charge the administrator with any part of the amount collected on said note.

As to the disallowance by the probate court of the item of \$1,512.50 charged by the administrator against the estate of his wife in his own favor, we think the action of the probate court was right; and also that the ruling of the presiding justice in this case in directing the jury to disallow said item, was correct. The claim of the administrator that said amount is due to him out of his wife's estate is based wholly upon an alleged agreement or understanding between him and his wife relative to the purchase of the two estates hereinbefore referred to,

and the amount that each advanced in the purchase thereof and in the construction and erection of certain buildings and improvements thereon. At the trial of the case he attempted to show the various agreements which he claimed to have made with his wife relating to said real estate in order to sustain his claim that his wife was indebted to him at the time of her decease on account thereof, but was not allowed to do so, on the ground that all the testimony offered consisted of communications between him and his wife, and hence were not admissible in evidence. This ruling was clearly right under the well-settled law of this state as declared in *Campbell v. Chace*, 12 R. I. 333, and *Robinson v. Robinson*, 22 R. I. 121 46 Atl. 455, 84 Am. St. Rep. 832. There being no evidence, therefore, in support of his claim against the estate of his wife, the court properly directed the jury that said item of \$1,512.50, charged by him against said estate, should be disallowed in his account.

In addition to the fact that the evidence offered was incompetent to sustain the claim of the administrator last considered, it is proper to say that at the time when the alleged contract or agreement was made a married woman was incompetent to make such a contract, and hence, even if it were made as claimed, it was a nullity and not enforceable.

As to the item of \$40 which the husband found in his wife's shoe after her death, which item the probate court directed should be charged against him, there is evidence from which the jury might properly find that this money in fact belonged to him; and hence their finding in his favor as to the ownership of this amount should not be disturbed.

We come now to the consideration of the second case, namely, that of *Nathaniel G. Hendrick v. The Probate Court of East Greenwich*, the facts of which are as follows, viz.: After the death of Mrs. Jones, her husband, who is the administrator c. t. a. of her estate, collected the rents of said Tillinghast estate, amounting to the sum of \$280; and it is claimed by said Hendrick that one-half of this amount should be charged to said administrator in his account. In his reasons of appeal Hendrick alleges that said probate court passed a decree refusing to charge the administrator with the income of one undivided half of said Tillinghast estate from the date of the death of said W. Anna Jones to the date of filing said first account, and that he, being aggrieved by said decree, appeals therefrom. Although an examination of the record before us fails to show that any request was made to the probate court in the premises, and also fails to show that any action was taken by said court regarding the matter of the rents in question, yet, as this item was treated by all parties concerned as be-

ing properly in the case at the trial in the common pleas division, we will regard it as being rightly before us for consideration. The said Tillinghast estate, as before stated, was owned by Mr. and Mrs. Jones as tenants in common, and the latter, by the twenty-fifth clause of her will, disposed of her interest therein as follows: "I direct my executor hereinafter named, as soon after my decease as he can conveniently do so, to sell, at public or private sale, as he may deem best, my interest in the estate known as the Tillinghast estate, in the village of East Greenwich aforesaid, next south of the premises where I now live, and to pay over and divide the fund arising from said sale to and among the following named persons, in the proportions specified, to wit." Then follows a list of the persons amongst whom said fund is to be divided.

The only question presented for our decision in this case is whether the administrator, as such, is properly chargeable with one-half of the rents collected from said estate as aforesaid. If the rents constitute a portion of the personal estate of the testatrix, of course they are properly chargeable to him in his account; but, if they do not, then they are not so chargeable. At the trial of the case the court directed the jury to find that the amount of \$140—this being one-half of the amount of rent collected—should be charged against Mr. Jones, and be accounted for by him; and they accordingly so found. We think this instruction was error. Under the will of Mrs. Jones, as we construe it, the entire beneficial ownership of the real estate devised by virtue of said twenty-fifth clause thereof passed immediately to the persons named as beneficiaries, and hence whatever rents were collected belonged to them. The direction to sell contained in said clause amounted, in effect, to an equitable conversion of said real estate into personalty, and impressed it with a trust in favor of said beneficiaries. And the mere fact that the real estate was not immediately converted into personalty did not have the effect to deprive the beneficiaries of any part of said property. The duty of the administrator *c. t. a.* under said clause was to convert said real estate into personalty as soon as he could conveniently do so after the death of the testatrix, and distribute the proceeds of such sale as directed. This direction impressed a trust upon the land, and specified who should execute said trust. The power of sale given in said clause was not a naked power, but was coupled with a trust, which required the execution of the power as soon as might be. And in powers which are in the nature of trusts, as said by the court in *Greenough v. Welles*, 10 Cush. 576, "the rights and interests of third parties who are beneficially interested in the trusts which arise and grow out of the execution of the power come in and can be enforced as against the

party to whom the power is given. * * *

When a trust is to be effected by the execution of a power, then the trust and power become blended, and binding upon the donee of the power. The most familiar instance given in the books of such a union is the case where a power is given by a will to sell an estate, with direction to apply the proceeds upon a trust." See *Gibbs v. Marsh*, 2 Metc. (Mass.) 243. In *Leeds, Ex'r, v. Wakefield*, 10 Gray, 517, Shaw, C. J., says: "As a general rule, one clothed with a mere naked power may execute the power or not, at his own will; but one invested with a power to which a trust is annexed is bound in equity, as in other cases of trust, to execute the power, in order that the equitable rights of those who are stated as the objects of the testator's bounty under such trusts may have the enjoyment of the benefits intended for them." The doctrine that in equity the beneficial interest in property is the controlling and real interest, and also that where, under a devise, an estate is to be sold, and the proceeds divided among designated parties, such direction amounts to an equitable conversion of the estate into personalty, was fully elaborated by Stiness, J., in delivering the opinion of this court in *Van Zandt v. Garretson*, 21 R. I. 418, 44 Atl. 221. See, also, *Newport Water Works v. Sisson*, 18 R. I. 411, 28 Atl. 336. And while it is true that the proceeding before us is not technically an equitable one, yet, for the purpose of determining as to the rights of the parties relating to said rents, we see no reason why said doctrine should not be applied. Moreover, it is well-settled law in this state that a probate court has nothing to do with the real estate, or the rents of real estate, of a deceased person, until the proper legal steps have been taken to place such property in the hands of the executor or administrator for the necessary purpose of settling the estate. That is to say, until the personal property of a decedent is exhausted in the payment of debts and legacies, neither the executor, the administrator, nor the probate court has anything to do with the real estate or the income thereof, except as may be directed by the will, if there be a will. As said by Matteson, C. J., in *Grinnell v. Baker*, 17 R. I. 49, 23 Atl. 913: "The ordinary powers and duties of an executor are to take possession of the goods and chattels of the testator; to collect the debts due to him; to sell the goods and chattels, so far as may be necessary for the payment of the testator's debts and the pecuniary legacies and expenses of administration; and to distribute the residue of the assets among the persons entitled to them under the provisions of the will. If to these ordinary powers and duties there is superadded the power and duty to invest portions of the testator's estate and to pay over the income, such power and duty, being appropriate to the office of a trustee,

rather than of an executor, are held to constitute a trust, and the executor, in executing them, is regarded as a trustee, and not as executor." Applying this rule to the case now under consideration, it clearly appears that said Charles B. Jones, administrator c. t. a., held the rents in question as trustee for said beneficiaries, and not as administrator c. t. a.; and hence it follows that he is not chargeable therefor in his account as such administrator. The exception taken to the ruling of the presiding justice relating to said item of rent must, therefore, be sustained.

Many other exceptions were taken during the trial, but, as what we have thus said covers all the material points raised by said exceptions, we do not find it necessary to consider them separately.

As the conclusions to which we have thus arrived in the cases before us would be controlling if a new trial were to be granted as prayed, and as there is no dispute about the facts upon which said conclusions are based, we see no occasion for granting a new trial. We therefore remand the cases to the common pleas division, with direction to enter a decree in each of said cases amending the administrator's account in accordance with this opinion, and to transmit to said probate court a certified copy of such decrees for record.

(25 R. I. 342)

ENNIS v. R. B. LITTLE & CO.

(Supreme Court of Rhode Island. July 14, 1903.)

MASTER AND SERVANT—DEATH OF SERVANT—APPLIANCES—DEFECTS—EVIDENCE—EXPERTS—CAUSE OF INJURY—FELLOW SERVANTS—DISCRETION—REVIEW—HARMLESS ERROR.

1. In an action for death of a servant, caused by the breaking of an eyebolt while a staging used for unloading coal was being moved, it was not error to exclude a question as to whether, in the original construction of such a structure and the insertion of eyebolts by ordinary mechanics and men engaged in such construction, it was or was not usual to estimate the exact amount of weight that the bolt would endure; the question being improper in form in failing to indicate any direct application to the issue.

2. A ruling as to the competency of an expert witness will not be reversed on appeal in the absence of a showing of clear abuse of discretion.

3. Where, in an action for death of a servant by the breaking of an eyebolt, defendant's experts testified that drift or leverage between the eye of the bolt and the post into which it was driven would diminish the power of the bolt to resist a transverse strain, the admission of evidence of the same fact by witnesses for plaintiff was harmless.

4. In an action for the death of a servant, caused by the breaking of an eyebolt, plaintiff asked a witness whether, if the testimony showed that the bolt was driven home, and was in use six months, when, in order to prevent ropes running on the outside of the post from rub-

bing on the nut, the post was countersunk sufficient to take in the nut and the bolt was hammered back level with the outside of the post, so that there was a leverage of from 1 to 1½ inches that did not exist before, and the next time the strain was put on the eyebolt it broke, what would he say as to the connection of the change of the eyebolt and the breaking thereof. Held, that such question was objectionable as asking the witness' opinion as to the defective condition based on the happening of the accident.

5. Evidence in an action for death of a servant held to show that the accident was not due to any defect in the appliances, but the result of the negligence of intestate's fellow servant, for which defendant was not liable.

Action by Agatha M. Ennis, as administratrix of the estate of her deceased husband, against R. B. Little & Co. On petition of defendants for a new trial. Judgment for defendants.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

John W. Hogan, Stephen J. Casey, and Philip S. Knauer, for plaintiff. David S. Baker and Lewis A. Waterman, for defendants.

DOUGLAS, J. The defendants are coal dealers in the city of Providence, and occupy a building adjacent to the river for the storage of coal. To facilitate the unloading of coal from vessels lying alongside the wharf and building, a sliding staging or platform 41 feet long and 12 feet wide had been attached to the building at the height of 30 or 40 feet, adapted to be pushed out about half its length and suspended over the hatch of a coal vessel, and when not in use to be partly retracted within the walls of the building. This staging ran upon four rollers and two small wheels, and was drawn in by the power of an electric engine applied by means of the boom and rope which were provided for hoisting coal. This boom was set near the side of the staging, and extended out from the building over the water. As used for hoisting, the rope from the drum of the engine passed through a block near the foot of the boom, thence over a block at the outer end, and thence to the bucket to be raised. When it was desired to haul in the staging, the rope from the block at the end of the boom was passed almost vertically down and over a snatch block hooked into an eyebolt at the northeast corner of the staging, thence back over a stationary block attached to a beam inside the building over the runway some 15 feet from the outer wall, thence to a block hooked into an eyebolt at the southeast corner of the staging. At each outer corner of the staging were upright beams, and the eyebolts referred to were inserted from behind through these uprights, and secured by nuts screwed upon their front ends. The plaintiff's intestate was a dumper, whose duty was to stand near the end of the platform and guide the hods of coal as they were lifted up, and to empty them into barrows

¶ 2. See Appeal and Error, vol. 3, Cent. Dig. § 3853; Evidence, vol. 20, Cent. Dig. § 2363.

which other men wheeled into the building. When a vessel had been emptied, and the use of the platform was temporarily over, it was his duty to fix the tackle and blocks in their places, and give a signal to the engineer to start the engine. When the platform had been drawn in as far as was desired, it was his duty to give a signal to the engineer to stop, and then to unhook the blocks and restore the tackle to its place. December 27, 1890, the plaintiff's intestate was in his place upon the staging directing the movement of drawing it in. He had adjusted the tackle and blocks and given the signal to the engineer to apply the power. When the staging had nearly or quite reached its inner position, the eyebolt in the northeasterly post broke, the block flew upwards, struck the plaintiff in the body, throwing him into the air, and inflicting such injuries as caused his death within a few hours. This action was brought to recover on the ground that the eyebolt was improperly adjusted to the upright post, and that the injury to the deceased was caused by this improper adjustment. The defendants denied that the bolt was adjusted as the plaintiff says it was, that it was in any way insufficient for the service it was designed to perform, or that any improper adjustment caused the accident. The jury found a verdict for the plaintiff in the sum of \$9,500, and the defendants have petitioned for a new trial, alleging that certain rulings by the court were erroneous, that the verdict is against the evidence, and that the damages are excessive.

The first question raised upon the rulings of the court is upon the rejection of the defendants' question to one of their experts: "Now, Mr. Bullock, in the original construction of such a structure as this, and the insertion of eyebolts by ordinary mechanics and men engaged in such construction, is it or not usual to estimate the exact amount of weight that that bolt will endure?" The discussion about this question seems to have been out of proportion to its importance. We see no reason why the question should have been objected to. It seems rather to be introductory to something further than to be calculated to elicit anything important by itself. It was a proper defense to the action to show that the arrangement and strength of the apparatus were like those employed usually by persons in a similar line of business; but how such persons procured their apparatus, and on what principles they selected it, seems remote from a description of what it was. The form of the question is unfortunate in not indicating any direct application to the issue, and we think the court exercised a reasonable discretion in ruling it out.

The next class of objections now insisted upon were made to the ruling of the court that certain witnesses produced by the plaintiff were qualified to testify as experts as

to the sufficiency of the eyebolt as it was supposed to have been adjusted with reference to the post. The competency of persons offered as experts is generally a question to be decided by the trial court. If error is committed in admitting an incompetent person, the cross-examination to which he is subjected may generally be relied upon to show his ignorance and neutralize the force of his opinions. Unless the ruling of the court is palpably and grossly wrong, it will not be reversed by the reviewing tribunal. Rogers on Expert Testimony, §§ 22, 23; Lawson on Expert Evidence, 276, 468; Gillett on Indirect Evidence, § 209; Howard v. Providence, 6 R. I. 514; Sarle v. Arnold, 7 R. I. 586. The first of these witnesses (Mr. Meehan) was a contractor and builder, of many years' experience in the use of eyebolts. His opinion might have been useful if the elements of the problem had been given him. The objection seems more appropriate to the testimony he gave than to his admission as an expert generally. The fact was developed in the course of his examination that, while he knew that an eyebolt of a certain size would carry a certain strain, he did not know how much more it would carry before breaking; and that, while an eyebolt projecting part way from a beam, leaving drift or leverage, would offer less resistance to a transverse strain than one which was driven in till the eye touched the wood, he had no accurate knowledge of the comparative strength of the bolt in these different adjustments. Inasmuch as the defendants' experts also said that drift or leverage would diminish the power of a bolt to resist transverse strain, and inasmuch as the mechanical principle involved is commonly known to intelligent people, it does not seem that the evidence of this witness ought to have seriously harmed the defendants.

The next witness was Joseph McAlpin, who had charge of a department in a bolt manufactory. This employment would seem to be sufficient qualification to admit him to testify as to the capacity of eyebolts. The court could not anticipate the insufficiency of his knowledge in a preliminary examination. It appeared afterwards that he had no accurate knowledge of the tensile strength of iron, and, consequently, the opinions which he gave should have had little weight with the jury.

Edward McCormick had been a rigger of derricks a number of years, and Thomas D. Wallace had had long experience in the use of eyebolts. The observations made in regard to Joseph McAlpin apply to these witnesses also. There is nothing in their testimony which contradicts the exact evidence of the defendants' experts as to the sufficiency of the particular bolt in question to support the definite strain which it was intended to resist. Some of the questions, however, which were asked of these witnesses, were admitted against the objection of

the defendants, and their exceptions, duly taken, must be considered.

In the examination of Michael Meehan the following appears: "Q. 70. If the testimony in this case shows that that bolt was driven home, and was in use six months, and on a certain day, in order to get the nut on the outside of the post out of the way from rubbing on the ropes running there on the outside of that post, was countersunk sufficient to take in that nut, and the bolt was hammered back level with the outside of the post so that there was a leverage there of from one to one and a half inches that did not exist before, and the next time that strain was put upon the eyebolt it broke, what would you say as to the connection in the change of the eyebolt and the breaking of the eyebolt? (Objected to. Admitted. Exceptions taken by Mr. Baker.) A. I should say that the change in the leverage on the bolt by reason of its being driven away from the post was the cause of the breaking." Substantially the same question was asked of Joseph McAlpin, and again of Thomas W. D. Wallace, and admitted against defendants' objection. The defendants' counsel now urges that this evidence was improper. He says: "It was asked for the purpose of showing that the cause of the accident was a defective condition of the eyebolt in the position it was in at the time the accident occurred, and the witness was asked, in effect, what the idea would be as to the defective condition based upon the happening of the accident?" We think this criticism is just. The defendants were negligent of their duty if they allowed the eyebolt to be adjusted so as to weaken it beyond the limit of safety for the load it was to carry. After the accident occurred it was easy to see that it would not sustain the strain which was put upon it, but it by no means follows that, with the knowledge which could have been obtained before the bolt broke, the defendants should have known that it was not sufficient for the strain. The question is improper, as the knowledge called for is not expert knowledge, but an inference of fact which the jury could make as well. It does not appear that either one of these witnesses knew enough about the tensile strength of iron to have anticipated this accident. It did not need experts to say, after the accident occurred, that the thing which broke must have been subjected to a greater strain than it could bear. Two of these experts had never seen a bolt break; one of them had tested bolts, but knew only from the tables at what tension the breaks occurred. None of them pretended to say with any accuracy what was the maximum load which the bolt in question could safely bear; but when it broke, as supposed in the question, it was easy for them to form an opinion as to the cause. Evidently such an opinion was based on the occurrence of the accident, and ought not to have been the basis of

estimation of the defendants' responsibility.

It may be said that the jury ought not to have been misled by such evidence, but we cannot say they were not. These witnesses were practical men, familiar with the uses of such appliances. What more natural than for the jury to rely upon their judgment in preference to the more accurate, but more technical, evidence of engineers and professional men, whose knowledge is often depreciated as theory and fancy.

Aside from the error in admitting this evidence, which would entitle the defendant to a new trial, we find the verdict to be against the evidence upon the question of the defendants' negligence. The evidence greatly preponderates in support of the defendants' assertion that the bolt, at the time of the accident, had not been changed in its relation to the beam after it was first placed there, but had been used exactly as it then was for about a year. The plaintiff claims that the projection of the end of the bolt on which the nut was screwed interfered with the rope in hoisting, and that Mr. Quinn accordingly dug into the beam a place large enough to receive the nut, and drove the bolt through till the nut was countersunk and the eye projected on the other side, and formed a leverage or drift which weakened the appliance and caused the accident. The story that Quinn countersunk the nut depends upon two witnesses—Walter B. Guy and Patrick J. Ennis, a cousin of the deceased. They were testifying a year after the occurrence, and in the meanwhile boards had been nailed against the timber so as to give the impression to the observer that the nut upon the new bolt which was substituted for the broken one was countersunk, as it was masked by the sheathing. It is easier to believe that these witnesses are giving from memory their impression of the conditions after the accident from examination made just before the trial than that the witnesses who positively contradict them on this point were mistaken. Quinn swears that the bolt which broke was not taken out from the time it was first put in until it broke; that the post was never countersunk. Frank D. Simmons, Robert B. Little, and Thomas F. Callaghan testify the same. In this conflict of testimony we might hesitate to accept this mere preponderance as conclusive against the implied conclusion of the jury, but the post itself is in evidence, and tells its own story. Upon it there is no trace of any recess for the nut. It is true that, after the post had been taken out of the staging and brought into court, the same two witnesses pretended to say that it was not the one which had stood at the northeast corner of the platform; but against the overwhelming testimony of Quinn, Ramos, Hill, Williams, Bermer, and Simmons, who assisted in taking it out and identified it in court, it is incredible that this impeachment, involving a barefaced fraud upon the court which

could have been detected at the time by an inspection of the staging, should have had any foundation. We cannot doubt that the post produced is the one in which the bolt was fastened, and, consequently, that the plaintiff's theory of the cause of the accident is erroneous.

The second contention of the defendants is that, whatever may have been the position of the bolt in the post, it was strong enough to sustain the strain which it was designed to bear. This claim is supported by all the positive testimony in the case. Certain measurements were taken by the defendants' experts, and their figures are not contradicted. The weight of the platform to be hauled in was found to be 13,275 pounds. To start it required a force of 2,250 pounds, and to keep it in motion after it was started a force of 1,800 pounds. About one-half of these strains was sustained by the eyebolt in question and about half by the one in the southeast post. The angle between the two lengths of rope which extended to the northeasterly eyebolt from the boom and thence to the beam over the runway determined the direction in which the pulling force was exerted upon the bolt. This direction was necessarily in the plane of these sections of rope, and practically half way between them. The maximum angle which this line of force formed with a line perpendicular to the post occurred when the platform was pulled in against the chock, and then was about 45 degrees. When the staging was extended, this angle became more acute. It follows that the force required to move the staging increased somewhat as it approached the building and as the angle of application of the power to the direction of its progress became greater, and, accordingly, the witnesses have taken account of this increment in calculating the required power as if it were to be applied at an angle of 45 degrees. While this change of angle in the application of the force increased the strain upon the bolt as it approached the building, the power exerted never approximated the force exerted at the starting point. The plaintiff's experts all express the opinion that the bolt, if it projects two inches from the post, would be unsafe; but none of them place the limit of capacity below the actual strain which was normally exerted by the rope upon the bolt. Mr. Meehan testifies that a safe load for this eyebolt in a straight pull would be 10 tons; i. e., 20,000 pounds. Supposing the eye to be close up to the wood, he says, "If the pull was in any direction except in a line with the eyebolt, it would carry safely, I think, three tons." Mr. McAlpin declines to state how much of a load such an eyebolt can carry. Mr. McCormick does not know what weight a $\frac{3}{8}$ -inch eyebolt would carry, but he thinks three tons. He does not know what load would be safe to put upon it. Thomas D. Wallace says that, if

the strain came at 45 degrees, as he had used eyebolts on board ship for hoisting, he would not trust more than 1,500 pounds on a $\frac{3}{8}$ -inch eyebolt. He puts the capacity of such a bolt to sustain a straight pull at "from one ton to twenty-five hundred net." If we take these figures and compare them with the actual strain laid upon the bolt in moving the platform, as sworn to by the defendants' experts and not contradicted, the opinion of these gentlemen that the bolt was insufficient is disproved by their own calculations. This appears still more clearly from the evidence of the defendants' experts. They agree upon the tensile strength of first-quality American iron, which this bolt was made of, and tell us that such iron, if subjected to transverse strain, would first bend 90 degrees, and then, before breaking, would sustain five-sixths of the load which it would bear if applied in a straight pull; and from these elements they show that, even if the eye projected two inches from the wood, it would still leave an ample margin of safety. Mr. Bullock fixes the strength of the bolt to resist a direct pull at 28,000 pounds, and estimates its efficient strength, in the least favorable adaptation claimed in this case, at 10,000 or 12,000 pounds; as the defendant claimed it to have been placed, at 19,000 pounds. Mr. Hatch thinks this bolt would stand a direct pull of upwards of 20,000 pounds. Mr. Bliss made calculations of the load which the bolt was normally required to sustain, and finds the bolt amply competent for its work. This conclusion rests upon actual measurements of the load to be moved, and accurate calculations from well-established scientific facts in regard to the strength of iron. These facts and mechanical laws also support the statement of the defendants' experts that the breaking of the bolt cannot be accounted for except on the supposition that some obstacle was interposed to the progress of the staging which brought an extraordinary strain upon the bolt. It appears that the bolt actually sustained a strain of 1,125 or 1,150 pounds when the staging started, and that after the start the strain upon it from the resistance of the staging was about 900 pounds only. It is a necessary inference, therefore, that some greater force than the normal resistance of the staging must have interposed to break the bolt. This conclusion is corroborated by an inspection of the bolt itself. All agree that it is of the best American iron, and perfect in structure. The break shows no flaw, and no defect in the welding. It indicates that the iron was pulled apart by an extraordinary force. It further appears that the breaking force was exerted nearly in the axis of the end which broke off. The bolt first bent until the projecting end coincided very nearly with the line of force, and then yielded to an enormous tension and parted. From the inclination of the hole

in the post, which was about 20 degrees, and the angle of flexion of the bolt, it is apparent that when the bolt broke the direction in which the pull came was about what was found when the platform was drawn in against the stop.

The testimony of the witnesses who saw the accident is conflicting as to how far the staging was in when it occurred. The two witnesses for the plaintiff, whom we have formerly referred to, say that it was not completely in; Guy's testimony is that the platform was drawn in immediately after the accident some five feet, and then did not reach the spud by a couple of feet. A rope was put around the post and the block hooked into that, and the platform was hauled in by the engine. Mr. Callahan, Mr. Ross, and some other men were there. Mr. Patrick Ennis was not. Patrick Ennis says the platform extended 20 feet from the building, and when it had been drawn in about 8 feet the eyebolt broke. The deceased was standing near the northeast corner of the staging, but in the angle formed by the parts of the rope which ran from the block inside to the two corners. "When the bolt broke, the block came loose, and hit him in the stomach, and the eyebolt went in about twenty feet, and Dick went up in the air about seven feet. He went straight up, and I caught him, and then he dropped down on the staging. He remained there a moment, and Mr. R. B. Little came up and said, 'Take him into the engine room.' He was unconscious." The witness further testifies that before the accident there was no spud, or chock, or appliance to arrest the motion inwards of the platform. "I remember well there was nothing there to stop it." He denies that he told Quinn that the accident was caused by running the engine after the platform was against the chock. William Quinn heard of the accident an hour after, and went to examine the staging, and found it was way in against the stop. Callahan, Guy, and Patrick J. Ennis were there. Ennis told witness that this happened because the engine was run back hard, putting the platform back against the chock, and that was the cause of the breaking of the bolt. Robert B. Little went up to the staging as soon as he heard of the accident. (According to Patrick Ennis, this was before the injured man had been moved.) At that time the staging was away in. Thomas F. Callahan, one of the three persons who saw the accident, says: "He was stooping down like this to unfasten the block. He signaled the engineer, and when he signaled him he stooped to unfasten the block, and the engineer said he got the power on and the bolt broke." The staging was home when the bolt broke. It was not pulled in as Patrick Ennis testified, immediately after the accident. After being extended again, a day or two later, it was pulled in by means of a rope, as was stated by Ennis, before they

rigged a new bolt. "When Mr. Richard Ennis [the deceased] signaled the engineer to stop, he didn't stop; he kept on with the power; and that is what broke the bolt." Patrick Ennis was not on the platform at the time of the accident, but stood near witness inside the building. The staging stopped, and immediately after the staging stopped the bolt broke. In cross-examination he says he did not look at the chock to see whether the platform touched it or not. Nell Ross was in charge of the engine. He did not hear any signal from the deceased. "I saw the staging stop and the eyebolt break, and as soon as I saw the staging stop I stopped the machine. The eyebolt was broken then. I looked at the staging after the accident to see how far in it was. It was against the stop block. There was no rope hitched to the post that day to draw it in with. Deceased was standing over the block when he was struck, not over six inches away from it. After the accident all the men went home, and this staging stayed where it was all day." The motor is 35 horse power. When the lever is in the eighth notch, the full power is on. When the lever is in the third notch, the power is sufficient to move the platform. It starts with four notches and continues with three.

In comparing the account given by Ennis, corroborated in part by Guy, with that of Callahan and Ross, it must be noted that the former witnesses are already discredited in the matter of the identity of the post, and contradicted in respect to the counteranking of the bolt, and now are met by another flat contradiction, from several witnesses, in respect to the platform being home at the time of the break. Their story is further open to the insuperable objection that it gives no rational cause for the breaking of the bolt. If there had been no chock there, the staging would have continued to be drawn in, so long as the power was applied, until it had gone far beyond the point where any of the witnesses place it, without developing any extraordinary strain upon the eyebolt. If, on the other hand, the deceased gave the signal to stop, and leaned over as he did so to unhook the block when the line should slacken, and if the engineer, not hearing the signal, kept the power on after the platform had brought up against its rest, the accident is rationally explained. If there can be any doubt that this explanation is the true one, we think it must be dissipated by the expert evidence in the case which we have already cited. The fact is established, therefore, that the accident was caused, not by any defect in the capacity or adjustment of the bolt, but by the continued application of the power after the platform could be pulled no further. This must have happened, because the deceased failed to give the signal in due time, or because the engineer failed to hear it, or neglected to obey it. In either case the defendants are not lia-

ble. The machinery was in proper condition to do the work it was intended for. The fault, if there was any, was that of the deceased or his fellow workman.

It is further contended by the defendants that the deceased was guilty of contributory negligence in taking the position he occupied over the block before the platform had stopped. As we have found no defect in the attachments of the block which ought to have been known to the defendants, we cannot say that there was any danger there which the deceased should have avoided. If the signal had been heard and obeyed, there would have been no danger.

It was not necessary to discuss the question of damages.

The case will be remitted to the common pleas division, with direction to enter judgment for the defendants.

(25 R. I. 332)

In re WILLIS' WILL.

(Supreme Court of Rhode Island. July 13, 1903.)

WILLS — CONSTRUCTION — ESTATE DEVISED — LIFE ESTATES — RULE IN SHELLEY'S CASE.

1. Testator devised to his son the house and lot "wherein he now lives," and provided that, if the son should die, the property should go to his wife "for and during her natural life, and no longer." *Held*, that the words "wherein he now lives" did not evidence an intention on the part of the testator to devise the property to the son in fee, and that he took only a life estate therein.

2. Where testator devised a life estate only in certain property to his son, the latter could dispose of his interest by deed only, and not by will.

3. Testator devised to his wife all his estate for life, and devised to his son the remainder thereof on condition that after the death of the wife the son should pay all testator's debts, funeral charges, and the settling of his estate, and erecting suitable gravestones, and that after the death of the son the property should go to testator's next of kin. *Held* that, since the rule in Shelley's Case has been abolished in Rhode Island, after the death of testator's wife the son took a life estate in the residue of his father's property, subject to the condition named in the will.

4. Where testator devised a certain house and lot in which his son then lived to his son for life, and in the succeeding paragraph of the will devised to his wife all his real and personal estate of every kind and nature for and during her natural life, the devise to testator's wife was exclusive of the real estate previously devised to the son.

Application for the construction of the will of Francis Willis, deceased. On a case stated.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Robert M. Franklin, for Orlando F. Willis.

TILLINGHAST, J. This is a case stated for an opinion under Gen. Laws R. I. 1896, c. 240, § 24, upon the following agreed statement of facts, namely:

"(1) That Francis Willis died in the town of New Shoreham in this state, on the 4th

day of March, 1902, leaving a last will and testament, which was duly approved, allowed, and ordered recorded by the probate court of said town on the 5th day of May, 1902, and that letters of administration with the will annexed were thereafterwards granted to Alton H. Mott, the executor named in said will, Alvin H. Sprague, having renounced the trust conferred upon him.

"(2) That the said Francis Willis, at the time of his death, was seized in fee of certain real estate in said town of New Shoreham, and in and by his last will and testament devised the same in the words following:

"'first I give and devise to my son Orlando F. Willis the house and lot wherein he now lives It being about $\frac{3}{4}$ of an anchor as it is now enclosed And it is butted bounded and described as followers Northerly on the old dam pond or stubes hole and easterly on lands of the grantor and southerly on the highway and westerly on lands of the grantor and of Orlando F. Willis should dye his wife Carrie Sprague Willis then the above described property is to go to her for and during her natural life and no longer.

"'secondly I give and bequeath to my said wife Hannah I. Willis all my real and personal estate of every kind and nature or waresoever situated or lying for and during her natural life.'

"'sixt I give and devise to my son Orlando F. Willis All the rest and residue of my estate of every kind and Nature and waresoever situated or lying. After the deth of my said wife Hannah I. Willis by his paying all my just dets funeral charges and settleing of my estate and erecting suitable gravestones at our graves my will is that after the deth of my son Orlando F. Willis the above property Must go to the next of kind.'

"(3) That your petitioners are the same persons mentioned as devisees in said first, second, and sixth clauses, respectively, of said last will and testament.

"(4) That said Francis Willis deceased, leaving a widow, Hannah I. Willis, and a son, Orlando F. Willis, your petitioners hereto. And your said petitioners hereby submit to the court for its opinion the following questions:

"(1) What interest in the real estate described in clause first does the said Orlando F. Willis take under and by virtue of the said first clause of the last will and testament of said Francis Willis, deceased?

"(2) Does the said Orlando F. Willis, under and by virtue of the said first clause of said last will and testament, take such an interest in said real estate as he can dispose of by deed or will?

"(3) What interest in the residue and remainder of the estate does said Orlando F. Willis take under and by virtue of the sixth clause of said last will and testament of said Francis Willis, deceased?

"(4) What interest, if any, does the widow, Hannah I. Willis, take in the real estate described in clause first of the said last will and testament of said Francis Willis, deceased, under and by virtue of the second clause of the last will and testament of said Francis Willis, deceased?

"(5) What are the respective interests in said real estate of the said Orlando F. Willis, the son, said Hannah I. Willis, the widow, and Carrie Sprague Willis, wife of said Orlando F. Willis, under and by virtue of the first, second, and sixth clauses of the said last will and testament of said Francis Willis, deceased?

"[Signed]

Orlando F. Willis.

"Carrie Sprague Willis.

"Hannah I. Willis.

"Alton H. Mott, Admr."

While the provisions of the will which we are thus called upon to construe are most bunglingly drawn, and, at first blush, are seemingly inconsistent and repugnant to each other, yet we have come to the conclusion, after considerable study thereof, that they can be allowed to stand as parts of the will, and that a reasonable interpretation thereof can be given. And in answer to the first question propounded we reply that, under the first clause of said will, the testator's son, Orlando, takes a life estate only in the real estate therein described.

We cannot agree with counsel for the son, Orlando, in his contention that the words "wherein he now lives," in said first clause, express the intention to devise said real estate to him in fee; or in his further contention that the will, taken as a whole, can be so construed. We might guess that, in view of the various provisions of the will and the particular relation to the testator of the persons mentioned as beneficiaries therein, it would be natural and reasonable for him to give his son said house and lot in fee simple. But, so long as he has not used any language which legally shows such an intention, or which can properly be construed to have such an effect, we cannot say that such an intention existed. In short, the court cannot make a will for the deceased, but can only interpret, as best it may, the very blind and obscure one which he has made himself. It is true that the clause now under consideration does not, in terms, limit the estate devised to Orlando to his life. But it expressly provides that, if he should die, then the property is to go to his wife, Carrie Sprague Willis, "for and during her natural life, and no longer"; thus showing by plain implication that the son took it for life only, as otherwise he could dispose thereof, and thereby deprive his wife of her interest therein by virtue of said provision. See "Life Estate by Implication," 1 Washb. Real Prop. (6th Ed.) § 224. But for the limitation thus put upon the devise to the son, he would doubtless take said real estate in fee, under Gen. Laws R. I. 1896, c. 203, §

14, which provides that: "Whenever any real estate shall be devised without words of limitation, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will." But the devise in question does contain words of limitation, and does show an intention contrary to an absolute gift to the son. Moreover, the provision that the estate is to go to the wife of Orlando "for and during her natural life and no longer" also shows by implication that the testator had in mind the existence of his property intact as a part of his estate after the death of said Carrie, and intended that it should then fall into the residue and go as provided in the residuary clause of his will.

In answer to the second question we reply that, it being only a life estate which said Orlando takes in said real estate, it follows, of course, that he can dispose thereof by deed only, and not by will.

In answer to the third question we reply that upon the death of the testator's widow, Hannah I. Willis, his son, Orlando, takes all of the residue of his father's estate, both real and personal, for life, subject to the payment of debts, funeral expenses, and the expense of erecting suitable gravestones over his parents' graves, and subject also to the payment of the pecuniary legacies elsewhere provided for in the will. See Phillips v. Clark, 18 R. I. 627, 29 Atl. 688. But for the abrogation of the rule in Shelley's Case in this state prior to the making of said will, the effect of said sixth clause would doubtless be to vest the fee of the real estate which the widow takes for life in the son at her death, the concluding phrase of said clause being, "My will is that after the death of my son Orlando F. Willis the above property must go to the next of kind" (meaning kin), which language is equivalent to saying that after the death of the son it was to go to his heirs. And it is well settled that no particular terms are necessary to pass a fee in cases of this sort, but that any words which are of similar import to "heirs and assigns" will have this effect. Moore v. Dimond, 5 R. I. p. 126. See, also, Bullock v. Baptist Society, Id. 273. We may also add that, but for the abrogation of the rule in Shelley's Case the effect of said sixth clause would be to vest the fee of the first-described realty in the son also, as that clause gives to him all the rest and residue of the testator's estate of every kind and nature, and wheresoever situated or lying. But under Gen. Laws R. I. 1896, c. 201, § 6, it is provided that: "When lands are conveyed by deed or devised by will hereafter executed, to a person for his life, and after his death to his heirs in fee, or by words to that legal effect, the conveyance or devise shall be construed to vest

an estate for life only in such first taker, and a remainder in fee-simple in his heirs." It is therefore clear that upon the death of the widow of the testator his son, Orlando, takes only a life estate in the property described in the sixth clause of the will.

In answer to the fourth question we reply that Hannah I. Willis takes no interest in the real estate described in clause first of said will; for, while it is true that the second clause thereof in terms gives all of the testator's real and personal estate of every kind and nature to his wife, yet, in view of the fact that he had just devised a certain specific part thereof to his son, Orlando, said second clause must by implication be held to cover and include only the remainder of the testator's estate, for otherwise the provisions would be hopelessly irreconcilable and meaningless. See Redfield on Wills (4th Ed.) vol. 1, p. 451, § 3, and cases cited. And it is a familiar rule in the construction of wills that effect will be given to each and every part thereof as far as possible, and that "within all reasonable limits the courts will endeavor to reconcile two apparently inconsistent provisions of the will, rather than to absolutely ignore either, or to declare that they are both void or uncertain." Page on Wills, § 470; Redf. on Wills, part 1 (1st Ed.) p. 445.

As what we have already said practically answers the fifth question in so far as it relates to the interests of Orlando F. Willis and Hannah I. Willis under said will, there is no occasion to consider it separately. In so far as it relates to the interest of Carrie Sprague Willis, we reply that she takes a life estate in the real estate described in clause first in case she survives her husband.

(72)

POFF v. NEW ENGLAND TELEPHONE & TELEGRAPH CO.

(Supreme Court of New Hampshire. Hillsborough. May 5, 1903.)

INJURIES RESULTING IN DEATH—SURVIVAL OF ACTION—LIMITATIONS—BURDEN OF PROOF.

1. Laws 1885, p. 223, c. 11, and Laws 1887, p. 454, c. 71, providing for the survival of actions of tort for personal injuries, were superseded by Pub. St. 1891, c. 191, §§ 8-13, on the same subject.

2. Pub. St. 1891, c. 191, § 10, provides that, if an action for injuries to a person is not pending at the time of his death, and is not already barred by limitations, an action may be brought for such cause at any time within two years after decedent's death. *Held*, that the limitation of time in such statute did not relate merely to the remedy, but was a part of the right which the statute created, which did not exist at common law, and hence, where an action for injuries resulting in death was not brought within the time limited, it was not maintainable.

3. Since, under Pub. St. 1891, c. 191, § 10, it was a condition precedent to plaintiff's right to maintain an action for injuries resulting in death that it should be brought within the time limited by the statute, the burden of proving that it was so brought was on the plaintiff.

Exceptions from Superior Court.

Action by Lizzie J. Poff, as administratrix, etc., against the New England Telephone & Telegraph Company, for personal injuries to her intestate, resulting in death. A motion for nonsuit was denied, subject to exception, and the case was transferred to the Supreme Court. Exception sustained.

Wason & Moran, Bertis A. Pease, and Burns & Burns, for plaintiff. Joseph W. Fellows, Brown, Jones & Warren, and John Lowell, for defendant.

WALKER, J. In the absence of statutory authority, the action cannot be maintained. At common law an action for a personal tort resulting in death does not survive. This "rule has been too long established and too generally recognized as a settled principle of the common law to be now shaken by anything short of a legislative act." Wyatt v. Williams, 43 N. H. 102, 108; Sawyer v. Railroad, 58 N. H. 517; Clark v. Manchester, 62 N. H. 577, 582, 583; Corliss v. Railroad, 63 N. H. 404. At the time of the last revision of the statutes, in 1891, the existing statutes relating to the survival of actions of tort for personal injuries were contained in Laws 1885, p. 223, c. 11, and Laws 1887, p. 454, c. 71 (French v. Mascoma Co., 66 N. H. 90, 20 Atl. 363); and, if they were sufficient to authorize an action like the present, they are not now applicable, because sections 8-13, c. 191, Pub. St. 1891, were adopted in their stead, and were regarded by the commissioners as making material changes in the law as it then existed. See Commissioners' Report. Section 8 is as follows: "Actions of tort for physical injuries to the person—although inflicted by a person while committing a felony—and the causes of such actions shall survive to the extent, and subject to the limitations, set forth in the five following sections, and not otherwise." Section 9 relates to the survival of such an action pending at the decease of the party. Section 10 provides that, "If an action is not then pending and has not already become barred by the statute of limitations, one may be brought for such cause at any time within two years after the death of the deceased party, and not afterwards." If the cause of action in this case had occurred within two years before the date of the writ, no reason has been suggested why the suit would not have been maintainable under the statute quoted. But, as the accident complained of as the cause of the death of the plaintiff's intestate occurred nearly six years before this action was begun, the plaintiff's ground of complaint has long since ceased to exist.

The limitation of time in the statute relates not merely to the remedy, but to the right which the statute creates. The right granted an administrator to sue in such a case is not an absolute right. It is not like the common-law right of making contracts.

In the absence of the statute, it does not exist. Hence its scope and effect must be determined as questions of legislative intention. The plaintiff's right to maintain this suit is not greater than the Legislature intended it should be. The language of the special provisions applicable leave no room to doubt that the right and the correlative liability thereby established were made conditional upon the bringing of the suit "at any time within two years after the death of the deceased party, and not afterwards." The cause of action is conditional. If the condition is not observed, the parties stand with respect to the wrongful act as though the statute had not been enacted. "It must be evident that, as this action is brought under a special law, and is maintainable solely by its authority, the limitation of time is so incorporated with the remedy given as to make it an integral part of it, and the condition precedent to the maintenance of the action at all." *Hill v. Supervisors*, 119 N. Y. 344, 347, 23 N. E. 921. In *The Harrisburg*, 119 U. S. 199, 214, 7 Sup. Ct. 140, 147, 30 L. Ed. 358, it is said: "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. * * * Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right." *Eastwood v. Kennedy*, 44 Md. 563; *O'Shields v. Railway*, 83 Ga. 621, 10 S. E. 268, 6 L. R. A. 152; *Rugland v. Anderson*, 30 Minn. 386, 15 N. W. 676; *Hanna v. Railroad*, 32 Ind. 113, 114; *Taylor v. Iron Co.*, 94 N. C. 525, 526; *Pittsburg, etc., Ry. v. Hine*, 25 Ohio St. 629; *Wood, Lim. § 9*. As the plaintiff failed in an essential respect to make out a case as defined by the statute, the defendant's motion for a nonsuit should have been granted. The burden was upon her to show that her action was begun within the time limited. Without such proof, the defendant's liability could not be claimed. Unlike the general statute of limitations, this special statute creating the right and giving the remedy does not merely confer a privilege upon the defendant to interpose a definite time limitation as a bar to the enforcement of a distinct and independent liability, but it defines and limits the existence of the right itself. In the one case the statute furnishes the defendant with a technical defense to which he may resort or not, as he sees fit; while in the other it gives the plaintiff a right conditioned upon its enforcement within a definite time. Hence, while it has been generally held that the defendant must plead

the general statute of limitations, or set it out in a brief statement under the general issue, in order to be protected by it, the reasoning that leads to that result, as a matter of pleading, has no application, when, as in this case, the statute confers upon the plaintiff a peculiar right, which, if not exercised, ceases to exist by its own limitation. *Bomar v. Hagler*, 7 Lea, 85; *Caldwell v. McFarland*, 11 Lea, 463; *Bus. Lim. § 375*.

Exception sustained. Verdict set aside. All concurred.

(72 N. H. 175)

MYERS v. BOSTON & MAINE R. R.

(Supreme Court of New Hampshire. Merri-mack. June 2, 1903.)

RAILROADS—INJURIES TO TRESPASSERS—CARE REQUIRED.

1. A railroad company is liable for injuries to a trespasser on the track, provided its servants failed to use due care to discover him in a position of danger, under such circumstances as would have put a man of average prudence on inquiry.

2. Plaintiff, who was a trespasser, rode on the footboard, at the rear end of the tender of a switch engine, in company with a switchman. After the engine stopped opposite a station, near a side track on which it was about to enter, the switchman alighted to turn the switch, and, without observing plaintiff, who had gotten off the footboard on the track, signaled the engine to back, which was immediately done, and plaintiff was struck. Plaintiff could have safely alighted from either end of the footboard without stepping on the track, and knew that the engine was a switch engine, and liable to back at any minute. *Held* that, since the switchman was entitled to presume that if plaintiff would alight, he would do so in a safe place, and not on the track, the switchman was not guilty of negligence in failing to inform himself as to plaintiff's position before signaling the engine to back.

Exceptions from Superior Court, Merri-mack County; Peaslee, Judge.

Action by George L. Myers against the Boston & Maine Railroad Company for personal injuries. Case transferred from superior court. Plaintiff was run over by an engine while on defendant's tracks for his own convenience. At the close of plaintiff's evidence a nonsuit was ordered, subject to exceptions. Exceptions overruled.

Martin & Howe, for plaintiff. Streeter & Hollis, for defendants.

BINGHAM, J. Notwithstanding the plaintiff was a trespasser upon the defendants' premises at the time he received his injury, it was the duty of the defendants, in the exercise of ordinary care, to avoid injuring him through their active intervention, if they knew of his presence in a dangerous situation, or if their failure to learn of it was due to their culpable ignorance. In other words, they were in fault if they failed to use due care to discover his presence in a position of danger, when circumstances ex-

¶ 1. See *Railroads*, vol. 41, Cent. Dig. §§ 1233, 1361.

isted which would put a man of average prudence upon inquiry. *Mitchell v. Railroad*, 68 N. H. 96, 34 Atl. 674; *Shea v. Railroad*, 69 N. H. 361, 363, 41 Atl. 774. This does not mean that the defendants were bound to ascertain and take precautions in reference to the plaintiff's possible or chance presence in a dangerous situation upon their premises, but that they were required not to actively injure him, if circumstances existed that warranted their anticipating his presence in such a situation as a probable occurrence. *Shea v. Railroad*, supra; *Davis v. Railroad*, 70 N. H. 519, 49 Atl. 108. The trial justice, in entering the order of nonsuit, must have ruled, as a matter of law, that the defendants could not reasonably be required to anticipate the presence of the plaintiff upon their track in a position of danger at the time their servant signaled the engineer to back the engine. If this ruling was right, the order must stand. The evidence was that the plaintiff, while riding from White River Junction to West Lebanon on a shifting engine, stood upon the footboard at the rear end of the tender, just south of the drawbar, and about midway between the rails. Upon arriving at West Lebanon, the engine was stopped opposite the station, which was on the north side of the track. A servant of the defendants, who had ridden over on the footboard, before getting off to go about his work, told the plaintiff to get off when the engine stopped. Another servant, a switchman, who saw the plaintiff riding upon the footboard, got off before the engine stopped, and went to set a switch; so that the engine might be backed upon a side track in the yard. When the engine came to a standstill, the plaintiff stepped down from the footboard upon the track. The switchman, without observing the plaintiff, though he could have seen him had he looked, gave a signal to back the engine, which was immediately done, and the plaintiff was run upon and injured. The plaintiff could have safely alighted from either end of the footboard without stepping upon the track, and knew the engine upon which he was riding was a shifter.

It was the duty of the plaintiff to use due care to avoid being injured. He was bound to use the care men of average prudence use under similar circumstances, and one of the circumstances to be considered is his knowledge of the situation and its dangers. He is held to know everything in respect to his situation and its dangers which he would have known had he exercised due care. Knowing the use made of the engine, and the position it was then occupying upon the track, as a man of average prudence, he ought to have known that it was liable to be moved at any moment, either forward or backward. He had no reason to believe that it would remain stationary for any given length of time. If moved backward, he knew that it would pass over the track immediately back of the footboard on which

he stood, and would injure him if he was upon the track. He could have seen the switchman had he looked, and further informed himself of the danger of going upon the track at that time and place. He did not look to see the switchman, or take any precautions to ascertain whether he could safely step upon the track. The evidence shows that he was careless when his duty required him to be careful.

If it would not be unreasonable to conclude from the evidence that the switchman should have anticipated the plaintiff would be getting off after the engine was stopped, still it does not follow that a jury would be warranted in concluding that the switchman was also bound to have anticipated that he would get off in a negligent and careless manner. When the switchman last saw the plaintiff, he was in a position of safety upon the engine; and the switchman had the right to assume that, if the plaintiff concluded to get off, he would exercise the care of a man of average prudence acting under like circumstances, and get off when and where he could safely do so. That the plaintiff might carelessly step upon the track was not sufficient to charge the switchman with knowledge that he would do so, or to make it the switchman's duty to look, and ascertain what he actually did. A jury would not be warranted in finding that the switchman was bound to anticipate that the plaintiff would negligently step upon the track as a probable occurrence. *Waldron v. Railroad*, 71 N. H. 362, 365, 366, 52 Atl. 443.

The nonsuit was properly ordered. Exceptions overruled.

WALKER, J., did not sit; the others concurred.

(72 N. H. 154)

TRUE v. MEREDITH CREAMERY.

(Supreme Court of New Hampshire. Belknap. May 5, 1903.)

MANUFACTORIES—INJURY TO CUSTOMER IN BUILDING—DUTY OF PROPRIETOR—NEGLIGENCE.

1. It being one of the incidents of defendant's course of business in the conduct of its creamery for plaintiff and other customers to remain on the premises till the cream was separated, plaintiff, who was so waiting at the time of his injury by the breaking of a belt, will be held to have been where he was by invitation of defendant, as regards its duty for his safety, he, though at the time watching the weighing of one whom he had told might be weighed, being in a passageway used in carrying the milk into the building, and there being no general rules or special instructions forbidding him to occupy any part of the building.

2. A finding that the proprietor of a creamery was negligent in not adopting appropriate means to protect customers, in its building by its invitation, from injury in case of the breaking of a rapidly moving belt near where customers were wont to go, is justified by evidence that it had knowledge that belts so used were quite liable to break or separate, and that the belt in question had parted some time before.

Exceptions from Superior Court.

Action by John N. True against the Meredith Creamery. Verdict for plaintiff. Defendant excepts. Exceptions overruled.

The plaintiff is a farmer. For two or three years before the injury complained of he had carried milk to the creamery of the defendant, where it was weighed on scales situated about six feet from the outside door opening into the main room, and about three feet from the nearest point of a belt running over a pulley and operating the separator. After the milk was weighed, it was put into the separator, which was made to revolve about 4,000 times per minute, in order to separate the cream. The separated milk was conveyed into tubs set to receive it in an adjoining room, where it was again weighed, and where the plaintiff and other patrons in turn received it in their cans to take home. The patrons were accustomed to wait about the premises until the cream was separated, sometimes but a short time and sometimes more than an hour, according to the time consumed by the process. The belt referred to was about four inches wide, and was parallel with the floor and a few feet above it. The top of the belt from the separator to the pulley was covered. The plaintiff testified that upon the morning of the accident he took his milk to the creamery. After it was weighed and poured into the separator, he carried the empty cans into the back room, to have them filled with milk to take home. He then returned to the front room by the same route; that is, between the scales and the belt. Upon his return one Hersey asked if he could be weighed on the scales, and the plaintiff replied that he could. As Hersey stepped upon the scales, the plaintiff told a young man standing by that he might do the weighing, and, just as he spoke the belt broke, one end striking the plaintiff in the eye, and causing the injury complained of. At the time of the accident the plaintiff was watching the scale beam, and he described his location as "between the young man and the scales, next to the belt, right where they pass back and forth." There was nothing to prevent the belt from flying as it did after it parted. The plaintiff's attention had never been called to the danger he encountered, nor had he been warned against being between the scales and the pulley. Some time within a year prior to the accident the same belt had parted while operating the separator. A witness for the plaintiff testified that it was a "common thing" for belts of that size to come apart when they are mended by making new holes and putting in new hooks. At the close of the plaintiff's evidence the defendant's motion for a nonsuit was denied, subject to exception.

Shannon & Young, for plaintiff. Jewell, Owen & Veazey, for defendant.

WALKER, J. The plaintiff's contention is that the proximate cause of his injury was the negligence of the defendant in using in its business a defective belt, or one so liable to break that under the circumstances the defendant, exercising reasonable care and prudence, ought to have used other precautions than it did use to protect its patrons from injuries reasonably to be apprehended therefrom. If the plaintiff was in the place he occupied at the time of the accident upon the invitation, express or implied, of the defendant, it was the defendant's duty to use ordinary care to protect him from dangers which its agents knew might be apprehended from the operation of the belt, and of which he had little or no knowledge. "The occupant of land is bound to use ordinary care and diligence to keep the premises in a safe condition for the access of persons who come thereon by his invitation, express or implied, for the transaction of business, or for any other purpose beneficial to him; or, if his premises are in any respect dangerous, he must give such visitors sufficient warning of the danger to enable them, by the use of ordinary care, to avoid it. The extent, however, of his obligation is to use ordinary care and prudence to keep his premises in such condition that visitors may not be unnecessarily or unreasonably exposed to danger." 2 Shearm. & Red. Neg. § 704; Poll. Torts, 490; Clark v. Manchester, 62 N. H. 577, 579; Frost v. Railroad, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396; Campbell v. Sugar Co., 62 Me. 552, 16 Am. Rep. 503; Sweeny v. Railroad, 10 Allen, 368, 372-375, 87 Am. Dec. 644; Bennett v. Railroad, 102 U. S. 577, 580, 26 L. Ed. 235. It was one of the incidents of the defendant's course of business for the plaintiff and other customers to remain upon the premises for an hour or more while the separator did its work. It is not inappropriate to say that the plaintiff was there on the morning of the accident upon the defendant's invitation. He was not a trespasser or mere licensee, unless for some reason he had no permission, as a customer waiting for his milk, to occupy the narrow space between the scales and the belt. The defendant had not, by general rules or by special instructions to the plaintiff, forbidden him to occupy any part of the building. If his occupancy of this particular place rendered him a licensee, for whose safety while there the defendant had no duty to perform, that conclusion cannot be reached as a matter of law from the reported facts. In going from the first room to the second, it appears that customers were in the habit of going between the scales and the belt. On the morning of the accident the plaintiff carried his cans into the back room, and, having returned, was standing "next to the belt, right where they pass back and forth." If he had received his injury while he was passing along with his cans, or while he was returning, it could not be seriously contended

that he was a mere licensee. His position there would be in accordance with the defendant's course of business with its customers, and in pursuance of its practical invitation. If the place was a dangerous one to stand in, it was a dangerous place to walk over; and the fact that the defendant invited its customers to carry their cans over it would furnish a strong probability that they did not object to their standing there. Indeed, the only danger of being in that position arose from its proximity to the belt, which was liable to break and fly at any moment. The facts that the plaintiff was watching the operation of the scales, and that, if he had not adjusted himself in such a way as to observe the scale beam, the belt would not have hit his eye, are unimportant. The jury might have been less serious if he had been in a different position, but that fact has no legitimate bearing upon the question whether he was a licensee or invitee of the defendant at the time of the accident. It is absurd to say that the act of watching the weighing of Hersey, or of telling him he could be weighed, made the plaintiff a mere licensee or trespasser. If he was properly there upon the invitation of the defendant, his acts, which in no way contributed to the breaking of the belt, and which were in fact harmless, did not change the character of his situation. The plaintiff adduced ample evidence to warrant the conclusion that his relationship to the defendant was such as to impose on the latter the duty of using ordinary care to avoid injuring him. *Indermaur v. Dames*, L. R. 1 C. P. 274; *Gilbert v. Nagle*, 118 Mass. 278.

The question remains whether there was sufficient evidence of the defendant's negligence. Could reasonable men find that it failed to perform its duty of using ordinary care to prevent the plaintiff's injury? Unless the defendant knew or ought to have known that there was a reasonable liability that a person standing between the scales and the belt would be exposed to the danger of bodily harm by the parting of the belt, its neglect of duty could not be found; or, conversely, if men of ordinary prudence in the defendant's position, and having its knowledge of the danger of using such a belt as this one was to operate a separator, would have guarded it, so as to prevent its doing harm to persons rightfully standing near it, or would have notified the plaintiff of the danger, the jury would be warranted in finding the fact of the defendant's negligence. The question is substantially one of fact relating to the conduct of men of ordinary prudence under the circumstances. The evidence for the plaintiff tended to show that the defendant had knowledge that belts used, as this one was, to produce 4,000 revolutions per minute, were quite liable to break or separate, and that this particular belt, while in use on this machine, had parted some time before the plaintiff

was injured. It cannot be doubted that the evidence is sufficient to support a finding that the defendant's omission to adopt appropriate means to prevent accidents naturally resulting from a broken belt was a failure to perform a reasonable duty required of it in the exercise of ordinary care. It cannot be said that reasonable men could not so find. Upon that question it may be that "reasonable and fair-minded men might differ, but it cannot be declared that no reasonable man could find as the jury did." *Mitchell v. Railroad*, 68 N. H. 96, 116, 34 Atl. 674, 676. No claim is made that the plaintiff was guilty of contributory negligence, and no exception was taken to the admissibility of the evidence. The defendant's motion for a nonsuit was properly denied.

Exceptions overruled. All concurred.

(72 N. H. 147)

ROBERTS BROS. v. CITY OF DOVER.

(Supreme Court of New Hampshire. Strafford. May 5, 1903.)

MUNICIPAL CORPORATIONS—SEWERS—OVERTAXED CAPACITY—DAMAGES TO ABUTTING OWNERS—CITY'S LIABILITY—EVIDENCE—SEWER CONNECTIONS—FEES—PAYMENT—BEST EVIDENCE—PRESUMPTIONS—PREVIOUS OVERFLOWS—REQUESTED INSTRUCTIONS.

1. In an action against a city for alleged negligence in the management of a sewer, by which sewage was caused to flow into plaintiff's cellar, evidence of the mayor of the city, at the time the sewer was constructed, that to the best of his recollection the owners of the property on that street made connections with the sewer at that time, and paid the city the fees fixed by ordinance, was not objectionable, as not the best evidence, since it purported to be original evidence, and did not disclose that there was any record of the facts testified to.

2. Where a city sewer was established in 1868-69, it would be presumed in 1901, from the lapse of time, that the owners of property who connected with the sewer paid the license fees required for such connections.

3. Where a sewer on two streets in a city connected so as to form a Y, and in an action against the city for damages caused by the discharge of sewage into plaintiff's cellar it was claimed that the sewer was not of sufficient capacity to carry the sewage which defendant permitted it to receive, evidence that at other times, under similar conditions, the sewer had discharged its contents into cellars along the route of the other leg of the Y from that on which plaintiff's property was located, was admissible to show the alleged incapacity of the sewer.

4. In an action for injuries from the overflow of a sewer alleged to be of insufficient capacity, evidence of damage suffered by others at a point above plaintiff's property was admissible, since the existence of the obstruction would be evidence of defendant's negligence in the management of the sewer, without regard to the point where it occurred.

5. Where, in an action for damages from the overflow of a sewer, it was not claimed that the original plan for the construction of the sewer was defective, but plaintiff sought to recover on the ground that defendant permitted the sewer to be overtaxed, and that obstructions were allowed to accumulate therein, it was not error to refuse requested instructions, based on the theory that the city was not liable for damages arising from defects in the original plan of construction.

6. Where a city, having constructed a sewer, connects it with other sewers and drains to such an extent that its capacity is overtaxed, and allows insoluble materials to accumulate therein and obstruct the flow of water, causing it to flow back upon private property of abutting owners, its liability for the resulting damage is the same as that of an individual, and is not affected by the fact that it is a public corporation.

Transferred from Superior Court; Wallace, Judge.

Action by Roberts Bros. against the city of Dover for negligently causing sewage to back up and drain into plaintiffs' cellar. A verdict was rendered in favor of plaintiffs, and the case was transferred to the Supreme Court on exceptions. Exceptions overruled.

The plaintiffs' evidence tended to show that for a time beyond the memory of any living person the city of Dover had maintained a stone sewer on the lower end of Washington street from Locust street to the Coheco river. The city also maintained another public sewer on Central avenue for more than 30 years, which united with the Washington street sewer at the intersection of Central avenue and Washington street. The Washington street sewer, from the river up to the intersection of Central avenue, would be represented by the lower part of the letter Y, and the part of the Washington street sewer above the intersection to Locust street and the Central avenue sewer would be represented by the upper parts of the letter Y. The mouth of the Washington street sewer was smaller than the stone sewer above, so that it could not discharge as much water as the sewer could carry. Within the last 20 years and more, as the city has expanded, new sewers draining new streets and territory have been connected with the two main sewers on Washington street and Central avenue, and in this way the amount of sewage and water flowing into these sewers has increased very largely. Within the last few years the Washington street sewer and that on Central avenue have several times failed to carry off the water and sewage flowing into them, either because the sewers were clogged or were insufficient in size. The two parts of these sewers represented by the upper part of the letter Y were on substantially the same level, and for many years prior to July 18, 1901, were in the same condition they were at that date. Both discharged sewage toward their junction, and thence down the Washington street sewer to the river. For many years prior to July 18, 1901, the part represented by the lower part of the letter Y was in the same condition it was on that date, except that a new outlet was built in 1896. On July 18, 1901, a tannery or belt factory discharged hair and pieces of hide into a sewer emptying into the Central avenue sewer above the plaintiffs' drain, and this state of affairs had continued for many years. One Brewster was allowed to testify for the plaintiffs that he was the

mayor of the city in 1868-69; that the Central avenue sewer was constructed in 1869; and that to the best of his recollection the owners of property on that street entered the sewer at that time, and paid the city the fees established by ordinance. To this evidence the defendants excepted on the ground that the city records were the best evidence. Subject to exception, the plaintiffs were permitted to introduce evidence that on several occasions prior to July 18, 1901, when the conditions were the same as on that date, the Central avenue sewer was clogged with hair, pieces of hide, sand, and mud, and that it had to be frequently flushed out to keep it from being stopped up, as tending to show a faulty condition of the sewer. Subject to exception, the plaintiffs were permitted to introduce evidence that the basements of buildings connected with the sewer on Washington street, which were substantially on the same level as the plaintiffs' store, were frequently flooded in time of heavy rains prior to July 18, 1901, and on one occasion since, as tending to show the incapacity of the sewer on Central avenue and below the junction of Washington street and Central avenue to carry off the water discharged into it; and that on the occasions prior to that date notice of such floodings was given to the city, to show that it had notice of the defective condition of the sewer. The evidence did not show that the basement of the plaintiffs' store had ever before been flooded from the sewer. The defendant also excepted to evidence that on one occasion before the plaintiffs' damage the basement of the third building above the plaintiffs' store was flooded. At the close of the plaintiffs' evidence the defendant moved for a nonsuit. The motion was denied, and the defendant excepted. The defendant requested instructions based upon the theory that the city was not liable for damages arising from defects in the original plan of construction of the sewers. Subject to exception, the requests were denied, except so far as covered by the following part of the charge: "The city is required to exercise ordinary care to properly construct and to keep in proper repair such sewers as they see fit to build and maintain. If the city, by negligently constructing this sewer, or by negligently keeping it in repair, or by negligently suffering it to get stopped up, caused a positive invasion of the plaintiffs' private property by collecting and throwing upon it, to the plaintiffs' damage, water and sewage which would not otherwise have flowed or found its way there, and the plaintiffs were without fault, the city is liable. If the sewer, as originally constructed, was adequate and sufficient for the purpose for which it was then designed and used, and subsequently the city turned into it a much larger amount of water and sewage than was contemplated at the time of its construction, thereby overtaking the sew-

er and causing water and sewage to flow back upon the premises of the plaintiffs, and they were without fault, the city would be liable after notice of such inadequacy of the sewer and neglect to remedy it."

William F. Nason and John S. H. Frink, for plaintiffs. Kivel & Hughes, for defendant.

WALKER, J. For the purpose of showing when the plaintiffs' drain was connected with the sewer on Central avenue, and that it was rightfully so connected, Brewster was allowed to testify that, according to his recollection, the connection was made in 1869, and that the license fee therefor was paid. However defective his memory may have been, his testimony tended to prove these facts. Its lack of positiveness affected only its weight. It purported to be original evidence. It did not disclose other or better evidence for which it was a substitute. Hence it could not be excluded on the ground that the records in the city clerk's office might furnish information on the same subject. *Hoitt v. Moulton*, 21 N. H. 586, 590; *Greeley v. Quimby*, 22 N. H. 335. The witness did not attempt to state facts which were necessarily matters of record, or which his testimony disclosed were recorded. His testimony did not presuppose or assume the existence of other evidence upon the same subject of a higher degree of authenticity. He merely stated from his recollection certain facts whose existence did not depend upon written evidence thereof. *Hall v. Ray*, 18 N. H. 128; *Putnam v. Goodall*, 31 N. H. 419, 424; *Pierce v. Richardson*, 37 N. H. 306, 314. As it does not appear that the connection of the drain with the sewer in 1869 and the payment of the established fee were evidenced by written documents recorded in the city clerk's office or elsewhere, no error was committed in the admission of parol evidence to prove those facts. *Wayland v. Ware*, 104 Mass. 46, 51; 1 Gr. Ev. §§ 82-89. However that may be, there is a legal presumption that after so great a length of time payment of the license fee was properly made. *Barker v. Jones*, 62 N. H. 497, 13 Am. St. Rep. 413; *Olcott v. Thompson*, 59 N. H. 154, 47 Am. Rep. 184.

While it has been generally regarded as a necessary rule or principle of proof that evidence must be confined to the point in issue (1 Gr. Ev. § 51), in order to avoid the inconvenience of trying immaterial collateral issues, it is equally true that evidence having a legal tendency to establish a material point in controversy is admissible, unless it falls within some of the rules of exclusion which are based upon considerations of policy. The defendant contends that evidence that the sewer at other times had discharged its contents, or a part of it, into cellars on Washington street, was not competent to

show that the overflow into the plaintiffs' cellar on another branch of the sewer was due to the same cause, of which the defendant had received ample notice. To ascertain the competency of the evidence, it is necessary to determine whether there was any controverted fact upon which it had a logical bearing. One of the controverted points in the case was the capacity or incapacity of the sewer to carry away the waste matter, both solid and liquid, which the defendant permitted it to receive. Was it capable of properly doing the work which the defendant imposed upon it? That was one of the questions tried, and to prove their contention upon that question the plaintiffs were not confined to evidence of the overflow into their premises. The incapacity of the sewer might be shown by instances of similar occurrences at other points and at other times. Such evidence had some tendency to prove the plaintiffs' theory, while the defendant was at liberty to neutralize its effect by showing that the injury in those instances was due to other causes than the incapacity of the sewer for the work it was expected to do. The plaintiffs' evidence might thus be shown to be of very little importance, but its legal relevancy cannot be doubted. It showed that something interfered with or prevented the reasonably successful operation of the sewer at those times; and it was not an unreasonable inference that the cause of the trouble was the turning into the sewer of a disproportionate quantity of sewage and insoluble matter. In other words, it tended to show that the capacity of the sewer was too small, or, what amounts to the same thing, that there was mismanagement in its use. In the absence of any change in its size, location, or use, it could not be said as a matter of law that the existence of this fact was not legal evidence that it would be likely to produce a similar result at the plaintiffs' store. *State v. Knapp*, 45 N. H. 148. Evidence of this character is admissible upon the ground that the operation of physical agencies is often satisfactorily shown by experiments or actual occurrences under circumstances similar to those disclosed by the case on trial. *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55; *Gordon v. Railroad*, 58 N. H. 396; *Lewis v. Railroad*, 60 N. H. 187; *Cook v. New Durham*, 64 N. H. 419, 420, 13 Atl. 650; *Shute v. Exeter Mfg. Company*, 69 N. H. 210, 40 Atl. 391. The similarity of the circumstances, or the similarity of the facts offered in evidence as compared with those actually on trial, must be clearly established in order to make the logical or legal sequence apparent. If no probative relation exists between the experimental evidence offered and the litigated facts, the evidence must be rejected. And this is understood to be the defendant's claim with reference to the plain-

tiff's evidence of damage occasioned by the sewer on Washington street.

From the evidence it was competent for the jury to find that the plaintiffs' damage was due to the fact (1) that the sewer on Washington street, at or below the junction, was not large enough to carry away the water; or (2) that *débris* clogged up the sewer on Central avenue, or (3) that the Washington street sewer below the junction was similarly obstructed, or (4) that all these causes were operative at the same time. But the court cannot say that any one of these causes alone produced the injury at one time and not at another time. Hence if, upon any one of the theories, the evidence excepted to had a legal bearing, the plaintiffs were entitled to the benefit of its admission. The incapacity of the sewer and the *débris* put into it may have been so related in causing an overflow or set-back as to manifest their effect at one time on one street and at another time on another street. It is not improbable that the accumulation of *débris* at the junction, produced in part by the smallness of the sewer, may have been so located as to impede the flow in one branch more than in the other, and thus to produce an overflow upon one branch of the system alone. As a practical matter, it may not be easy to say how a quantity of leather, waste, and dirt put into the sewer of insufficient capacity would concentrate and constitute an obstruction, or how or where the obstruction would manifest itself by producing a stoppage in the flow of the water. That it would not necessarily have the same effect upon both branches, though located on the same level, is apparent. Hence the flooding of cellars on Washington street might be produced by the same defects in the sewer in conjunction with solid matter allowed to accumulate in it, which at another time would produce a flooding of the cellars situated on the other branch of the sewer. The defendant's negligence in the construction and care of the sewer might be the same in both instances; and evidence of its effect on one branch of the system at one time would have some tendency to show that it was the proximate cause of a similar effect on the other branch at another time. As the evidence may have had some legitimate probative bearing, the question of its admissibility presents only a question of remoteness, which was properly determinable by the trial court.

The defendant's attempt to demonstrate with mathematical certainty that an obstruction below the junction would produce the same effect on both branches, because they were on substantially the same level, and consequently that evidence of floodings on Washington street when no such effect was observed on Central avenue was not competent to prove that the same cause would produce the same result at another

time on the latter street, assumes that the obstruction was the same in both instances, or that the accumulation of *débris*, whatever its character as to size and location, would necessarily have the same effect upon the flow of water in the sewer at all times. This erroneous assumption deprives the argument of the conclusive character it was intended to have. The negligence may have been the same, while its manifestation may have been different at different times. For similar reasons, evidence of the damage suffered at a point above the plaintiffs' store on Central avenue was admissible. The obstruction producing that damage may have existed above the plaintiffs' store; and, if so, while it would not injure the plaintiffs, its existence there would be evidence of the defendant's negligence in its management of the sewer, not alone at that point, but at all points in the system where similar obstructions were formed.

Upon the plaintiffs' evidence, it was competent for the jury to find that the defendant had actual notice or knowledge, before the date of the plaintiffs' damage, that the sewer was of insufficient size, and was liable to be clogged up by refuse matter which was allowed to accumulate in it. It knew of the defect and the results that might reasonably be apprehended. It is, therefore, unnecessary to consider whether it might not also be chargeable constructively with notice. As the plaintiffs' evidence tended to show that the defendant had notice that the capacity of the sewer was being overtaxed, and that obstructions were allowed to accumulate therein, the natural effect of which was to cause the damage suffered by the plaintiffs, the defendant owed the duty to the plaintiffs to use reasonable care under the circumstances to prevent such damage. It does not appear that there was any evidence to show, or that the plaintiffs claimed, that their injury was caused by negligence or carelessness in the original plan of the sewer. Their contention was that it was improperly and negligently constructed and managed, and was not a safe and expeditious conduit for the sewage which the defendant sought to dispose of by that means. Whether the original plan was adequate for the sewage needs of the city as they existed when it was adopted was not material. The important question was whether the use that the defendant attempted to make of it at or about the time of the overflow of the plaintiffs' premises was a reasonable use, in view of its size and construction, and in view of the right of the plaintiffs and others similarly situated to a reasonable enjoyment of their property. *Franklin v. Durgée*, 71 N. H. 186, 51 Atl. 911, 68 L. R. A. 112. The cause of the injury was not the existence of the sewer opposite the plaintiffs' premises, but the defendant's negligent use and management of

it. The defendant's motion for a nonsuit was properly denied.

In the absence of evidence that the original plan of construction was defective, the defendant was not entitled to have the jury instructed upon that point, as requested. The plaintiffs complain, and base their right to recover upon the fact, that the defendant permitted an improper use of the sewer. The same idea is expressed when it is said that it was not large enough for the uses to which it was put. The original plan of the sewer and its construction in accordance with that plan under legislative license (Gen. St. c. 44, § 9) may have presented no defect. But freedom from error in that respect would not excuse the city for the negligence of its officers and agents in their subsequent care and management of the sewer. In *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464, it was held that in maintaining a public sewer a city is bound to use that degree of care and prudence which a discreet and cautious individual would use if the whole loss or risk was to be his alone. The case renders unnecessary a discussion of the liability of a city or town, which builds a sewer under legislative authority, for defects in the plan adopted. When, having constructed a sewer, it connects it with other sewers and drains, overtaxing its capacity, and allows insoluble materials to accumulate in it and obstruct the flow of the water, causing it to flow back upon private property, its liability for the resulting damage does not differ from that of an individual who so unreasonably manages his property as to cause damage to the adjoining property of his neighbor. The fact that it is a public corporation, performing certain public duties, does not exempt it from liability for negligence when performing a work not imposed upon it as a public agent, but voluntarily assumed by it under a legislative license. Having undertaken the construction and management of a system of sewerage for the local accommodation and convenience, its duties to individuals liable to be damaged thereby is measured by the same rule of ordinary care and prudence under the circumstances as would be applied if it were a private business corporation, partnership, or individual engaged in the same work. *Gilman v. Laconia*, 55 N. H. 130, 131, 20 Am. Rep. 175; *Rowe v. Portsmouth*, 56 N. H. 291, 293, 22 Am. Rep. 464; *Clark v. Manchester*, 62 N. H. 577, 579; *Rhobidas v. Concord*, 70 N. H. 91, 107, 109, 110, 47 Atl. 82, 51 L. R. A. 381, 85 Am. St. Rep. 604; *Franklin v. Durgee*, 71 N. H. 186, 51 Atl. 911, 58 L. R. A. 112; *Bates v. Westborough*, 151 Mass. 174, 182, 23 N. E. 1070, 7 L. R. A. 156; *Barton v. Syracuse*, 36 N. Y. 54; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552. The instructions to the jury, therefore, afford the defendant no tenable ground for exception.

Exceptions overruled. All concurred.

(21 N. H. 114, 154)

STATE et al. v. SUNAPEE DAM CO. et al.
(Supreme Court of New Hampshire. Merri-
mack. April 11, 1903.)

EQUITY—JURISDICTION—WATER RIGHTS—DETERMINATION—NUISANCES—INJUNCTION—MULTIPLICITY OF SUITS—DENIAL OF INJUNCTION—TERMINATION OF JURISDICTION—ASSESSMENT OF DAMAGES—RIGHT TO JURY TRIAL—REFERENCE—ASSESSMENT BY MASTER—COSTS—PARTIES APPEAL—EXCEPTIONS—RESERVED CASE—SUPREME COURT—EQUAL DIVISION—EFFECT.

1. Where several shore owners were entitled to rights in a lake, but the rights of each had not been defined and limited, nor the proper mode of exercising and enjoying them ascertained and determined, but existed in common, a suit by several of them to restrain a corporation authorized to maintain a dam at the outlet of the lake from so conducting the dam as to seriously interfere with plaintiffs' use of the lake, was within the jurisdiction of equity on the ground that it was brought to determine the extent of the rights of the parties in admitted legal rights in a body of water. Per *Remick and Bingham, JJ.*; *Parsons, C. J.*, and *Chase, J.*, dissenting.

2. The bill was also maintainable for the purpose of preventing a multiplicity of suits at law. Per *Remick and Bingham, JJ.*; *Parsons, C. J.*, and *Chase, J.*, dissenting.

3. Where a corporation, authorized to maintain a dam at the outlet of a lake, for several years since 1897 had so operated the dam that at some seasons of the year the shore of adjoining owners would be flooded, and at other seasons the water would be drawn from the lake to such an extent that large patches of ground previously covered by water were exposed, and navigation of the lake was rendered dangerous, a bill in equity to restrain such operation of the dam was maintainable as a bill to restrain a nuisance. Per *Remick and Bingham, JJ.*; *Parsons, C. J.*, and *Chase, J.*, dissenting.

4. Where a suit was brought to restrain the owner of a dam at the outlet of a lake from so operating it as to injure other shore owners, and on appeal the court held that the allegations of nuisance and irreparable injury were made in good faith, and that certain of the defendants were entitled to relief by way of damages, but withheld an injunction on the belief that defendant would so operate its dam thereafter that an injunction would not be required, the denial of such injunction did not oust the court of equity of jurisdiction of the suit so as to preclude it from ascertaining the damages to which plaintiffs were entitled and require a dismissal of the bill. Per *Remick and Bingham, JJ.*; *Parsons, C. J.*, and *Chase, J.*, dissenting.

5. Where, in a suit in equity to restrain a dam owner from unreasonably interfering with the rights of lake shore owners, the court held that plaintiffs were entitled to damages, but refused an injunction, defendants were not entitled as of right to a jury trial of the damages to which each plaintiff claiming more than \$100 was entitled, but the trial court was justified, in its discretion, in requiring such damages to be assessed by a master. Per *Remick and Bingham, JJ.*; *Parsons, C. J.*, and *Chase, J.*, dissenting.

6. The exercise of the jurisdiction of a trial judge sitting in equity in ordering damages to be assessed by a master instead of by a jury cannot be reviewed on appeal. Per *Remick and Bingham, JJ.*; *Parsons, C. J.*, and *Chase, J.*, dissenting.

7. Where a suit in equity was originally tried by a referee, who reserved the question of damages until the merits of the case had been passed on by the Supreme Court, it was not error, after the merits had been so decided, for the

court to order the assessment of damages by a master, instead of recommitting the case to the referee. Per Remick and Bingham, JJ.; Parsons, C. J., and Chase, J., dissenting.

8. Pub. St. 1891, c. 229, § 1, providing that costs shall follow the event of every action or petition unless otherwise directed by law or by the court, applies to suits in equity as well as actions at law, and hence an order relating to costs before the suit was finally terminated was premature.

9. In a suit by shore owners against a corporation owning a dam at the outlet of a lake to restrain the improper use of the dam, by which the level of the lake was unreasonably raised and lowered, where it was held that such owners were entitled to recover damages sustained thereby, whether they should be made parties to the bill should not be determined until they applied for leave to be made parties.

10. Where in a suit in equity the Supreme Court is equally divided on the exceptions to the refusal to dismiss the bill and to an order of the trial court in so far as it related to the assessment of damages, the action of the trial court in such respects stands affirmed. Per Remick and Bingham, JJ.; Parsons, C. J., and Chase, J., dissenting.

11. Where in a suit in equity exceptions to certain interlocutory orders presenting questions of law were reserved for the determination of the Supreme Court, and the court was equally divided on the questions presented, the orders affected by such exceptions cannot be set aside or affirmed, but stand without any decision as to their legality for such further action as the superior court may see fit to take. Per Parsons, C. J., and Chase, J.; Remick and Bingham, JJ., dissenting.

Bill by the state of New Hampshire and others against the Sunapee Dam Company and others. On reserved case. Affirmed.

Edwin G. Eastman, Atty. Gen., and Sargent, Niles & Morrill, for plaintiffs. Ira Colby and Albert S. Wait, for defendants.

REMICK, J. (BINGHAM, J., concurring). Lake Sunapee is about 10 miles in length, and varies in width from one-half mile to 3 miles, and is one of the leading summer resorts in the state. About 1821, the defendants, by authority of the Legislature, constructed, and have since maintained, a dam at the outlet of the lake, by means of which they draw water from the lake to supply power to mills below. The complainants are the numerous riparian proprietors whose estates bound the lake; various owners of steamboats, launches, boats, wharves, landings, and boathouses employed in navigation of the lake; and the state, as owner of a fish hatchery on its shores, and trustee for the public of the right of fishery in its waters.

The bill was filed March 17, 1898, and charged, in substance, that the defendants had made, and were threatening to make, an unreasonable use of the waters of the lake, as against the plaintiffs; and had thereby inflicted, and were threatening to inflict, irreparable injury upon the plaintiffs. The prayer was for an injunction and for general relief. The answer was, in substance, a denial of the unreasonable use alleged. The trial court ordered the case to a referee to

find the facts. Upon the facts reported the case was transferred to the Supreme Court. Upon the case thus transferred the law governing the rights of the parties was declared. It was also decided that the plaintiffs were entitled to "an assessment of compensatory damages" on account of unreasonable use of the water in 1897. But the court, thinking, evidently, that a repetition by the defendants of the wrongs complained of was improbable after judicial declaration of the law of the case, concluded, in the exercise of discretion, to withhold "at this time" equitable relief "by way of injunction." *State v. Sunapee Dam Co.*, 70 N. H. 458, 463, 50 Atl. 108, 59 L. R. A. 55. There was, however, no order for the dismissal of the bill. The only order was, "Case discharged," which left the bill in control of the superior court for such further proceedings, in conformity with the opinion, as should seem proper. Thereupon the defendants moved in the superior court that the bill be dismissed. The motion was denied, and the defendants excepted. The plaintiffs then moved (1) that a master be appointed to assess the damages to which the Supreme Court had declared them to be entitled; (2) that all persons claiming to have suffered by the unreasonable use of 1897 have leave to appear as plaintiffs; (3) that costs be awarded to the plaintiffs in the main action. The motion was granted, and the defendants excepted. The case is before us upon these exceptions.

The difficulty encountered is over the order for a master to assess damages. Upon this question the court are equally divided. BINGHAM, J., and myself are of the opinion that the superior court committed no error in granting the plaintiff's motion in this respect. The CHIEF JUSTICE and CHASE, J., are of the contrary opinion. WALKER, J., does not sit. Under these circumstances there can be no authoritative decision, except for the purposes of this case; but, as the result of our attitude is to affirm the order of the superior court in the disputed particular as effectually, so far as concerns the present case, as if it were done by the concurrence of all the judges (*State v. Perkins*, 53 N. H. 435; *Lathrop v. Knapp*, 37 Wis. 307; *Kolb v. Swann*, 68 Md. 516, 13 Atl. 379; *Durant v. Essex Co.*, 101 U. S. 555, 19 L. Ed. 154; *Hartman v. Greenhow*, 102 U. S. 672, 676, 26 L. Ed. 271), it is due to the parties, and seems to be required by law (*Laws 1901*, p. 563, c. 78, § 4), that we should file an opinion.

It has been contended (1) that equity is without jurisdiction to assess the damages—that it must be done at law; (2) that, if it can be done in equity, it is the constitutional right of the defendants to have it done by a jury; and (3) that, in any event, the motion for a master should have been denied, and the assessment sent to a jury as a matter of discretion or practice, and that in this view, as well as upon the ground of con-

¶ 8. See Costs, vol. 12, Cent. Dig. § 762.

stitutional right, the action of the superior court in granting the plaintiffs' motion should be reversed.

I. That damages may be assessed in equity (the court otherwise having jurisdiction) in order "to do complete justice" and accomplish "final determination," is firmly established. *Dennett v. Dennett*, 43 N. H. 490, 503; *Chartier v. Marshall*, 51 N. H. 400, 58 N. H. 478; *Carpenter v. Fisher*, 68 N. H. 486, 498, 38 Atl. 211, 73 Am. St. Rep. 616; *Ellis v. Association*, 69 N. H. 385, 389, 41 Atl. 856, 42 L. R. A. 570; *Winslow v. Nason*, 113 Mass. 411, 421, 422; *Cathcart v. Robinson*, 5 Pet. 264, 278, 8 L. Ed. 120. The vital question, then, is, did equity have jurisdiction of the present case at the time the assessment in question was ordered? It has been authoritatively declared that "the present proceeding is to restrain an alleged infringement of public and private rights in and to the waters of the lake, through changes in the water level, occasioned by the maintenance of the defendants' dam and works, and is instituted under the general equity powers of the court, and particularly under section 3, c. 205, of the Public Statutes of 1891." *State v. Sunapee Dam Co.*, 70 N. H. 458, 459, 50 Atl. 108, 59 L. R. A. 55. In form, at least, the proceeding is in equity, and all that has been done to the present time has been according to the course in equity. That the proceeding is also one of equitable cognizance, not alone under the statute, but, "when tested by the general principles of equity," is an irresistible conclusion from the facts and circumstances shown by the record before us. The fundamental fact to be observed in this connection is that the parties, plaintiffs and defendants, all had rights in the waters of Lake Sunapee, which they could vindicate in a proper action. *Clement v. Burns*, 43 N. H. 609, 616; *Conn. River Lumber Co. v. Olcott Falls Company*, 65 N. H. 290, 390, 392, 21 Atl. 1090, 13 L. R. A. 826; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 11, 18-20, 23, 25 Atl. 718, 18 L. R. A. 679; *Aborn v. Smith*, 11 R. I. 594; *Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Company*, 79 Wis. 297, 302, 48 N. W. 371; 1 *Spell. Inj. & Ex. Rem.* § 518; *Gould, Wat.* (2d Ed.) §§ 148, 149. The defendants' charter did not give them the exclusive right. The act contains no express terms to that effect, and a legislative intent to make absolute surrender of the public right of fishery and navigation and of the riparian rights of the shore owners will not be implied. *Conn. River Lumber Co. v. Olcott Falls Company*, 65 N. H. 290, 291, 375, 379, 380, 21 Atl. 1090, 13 L. R. A. 826; *Commonwealth v. Essex Co.*, 13 Gray, 239, 248; *Inland Fisheries Commissioners v. Holyoke Water Power Company*, 104 Mass. 446, 450, 6 Am. Rep. 247. The act in terms limits the power of the company to raise the waters of the lake by restricting the height of the dam to low-water mark, and they are still

further limited, by implication of law, to a reasonable use of the water, even within their charter limits. *State v. Sunapee Dam Co.*, 70 N. H. 458, 461, 463, 50 Atl. 108, 59 L. R. A. 55. Another fact important to be borne in mind is that, although the plaintiffs and defendants each had rights in the lake, their extent had not been defined and limited, nor the proper mode of exercising and enjoying them ascertained and determined, at the time the plaintiffs filed their bill. They lay in common and confusion, with no boundary but the law's unapplied and indefinite boundary of reasonable use. *Gardner v. Webster*, 64 N. H. 520, 522, 523, 15 Atl. 144; *Conn. River Lumber Co. v. Olcott Falls Company*, 65 N. H. 290, 291, 390, 392, 21 Atl. 1090, 13 L. R. A. 826; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 11, 18-20, 22, 23, 25 Atl. 718, 18 L. R. A. 679; *State v. Sunapee Dam Co.*, 70 N. H. 458, 461, 463, 50 Atl. 108, 59 L. R. A. 55; *Aborn v. Smith*, 11 R. I. 594. As a result, the defendants had repeatedly encroached upon the rights of the plaintiffs and their grantors, inflicting upon them manifestly irreparable injury. The extent, character, and frequency of these encroachments and injuries will appear from the following extracts from the report of the referee: "The natural variation of the level of the lake * * * was not perceptibly changed by the erection and maintenance or management of the defendants' dam prior to its reconstruction in 1851," and the use of the dam by the defendants during that period was "without any apparent objection on the part of those under whom the plaintiffs now hold or claim, or others, except when the height of the water was increased by the addition of flashboards, which occurred about 1845, and resulted in the flowing of the lands of shore owners." "The defendant corporation, in 1851, * * * reconstructed the dam. * * * The result of changes made at this time, and the addition of planks or flashboards creating a higher level of the water, caused injury to property owners upon the shores by the flowage of their lands." Some of them subsequently brought suits therefor, and received compensation through an adjustment made with them by the defendants involving the "acknowledgment of liability." "In 1859 one Gardner made claim for flowage. The corporation authorized the settlement of his claim. Aside from the records of the corporation in 1861, in which there was a recognition that other claims had been before made and adjusted, and occasional complaints which took no tangible form, there was no other complaint, or evidence of complaint, of the defendant corporation's misuse or mismanagement of the water of the lake, until about 1882." In 1880 or 1881, "in consequence of * * * the negligence and the improper manner in which the servants of the defendant corporation managed the flow of the water through the dam, * * * the

rights of the shore owners * * * were impaired, and navigation upon the lake was rendered inconvenient and dangerous. This condition resulted in complaint * * * by those having homes, cottages, and hotels upon the shores and a steamboat upon the lake. * * * This complaint and the resulting agitation * * * resulted in an act of the Legislature (chapter 145, p. 106, Laws 1883) authorizing the Governor and Council to appoint a commissioner to take evidence and report facts to the Legislature. * * * As a result of this investigation, better management of the water from the lake through the dam was not only promised, but secured." "Among the concessions made by the defendant corporation to the complainants" at this time were certain changes in the by-laws of the corporation, whereby it was provided "that a member of the board of directors should be resident in the town of Sunapee, the location of the dams and works of the corporation," and that "in controlling the gates the object shall be to hold back and draw out the waters of Sunapee Lake in such manner as will equalize the flow of the water the year around (as near as it can be accomplished by man), * * * unless the said directors shall unanimously agree upon a more judicious manner to manage them." "Mr. Flanders, a person acceptable to the company, the shore owners, and steamboat proprietors, * * * was employed by the corporation to manage the water at the dam. * * * By the exercise of care and the necessary watchfulness, he secured a comparatively even level of the water, and avoided just ground of complaint." In June, 1896, "he was superseded by Mr. Abbott, who was managing the dam for the defendant corporation at the time of the hearing before the referee." About the time Flanders was superseded by Abbott, the by-law providing for a resident director and an equalized flow of the water was rescinded, "in disregard of the arrangement entered into with those interested in the shores and waters of Lake Sunapee in 1886." "During the spring and summer of 1897 (especially in May and June) * * * the level of the lake was * * * raised by putting additional plank upon the dam. * * * The effect of this management of the dam was to raise the water of the lake to such an extent as to submerge the wharves, * * * flood some cellars upon the shores, and wash and injure beaches upon the properties, respectively, of the plaintiffs Quackenbos and Hay, and injuriously affect the state's fish hatchery on the shore of the lake. * * * The defendant corporation has * * * at different times, by the management of its dam and gates, drawn the waters of the lake so low that navigation by steamers has been inconvenient and dangerous at certain points on established routes; and at low water, thus caused, the shores of the lake at occupied places have become unsightly and unwholesome; and, too,

the lake, when its level is thus lowered, is rendered much less useful for the propagation of fish by the state authorities." In short, "Mr. Abbott, the agent selected by the defendant corporation in June, 1896, did not manage and control the waters of the dam in a reasonable and proper manner, especially during May and until June 12, 1897."

After such a record of recurring disputes and collisions concerning the measure and use of the rights of the parties, covering a period of about 50 years; after the futility of suits at law had been demonstrated by repeated actions and settlements, followed by repeated mismanagement; after the defendants had repudiated a basis of operation conceded as a result of the complaints and legislative inquiry growing out of the mismanagement of 1890 and 1881; after they had installed in place of Mr. Flanders, who "secured a comparatively even level of the water, and avoided just ground for complaint," Mr. Abbott, who "did not manage and control the waters of the dam in a reasonable and proper manner"; after the defendant corporation had "at different times, by the management of its dam and gates, drawn the waters of the lake so low that navigation by steamers" was rendered "inconvenient and dangerous," the shores of the lake unsightly and unwholesome, and the lake "much less useful for the propagation of fish by the state authorities"; and especially after the mismanagement of May and June, 1897, the effect of which was "to raise the water of the lake to such an extent as to submerge the wharves of the steamboats, as well as those of others, to injure and destroy some of those wharves, flood some cellars upon the shores, and wash and injure beaches upon the properties, respectively, of the plaintiffs Quackenbos and Hay, and injuriously affect the state's fish hatchery on the shore of the lake"—it hardly seems necessary to say that the action of the complainants in seeking a court of equity was neither premature nor inappropriate, particularly in view of the conclusion of the court that the defendants' dam was being maintained "two feet above the point authorized by their charter," and the findings of the referee that "injury to the plaintiffs and others with like rights * * * may be avoided by the exercise of reasonable care in the management of the defendants' dam," and, in effect, that a practically reasonable use can be secured to all by proper regulation. *Patten v. Marden*, 14 Wis. 473, 476. Jurisdiction of equity under such circumstances cannot admit of doubt.

First. It rests primarily upon the well-established ground of equity jurisdiction "to determine, as between parties having admitted legal rights in bodies of water, the extent of their respective rights and the proper mode of exercising and enjoying them," a ground of equity jurisdiction existing at and before the adoption of the Con-

stitution, and still existing. *Burnham v. Kempton*, 44 N. H. 78, 100; *Banlet v. Cook*, 44 N. H. 512, 515, 84 Am. Dec. 92; *Bean v. Coleman*, 44 N. H. 539, 542; *Conn. River Lumber Co. v. Olcott Falls Company*, 65 N. H. 290, 291, 361, 390, 391, 21 Atl. 1090, 13 L. R. A. 826, and authorities cited; *Lyon v. McLaughlin*, 32 Vt. 423, 426; *Bemis v. Upham*, 13 Pick. 169, 171; *Ballou v. Inhabitants of Hopkinton*, 4 Gray, 324, 328; *Aborn v. Smith*, 11 R. I. 594; *Robinson v. Byron*, 1 Bro. Ch. 588; *Universities v. Richardson*, 6 Ves. Jr. 689; *Lane v. Newdigate*, 10 Ves. Jr. 192; *Gould, Wat. § 540*. The wisdom and propriety of such a jurisdiction are manifest; but after the adjudications to which attention has been called, and especially after the exhaustive briefs, arguments, and opinion in *Conn. River Lumber Co. v. Olcott Falls Company*, which cover the whole subject with great thoroughness and ability, we do not feel called upon to defend the jurisdiction on fundamental grounds.

Second. But the jurisdiction of equity in the present case rests as firmly upon another ground—the prevention of a multiplicity of suits. Whatever may be said against this as an independent ground of jurisdiction in some cases and under some circumstances (*Tribette v. Railroad Co.*, 70 Miss. 182, 190, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642), in view of the subject-matter, the nature of the controversy, the character of the rights involved, the great number of parties affected by the defendants' mismanagement of the dam, the impracticability of a separate suit at law in behalf of each, and the proven futility of such suits to accomplish the ends of justice, it cannot admit of doubt that this ground fully sustains the jurisdiction of equity in the present case. Nor is it a recently discovered ground of jurisdiction. It existed long before the New Hampshire Constitution was adopted, when it was adopted, and still exists, and it is nowhere more distinctly recognized and firmly established than in this jurisdiction. *Walker v. Cheever*, 35 N. H. 339, 351; *Smith v. Bank*, 69 N. H. 254, 45 Atl. 1082; *Carlton v. Newman*, 77 Me. 408, 1 Atl. 194; *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763; *Ballou v. Inhabitants of Hopkinton*, 4 Gray, 324; *Cadigan v. Brown*, 120 Mass. 493, 495; *New York, etc., R. Co. v. Schuyler*, 17 N. Y. 592, 608; *Supervisors v. Deyoe*, 77 N. Y. 219; *Chicago v. Collins*, 175 Ill. 445, 451–453, 51 N. E. 907; *Corey v. Sherman*, 96 Iowa, 114, 64 N. W. 828, 32 L. R. A. 490, 514; *Keese v. Denver*, 10 Colo. 112, 123, 124, 15 Pac. 825; *Osborne v. Railroad (C. C.)* 43 Fed. 824, 826, 827; *Cowper v. Clerk*, 1 P. Wms. 155, 157; *Mayor v. Pilkington*, 1 Atk. 282; *Tenham v. Herbert*, 2 Atk. 483; *Jesus College v. Bloome*, 3 Atk. 262, 263; *Sheffield Waterworks v. Yeomans*, L. R. 2 Ch. 8, 12; 1 Pom. Eq. Jur. § 243;

Whitehouse, Eq. Pr. § 136; *Black's Pom. Wat. § 169*.

Third. Finally, upon the facts appearing in the record, equity had jurisdiction upon the ground of nuisance—a ground of equity jurisdiction which has been distinctly traced back to the reign of Queen Elizabeth, and which was firmly established in the jurisprudence of the mother country at the time of the adoption of our Constitution. *State v. Saunders*, 66 N. H. 39, 81, 82, 25 Atl. 588, 18 L. R. A. 646. That the dam, two feet higher than the defendants' charter authorized (*State v. Sunapee Dam Co.*, 70 N. H. 458, 461, 50 Atl. 108, 59 L. R. A. 55), and used and managed in the manner and with the results alleged and found, was a nuisance, cannot admit of doubt. That its continuance was threatened on the day the bill was filed, was an unavoidable inference (1) from the fact that the dam was still in use by the defendants, for the same purposes, under the same management, and at the same unauthorized height; (2) from the fact that the by-law, previously conceded by the defendants as a guaranty against future mismanagement, and under which injury to the plaintiffs had been avoided, stood rescinded, "in disregard of the arrangement entered into with those interested in the shores and waters of Lake Sunapee"; and (3) from the fact that at intervals throughout a period of nearly 50 years, and "at different times" during the immediate administration of Abbott, including the summer of 1897, the defendants had so used the dam as to infringe upon the rights of the plaintiffs and their predecessors, and this in spite of repeated suits and settlements, "involving acknowledgment of liability." That the injuries threatened were irreparable sufficiently appeared from the character of the injuries already suffered, as detailed by the referee, including peril to life from endangered navigation and menace to health from unwholesome conditions. That the injuries were of periodic, instead of constant, occurrence, was no objection to the jurisdiction (*Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; 1 *Spell. Inj. & Ex. Rem. § 392*; *Wood, Nuis. § 780*), especially in view of their irreparable character, and the demonstrated futility of suits at law and legislative investigations and adjustments to prevent their recurrence. That equity was not bound, under the circumstances of the present case, to await an action at law, is also clear. The plaintiffs having rights in Lake Sunapee in common with the defendants as an undoubted and unquestioned proposition of law, and the question of right involved in the case being a mere matter of partition and regulation, and not of title, "there is no question of 'right' or 'title,' in the sense in which those words are used, when it is said that the legal right must be established at law before it is specifically enforced in equity." *Conn.*

River Lumber Co. v. Olcott Falls Company, 65 N. H. 290, 392, 21 Atl. 1090, 13 L. R. A. 826. Furthermore, if there was any legal right involved, in the sense material in this connection, it had been established by the suits at law, settlements, and "acknowledgment of liability" already referred to. Finally, the multiplicity of actions necessary on account of the numerous parties concerned, and the irreparable nature of the injuries threatened, gave the court immediate jurisdiction, whatever legal right may have been involved. *Smith v. Bank*, 69 N. H. 254, 45 Atl. 1082; *Lockwood v. Lawrence*, 77 Me. 297, 311, 314, 52 Am. Rep. 763; *Wheelock v. Noonan*, 108 N. Y. 179, 185, 187, 15 N. E. 67, 2 Am. St. Rep. 405; *Tenham v. Herbert*, 2 Atk. 432; 1 Harv. Law Rev. 126, 127; 1 Spell. Inj. & Ex. Rem. §§ 402, 403; and numerous authorities already cited on the subject of multiplicity of actions as a ground of equity jurisdiction. Thus, in every view, equity had jurisdiction of the bill for the purpose of dealing with nuisance. To say that equity has jurisdiction to enjoin the owner of animals from permitting them to pass from his own land over the uninhabited wood and pasture lot of another, as was done in *Ellis v. Association*, 69 N. H. 385, 41 Atl. 856, and to enjoin the claimant of a share in a campmeeting tent from repeated occupation of the same with the plaintiff during campmeeting seasons, as was done in *Ford v. Burleigh*, 60 N. H. 278, and yet deny the jurisdiction of the court in a case like the present, where the rights of so many were involved, and the injuries complained of so persistent, serious, and far-reaching, affecting not only property, but life and health, would be to substitute caprice for established principles as the test of equity jurisdiction. But it is suggested that, if equity had jurisdiction at the outset upon the ground of nuisance, the jurisdiction was ousted by the denial of the injunction. This would by no means follow, even if nuisance had been the sole ground of jurisdiction. It is apparent from the course of the trial and the findings of the referee that the allegations as to nuisance and irreparable injury were made in good faith, and not for the mere purpose of transferring the case from a court of law to a court of equity. *Whipple v. Village of Fair Haven*, 63 Vt. 221, 21 Atl. 533; *Milkman v. Ordway*, 106 Mass. 232; *Case v. Minot*, 158 Mass. 577, 588, 33 N. E. 700, 22 L. R. A. 536; *Morss v. Eimendorf*, 11 Paige, 277, 278; *Thorne v. French*, 4 Misc. Rep. 436, 437, 24 N. Y. Supp. 694; *Jones v. Bradshaw*, 16 Grat. 355; *Walters v. Bank*, 76 Va. 12; *Waite v. O'Neill* (O. C.) 72 Fed. 348; *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. Ed. 909. Upon the facts reported, an injunction or some order regulating the use of the water as between the parties was clearly within the jurisdiction of the court. *Conn. River Lumber Co. v. Olcott Falls Company*, 65 N. H.

290, 22 Atl. 1090, 13 L. R. A. 826; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 20, 25 Atl. 718, 18 L. R. A. 679; *Aborn v. Smith*, 11 R. I. 594; *Lawson v. Menasha Wooden-Ware Co.*, 59 Wis. 393, 397, 18 N. W. 440, 48 Am. Rep. 528; *Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Company*, 79 Wis. 297, 302, 48 N. W. 371; *Webb v. Portland Mfg. Co.*, 3 Sumn. 189, 197, 198, Fed. Cas. No. 17,822; 1 Spell. Inj. & Ex. Rem. § 318; *Gould, Wat. §§ 510, 512*. The fact that the court, in the exercise of its discretion (*Bassett v. Salisbury Mfg. Company*, 47 N. H. 426, 437; *State v. Saunders*, 66 N. H. 89, 60, 25 Atl. 588, 18 L. R. A. 646; *Russell v. Farley*, 105 U. S. 433, 438, 26 L. Ed. 1000; *Clark v. Wooster*, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 892; *Kerr, Inj.* 209, 210), believing, no doubt, that, having declared the legal rights of the parties, a regulating process might not be needed (*Conn. River Lumber Co. v. Olcott Falls Company*, 65 N. H. 290, 392, 21 Atl. 1090, 13 L. R. A. 826), chose to keep on the conservative side, and withhold its restraining power, did not deprive it of jurisdiction of the bill for the purpose of affording relief by way of damages. Jurisdiction, as spoken of with reference to the right of the court to administer full relief, does not depend upon the order of the court granting or denying the relief prayed (as that may proceed upon considerations entirely apart from the question of jurisdiction), but upon the essential character of the proceeding, as to being legal or equitable. When the case is one of equitable cognizance in its essential character, the right to grant full relief, legal as well as equitable, attaches with the jurisdiction, and is not defeated by denial of the specific relief asked. That the present case is one in equity in its essential character, the bill, answer, and referee's report conclusively establish. Being so, the right to grant full and complete relief was not lost because the court, as a matter of discretion, thinking that a repetition of the wrongs complained of was improbable after the judicial declaration it had made concerning the rights of the parties, saw fit to deny the prayer for injunction. *Pratt v. Law*, 9 Oranch, 456, 493, 3 L. Ed. 799; *Cathcart v. Robinson*, 5 Pet. 264, 3 L. Ed. 120; *Watts v. Waddle*, 6 Pet. 389, 3 L. Ed. 437; *Mobile County v. Kimball*, 102 U. S. 691, 706, 707, 26 L. Ed. 233; *Clark v. Wooster*, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 892; *Omaha, etc., Ry. v. Cable Tramway Company* (C. C.) 32 Fed. 727; *Waite v. O'Neill* (O. C.) 72 Fed. 348, 354-356; *Chartier v. Marshall*, 51 N. H. 400; *Id.*, 56 N. H. 478; *Carpenter v. Fisher*, 68 N. H. 486, 493, 38 Atl. 211, 73 Am. St. Rep. 616; *Whipple v. Village of Fair Haven*, 63 Vt. 221, 21 Atl. 533; *Milkman v. Ordway*, 106 Mass. 232, 254; *Thompson v. Heywood*, 129 Mass. 401, 404; *Woodbury v. Marblehead Water Company*, 145 Mass. 509, 512, 15 N. E. 282; *Brande v. Grace*, 154 Mass. 210, 31

N. E. 633; *Case v. Minot*, 158 Mass. 577, 578, 33 N. E. 700, 22 L. R. A. 536; *Morss v. Elmendorf*, 11 Paige, 277, 278; *Phillips v. Thompson*, 1 Johns. Ch. 131, 149; *Parkhurst v. Van Cortlandt*, Id. 273, 286; *Woodcock v. Beant*, 1 Cow. 711, 13 Am. Dec. 568; *Cuff v. Dorland*, 55 Barb. 481, 496; *Valentine v. Richardt*, 126 N. Y. 272, 277, 27 N. E. 255; *Thorne v. French*, 4 Misc. Rep. 436-438, 24 N. Y. Supp. 694; *Hart v. Brown*, 6 Misc. Rep. 238, 245, 27 N. Y. Supp. 74; *Domschke v. Railway*, 74 Hun. 442, 445, 26 N. Y. Supp. 840; *Masson's Appeal*, 70 Pa. 26, 29; *Stearns v. Beckham*, 31 Grat. 379, 420, 421; *Walters v. Bank*, 76 Va. 12; *Evans v. Kelley*, 49 W. Va. 181, 38 S. E. 497; *Aday v. Echols*, 18 Ala. 353, 357, 52 Am. Dec. 225; *Atkinson v. Felder*, 78 Miss. 83, 85, 29 South. 767; *Brown v. Gardner*, Har. Ch. (Mich.) 291; *Holland v. Anderson*, 88 Mo. 55, 58; *Hedges v. Everard*, 1 Eq. Cas. Abr. 18, pl. 7; *London v. Nash*, 3 Atk. 512; *Cleaton v. Gower*, Finch. 164; *Denton v. Stewart*, 1 Cox, Ch. 258; *Greenaway v. Adams*, 12 Ves. Jr. 395; *Gwillim v. Stone*, 14 Ves. Jr. 128; 1 Beach, Mod. Eq. Pr. § 91; *Pom. Cont.* § 474; 11 Am. & Eng. Enc. Law (2d Ed.) 201. Although, as shown, this was the rule in England at and prior to the adoption of our Constitution, it was afterwards doubted. *Todd v. Gee*, 17 Ves. Jr. 278; *Blore v. Sutton*, 3 Mer. 257; *Jenkins v. Parkinson*, 2 Myl. & K. 5, 12. To remove all doubt, it was enacted (21 & 22 Vict. c. 27) that "in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct." "This statute is held to apply only to cases which are of equitable cognizance in their essential character." *Durell v. Pritchard*, L. R. 1 Ch. 244. It was uncalled for, except to remove doubts occasioned by decisions rendered long after the adoption of our Constitution. The same authority conferred by the act belonged to the court, "as incident to its chancery jurisdiction and essential to the complete exercise of that jurisdiction." *Milkman v. Ordway*, 106 Mass. 232, 257. True, many of the cases cited were where damages were assessed upon a bill for specific performance, after denial of the prayer for performance. But it can make no difference in principle whether the bill is to restrain or compel action. If relief by way of damages is permissible in one case, it must be in the other. To hold otherwise would introduce a distinction wholly technical and arbitrary. No such distinction is recognized by the courts of this country

(*Whipple v. Village of Fair Haven*, 63 Vt. 221, 21 Atl. 533; *Woodbury v. Marblehead Water Company*, 145 Mass. 509, 15 N. E. 282; *Case v. Minot*, 158 Mass. 577, 588, 33 N. E. 700, 22 L. R. A. 536; *Thorne v. French*, 4 Misc. Rep. 436-438, 24 N. Y. Supp. 694; *Masson's Appeal*, 70 Pa. 26, 29; *Brown v. Gardner*, Har. Ch. [Mich.] 291; *Omaha, etc., Ry. v. Cable Tramway Company* [C. C.] 32 Fed. 727), and the act of Parliament to which reference has been made conclusively shows that, while the courts of England may have disputed as to the fundamental question whether purely legal relief can be granted in any case where equitable relief is denied, no distinction is there recognized between bills for injunction and those for specific performance respecting the application of the rule under consideration. Both are put upon the same ground, and made subject to the same rule. They are treated the same in this jurisdiction. *Chartier v. Marshall*, 51 N. H. 400; *Id.*, 56 N. H. 478; *Carpenter v. Fisher*, 68 N. H. 486, 493, 38 Atl. 211, 73 Am. St. Rep. 616.

But if it were true that a bill for injunction, brought in however good faith, upon whatever state of facts, to restrain a nuisance, can afford no jurisdictional basis for relief by way of damages, after a denial, for whatever reason, of the prayer for injunction, the rule would have no application in the present case, because in this case, after the denial of the injunction, the jurisdiction was still supported by the two grounds first named. Having jurisdiction for the purpose of determining by specific decree the extent of the respective water rights of the contending parties, and the proper mode of exercising and enjoying them (*Burnham v. Kempton*, 44 N. H. 78, 79; *Conn. River Lumber Co. v. Olcott Falls Company*, 65 N. H. 290, 390, 392, 21 Atl. 1090, 13 L. R. A. 826; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 20, 25 Atl. 718, 18 L. R. A. 679), and also to prevent a multiplicity of suits (*Burnham v. Kempton*, 44 N. H. 78; *Smith v. Bank*, 69 N. H. 254, 45 Atl. 1082), equity was not ousted of its jurisdiction upon these grounds merely because another distinct and independent ground of jurisdiction failed. Nor did denial of the specific prayer for injunction leave the court with a jurisdiction it was powerless to exercise. The general prayer for such further relief as may be just was sufficient for any decree appropriate to the case as presented by the bill, answer, and report. "The rule is that if the complainant, on the facts, * * * is entitled to any equitable relief whatever, and there is a prayer for general relief, this may be granted, even if the special relief claimed be not warranted by the facts, or if he mistakes the principles of equity upon which his right to relief is founded." *Junior, etc., Ass'n v. Sharpe*, 63 N. J. Eq. 500, 52 Atl. 832. See, also, *Treadwell v. Brown*, 44 N. H. 551; *Winslow v. Noyson*, 113 Mass. 411; *Hill v.*

Beach, 12 N. J. Eq. 31, 35; *Rutherford v. Jones*, 14 Ga. 521, 525, 60 Am. Dec. 655; *Watts v. Waddle*, 6 Pet. 389, 8 L. Ed. 437; *Omaha, etc., Ry. v. Cable Tramway Company (C. C.)* 32 Fed. 727; *Sto. Eq. Pl.* § 40; 1 Beach, Mod. Eq. § 91. If there is anything in *Bassett v. Salisbury Mfg. Company*, 43 N. H. 249, which forbids assessment of damages in equity under such circumstances as are presented in this case, it is contrary to *Chartier v. Marshall*, 51 N. H. 400, Id., 56 N. H. 478, *Carpenter v. Fisher*, 68 N. H. 486, 493, 38 Atl. 211, 73 Am. St. Rep. 616, and the great weight of authority.

Whatever the court, in its discretion, saw fit to do as to granting or withholding the injunction prayed for, it is clear, not alone from the allegations of the bill, but from the facts found by the referee, that equity had jurisdiction of the case. Jurisdiction having attached, and the court having proceeded to determine every other question involved, it should now go forward, and assess the damages; in other words, in the language of *Marshall, C. J.*, "go on to do complete justice" (*Cathcart v. Robinson*, 5 Pet. 264, 278, 8 L. Ed. 120), or, in the language of *Carpenter, C. J.*, dispose "of all questions the decision of which is necessary to its final determination" (*Carpenter v. Fisher*, 68 N. H. 486, 493, 38 Atl. 211, 73 Am. St. Rep. 616). This course is so clear in principle, and so reasonable in practice, the suggestion to convert the proceedings by amendment into several actions at law, in order to have the damages assessed, seems idle. *Smith v. Bank*, 69 N. H. 254, 45 Atl. 1082.

II. But it is said, assuming that the damages may be assessed in equity, nevertheless the defendants, as against those plaintiffs who claim more than \$100, have a constitutional right to an assessment by jury trial. That there is no constitutional right to a jury trial in equity was conclusively settled, so far as this jurisdiction is concerned, in *Conn. River Lumber Co. v. Olcott Falls Company*, 65 N. H. 290, 379, 391, 21 Atl. 1090, 13 L. R. A. 826, and *State v. Saunders*, 66 N. H. 39, 71, 72, 78-80, 89-91, 25 Atl. 588, 18 L. R. A. 646, if, indeed, it was not previously settled. *Copp v. Henniker*, 55 N. H. 179, 210, 211, 20 Am. Rep. 194; *Perkins v. Scott*, 57 N. H. 55, 81; *Bellows v. Bellows*, 58 N. H. 60; *Sargent v. Putnam*, Id. 182; *Proctor v. Green*, 59 N. H. 350, 352; *Davis v. Dyer*, 62 N. H. 231, 236; *Parker v. Simpson*, 180 Mass. 334, 62 N. E. 401; *Shapira v. D'Arcy*, 180 Mass. 377, 62 N. E. 412; *Ward v. Farwell*, 97 Ill. 593, 612, 613; *Littleton v. Fritz*, 65 Iowa, 488, 22 N. W. 641, 54 Am. Rep. 19; *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672; *Gormley v. Clark*, 134 U. S. 338, 348, 349, 10 Sup. Ct. 554, 33 L. Ed. 909. "Of course, it would not be competent for the Legislature to defeat the right of trial by a jury in common-law cases by simply declaring they might be tried in courts of chancery, and that the proceedings there-

in should conform to the proceedings in chancery causes. This would simply be an attempted evasion of the provisions of the Constitution. Where a new class of cases are, by legislative action, directed to be tried as chancery causes, it must appear that, when tested by the general principles of equity, they are of an equitable character, and can be more properly tried in a court of equity than in a court of law. And if of this character, when brought in a court of equity they stand upon the same footing with other causes, and the court will have the right, as in other cases, to determine all questions of fact without submitting them to a jury." *Ward v. Farwell*, 97 Ill. 593, 613, 614; *Gormley v. Clark*, 134 U. S. 338, 347, 348, 349, 10 Sup. Ct. 554, 33 L. Ed. 909. Assessment of damages in equity, the court otherwise having jurisdiction, stands no different with regard to the constitutional right of trial by jury than any ordinary issue in equity. "The cases are numerous in which the court of chancery has caused damages to be assessed, either by an issue or by a master." *Phillips v. Thompson*, 1 Johns. Ch. 131, 151. "Chancery has directed damages to be assessed in either way, at discretion, for nearly two centuries—at least from 1660 to the present day." *Woodcock v. Bennet*, 1 Cow. 711, 727. "The practice has been almost, if not quite, universal to regard the question of damages in equity cases as so incidental to the principal relief demanded that it was wholly within the discretion of the trial court to determine whether or not an issue should be framed to have it tried by jury. After a careful search, but one case has been found in which the claim was directly made that such issue must be tried by jury, and in that case it was denied." *Lynch v. Railroad Co. (N. Y.)* 29 N. E. 315, 15 L. R. A. 287, 26 Am. St. Rep. 523. See, also, *Carpenter v. Fisher*, 68 N. H. 486, 493, 38 Atl. 211, 73 Am. St. Rep. 616, and numerous authorities already cited.

III. This brings us to the third contention, viz., that, although the defendants may have no constitutional right to an assessment by jury, the court should, as matter of discretion or practice, have ordered an assessment by that method as to all claims in excess of \$100. If it were the province of this court to revise the action of the superior court in matters of discretion, we should say, under the circumstances of the present case, that the discretion was reasonably exercised. Under the circumstances, a master or referee was deemed appropriate to try the fundamental issue of reasonable use, and no logical reason appears why a tribunal suitable in the judgment of the parties and the court to try this primary question of fact should be unsuitable for the purpose of merely assessing the incidental damages. *Chase v. Lovering*, 27 N. H. 295, 297; *Carpenter v. Fisher*, 68 N. H. 486, 493, 38 Atl. 211, 73 Am. St. Rep. 616; *Lynch v. Railway*, 129 N. Y. 274,

283, 284, 29 N. E. 315, 15 L. R. A. 287, 26 Am. St. Rep. 523. The idea of impaneling a separate jury and going through the expensive process of such a trial in each of the numerous claims possible under the bill merely to assess damages does not appeal to the judgment, and is condemned by authority. *Carpenter v. Fisher*, 68 N. H. 486, 88 Atl. 211, 73 Am. St. Rep. 616; *Smith v. Bank*, 69 N. H. 254, 45 Atl. 1062. Convenience, economy, and the practical administration of justice all argue in favor of a master; and it does not appear how any substantial right of the parties can be prejudiced by this course. But whether assessment by master would better serve the ends of justice than an assessment by jury is not for us to decide. Presumably, the arguments for and against both methods of assessment were presented to the presiding justice in the superior court. He has decided in favor of the former. It was his right to so decide. Sitting in equity, he was the chancellor. From the earliest down to the present time it has been the province of the chancellor to determine according to his own discretion how he would inform his conscience—whether by personal hearing, reference to a master, or by framing issues to the jury. *Tappan v. Evans*, 11 N. H. 311, 334; *Proctor v. Green*, 59 N. H. 350, 354; *State v. Saunders*, 66 N. H. 39, 78, 79, 25 Atl. 588, 18 L. R. A. 646; *Briggs v. Shaw*, 15 Vt. 78, 81; *Parker v. Simpson*, 180 Mass. 334, 62 N. E. 401; *Phillips v. Thompson*, 1 Johns. Ch. 131, 150; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273, 285; *Smith v. Carll*, 5 Johns. Ch. 118, 119; *Dale v. Roosevelt*, 6 Johns. Ch. 255; *Woodcock v. Bennet*, 1 Cow. 711, 713, 727, 755, 756, 13 Am. Dec. 568; *Candee v. Lord*, 2 N. Y. 269, 51 Am. Dec. 294, 298, and note; *Sheetz's Appeal*, 35 Pa. 88; *Keith v. Henkleman*, 173 Ill. 137, 50 N. E. 692; *Field v. Holland*, 6 Cranch, 8, 22, 3 L. Ed. 136; *Barton v. Barbour*, 104 U. S. 126, 133, 134, 26 L. Ed. 672; *Idaho, etc., Co. v. Bradbury*, 132 U. S. 509, 515, 516, 10 Sup. Ct. 177, 33 L. Ed. 433; *Kohn v. McNulta*, 147 U. S. 238, 240, 13 Sup. Ct. 298, 37 L. Ed. 150; *Hedges v. Everard*, 1 Eq. Cas. Abr. 18, pl. 7; *Cleaton v. Gower*, Finch, 164; *Denton v. Stewart*, 1 Cox, Ch. 258; *Bullen v. Michel*, 2 Price, 399; *O'Connor v. Cook*, 6 Ves. Jr. 665, 671; *Warden of St. Paul's v. Morris*, 9 Ves. Jr. 155, 166, 168; *Pearce v. Creswick*, 2 Hare, 286, 297; *Roskell v. Whitworth*, L. R. 5 Ch. 459, 463, 464; 3 Gr. Ev. § 261; Bisp. Eq. 17; 2 Am. Dig. (Cent. Ed.) 1213.

That the chancellor's discretion in ordering the damages to be assessed by a master instead of by a jury is not subject to exception is well established. *Tappan v. Evans*, 11 N. H. 311, 334; *Proctor v. Green*, 59 N. H. 350, 354; *Briggs v. Shaw*, 15 Vt. 78; *Ward v. Hill*, 4 Gray, 593; *Crittenden v. Field*, 8 Gray, 621, 626; *Candee v. Lord*, 2 N. Y. 269,

51 Am. Dec. 294, and note 290; *Brinkley v. Brinkley*, 56 N. Y. 192; *Sheetz's Appeal*, 35 Pa. 88, 94; *Hammond v. Foreman*, 43 S. C. 204, 21 S. E. 3; *Adams v. Munter*, 74 Ala. 338, 342; *Cook's Heirs v. Bay*, 4 Miss. 485, 491; *Maynard v. Richards*, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. Rep. 145; *Well v. Kume*, 49 Mo. 158, 159; *Lake v. Tolles*, 8 Nev. 285, 286, 291; *Idaho, etc., Co. v. Bradbury*, 132 U. S. 509, 516, 10 Sup. Ct. 177, 33 L. Ed. 433. *Tasker v. Lord*, 64 N. H. 270, 8 Atl. 823, and *State v. Saunders*, 66 N. H. 39, 25 Atl. 588, 18 L. R. A. 646, decide nothing to the contrary. In neither of these cases was the court called upon to overrule the decision of the court below. In each case the question whether there should be a jury trial was presented for the first time in the law court. In neither was it suggested that there was a constitutional right to such a trial, or that it was not within the discretion of the chancellor to try the questions himself, or that the law court could overrule the chancellor's discretion as to the mode in which he would inform his conscience. On the contrary, in *State v. Saunders* constitutional right is expressly denied, and nothing more than the propriety of a jury trial was asserted in either case. The true understanding of the court, as then constituted, as to its province in such case, is disclosed in *Proctor v. Green*, 59 N. H. 350, 354, and is in exact accordance with the views we entertain, viz., that the granting of jury trial in equity is a matter resting entirely in the discretion of the chancellor.

It was natural under the old system, when the law and trial courts were all one in personnel, that suggestions concerning the mode of exercising discretionary powers should emanate from the former for the guidance of the latter. *Ellensohn v. Keyes* (Sup.) 39 N. Y. Supp. 774, 775. But instances of suggestion of this sort by the law to the trial court, under a system so interrelated, can hardly be regarded as precedents warranting this court in overruling the superior court in matters of pure discretion, under a system designed to secure the independence of each court within the sphere of its jurisdiction. Whatever liberty may have been taken by way of regulating discretion under the old system, under the present system we think that in matters of mere discretion the action of the superior court, unless reserved for our consideration, should be subject to revision for abuse only. *Dale v. Roosevelt*, 6 Johns. Ch. 255; *Candee v. Lord*, 2 N. Y. 269; *Roskell v. Whitworth*, L. R. 5 Ch. 463, 464, 465. Consistently adhered to, this policy will commend and justify itself, and conduce to the practical administration of justice. But, if exceptions are made, it will be impossible to draw a satisfactory line. Inconsistencies and contradictions will inevitably ensue, and the rule itself will come to be regarded as a makeshift.

It should be consistently enforced, or altogether abandoned. As a rule calculated to promote practical administration, we think it should be enforced, and especially so in the present instance, where the question is not a mere question of practice in an isolated case, but a question involving the integrity of systems. While the right of trial by jury should be scrupulously preserved within its constitutional sphere, the province of the chancellor should not be invaded. Certainly, the chancellor in the present case cannot be charged with abuse of discretion for adopting a mode of assessment in accordance with the established course in equity and permissible by the weight of authority.

IV. Finally, it is said that, if equity had jurisdiction to assess the damages, still the court erred in not recommitting the report to the referee for this purpose, instead of ordering the assessment to a master. This was a matter entirely in the discretion of the trial court; as much so as if it had itself found the primary facts, or caused them to be found by a jury upon issues framed. Its discretion in such case to refer the incidental matter of assessment to a master cannot admit of doubt. That the facts establishing the defendants' liability to an assessment were found by a referee, instead of by the court or a jury, does not alter the discretion of the court in this behalf. The fact that the bill contained no prayer for damage, and that the referee gave no consideration to that subject, left the trial court peculiarly free to exercise its discretion in the present case. The suggestion (doubtfully made) that by submitting to the referee the parties are estopped to object to a recommitment of the question of damages, is not pertinent, for the question before us is not whether the superior court might have recommitted the case to the referee to assess damages, but whether, having in its discretion ordered an assessment by master, this court can revise that discretion. No question of waiver or estoppel is involved. While denying that there is any constitutional right to a jury trial in equity, and maintaining in full vigor the discretion of the chancellor in this regard, we are not to be understood as questioning the propriety of issues to the jury in equity whenever such course commends itself to the good sense of the presiding justice, nor as discouraging such issues in cases where their propriety has already been recognized. On the contrary, expressions of the Supreme Court, under the old system, as to the proper course in particular cases, may well be accepted by the justices of the superior court for guidance in the exercise of their discretion. Nor are we to be understood as abdicating in any degree the authority conferred upon the Supreme Court by section 2, c. 205, Pub. St. 1891, to revise the order

of the superior court sitting in equity, but only as exercising that authority in accordance with recognized principles in equity, and as the practical administration of justice seems to require. Nor, in refusing to interfere with the general order of the superior court for a master to assess damages in the present case, do we understand that the assessment is necessarily to be by some other person than the referee who has heard the case in its general features. On the contrary, if otherwise unobjectionable, there would seem to be strong reasons why the assessment of damages should be sent to him. But this is a matter within the sound discretion of the superior court.

V. A question respecting costs is also raised by the defendants' exception. "Costs shall follow the event of every action or petition, unless otherwise directed by law or by the court." Pub. St. 1891, c. 229, § 1. This applies to a suit in equity the same as to an action at law. *Clement v. Wheeler*, 25 N. H. 361. The event of an action is that which happens to it in the end—the judgment that is rendered upon the issues of fact or law that finally disposes of the action. Terms are sometimes imposed upon one party or the other during the pendency of the action, but costs are not imposed until its termination. The order of the court in this suit relates to costs, and not to terms pertaining to some interlocutory order. It was premature. The question of costs should be delayed until the end. Equity may then require a different apportionment of the costs than it would now. Upon this point the court are unanimous.

VI. It will be in season to determine whether persons not already plaintiffs in this suit, who claim to have suffered damage as result of the high water of 1897 (if there are any such), should be made plaintiffs by amendment when they apply for leave. In this respect the court are also agreed.

The court being equally divided upon the exceptions to the refusal to dismiss the bill and to the order in so far as it relates to the assessment of damages, the action of the superior court in those respects, according to the well-recognized rule of appellate practice, stands affirmed. *Northern R. R. v. Railroad*, 50 N. H. 166, 176, 177; *State v. Perkins*, 53 N. H. 435, 437, and cases cited; 3 Cyc. 405, and cases cited. The exception to the order so far as it relates to costs and parties is sustained by unanimous concurrence.

CHASE, J. (PARSONS, C. J., concurring). After the decision in this case at the December term, 1900 (70 N. H. 458, 50 Atl. 108, 59 L. R. A. 55), the defendants moved in the superior court for the dismissal of the bill and for costs. The plaintiffs moved that the damages be assessed by an auditor, commissioner, or master, or by the court; that all

parties claiming damages have leave to appear as parties plaintiff; that costs to that time be awarded the plaintiffs; and that subsequent costs abide the result of the action. The court denied the defendants' motion, and granted the plaintiffs', subject to exception. While the court are agreed that the granting of the plaintiffs' motion as to costs and admitting additional parties cannot be sustained, the justices sitting in the cause are equally divided upon the question presented by the defendants' exception to the orders denying their motion to dismiss the bill and granting the plaintiffs' motion for the assessment of damages. Under the practice in this state during the last 20 years it is not usual to take time to consider whether the remedy applicable to the facts is one which can or cannot be awarded in the particular proceeding. If, upon a trial at law, it is shown that the plaintiff is entitled to equitable relief instead of the relief sought, the form of action is changed by amendment, and appropriate relief is decreed. *Wilcox v. Busiel*, 70 N. H. 628, 47 Atl. 703; *Tripp v. Forsaith Mach. Company*, 69 N. H. 233, 45 Atl. 746; *Brooks v. Howison*, 63 N. H. 382, 389; *Metcalf v. Gilmore*, 59 N. H. 417, 431, 47 Am. Rep. 217. Similarly, if, misconceiving his remedy, the plaintiff seeks it in equity, instead of at law, an amendment changing the form of the proceeding removes the difficulty. *Walker v. Walker*, 63 N. H. 321, 326, 56 Am. Rep. 514; *Cushing v. Miller*, 62 N. H. 517, 527. It has been repeatedly said that time spent in considering whether the form of action is appropriate is wasted. *Fowler v. Owen*, 68 N. H. 270, 271, 39 Atl. 329, 73 Am. St. Rep. 588; *Gage v. Gage*, 60 N. H. 282, 296, 29 Atl. 543, 28 L. R. A. 829; *Peaslee v. Dudley*, 63 N. H. 220. When the objection can be obviated by amendment, it is ordered without considering its necessity. *Peaslee v. Dudley*, supra; *Sleeper v. Kelley*, 65 N. H. 206, 18 Atl. 718; *Morse v. Glover*, 68 N. H. 119, 120, 40 Atl. 396. The avoidance of the objection is regarded as a sufficient reason for making the order. *Roulo v. Valcour*, 58 N. H. 347; *Metcalf v. Gilmore*, supra. "When on a full and fair trial the merits of a controversy have been determined, and the only objection is to the form of procedure, the prevailing party is permitted to file any amendment of his pleadings that may be necessary to obviate the objection, and thereupon to take judgment." *Carpenter, O. J.*, in *Johnson v. Association*, 68 N. H. 437, 439, 36 Atl. 13, 73 Am. St. Rep. 610; *Holman v. Manning*, 65 N. H. 223, 229, 19 Atl. 1002; *Peaslee v. Dudley*, *Cushing v. Miller*, and other cases above cited. These cases are only a few of the cases in which the rule has been approved and applied. The practice has been followed in many other cases which did not reach the law term. It has received the approval of the bar, and been specially authorized by the Legislature,

Laws 1879, p. 332, c. 7, § 1; Pub. St. c. 222, § 8. In this case the facts in controversy have been fully and fairly tried, and the law respecting the rights of the parties has been settled. It has been decided that the plaintiffs are not entitled to equitable relief, but are entitled to compensatory damages. Whether the damages can properly be awarded in equity is of no importance, because, if not, the defect can be obviated by filing counts in trespass. Such amendment would render the defendants' contention that the bill should be dismissed for want of jurisdiction in equity to proceed farther immaterial, because, assuming their contention to be sound, the action would proceed at law. The plaintiffs have not asked for such an amendment, and, as a majority of the court do not agree that it should be ordered, the questions raised respecting the assessment of damages cannot be disposed of in this way. Although the law cannot be settled, because of the equal division of the court, we feel called upon to state the reasons for our position. They are founded in part upon an understanding of the pleadings and facts of the case and the decision already rendered, which differs materially from that of our associates as disclosed in the opinion prepared by Judge REMICK, and in part upon a different understanding of the law applicable to the facts.

The plaintiffs are the state, a corporation which navigated the lake with steamboats, and six owners of land upon the shores of the lake. They allege in the bill, filed March 17, 1898, that the lake is a "large natural pond," in which the public have the rights of fishing, boating, bathing, etc., and in which the plaintiffs, as owners of land upon its shores, have the rights of littoral proprietors; that "for several, to wit, five, years past," both the public and private rights have been infringed by the defendants by wrongfully, unlawfully, and unreasonably raising the water above and lowering it below its natural level by means of the dam maintained by them at the outlet of the lake; that the defendants claim the right to raise and lower the lake to suit their convenience; that they intend and have threatened to exercise the right, regardless of the rights of the public and the plaintiffs; and that such course will cause irreparable injury to the plaintiffs. The prayer is for an injunction to restrain the defendants from changing the natural level of the lake by means of the dam, and for such other relief as may be just. According to the allegations of the bill, the only equitable relief that was in the contemplation of the plaintiffs was that specifically invoked—the restraint of a nuisance the continuance of which would cause them irreparable injury. The answer sets forth the defendants' charter, and alleges that they have the rights conferred by it, and that they built the dam and lowered the channel at the outlet of the

lake, and have maintained the same in the exercise of those rights. It denies that they have infringed public and private rights by raising and lowering the water, and that they intend or have threatened to exercise their rights regardless of the rights of the public and the plaintiffs. The case was referred to a referee, without objection by either party, so far as appears. He reported the facts found by him, the following being those material to the present inquiry: A charter was granted to the defendants December 7, 1820, by which they were empowered "to sink the outlet of said lake at the source of said Sugar river to the depth of ten feet below the low-water mark of said lake, and to erect and maintain a dam there with suitable gates and flumes, to the height of said low-water mark, for the benefit of the mills and mill privileges" on Sugar river, provided the defendants should make or tender reasonable compensation to those who should suffer damage by the erection of the dam. The defendants organized under the charter in 1821, and soon built a dam at the outlet of the lake of a height that has never been changed. Since 1851 the dam has consisted of upright timbers located at some distance from each other, having grooves on the sides into which plank are dropped. The plank are removable at pleasure. In that year the defendants sunk the channel near the dam $2\frac{1}{2}$ feet or more, but never to the limit specified in the charter. In 1880 or 1881—an extremely dry year—and perhaps in other years, they lowered the water to such an extent as to affect the enjoyment of the estates of littoral proprietors on the lake, and to render navigation inconvenient and dangerous. In 1845, 1851, 1859, and perhaps other years, they put additional plank or flashboards on the dam, and flowed the lands of littoral proprietors, some of whom brought suits. The defendants settled the suits, not merely to purchase peace, but acknowledging their liability. In the settlement with Pike (a predecessor in title of one of the plaintiffs), made in 1855, they agreed not to raise the water to a higher level than the point indicated by the figures "10" upon the gauge at the dam, and since then they have not claimed the right to raise it above that level. So far as stated in the report, there were no complaints of flowage between 1859 and 1897. Prior to the latter date changes were made in the by-laws of the corporation relating to the control of the dam, and a person to manage it was substituted for one previously employed. During the spring and summer of 1897, especially in May and June, an exceptionally large quantity of rain fell, and the waters of the lake were extremely high, and their level was further raised by putting plank upon the dam. It did not appear who put the plank there, but the defendants' agent knew of it, "and permitted them to remain until

June 12th, thus continuing the level of the water at an unusual height for an unreasonable length of time." His management of the dam was not reasonable and proper. On that day the defendants, upon complaint of parties whose rights were affected by the flowage, ordered their agent to lower the water. The plaintiffs, or some of them, suffered damage at this time.

In the former opinion the court, after deciding that the defendants' charter is valid, say "that the mere lowering of the lake by the defendants to the charter point can afford the state and the public no well-founded ground of complaint, if done in a reasonable manner; and, a fortiori, much less can the lowering of it only about two and one-half feet, which is the extent of the defendants' acts in that regard, so far as appears. And certainly the littoral proprietors, as such, can have no better ground of complaint, because, as is well understood, in public waters there is no private ownership in the soil below ordinary high-water mark. The primary ground of their grievance, and the one from which all the others follow, is the uncovering of a portion of the land underlying the water between the high and low water mark.

* * * If this affords some inconvenience to the plaintiffs in reaching the water, or lessens the enjoyment of residences upon or near the lake shores, there is no legal ground of complaint; it is purely *damnum absque injuria*." *State v. Sunapee Dam Co.*, 70 N. H. 458, 460, 461, 50 Atl. 108, 109, 59 L. R. A. 55. After referring to the requirement that the defendants shall exercise their right to lower the lake in a reasonable manner, in view of the rights of others having interests in the waters and shores of the lake, and reviewing the defendants' acts in this respect, the court say: "We are of opinion that no case is established by the reported facts which entitles the plaintiffs, or any of them, to equitable relief." In other words, the plaintiffs failed to sustain the allegations of their bill in respect to the lowering of the water. So far, at least, as this matter is concerned, the defendants are entitled to an order dismissing the bill. In fact, the plaintiffs are not entitled to any remedy, legal or equitable, on this account.

It is further said in the former opinion that the charter limits the height of the dam to low-water mark, and that the defendants originally built it to high-water mark, or two feet higher than the charter authorized. But by the Pike agreement, made in 1855, the defendants limited the height to which they might raise the water to the point indicated by the figures "10" upon the gauge at the dam, which is understood to be in the line of the natural high-water mark of the lake. Since that date they have not claimed the right to raise it higher, and the dam is so constructed that it can be readily adjusted to the capacity required for raising the water

to this height. It is not a permanent structure of a given height, but a structure whose height is variable according to the number of plank in use for the time being. The court say that, upon the reasonable construction of the Pike agreement, "no violation of it by the defendants appears until 1897." After rehearsing the findings of the referee in relation to the flowage of May and June, 1897, the court state their conclusion as follows: "While the foregoing findings leave no room for doubt that the right to an assessment of compensatory damages in favor of those of the plaintiffs who may be legally entitled thereto is established in the particular instance referred to, yet, in view of the circumstances attending it, as detailed by the referee, the improbability of its repetition, and the unquestioned ability of the defendants to respond in damages, we do not think a case is made which at this time calls for the restraining power of equity by way of injunction." It could not be justly held that the dam, constructed as it was, and used as it had been for more than 40 years, without a claim of right to use it otherwise, was a nuisance. *Town v. Faulkner*, 56 N. H. 255. The plaintiffs having failed to prove the existence of a nuisance that flowed their lands or infringed their rights to their irreparable injury, the injunction they prayed for was denied. This disposed of the entire case made by the bill and answer, and the facts found thereunder. Ordinarily, under such circumstances the bill would be dismissed. But in this case the referee found facts which entitled the plaintiffs, or some of them, to "an assessment of compensatory damages," arising from the defendants' negligence in the management of the dam in May and June, 1897. Although this was a matter for the determination of a court of law, instead of a court of equity, the referee could assess the damages with less delay and expense to the parties and less expense to the public than any other tribunal. If he was not selected by the parties and appointed in accordance with their agreement, none of them objected to him or his appointment, so far as appears. If they could have objected, they waived their right to do so by going on with the hearing before him without objection. His report shows that he understood the question of damages was included in the reference. He says: "The question of damages, if any, to which the plaintiffs, or either of them, are entitled, has not been determined by the referee; that question having been deferred until the measure of the plaintiffs' rights and the defendants' duties and obligations to them, upon the foregoing facts, is determined by the court." The plaintiffs also so understood it. They say in their brief "that the plaintiffs at the trial raised the question of damages, and the grounds upon which the referee refused to consider

it are clearly stated in the report," referring to the portion of the report above quoted. They have no just ground to complain of a denial of their motion to have the damages assessed by an auditor, commissioner, or master, provided the matter is recommitted to the referee. There is evidence tending strongly to show that the defendants have so far committed themselves to the reference that they have waived their right to a trial by jury, if they would otherwise be entitled to the right. Presumably, it was in view of these facts that the court discharged the case before it, instead of dismissing the bill.

But suppose the conduct of the parties was not such as to require the recommitment of the question of damages to the referee, or suppose the presiding justice could properly deny a recommitment, the question arises whether he, as a court of equity in the exercise of his discretion, had authority to try the question himself, or to commit it to a master or a jury for trial, in view of the fact that equitable relief was denied. This question is of grave importance, inasmuch as an erroneous decision may deprive the parties of the right of trial by jury guaranteed to them by the Constitution. Whether, before our Constitution went into effect, there were, in equity, any "controversies concerning property" which were usually tried by jury, and which fall within the guaranty of the bill of rights, is a question that need not now be considered. Undoubtedly, the chancellor had authority to try most questions arising in equity suits himself, or by a master or a jury, according to his discretion; and parties now have no constitutional right to a trial of them by a jury. But in this state, at least, the chancellor's discretion is liberally exercised in favor of submitting such questions to a jury. *Tasker v. Lord*, 64 N. H. 279, 8 Atl. 823; *State v. Currier*, 66 N. H. 622, 19 Atl. 1000, where the case is more fully reported than in the state report; *State v. Saunders*, 66 N. H. 39, 25 Atl. 588, 18 L. R. A. 646. As was said in the latter case, "in our present practice there is a jury trial in many cases in which it is not a constitutional right." If the court had jurisdiction to assess the damages in this case according to his discretion, it would be in accordance with our practice to do it by a jury, and there is authority for sustaining the defendants' exception on this ground. *Clough v. Fellows*, 63 N. H. 133; *Pearson v. Railroad*, 63 N. H. 534, 4 Atl. 388.

But we are unable to agree that the court, sitting as a court of equity, has jurisdiction to assess these damages, or that they can be properly assessed in this suit except by a recommitment of the question to the referee, as above suggested. As a general rule, a court of equity does not have jurisdiction to assess damages for the breach of a contract

or for a tort, in the absence of some equitable ground for such relief. *Bally v. Taylor*, 1 R. & M. 73; 1 Pom. Eq. Jur. § 112; 2 Sto. Eq. Jur. § 799. If the court has jurisdiction of the subject-matter, and decrees equitable relief, it may consider and adjust the plaintiff's damages for past injuries as an incident to the relief afforded. *Coe v. Winnepiologee Lake Cotton & Woolen Mfg. Company*, 37 N. H. 254, 266; *Bassett v. Company*, 43 N. H. 249; *Dennett v. Dennett*, Id. 499, 503; *Eastman v. Bank*, 58 N. H. 421; *Milan Steam Mills v. Hickey*, 59 N. H. 241; *Gale v. Sulloway*, 62 N. H. 57, 60. In the *Bassett* case, *Bell, C. J.*, after stating the general principles on the subject, says: "It results from these principles that any defense which goes to the whole ground of the relief by injunction is fatal to the bill, and, such defense being sustained, the court will not retain the bill for any purpose of settling the damages." See, also, *Bally v. Taylor*, supra, a case directly in point; *Parrott v. Palmer*, 3 Myl. & K. 632; *McCone v. Courser*, 64 N. H. 506, 15 Atl. 129.

Courts of equity also assess and award compensation in some cases in which such action is not incidental to the relief afforded. In bills for the specific performance of contracts, if it appears that the defendant has disabled himself from performing the contract during the pendency of the suit, the court, although it cannot decree specific performance, will afford alternative relief by compelling the defendant to make compensation for his breach of the contract, and will retain the bill for the purpose of having the amount of such compensation ascertained. *Denton v. Stewart*, 1 Cox, Ch. 258; *Greenaway v. Adams*, 12 Ves. Jr. 395; *Gwillim v. Stone*, 14 Ves. Jr. 128; *Todd v. Gee*, 17 Ves. Jr. 273; *Blore v. Sutton*, 3 Mer. 237, 248; *Morss v. Elmendorf*, 11 Paige, 277, 288; *Woodcock v. Bennet*, 1 Cow. 711, 755, 13 Am. Dec. 568; *County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238. The same course is pursued when the defendant's disability occurs before the suit is brought, provided the plaintiff had no knowledge of the fact when he began the suit, but supposed in good faith that he was entitled to specific performance. *Hatch v. Cobb*, 4 Johns. Ch. 559; *Kempshall v. Stone*, 5 Johns. Ch. 193; *Morss v. Elmendorf*, supra; *Milkman v. Ordway*, 106 Mass. 232; *Chartier v. Marshall*, 51 N. H. 400; Id., 56 N. H. 478. It has furthermore been held that, where a vendor has contracted to convey a tract of land, and the title to a part of it fails, the vendee may have specific performance of the contract as to the residue of the land, and compensation and damages for failure to convey the part of which the defendant has no title. *Morss v. Elmendorf*, supra; *Cleaton v. Gower*, Finch, 164; *Pratt v. Law*, 9 Cranch, 456, 3 L. Ed. 791. In all these cases the plaintiff would have a decree for specific performance

were it not for the fact that performance is rendered impossible by the acts of the defendant or some other fact. As performance is impossible, damages are awarded in place of it as alternative relief. The doctrine of these cases was doubted at first. In *Greenaway v. Adams*, supra, the court appears to have reluctantly followed the decision in *Denton v. Stewart*, supra. The Master of the Rolls, Sir William Grant, says: "If the court does not think fit to decree a specific performance, or finds that the contract cannot be specifically performed, either way I should have thought there was equally an end of its jurisdiction; for in the one case the court does not see reason to exercise the jurisdiction; in the other, the court finds no room for the exercise of it. It seems that the consequence ought to be that the party must seek his remedy at law." *Denton v. Stewart* is also questioned, but followed, in *Gwillim v. Stone*, supra, and in *Todd v. Gee*, supra. In the latter case, Lord Chancellor Eldon says: "My opinion upon the question, which depends on the three cases cited [the three last mentioned], is confirmed by reflection; that, except in very special cases, it is not the course of proceeding in equity to file a bill for specific performance of an agreement, praying in the alternative, if it cannot be performed, an issue or an inquiry before the master, with a view to damages. The plaintiff must take that remedy, if he chooses it at law. Generally (I do not say universally) he cannot have it in equity. * * * In *Denton v. Stewart* the defendant had it in his power to perform the agreement, and put it out of his power pending the suit. The case, if it is not supported upon that distinction, is not according to the principles of the court." The doctrine, however, has become more or less firmly established in the practice of courts of equity—firmly and generally so far as it relates to cases where the defendant voluntarily disables himself from performing the contract during the pendency of the suit.

The cases cited in Judge REMICK's opinion were decided either upon an application of the above-mentioned principle, or upon a consideration of some supposed special equity involved in the case. Of the latter class is *Phillips v. Thompson*, 1 Johns. Ch. 131, in which an issue of quantum damnificatus was awarded, "as the plaintiff had sustained an injury for which he ought to be compensated, and for which he had no remedy, or, at best, a doubtful and inadequate one, at law." Similar reasons were given for the decisions in *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273, *Aday v. Echols*, 18 Ala. 353, 357, 52 Am. Dec. 225, and *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476. In *London v. Nash*, 3 Atk. 512, the plaintiff, by laches, had suffered the defendant to place himself in a position in which he would

be subjected to great loss and hardship if specific performance were enforced. See, also, *Brande v. Grace*, 154 Mass. 210, 81 N. E. 633. If the form of the bill is such that a demurrer to it would be sustained on the ground that the plaintiff has an adequate remedy at law, and the defendant yields to the jurisdiction without objection, he will be bound to submit to the jurisdiction throughout, and to have damages awarded against him as if incident to other equitable relief. *Creely v. Bay State Brick Company*, 103 Mass. 514; *Woodbury v. Marblehead Water Company*, 145 Mass. 509, 15 N. E. 282. "Where the bill alleges proper matter for the jurisdiction of a court of equity (so that a demurrer will not lie), if it appears on the hearing that the allegations are false, and that such matter does not in fact exist, the result must be the same as if it had not been alleged, and the bill should be dismissed for want of jurisdiction." *Jones v. Bradshaw*, 16 Grat. 355. *Stearns v. Beckham*, 31 Grat. 379, is not inconsistent with this case, or the views expressed in this opinion. See, particularly, page 420 of the report. The New York authorities cited by Judge REMICK have no weight here. "As the courts of the [that] state are now constituted, they apply legal and equitable rules and maxims indiscriminately in every case." *New York, etc., Ins. Co. v. National Protection Ins. Company*, 14 N. Y. 85, 90; *Despard v. Walbridge*, 15 N. Y. 374; *Phillips v. Gorham*, 17 N. Y. 270; *New York Ice Co. v. Northwestern Ins. Company*, 23 N. Y. 357. Story's statement of the result of the authorities upon this point requires no modification when the cases cited by Judge REMICK are taken into consideration. In fact, the statement is strengthened thereby. Story says: "In the present state of the authorities, involving, as they certainly do, some conflict of opinion, it is not possible to affirm more than that the jurisdiction for compensation or damages does not ordinarily attach in equity, except as ancillary to a specific performance or to some other relief. If it does attach in any other cases, it must be under very special circumstances and upon peculiar equities; as, for instance, in cases of fraud, or in cases where the party has disabled himself by matters *ex post facto* from a specific performance, or in cases where there is no adequate remedy at law." 2 Sto. Eq. Jur. § 799. "Compensation or damages (it should seem) ought, therefore, ordinarily to be decreed in equity only as incidental to other relief sought by the bill and granted by the court, or where there is no adequate remedy at law, or where some particular equity intervenes." *Id.* § 794; *Gould, Wat.* §§ 223, 561; *Coe v. Winnepisiogee Lake Cotton & Woolen Mfg. Company*, 37 N. H. 254, 266. *Carpenter v. Fisher*, 68 N. H. 486, 88 Atl. 211, 73 Am. St. Rep. 618, is also cited

55 A.—58

in Judge REMICK'S opinion to sustain the views there expressed. It was held in that case that the question of the amount of damages caused to a prevailing defendant by a preliminary injunction issued against him in the suit was incidental to the principal issues, and might be determined in the suit upon equitable principles. Such damages are an incident of the suit—arise from its prosecution—and the court has authority to measure them, and leave the parties as it found them, although they grant no relief. It does not fall within the general rule, but is an exceptional case, the "special circumstances" and "peculiar equities" of which justify a departure from general principles.

There is a New Hampshire case that singularly resembles the present case. *Coe v. Winnepisiogee Lake Cotton & Woolen Mfg. Company*, 37 N. H. 254. The plaintiff owned lands upon the shores and islands of Squam Lake. The defendants built a dam across the outlet of the lake, and lowered its channel. By these means they raised and lowered the water of the lake, causing the plaintiff, as he alleged, irreparable injury, and threatened to continue the wrongful acts. The prayer of the bill was for an injunction to restrain the defendants from drawing off the water to a greater extent than it naturally flowed, and from throwing back the water by means of the dam. The defendants' demurrer to the bill was sustained, and the bill was dismissed with costs. The court says: "Upon looking to the facts alleged, they present nothing of a peculiar or extraordinary character, either in a subject-matter or nature of the injury threatened. The destruction of the plaintiff's grass and timber, the deterioration of his land, the throwing it open to cattle, thus rendering additional fences necessary, and the obstruction to the passage of logs [by the dam], assuming that all these are the necessary consequences of the proceedings of the defendants, are the usual consequences of direct trespass to land or of torts, for which consequential damages may be recovered, and for which adequate compensation may be given at law." In speaking of damages occasioned by nuisances of this kind, they say (page 266, 37 N. H.): "For this the remedy at law is in all respects as full and complete, and as efficacious and prompt, as in equity. Indeed, as to past damages thus sustained, equity affords no remedy when they are disconnected from all other grounds for its interposition."

Assuming that the only ground of equity jurisdiction in the present case is the abatement of a nuisance that threatens irreparable injury to the plaintiff, the examination of the authorities and reflection upon the question that we have been able to make lead us to the conclusion that the superior court, sitting as a court of equity, had no

authority to assess the plaintiffs' damages for the torts committed in May and June, 1897, it having been determined that the plaintiffs were not entitled to an injunction. It must, we think, be admitted by everybody that a court of law furnishes an adequate and complete remedy for such torts. The plaintiffs attempted to show that the defendants' acts and threats constituted a nuisance, and would cause irreparable injury, and so afforded ground for equitable jurisdiction and relief. They failed in the attempt, and the ground for equitable relief has gone out from under them. They have shown that they are entitled to relief in a court of law. A court of equity cannot afford them this relief, any more than a court of law could afford them equitable relief if it turned out upon the trial of the case in such court that they were entitled to that relief, instead of the relief they sought in the action at law. The distinction in the jurisdictions of the two courts continues so far as these matters are concerned, and is very important. A loose practice in the observance of it will seriously endanger the constitutional right which parties have to a trial by jury when their property rights are in controversy. The cases in this state show that the courts have been very particular not to encroach upon this right. When there is a doubt whether a party is entitled to the right or not, the provision of the Constitution is given the benefit of the doubt.

There is nothing that brings the case within an exception to the general rule. The specific relief sought has not been rendered impossible by any acts of the defendants, either before or since the commencement of the suit, except so far as the inherent nature of the defendants' acts themselves rendered such relief impossible under the rules of law. The acts of May and June, 1897, were not the result of fraud, but of negligence. They were ordinary torts. We discover no special circumstances or peculiar equities calling for an assessment of the damages. The plaintiffs are not entitled to an assessment as ancillary to other equitable relief, for no such relief is afforded; nor are they entitled to it as taking the place of or "alternative to" other equitable relief, for it does not take the place of this relief, but, if granted, will simply afford the relief of an action at law.

The opinion also places the jurisdiction upon another and independent ground of equitable jurisdiction—that of determining the extent of the respective rights of parties in water and water privileges, and the proper mode of exercising and enjoying them. It is a sufficient answer to this position that the bill sets forth no such case and asks for no such relief. It is true that the defendants' charter has been construed, but that was merely an incident of the proceeding. If the action at law brought by Quack-

enbos against the defendants were tried, it would no doubt be necessary to construe the defendants' charter upon the trial. The construction of the charter is a pure question of law, and in no sense an equitable question. When the case was formerly before the court, no attempt was made to specifically prescribe how the respective parties should exercise and enjoy their rights. No one has asked for a decree of that kind. It would be very difficult, if not impossible, to set forth in a decree the particular manner in which the dam shall be managed under all the varying conditions affecting the control of the level of the water, so as to afford the defendants a reasonable exercise of their rights, and not trespass upon the rights of the plaintiffs. The boundary between the rights of the parties is reasonableness in view of all the circumstances. The circumstances are so variable and uncertain that it would seem to be impracticable to define or set up a more definite boundary in advance. The case differs from cases in which the rights of mill owners upon a dam may be measured out to them by limiting the size of the orifices in the dam through which they shall take their water, or limiting the number of cubic feet per second that they shall draw from a pond. It differs from *Conn. River Lumber Co. v. Olcott Falls Company*, 65 N. H. 290, 21 Atl. 1090, in which it was suggested that the form, dimensions, and place of a sluice, in which the public should exercise their right of running logs over a dam across a river that was a public way, might be prescribed by a decree in equity. This seems a much less difficult problem than it would be to set forth the steps that shall be taken under all the varying conditions of water to insure to all the parties in interest their several rights. In *Burnham v. Kempton*, 44 N. H. 78, 100, it is said: "A court of equity will not assume jurisdiction of a case under any pretense of adjusting rights in common to water power, when it is perfectly apparent that all that is sought or needed by the parties, or either of them, is the settling and establishing of a disputed right, which depends entirely upon the application of legal principles, and where, from the character of the right in question, and the evidence upon which it must be established, it is evidently a case peculiarly appropriate for the consideration of a jury and for a decision in a court of law." It appears from the decision already rendered in this suit that all the parties needed was a decision as to the validity and interpretation of the defendants' charter.

Nor is the equitable jurisdiction invoked in the case that of preventing a multiplicity of suits. It is true that several parties having a community of interests join in the suit, but they do not seek relief on that ground. They say that each of them suffers irreparable in-

jury from the maintenance of a nuisance, and they pray for an injunction to abate the nuisance. They do not seek to recover the damages they have severally suffered by the defendants' wrongful acts, on the ground that equity has jurisdiction to assess and award the damages to prevent a multiplicity of suits at law. If equity has jurisdiction on this score, it does not need other grounds to support the jurisdiction. If this were sufficient ground, a bill could be maintained by the plaintiffs if their sole object was to obtain compensation for the injuries done to them by the high water of May and June, 1897. If the principle applies to this case, we do not see why it would not apply to any case in which a number of independent persons are injured by the same wrongful act or negligence; as, for example, a case where a number of persons are injured in a railroad accident, or by a fire set by sparks from a locomotive. See *Tribette v. Railroad*, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642. Such a doctrine would take away the right of trial by jury in numerous cases in which it has heretofore been regarded as an absolute right. We are not prepared to give assent to the doctrine. It should be borne in mind that, if the damages are assessed on this ground, it must be on this ground only; that the jurisdiction will not be exercised incidentally to that of other equitable jurisdiction, for no other equitable relief will be afforded.

Smith v. Bank, 69 N. H. 254, 45 Atl. 1082, is cited as an authority sustaining the position taken on this point in Judge REMICK'S opinion. The defendants in that case were trustees of property held for the benefit of the plaintiffs. The prayer of the bill was for a discovery and accounting, and for a determination of the damages caused by the defendants' negligence in the management of the trust estate, and a decree that the defendants should pay the same. The damage was a single sum, depending upon the nature and extent of the negligence and its injurious effects upon the rights of the beneficiaries. When determined and recovered, it would be a trust fund, in which the plaintiffs would be entitled to share according to the amount of bonds severally held by them—a matter that could be readily determined by computation. If the plaintiffs had brought several actions at law, not only the question of the defendants' negligence would necessarily be determined upon the same evidence, but the damages would be assessed upon the same principle, and necessarily ought to be the same sum. It would be useless litigation and a multiplicity of needless suits to have these questions tried 79 times (there being 79 plaintiffs), when a single trial would settle them. It should be noticed, also, that no question was raised as to the rights of the parties to a jury trial. They have had two jury trials covering nu-

merous issues of fact that arose in the case, both having all the characteristics of, and being treated in all respects as if they were, the common-law jury trials guaranteed by the Constitution. *Smith v. Bank*, 70 N. H. 187, 46 Atl. 230; *Id.*, 69 N. H. 254, 45 Atl. 1082. In the present case the assessments of damages must of necessity be several. The nature and extent of the injury suffered by the plaintiff Quackenbos depend upon the location, nature, and extent of his particular land and its appurtenances, while those of the plaintiff Hay depend upon the extent and peculiarities of his property. It would be very inconvenient, if not impracticable, to assess the damages for each plaintiff's injury on a single trial.

As the court are equally divided upon these questions and as to the propriety of ordering an amendment, the question arises, what action can be taken in the case? This question was exhaustively considered in *Northern R. R. v. Railroad*, 50 N. H. 160, and the conclusion was reached that in that case nothing could be done except to continue the case for further advisement. In a later case—*State v. Perkins*, 58 N. H. 435—it is said that, as a result of the former case, a rule was adopted by which in civil cases and cases for misdemeanors verdicts depending upon questions of law reserved should generally be sustained when the courts were equally divided, in the absence of a good reason for a different course. Diligent search has failed to discover a record of this rule. Inasmuch as, if now in force, the rule leaves open the question whether it should be applied in a particular case, it cannot be effective to dispose of a case unless a majority of the court shall agree that the case is one in which it should be applied. In this case there is no question of sustaining a verdict or ordering judgment. Upon exception to certain interlocutory orders, the superior court reserved the question of law for the determination of this court. The court is unable to determine the question. The result is that this portion of the order cannot be set aside nor be affirmed. It stands—without any decision as to its legality—for such further action as the superior court shall see fit to take.

Case discharged.

WALKER, J., *dtd not sit.*

(206 Pa. 162)

KUNTZ v. NEW YORK, C. & ST. L. R. CO.
(Supreme Court of Pennsylvania. May 11, 1903.)

ACCIDENT AT CROSSING—SIGNALS—CONTRIBUTORY NEGLIGENCE—APPEAL.

1. Where, in an action for injuries at crossing, the evidence of defendant was that the

§ 1. See *Railroads*, vol. 41, Cent. Dig. § 1161.

proper signals were duly given by the approaching train, and three witnesses for plaintiff testified that they were listening for some signals and heard none, the question of whether the proper signals were given was for the jury.

2. In an action for injuries at a crossing, *held*, that the question of plaintiff's contributory negligence was, under the evidence, for the jury.

3. Assignments founded on errors alleged to have been committed by the court in referring to the testimony, not brought to his attention at the time, will not be considered.

Appeal from Court of Common Pleas, Erie County.

Action by Frank Kuntz against the New York, Chicago & St. Louis Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, MESTREZAT, and POTTER, JJ.

Frank Gunnison, for appellant. J. M. Sherwin, S. A. Davenport, and A. P. Howard, for appellee.

FELL, J. The principal error assigned is that the court did not take the case from the jury on the grounds (1) that there was not sufficient evidence of negligence on the part of the defendant to warrant a recovery; (2) that the plaintiff failed to present a case clear of contributory negligence on his part.

The weight of testimony on the question whether proper notice was given of the approach of the train to the crossing was undoubtedly with the defendant. But three witnesses on behalf of the plaintiff testified that they were listening for some signal by bell or whistle of the approach of the train and heard none. This testimony was more than a scintilla, and of a higher grade than merely negative testimony. *Longenecker v. Railroad Co.*, 105 Pa. 328; *Quigley v. Del. & H. Canal Co.*, 142 Pa. 388, 21 Atl. 827, 24 Am. St. Rep. 504; *Daubert v. Delaware, etc., Railroad Co.*, 199 Pa. 345, 49 Atl. 72. It raised an issue that was clearly for the jury.

The facts that must be considered as established in determining whether the plaintiff was negligent are these: With two companions, he was going to his work at 6 o'clock in the morning in the early part of February. This was before daylight, and a snowstorm of unusual force and severity was prevailing. The temperature was 6 degrees above zero, and the wind was blowing at the rate of 80 miles an hour. Several inches of snow had fallen. Drifts had formed on the sidewalks, and these men were walking in the middle of the street. When they reached the crossing of the defendant's road in a populous part of the city of Erie, they stopped within five feet of the track, and looked both ways, and listened for the sound of a bell or whistle. They heard neither, and walked on the single track, and the plaintiff was struck by an engine which was running 35 or 40 miles an hour on a down grade with the steam off. The headlight of

the engine was to some extent obscured by the snow that clung to the glass and by snow in the surrounding atmosphere. At the place where the men stopped, an engine could be seen in daylight, under ordinary circumstances, when 1,500 feet away. The court instructed the jury that, if the accident had occurred on a clear morning, or in the daytime, when the headlight of the engine could have been seen, the plaintiff could not recover. But it was left to the jury to say whether, under the circumstances, the plaintiff's view being obstructed by wind and snow, he had exercised reasonable care. This instruction was correct. The question of contributory negligence cannot be treated as one of law unless the facts and the inferences to be drawn from them are free from doubt. If there is doubt as to either, the case is for the jury. It was the duty of the plaintiff to stop, look, and listen before placing himself in a position of danger, and to continue to look as he approached and crossed the track. Ordinarily, a pedestrian, when there is nothing to prevent his seeing and hearing, will not be heard to say that he did not see a train which could have been plainly seen if he had looked. But the rule established by *Carroll v. Railroad Co.*, 12 Wkly. Notes Cas. 848, and *Marland v. Railway Co.*, 123 Pa. 487, 16 Atl. 624, 10 Am. St. Rep. 541, 16 L. R. A. 624, and since followed, is applicable only in clear cases where a person steps in front of a moving train which he could see. *McNeal v. Railway Co.*, 131 Pa. 184, 18 Atl. 1026; *Laib v. Railroad Co.*, 180 Pa. 503, 37 Atl. 96; *Muckinhaupt v. Railroad Co.*, 196 Pa. 213, 46 Atl. 364; *Bard v. Railway Co.*, 199 Pa. 94, 48 Atl. 684. According to his testimony, the plaintiff in this case did not proceed recklessly in crossing the defendant's tracks. He stopped within five feet of them to ascertain whether a train was approaching. The storm prevented his seeing more than 50 or 100 feet, and made his progress more difficult. Whether, under the circumstances, he exercised proper care, was for the jury.

The errors alleged to have been committed in referring to the testimony were not brought to the attention of the court at the time, and the assignments founded upon them need not be considered. *Provident Life & Trust Co. v. Philadelphia*, 202 Pa. 78, 51 Atl. 597, and cases there cited.

The judgment is affirmed.

(206 Pa. 132)

MARSHALL v. PILOTS' ASS'N.

(Supreme Court of Pennsylvania. May 18, 1903.)

BENEFICIAL ASSOCIATION—CHANGE OF BY-LAWS—EFFECT.

1. Where the rights of a member of a beneficial association have become fixed, when subse-

¶ 1. See *Beneficial Associations*, vol. 6, Cent. Dig. §§ 42, 43.

quently the association chooses to alter its by-laws, the rights of such member were not affected thereby.

Appeal from Superior Court.

Action by James W. Marshall against the Pilots' Association for the Bay and River Delaware. From the judgment, plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Edgar J. Pershing and Horace G. Knowles, for appellant. Henry Flanders, for appellee.

MITCHELL, J. The plaintiff was a member of the defendant association in good standing down to the time of his disability. He had contributed his due share of earnings to make up the relief fund of the association down to that time, and, in return, was entitled to the benefits, whatever they might be, which were provided by the constitution and by-laws of the association. These constituted the contract which governed the rights of the parties, respectively; and when plaintiff's rights to a special benefit accrued according to such contract, they became fixed, and thereafter could only be changed by mutual consent. Whatever the duty of plaintiff might be as a general member, with no special rights vested, to acquiesce in changes of the by-laws made in conformity with the charter or constitution, his status changed as soon as he had acquired special rights under the by-laws as they stood at the time. Thereafter, as said in *Becker v. Berlin Beneficial Society*, 144 Pa. 232, 22 Atl. 699, 27 Am. St. Rep. 624, "he was a creditor whose rights had previously attached, and those rights cannot be swept away by such a scheme as this by-law." The by-law as it was when plaintiff became disabled provided that "a member losing his license for any other cause than intoxication shall receive half pay until reinstated." This classed all losses of license together, except those from intoxication. It made no other distinction between causes, whether fault or misfortune, negligence, willful disobedience of regulations, or unavoidable disability, nor any distinction between consequences, whether the loss of license was temporary or lasting. Such being the rule of the contract at the time of the revocation of the plaintiff's license, the cause not being intoxication was immaterial, and plaintiff became entitled to half pay until reinstated, whether that was soon or never. When subsequently the association chose to alter its by-laws in order to differentiate disabilities and class them as temporary or permanent, with different results in regard to benefits, it could not affect the rights of plaintiff already vested. However, binding in future cases, such change was inoperative and a nullity as affecting plaintiff. The case of *Becker v. Berlin Beneficial Society*, 144

Pa. 232, 22 Atl. 699, 27 Am. St. Rep. 624, already cited, is express and controlling authority in this state, and is, moreover, in entire accord with the general current of American decisions.

Judgment reversed, and record remitted to the court of common pleas, with directions to enter judgment for the plaintiff on the case stated.

(206 Pa. 204)

In re KANE'S ESTATE.

(Supreme Court of Pennsylvania. May 18, 1903.)

WILLS—TESTAMENTARY CAPACITY—EVIDENCE.

1. The testimony of the attorney who drew the will of testator, and that of the physician who attended him at the time, when positive as to the testamentary capacity of the testator, is of far more weight than the opinion of medical experts, based on hypothetical questions.

2. Evidence in a proceeding to contest a will for lack of testamentary capacity of testator reviewed, and held insufficient to take the case to the jury.

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of Michael C. Kane. From an order dismissing appeal from the register of wills, Ursula Breen appeals. Affirmed.

Argued before MITCHELL, DEAN, BROWN, and MESTREZAT, JJ.

William B. Rodgers, William Le Goulion, and A. M. O'Brien, for appellant. Johns McCleave, for appellee.

MITCHELL, J. The member of the bar who wrote the testator's will had known him well, as a client and otherwise, for many years. He testified clearly and positively to the circumstances; how testator came to the courtroom in search of him, and, finding him occupied, waited until lunch time, went then with him to his office, talked awhile about other matters of mutual interest, and then gave directions for his will. The will was written and executed there, witnessed by Mr. McKenna and a student in his office. Being asked about an executor, testator named his brother, Patrick, the beneficiary, and to a question whether he had said anything to Patrick about the will, replied that he had not; he wanted to surprise him. McKenna's testimony was positive that he saw no impairment of testator's mind, nor any change from what he had always seen in him. It further appeared in the undisputed evidence that the testator had been in business for many years, at first and for the larger part of the time with his brother, but afterwards by himself, and had accumulated a moderate fortune, chiefly during the later years, when he had conducted a separate business by himself, without even the aid of a clerk. This, continued down to the date of the execution of the will. On the other hand,

it was conceded that the testator died in May, 1900, insane. The will was made September 21, 1896, and it was shown that on September 11th he had had a congestive attack, which he called a rush of blood to the head, and which was variously described by others as apoplexy, an "apoplectic attack," a "stroke," and "a slight stroke." He recovered, and returned to his business on September 19th, made his will on September 21st, as already related, and continued in discharge of his business until October 1st, when he had another and more severe attack of the same kind, and subsequently others, which terminated in his admitted insanity in the summer of 1897. The crucial inquiry here is upon the state of his mind on September 21, 1896, when he made his will. Dr. Ayres, the physician who attended him for the attack of September 11, 1896, had attended his niece in the same house a year previously, and had been his physician from that time. He testified that the testator's mental condition was "perfectly normal" by September 16th or 17th, so that no further visits to the patient's house were necessary, and that he had "made a complete recovery." Other witnesses, including two physicians, business men with whom he dealt, neighbors, and others, all of whom had known the testator for some years, gave testimony to business and personal relations with him, and to his entire mental competency down to and including September, 1896. The contestant, on the other hand, produced four medical witnesses as to testator's mental condition. The first was a graduate of 1899, who did not see the testator until the fall of 1899, when he was brought to the hospital; another attended him in the summer of 1897, until the arrival of Dr. Ayres, his regular physician; and the last, called in rebuttal, never saw him at all, and testified only in answer to suggested hypothetical questions. All three must be considered only as experts, testifying to deductions from conditions long subsequent to the date of the will, which they had observed, or had had stated to them. The real burden of the medical testimony for the contestant was borne by Dr. Kearns. This witness, who had known the testator many years, testified to having prescribed for him as early as 1881, and gave in considerable detail the nature of the disease, its progress, and its anticipated result. Without dwelling on particulars, they are summed up in the assertion of this witness that the testator had "incipient dementia" as far back as 1882. The testimony does not commend itself by clearness or consistency, but, accepting it for its face value, it is deprived of substantial weight by proving too much. A dementia so "incipient" that it allowed the sufferer to continue in business for 14 years, and by his own exertions accumulate a fortune, before any business associate or acquaintance suspected a want of mental ca-

capacity, may present an interesting medical problem, but may be safely disregarded in a legal inquiry into his testamentary competency. Besides this medical testimony, a large number of other witnesses were produced as to failure of memory, peculiarities of action, etc., on the part of testator, from which they inferred want of mental capacity. Most of them were women, who gave no indication of knowing what testamentary capacity is, and whose testimony was mostly the tattling neighborhood gossip, which is usually so plentiful in cases of this kind. A regiment of such witnesses should be outweighed by the clear, positive, and intelligent testimony of men who knew what they were talking about, such as the scrivener who wrote the will, and the physician who attended the testator in his illness shortly preceding.

As already said, the crucial question here is the condition of the testator's mind at the date of the will. All testimony on other points is relevant and material only so far as it bears on this. The direct, clear, and positive testimony as to the circumstances attending the making of this will is convincing. The draftsman of a will, especially if a lawyer or conveyancer, is always an important, and usually the most important, witness in the case; and where, as here, he had known the testator well for a long time, and shows such circumstances of voluntary and intelligent action by testator at the time, his testimony makes a *prima facie* case that requires very strong evidence to offset. The only evidence in this case which could raise a reasonable doubt of testamentary capacity prior to the making of the will is the congestive or apoplectic attack on September 11th. Without that, the loose gossip about failing memory, etc., would not stand a moment's consideration. But the physician who attended the testator in that illness, and was in a position to know more about it than a dozen theoretical experts or talkative neighbors, testified positively that the testator made a "complete recovery" before the date of the will, and all the circumstances confirm the accuracy of the diagnosis. Against the testimony of Mr. McKenna and Dr. Ayres alone, even if it were not supported, as it is, by business men and others as to the actual dealings of the testator, the evidence against the will would not be sufficient to sustain a verdict.

The question of undue influence scarcely requires comment. The beneficiary was the testator's only surviving brother. They had lived together in the same house for 40 years, including even the year of testator's married life, and they had been in partnership, through adversity and through success, for more than half that time. Such relations of blood and association are naturally productive of affection and of testamentary remembrance, but they do not warrant the inference of undue influence. The circumstances

of the making of the will affirmatively disprove any exertion of undue influence on the part of the beneficiary at that time, and the few trifling acts of assistance, or even of direction, to the testator as to making change, etc., in the store, fall far short of establishing any continuing influence of the beneficiary, which, even in his physical absence, controlled the mind of the testator. *Miller v. Oestrich*, 157 Pa. 264, 27 Atl. 742.

Decree affirmed, at costs of appellant.

(206 Pa. 188)

LANDSDOWNE v. CITIZENS' ELECTRIC LIGHT & POWER CO.

(Supreme Court of Pennsylvania. May 18, 1903.)

BOROUGH—CONTRACT FOR LIGHTING—VALIDITY—ACCEPTANCE.

1. Where an electric light company offers to do the public lighting for a borough, and the borough accepts the offer within the time stipulated for such acceptance, and the company thereafter takes certain steps as if to carry out the contract, the company is bound thereby, though the borough, between the date of the offer and the time of the acceptance, advertised and received bids for the public lighting.

2. Where a borough council is authorized by ordinance to contract for the public lighting, the action of the council in accepting a bid thereunder is ministerial, and not such an enactment or ordinance as must be recorded in the ordinance book, and advertised, under Act April 8, 1851 (P. L. 820), or Act May 23, 1893 (P. L. 113).

3. The bid of an electric light company for the public lighting of a borough was accepted by a resolution of the council, which contemplated the execution of a formal contract. The company sent a form of agreement, acceptable to the solicitor of the borough, who thereupon prepared the agreement as desired by the company, and delivered it to its general manager. *Held*, that the agreement was binding on the company, though not executed by it.

Appeal from Court of Common Pleas, Delaware County.

Action by Lansdowne borough against the Citizens' Electric Light & Power Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

J. B. Hannum, for appellant. Lewis Lawrence Smith and Fred. Taylor Pusey, for appellee.

BROWN, J. On July 7, 1899, the Citizens' Electric Light & Power Company submitted a written proposal to the borough of Lansdowne to light the town for a term of five years for \$6 per lamp per year. The proposal was to be good until the 30th of the following September. The next day, July 8th, the borough advertised for bids for lighting, and on July 14th the appellant and the Lansdowne Electric Company each submitted a bid, the former offering to furnish light at \$8 per lamp per year for five years, and the latter at \$13 per lamp per year for the same period. Neither of these bids was ac-

cepted, and on July 18th, by a resolution of the council of the borough, the contract for lighting was awarded to the appellant at its bid of July 7th. On July 22d the company was notified of the borough's acceptance of its bid. The proposal of July 7th by the appellant, and the acceptance of it on July 18th by the appellee, formed what the latter alleges is the contract, for the breach of which it is entitled to recover damages.

The first contention of the appellant is that, as the borough advertised for bids on July 8th—a day after its bid had been submitted—and on July 14th received bids from it and the Lansdowne Electric Company, it cannot now be held by the borough to its bid of July 7th. At any time after the bid of July 7th was made, the appellant could have withdrawn it (*Vincent v. Woodland Oil Co.*, 165 Pa. 402, 30 Atl. 991); but, until withdrawn, it was open to acceptance by the borough until September 30th. In the meantime, it was the right of the borough to inform itself, by advertising for bids, or in any other way, whether it ought to accept the appellant's bid of July 7th. By taking steps to so inform itself, the appellant was not prejudiced, and, if it was not satisfied with the course pursued by the borough in advertising for bids, it had the right to withdraw its proposal. But it did not do so, and it did not regard the borough's advertisement for proposals as a refusal to entertain its bid. On the contrary, its conduct from July 22d—the day it was notified that its bid had been accepted—down almost to the last day of September, clearly indicates that it not only had not withdrawn its proposal, nor intended to do so, but had regarded the same as accepted by the borough, and binding upon it. It located the poles on the streets, and on September 20th returned to the borough a draft of the contract, which had been prepared by the borough solicitor, and sent to it, and in which it made certain changes. The statement of the general manager of the company, in the letter returning the paper, was: "Find herewith contract, with changes made, which leaves it acceptable to us. Please hurry the contract, so that there will be no time lost in furnishing you with light. Contract with changes, as noted, has been approved by our vice president." As appellant is estopped from making its first objection, nothing further need be said about it.

The second reason assigned by the appellant why it is not liable to the appellee is that, as there was no ordinance in existence providing for the lighting of the borough, and authorizing the making of contracts from year to year, or at stated periods, its bid for lighting the streets, accepted by a resolution of council, which was signed by the burgess, but not recorded and advertised, did not establish a contract between them. If there was an ordinance authorizing the council to make contracts for the

lighting of the borough, the action of council in accepting the bid of appellant was merely ministerial, and not such an enactment, regulation, general law, or ordinance as must be recorded in the borough ordinance book and advertised, under Act April 3, 1851 (P. L. 320), or Act May 23, 1893 (P. L. 113). If the resolution was purely ministerial, then, as was said in *Seltzinger v. Edison Electric Company*, 187 Pa. 539, 41 Atl. 454, the "only ground of attack upon it is the alleged omission to record it in the ordinance book, and to duly advertise it. We have carefully examined and considered all the Pennsylvania cases cited by the appellant in support of his contention pertaining to the resolution, and have failed to discover in them any warrant for it. It is a contention which overlooks the fact that the passing by a borough council of a resolution awarding a contract for lighting streets is not a legislative, but a ministerial, act, 'in the nature of a business transaction relating to municipal affairs of the borough.' *Millvale Borough*, 162 Pa. 374, 29 Atl. 641, 644; *Shaub v. Lancaster City*, 156 Pa. 362, 28 Atl. 1067, 21 L. R. A. 691; *Straub v. City of Pittsburg*, 138 Pa. 356, 22 Atl. 93; *Howard v. Borough of Olyphant*, 181 Pa. 191, 37 Atl. 258." A different rule is not found in *Jones v. Schuylkill Light, Heat & Power Company*, 202 Pa. 164, 51 Atl. 762. But, even if the appellee, as one of the parties to the contract, could question the validity of the resolution (which we need not decide), because it had not been passed in pursuance of a general ordinance, there was no proof of the nonexistence of such an ordinance. The assault upon the resolution is made by the defendant as a technical defense to the borough's claim, founded on a contract apparently regularly entered into, and the burden was upon the appellee to show affirmatively wherein the resolution was invalid. *Prell v. McDonald*, 7 Kan. 428, 12 Am. Rep. 423; *City of Atchison v. King*, 9 Kan. 550. The assignments in support of the second objection are dismissed.

It is clear that the resolution of July 18th contemplated the execution of a formal contract in writing between the borough and the light company, and, if it was not executed because there was a dispute between the parties to it as to the terms and conditions to be incorporated in it, or the borough's officers willfully refused to sign it, the appellant's third and last reason why it should not pay for its default might prevail. There had been a dispute as to what some of the terms and details of the written contract should be, but finally there was a distinct understanding as to just how the agreement should be written. The company, through Samuel Haigh, its general manager, on September 20, 1899, sent to the borough solicitor the form of an agreement, as already stated, which was acceptable to him. The borough solicitor promptly pre-

pared the agreement, with the changes in it desired by the company, and in a day or two it was delivered to Mr. Haigh, the general manager, but it was not executed by his company. And yet because it was not executed is one of the reasons now given by the company for not being bound by it. When the copy, with the changes made in it, was sent by the appellant to the borough solicitor, it was the final proposal of the company, and when it was accepted by the borough in the exact form that the company wished, it became the agreement between them, no longer open to objection or exception, which the general manager wished to make when he met a representative of the borough at the Union League.

As the case was properly tried and submitted to the jury, we need say nothing more than that the judgment on the verdict is affirmed.

(206 Pa. 193)

PITTSLEY v. YOUNG et al.

(Supreme Court of Pennsylvania. May 18, 1903.)

CONTRACT—CONSTRUCTION—JOINT OBLIGATION.

1. Plaintiff agreed in writing to build for 186 defendants a milk condensory plant, the price as agreed upon to be paid by defendants, who were also to furnish the land on which the building was to be erected. *Held* a joint obligation of defendants, and that it was immaterial that defendants had agreed to become incorporated for the purpose of conducting the business, where the total subscription to the stock of such corporation was less than the contract price of the condensory, and 36 of the defendants subscribed no stock at all.

Appeal from Court of Common Pleas, Lackawanna County.

Action by Henry E. Pittsley, trading as Sayre Lumber Company, to use of J. Hibbs Buckman and another, against F. M. Young and others. Judgment for defendants, and plaintiff appeals. Reversed.

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

J. Hibbs Buckman and Michael J. Martin, for appellant. Everett Warren, for appellees.

BROWN, J. On March 31, 1900, Henry E. Pittsley, trading as the Sayre Lumber Company, entered into a contract with F. M. Young and 185 other individuals or firms for the erection of a milk "condensory." This suit was brought by the appellants, as the use plaintiffs, to recover from the 186 defendants, jointly, the balance due on the contract price for the building and equipment of the plant and for extra work done and materials furnished. Demurrers were filed to plaintiffs' statement by different defendants, all, however, on the same ground, that the contract was several and not joint. The court below, having been of opinion that there was no joint liability, entered judgment

for the defendants on their demurrers, and from it we have this appeal.

The first clause of the contract is: "It is hereby agreed between the Sayre Lumber Company, of Sayre, Pa., party of the first part, and the other subscribers hereto as party of the second part. That the first party is to build, equip and complete in good running order for said second party within four months from the date hereof, a milk condenser plant, according to plans and specifications hereto attached, at Clark's Summit, state of Pennsylvania, court of Lackawanna, on land provided by said second party, for the agreed price of forty-two thousand dollars (\$42,000), which is to be paid as follows: Seven thousand dollars (\$7,000) when the building is completed; ten thousand dollars (\$10,000) when boilers and engines are set and pumps and can-making machinery are delivered in building; ten thousand dollars (\$10,000) when the copper works and all machinery is delivered in building; ten thousand dollars (\$10,000) when all machinery is set and arranged in position ready to start; the balance, five thousand dollars (\$5,000), sixty days from the starting of said plant. This sixty days' time is given on the final payment, as a guarantee that the factory is complete and to demonstrate that the first party has fully discharged his part of this contract and the machinery is all new and first class, and of the character, quality and capability for which it is intended and recommended. And if said trial should discover or develop any flaws, defect or mistake in the construction or equipment of said plant, said first party shall have the right to correct such errors or mistakes within a reasonable time after the discovery of the same. Such errors or mistakes shall be corrected, as quickly as is practical, and with as little obstruction as possible to the continuous running of said plant. It is understood and agreed that the second party is to furnish the land on which to build the said plant, and the water on said land ready to attach the pumps, and to provide all needed tilling, sewerage or drainage, at their own expense, from beyond fifty feet outside of building, if needed, aside from the price of plant named in the contract, and within thirty days from the date of this contract, the second party shall provide the first party with a written or printed description of the land with permit to build thereon, free from all incumbrances or liabilities."

That the obligation imposed upon and assumed by the appellees by this clause is joint is too plain for discussion. Party of the first part agreed to build, equip, and complete for the parties of the second part "a milk condenser plant" for the agreed price of \$42,000. The price so agreed upon was to be paid by the parties of the second part, who were also to furnish the land on which the plant was to be built. They were not to pay aliquot parts of the contract price, nor to furnish aliquot portions of the land; but, jointly, they were

to pay the sum agreed upon, and, jointly, to furnish the land needed. "Wherever an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of law that it is a joint obligation or right. Words of joinder are not necessary for this purpose; but, on the other hand, there should be words of severance, in order to produce a several responsibility or a several right. Whether the liability incurred is joint, or several, or such that it is either joint or several at the election of the other contracting party, depends (the rule above stated being kept in view) upon the terms of the contract, if they are express." 1 Parsons on Contracts, p. 11. "It is a general presumption of law, when two or more persons undertake an obligation, that they undertake jointly. Words of severance are necessary to overcome this primary presumption. In all written contracts, therefore, whether the liability incurred is joint or several, or joint and several, is to be determined by looking at the words of the instruments, and at them alone. The subject-matter of the contract, and the interests of the parties assuming a liability, have nothing to do with the question. It may be otherwise with respect to the rights of the covenantees, where there are more than one. There are not wanting cases in which it has been held that when the interests of the covenantees are several they may sue severally, though the terms of the covenant upon which they sue are strictly joint. Even this, however, has been doubted. But, however it may be with the rights of covenantees, it is a settled rule that whether the liability of covenantors is joint, or several, or both, depends exclusively upon the words of the covenant. And the language of severalty or joinder is the test. The covenant is always joint unless declared to be otherwise. *Enys v. Donnithorne*, 2 Burrows, 1190; *Phillips v. Bonsall*, 2 Bin. 183." *City of Philadelphia v. Reeves*, 48 Pa. 472.

Of the above-quoted clause in the contract the learned judge said: "The first clause of the contract, standing alone, with the bare signatures of the Sayre Lumber Company and the defendants, would undoubtedly make the undertaking a joint one;" but he was of opinion that, taking the contract as a whole, the intention of the parties, as gathered from it, was that it was several, and not joint, and that each of the parties of the second part should be bound only to the extent of his subscription to the capital stock of a proposed corporation. The clauses in the agreement from which he interpreted the contract as a whole to be several are as follows: "For the purpose of forming a corporation to own and operate said factory and fully carry out the intention of the subscribers, it is hereby agreed that when this contract is closed second parties are to incorporate under the laws of the state limited corporation stock, nonassessable, fixing the aggregate amount of capital at not less than the amount subscribed,

divided into shares of one hundred dollars each, or according to the laws of the state, which are to be issued to subscribers in proportion to their paid-up interests in said factory; and it is understood and agreed that the by-laws shall provide that one-half a cent a can toll shall be set aside as a fund and declared and paid to shareholders as dividend on stock, and shall be paid for no other purpose. And it is further agreed by and between all the subscribers for stock that the producers of milk are to receive all its product brings, less the actual cost of canning, packing, marketing, etc., after one-half a cent a can has been declared as a dividend. In consideration of the above, all agree that all their milk shall be furnished to said condensory. For a full and faithful performance of our respective parts of this contract we bind ourselves and our successors."

The intention of the parties of the second part to the agreement evidently was that they would become incorporated for the purpose of conducting the "milk condensory" under corporate management. One hundred and fifty of the one hundred and eighty-six subscribed for stock, amounting in the aggregate to \$40,600. The remaining thirty-six subscribed for no stock at all, but set opposite their respective signatures the number of cows whose milk presumably they agreed they would furnish to the "condensory." Of the 150 who agreed to take stock, some also made the same apparent agreement as to milk. Instead of making their incorporation the subject of an independent agreement, they put it in the shape of an appendage to their contract with the Sayre Lumber Company; but, though so appended, it is independent of that contract, and is a separate and distinct agreement of the parties, relating to a different matter. The only reference in this appended agreement to the contract with the Sayre Lumber Company is for the purpose of fixing the time when the subscribers would become incorporated. Without reference to the contract price which they agreed they would pay for their plant, they agreed to become incorporated with a capital not less than the amount of their subscriptions, which amounted to only \$40,600, or \$1,400 less than they had agreed to pay for their plant. In this respect, as well as in others, the present case differs from the following, relied upon by the learned judge in support of the judgment entered: *Davis & Rankin Building & Manufacturing Co. v. Jones*, 66 Fed. 124, 14 C. C. A. 30, 32 U. S. App. 32; *Davis & Rankin Building & Manufacturing Co. v. Barber et al.* (C. C.) 51 Fed. 148; *Davis v. Belford*, 70 Mich. 120, 37 N. W. 919; *Davis & Rankin Building & Manufacturing Co. v. Murray*, 102 Mich. 217, 60 N. W. 437; *Gibbons v. Grinsel*, 79 Wis. 365, 48 N. W. 255; *Davis v. Ravenna Creamery Co.*, 48 Neb. 471, 67 N. W. 436. We have examined each of these cases, and whether they were correctly decided, or whether the contrary view, as expressed in

Davis v. Shafer (C. C.) 50 Fed. 764, was the correct one, we need not determine; for in all of them the agreement to incorporate was part of the agreement for the erection of the plant. In each case the agreement was that when the contract price for the plant had been subscribed for the subscribers would become incorporated, with a capital stock not less than the amount of their aggregate subscriptions as found after their signatures to the agreement for the erection of the plant; and the opinion of the court in each case was that it was manifest, from the face of the contract for the erection of the "condensory" or creamery, part of which was the agreement to become incorporated, that the intention of the parties was that the amount each should pay for the erection of the building should be limited to the amount of his subscription. In each case after the name of each of the parties appeared the amount of stock that he had subscribed for in the proposed corporation. There were no parties to any of those agreements who did not agree to subscribe for stock. In the present case the amount of stock subscribed for is less than the contract price that the parties agreed to pay for the plant, and 36 of them have not subscribed for any stock at all, but opposite each name appears a specified number of cows. The milk of the cows would be of use to the "condensory," but neither the milk nor the cows were what Pittsley agreed to receive for what he furnished to the parties of the second part, nor were they what the said parties agreed to pay. He was to get \$42,000 in money, and yet, under the view expressed by the learned court below, if each subscriber is limited to the amount of his subscription, instead of receiving \$42,000, the appellants cannot collect more than \$40,600; and, if the several liability is to be enforced against the remaining parties to the agreement, cows or milk are all that the appellants can recover from them, for nothing else appears opposite the signatures of 36 who signed the agreement to pay \$42,000 in money.

This judgment was on a demurrer, and all that we now decide is that on the face of the contract, as set forth in the statement, the liability of the appellees is joint. The present judgment, relieving them from liability in this joint action against them, is reversed, and the demurrers are overruled, with leave to plead.

(306 Pa. 155)

BREW v. HASTINGS et al.

(Supreme Court of Pennsylvania. May 11, 1903.)

SURVIVING PARTNERS—ACCOUNTING.

1. The articles of copartnership provided for the continuance of the firm after the death of a member, but that the representative of the decedent should not participate in the firm business, but should receive 6 per cent. per annum on the capital invested and a share in the profits from year to year. *Held*, that the repre-

representatives of the decedent could not maintain a bill for an accounting for interest and profits until the expiration of the term of the partnership, where the answers of the surviving partners show that decedent at the time of his death had withdrawn an amount in excess of his interest from the firm.

Appeal from Court of Common Pleas, Center County.

Bill by George T. Brew, administrator of George W. Jackson, against Daniel H. Hastings and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Love, P. J., filed the following opinion of the court below:

"The plaintiff filed his bill, alleging the formation of the partnership of Jackson, Hastings & Co., August 31, 1897, between Geo. W. Jackson, Daniel H. Hastings, J. Henry Cochrane, and Henry C. McCormick. That the capital stock was \$50,000, of which sum Geo. W. Jackson was to pay into the common fund \$20,000, D. H. Hastings \$16,666%, J. Henry Cochrane \$6,666%, and H. C. McCormick \$6,666%. That the said Geo. W. Jackson did contribute his \$20,000 to said capital stock. That Geo. W. Jackson died intestate October 22, 1897, and letters of administration duly issued to Geo. T. Brew, plaintiff, and Geo. L. Jackson. That Geo. L. Jackson died on or about May 21, 1900. That the partnership was to continue for the term of ten years. That the fourth paragraph of the articles of copartnership provided: 'That in the event of the death of one or more of the partners before the expiration of the term fixed for the duration of the partnership, the capital of the deceased partner or partners shall remain in and be employed in the business until the end of the term for which this partnership is created unless otherwise agreed between the surviving partners or partner, and the legal representatives of the deceased partner or partners, and the survivor or survivors, shall have the right to continue to use the copartnership name. The legal representatives of the deceased partner or partners in such case, however, shall be paid six per cent. per annum on the capital invested by said partner or partners, and shall also participate from year to year, during the term aforesaid, in the earnings, in the same manner, in the same proportions and to the same extent, as the deceased partner himself would have participated under the terms of this agreement, had he continued in full life until the expiration of the term of the partnership hereby fixed. And it is further distinctly agreed that the surviving partner or partners shall have the entire, exclusive and independent management of the business as fully as all the partners now have, with no increased liability for mistakes, accidents or errors of judgment, and the legal representatives of any deceased copartner shall at no time have any voice in or power of control over the policy of the management or conduct in said business.' That the

capital of said Geo. W. Jackson, deceased, interest, and undivided profits have remained in said business, under the custody and control of said defendants, from the date of his death, October 22, 1897, to the time of filing the bill. That the plaintiff has repeatedly demanded the payment of the interest due upon the capital of said Geo. W. Jackson in said business, and that the defendants have refused and still refuse to pay the same, and refuse to render any statement or account of the profits of said business. The prayers are for a decree for the payment of \$3,600, the amount of interest alleged to be due on the capital of the decedent in said partnership, and for an accounting of the profits thereof to the time of the filing of said bill.

"The answer admits most of the facts alleged in the bill. It denies that any demand was made for the payment of the interest by the plaintiff. It denies the liability of the defendants to pay the interest or to account. It alleges that the decedent was largely indebted to the partnership; that the administrators paid on account of the said indebtedness the sum of about \$43,000; that the estate of the decedent is still indebted to the partnership in excess of the capital stock of said decedent in the partnership; and that there is no liability to account until the term of the partnership expires. The answer also alleges that the matters alleged in the bill are res adjudicata; that they were passed upon and determined in No. 1, August term, 1898, between the same parties, when this court decreed an accounting to be had, from which an appeal was taken to the Supreme Court, and the decree of the lower court reversed, reported in *Brew v. Hastings et al.*, 196 Pa. 222, 46 Atl. 257.

"The facts, as appear from the pleadings and evidence, are as follows: The firm or copartnership of Jackson, Hastings & Co. was formed between Geo. W. Jackson, D. H. Hastings, J. Henry Cochrane, and H. C. McCormick, August 31, 1897. The contract of partnership was in writing of that date, and prescribed the terms and conditions of the partnership, the term of 10 years for which it was to continue, and fixed the capital stock at \$50,000. Geo. W. Jackson paid into the concern \$20,000 as his share, D. H. Hastings \$16,666%, and each of the other partners \$6,666% each. It was provided that the death of one or more of the partners should not work a dissolution of the partnership, that the capital of a deceased partner should remain in the business until the expiration of the term provided for in the agreement, and that the legal representatives of a deceased partner should receive 6 per cent. per annum upon the capital of such deceased partner, as well as participate from year to year in the earnings, in the same manner and in the same proportions and to the same extent as the deceased partner

would have done while living. The survivor or survivors are to have the exclusive and entire control of the business. Geo. W. Jackson died on or about October 22, 1897. That the survivors have continued the business in the firm name of Jackson, Hastings & Co. ever since. That the survivors or the firm have neither paid the interest, as provided in the agreement, nor have they rendered any account of the profits or earnings of the business from year to year, but have refused to pay the interest or render any account of the earnings of the business to the legal representative of the estate of said Geo. W. Jackson, deceased. That the plaintiff, the duly qualified administrator of the estate of Geo. W. Jackson, deceased, has demanded the payment of the interest and an account of the earnings of the business from the defendants, but they have refused to either pay the interest or to render any account. The defendants, however, contend that they are not liable to either pay the interest claimed by the plaintiff or account as provided in the articles of copartnership, because they allege the estate of Geo. W. Jackson is still indebted to the partnership to an amount in excess of his capital stock therein. This is denied by the plaintiff. The real question, therefore, involved, is as to the right of the defendants to set off their alleged claim against the said estate against the claim of the plaintiff, based upon the express terms and conditions of the contract of copartnership.

"The contention of the defendants involves the following propositions: (1) The right that under the contract of copartnership, because of the alleged indebtedness of the estate of Geo. W. Jackson, deceased, to the firm, they are not liable, legally or equitably, to pay the interest, as provided in the agreement or to account. (2) That, notwithstanding that the legal representatives of the estate of said decedent deny said alleged indebtedness, yet the defendants are in no wise obliged to establish said claim against said estate by legal proof, and that they have the right to refuse the inspection or examination of the books and accounts of the firm to the plaintiff, whereby the justness and legality of said alleged indebtedness could be determined. (3) That, because of the said alleged indebtedness due the firm, that the defendants, without proving their claim, can offset it against the demands of the plaintiff, based on the express terms of the contract of copartnership, and thus they assume the right to distribute the estate of the decedent, regardless of the rights of other creditors thereof or of the insolvency of the estate. (4) That the said alleged claim of the firm against the estate, without duly proving the same or putting it in judgment, is entitled to preference over the claims of other creditors of said estate; and, further, that the defendants can definitely violate and repudiate the terms of the contract of copartnership,

and refuse to be bound by or comply with the terms thereof, while the legal representatives of the estate of Geo. W. Jackson are to be held and bound by the very letter of it, until it expires by its own limitation.

"These propositions are practically the same as were involved when the case was before us in the case of *Brew v. Hastings et al.*, to No. 1, August term, 1898. We then found and held that partnership was practically dissolved; not because the evidence of a parol agreement to dissolve warranted it, as we distinctly said it did not, but that the parties so treated it, and we decreed a dissolution of it. The decree was based upon all the evidence, acts, and the claim of the defendants that they were not obliged to comply with the terms of the articles of copartnership, and did not propose to; that they did not propose to pay the annual interest upon the capital of the estate of Geo. W. Jackson in the business, or allow his legal representatives to also participate from year to year in the earnings of the business. They assumed, as they do now, that because of their alleged claim against the estate of said decedent they could appropriate the capital of said decedent to the payment of their claim, the legality of which was denied, without legally proving the same or putting it in judgment, and thus liquidate the interest of said decedent in the partnership in their own way, regardless of the rights of other creditors of the estate, or of its insolvency. We had always understood the law to be, and in fact had not heard it mooted, that a contract should be mutually binding upon all parties to it, and, if one or the other of the parties refuse to be bound or comply with its terms, that the other could have a remedy for the breach thereof or rescind the contract. Thus the contractual relation would be dissolved, and, if it were a contract of partnership, it would work its dissolution, and the accounts of the partnership would be subject to adjustment and settlement and the rights of the parties determined.

"Inasmuch as the defendants claimed the right and assumed to liquidate the interest of the estate of Geo. W. Jackson in the copartnership, with the other facts in the case, and their refusal to abide by the terms of the agreement, we felt warranted in decreeing a dissolution of the partnership when the case was before us on the prior hearing. We also held that, if the estate was indebted to the firm as alleged, that the firm, as a creditor of the estate, had no preference over other creditors, and that the defendants could not assume to distribute in their own way the estate of the decedent.

"This is a preliminary hearing, asking for a decree, ordering an account, and the payment of money. The defendants take the same position now that they did in the former hearing and trial. They deny their legal liability to pay the interest on the capital of decedent's estate paid into the partnership

annually, and to pay the earnings from year to year, as provided in the agreement, because they allege the estate is indebted to them in excess of the amount of the said capital paid in. In other words, they are not obliged to perform their part of the contract. They do not retain the said capital as a loan under the articles, but appropriate it to a claim that is disputed. Suppose the defendants asserted no claim against the estate of Geo. W. Jackson, and the defendants refused to pay the interest and the earnings from year to year, as provided in the agreement, would it be held that the estate would be bound by the letter of the agreement, and would be remediless, until the term of the partnership expired by the limitation therein provided? We hardly think so.

"So the question involved in the case is whether one party to a contract is to be bound and the other not? Whether the defendants, because of an alleged claim, which is denied by the plaintiff, can assume to appropriate the interest of Geo. W. Jackson, deceased, to the payment thereof, without legally proving the same or subjecting it to proper investigation and examination, and thus liquidate the interest of said estate in the partnership, and, further, whether the defendant can assume to distribute the estate of said decedent, regardless of the rights of other creditors or its insolvency, the defendants contend they have such right. It would appear from the decision in *Brew v. Hastings et al.*, 196 Pa. 222, 46 Atl. 257, it was meant to sustain the contention of the defendants and that they are not liable to account. Under that decision we feel constrained to dismiss the bill, and refuse the prayers thereof."

"Error assigned" was the decree of the court.

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Charles P. Hewes and John M. Dale, for appellant. Seth T. McCormick and Wilbur F. Reeder, for appellees.

PER CURIAM. In the case of *Brew v. Hastings et al.*, 196 Pa. 222, 46 Atl. 257, we decided that the partnership agreement between the parties of September 1, 1897, was a valid one, equally binding upon all, and that their rights and remedies against each other must be defined and restricted by its terms. That suit was brought in 1899, the one before us in March, 1901. We did not hold in the former, nor do we hold in this case, that defendants are not accountable. We do hold that under the agreement the suits for an account now are premature, and the decree of the learned judge of the court below is to that effect, although his reasoning would lead to an entirely different one. In substance, part of the argument of the able counsel for appellant is an apology for the inconsistent reasons given; but these are immaterial. As we have more than once

said, we do not review reasons for judgments. If the judgment be right, even though the reasons given wholly fail to sustain it, or would logically lead to a different one, it must stand.

In the first case, in our view of the law, we felt compelled to reverse the judgment, and at some length we gave our reasons therefor. In the present case the learned judge of the court below inadvertently fell into the mistake of assuming that one of his functions was that of reviewing a decree of this court, while the law and the Constitution restrict that function to a vindication of his own. Hence this anomalous record of an opinion calling for a decree in favor of plaintiff, yet concluding with one in favor of defendants. But as the decree is right, the reasons work no material injury to anybody; we pass them over, therefore, as harmless, and affirm his decree.

Decree affirmed accordingly.

(206 Pa. 208)

KELLEY v. SHAY et al.

(Supreme Court of Pennsylvania. May 11, 1903.)

**INTERVENTION—DECREE—CROSS-BILL—
PARTNERSHIP—ACCOUNTING.**

1. Where, on a bill for a partnership accounting, plaintiff sets up a debt owing by the firm to a third party, who is made defendant by intervention, and the debt is established in the accounting, the intervening creditor is entitled to a decree in his favor without filing a cross-bill.

2. Where, on dissolution of a partnership, the sale of the partnership property would, under the circumstances, give an advantage to one of the partners in the bidding, the court, on payment of all the debts, may divide the property in specie.

Appeal from Court of Common Pleas, Washington County.

Bill by H. A. Kelley against John W. Shay and others. From the decree the defendants appeal. Affirmed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

A. M. Todd, John C. Bane, and George A. Jenks, for appellants. A. Leo Well, John W. Donnan, David Sterrett, and Chas. M. Thorp, for appellee.

POTTER, J. This bill is filed for an accounting of partnership transactions, and for the appointment of a receiver. The bill avers and the answer admits that a partnership, under the firm name of John W. Shay, was formed between Shay and Kelley in the spring of 1891, for the purpose of drilling oil and gas wells by contract in Washington county, Pa. The partnership continued until its dissolution by defendant Shay on November 27, 1897. During the existence of the partnership, each member was at liberty to engage in the business of leasing lands and producing oil upon his own account, and each of them availed himself of this privilege. In

conducting the business of the firm, Kelley was the outside man, and did the field work, while Shay was the financial man, and the managing partner, and took the contracts, collected and paid out the money, and kept the books. Shay and Kelley were also partners with others in similar operations in West Virginia and in Greene county, Pa.; the Greene county leases having been negotiated by one McCaulley, under an agreement by which he was to have an interest in the leases. Shay alleges that at three different periods during the existence of the partnerships, final settlements to their dates were made between the partners, and balances shown were paid, and receipted for by the plaintiff. But the court below finds that, without fraud or wrongful intent upon Shay's part, very serious and extensive errors were made in the keeping of the accounts, which warranted the disregarding of the intended settlements, and entitled Kelley to an accounting for the entire period of the partnership. The court suggested, however, that it be "along the lines of the defendant's accounting heretofore, in order that from the books and accounts kept of the business between them there may be pointed out errors and items of debit and credit, and explained in the various accounts, and the recollection of the parties concerned refreshed from them." He therefore appointed James I. Brownson, Jr., Esq., as assessor, to call before him the parties, with their account books, vouchers, and papers, from which, and from the testimony to be taken, he was to state an account; and, in order to facilitate the taking of the testimony, he was, by agreement of all concerned, appointed an examiner, for the purpose of administering oaths and taking the depositions of witnesses. The assessor proceeded most thoroughly and diligently with the duties of his appointment, and after much patient investigation and careful consideration, filed a clear, methodical, and able account; and thereafter, the assessor having filed his report, and exceptions thereto having been filed by both parties, and additional testimony having been taken before the court, after argument by counsel, and due consideration, the court entered a final decree, dismissing most of the exceptions, and confirming the report, as modified in certain particulars. The decree sets forth, *inter alia*, that certain shares of the capital stock of the Greensboro Natural Gas Company, standing in the name of John W. Shay, and subscribed for by him, and purchased with partnership property, are the property of the partnership of Shay & Kelley, and are subject also to the interest of S. F. McCaulley therein. The interests of the several parties are further defined by the decree, and the gas company is directed to issue certificates of stock to the parties entitled thereto, upon payment of the balances yet due. It is argued here, under the assignments of error filed upon behalf of the appellant Shay, that the defendant McCaulley

was not entitled under the pleadings to affirmative relief, in the absence of a cross-bill. He was not an original defendant. It was found upon preliminary hearing that McCaulley claimed an interest in the partnership and in the property in controversy, and the appellant Shay moved to dismiss the bill for these reasons. The court below refused, but ordered the case to stand over until McCaulley should be brought upon the record. Upon notice and service of the bill, to which his name had been added as defendant by an amendment duly allowed, McCaulley appeared, and filed what was termed an "answer," but which, in effect, was a petition to intervene. Upon final hearing, it was found that the partnership owed money to McCaulley, and that he was also entitled to certain shares of stock of the Greensboro Natural Gas Company, which were held by the receivers of the partnership. The court directed that the money should be paid, and the certificates of stock should be delivered to McCaulley. This is the extent of the affirmative relief granted to him, and of which appellant complains. It was no more than would have been required if McCaulley had not been a party to the bill. The indebtedness of the partnership to him must have been ascertained and paid before the partnership affairs could be wound up and the assets distributed. It was not the awarding of an amount claimed by both partners or by neither. Kelley admitted McCaulley had a claim, but did not know the amount; Shay denied it altogether. Before Kelley's interest in the partnership could be ascertained, McCaulley's claim must be determined. The method pursued simply made McCaulley a party to the adjudication, and bound him by the result. To the general rule which requires a defendant to file a cross-bill when seeking to enforce his rights, there is a well-recognized exception in cases of accounting where a balance is found due to the defendant. Thus in *Freeland v. South Penn Oil Co.*, 189 Pa. 54, 41 Atl. 1000, after citing the rule, Justice Fell, delivering the opinion of the court, thus continues: "There are some well-recognized exceptions to this rule, where a defendant may have a decree in his favor without a cross-bill, as on a bill for a specific performance, where the defendant sets up in the answer and proves an agreement different from the one sought to be enforced; on a bill for accounting, if a balance is found due the defendant; and on a bill for partition, where the defendant claims the same relief as is sought by the original bill. These and other exceptions are very clearly stated in 5 Ency. of Pl. & Pr. p. 634." And in *Langdell on Equity Pleading* (section 159, p. 184), after discussing the question as to the necessity for a cross-bill, it is said: "So where the decision of a controversy between a plaintiff and two defendants raises an incidental and collateral question between the codefendants, the court will sometimes dispose of the matter by

means of a reference to a master, and thus save the expense of a separate suit, and the same course has been taken where it was impossible to give the plaintiff the relief to which he was entitled without first deciding a question between the codefendants. *Hood v. Clapham*, 19 Beav. 90-96; *Duberly v. Day*, 14 Beav. 9."

But there is another ground upon which the action of the court below in this respect may be sustained. The adverse interest here is between codefendants, and, as between themselves, defendants may have affirmative relief without a cross-bill. In *Beach on Mod. Eq. Pr. § 430*, this rule is thus stated: "In chancery suits, where parties have been made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between codefendants may be passed upon and decided, although they are not put in issue by the pleadings, and no adversary proceedings are had; and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree"; and many authorities are cited to sustain the proposition. The partnership property was in the hands of the court, through its receivers, and was there for division and distribution. McCaulley claimed an interest in the property. The interests of the partners could not be determined until his claim was adjudicated. He appeared, and submitted his interests to the court, and asked for its protection; and the court has by its decree, made with all parties in interest before it, defined the extent of McCaulley's interest, and was thereby enabled to determine the main controversy between the partners, and state the account between them. We see no error in its action in so doing. The court found as facts that both the partnership and McCaulley had interests in the lease upon the Gray farm in Greene county, Pa., and that Shay had exchanged that lease for stock in the Greensboro Natural Gas Company, and it therefore ordered Shay to turn over to McCaulley and to the partnership their proportionate shares of the stock. This was manifestly right upon the facts, and we will not, of course, disturb the finding of facts by the court below.

The appellant complains, also, that the court, having found that the partnership owned certain shares of the stock of the Greensboro Natural Gas Company, ordered the distribution of the said stock to be made in specie, instead of directing it to be sold, and the proceeds divided. The general rule is that, upon the dissolution of a partnership, it is the right of each partner to have the partnership property converted into money by a sale. The reason for this course is that it is generally the fairest way to pro-

ceed. But here the court has found that the partnership debts are all paid, and hence there is no need for money, and that further, in case of a sale of the stock, Shay would, from the circumstances of the case, have certain advantages over Kelley, so that, to use the language of the court, "these parties would not be upon an equality in bidding for the stock if it were put up for sale, and that it will be fairer and more just to give to each his proper share of the stock in specie, if Kelley's proportion of the liability to the gas company is provided for." Equity and good conscience, therefore, require that in the present case the stock should be divided in kind, rather than that it should be sold and the proceeds divided. The rule is generally the other way, because the fairest results are in most cases reached by a sale. But where, as here, the reason fails, the rule must be honored in the breach, rather than in the observance.

The conclusions of law reached by the court below are warranted by the facts as found by him, and we are not convinced that the evidence fails to support, in any particular, his findings of fact. It follows that the specifications of error based thereon cannot be sustained. The thirteenth specification of error complains of the placing of the costs upon this appellant. Under the evidence, as a whole, we think they were properly imposed. The court below will, of course, protect the interests of the Greensboro Natural Gas Company in obeying its order to transfer upon its books the shares of stock to the various parties entitled thereto.

The assignments of error are all overruled, the appeal is dismissed, and the decree of the court below is affirmed.

(206 Pa. 215)

KELLEY v. SHAY et al.

(Supreme Court of Pennsylvania. May 11, 1903.)

APPEAL—REVIEW—PARTNERSHIP—ACCOUNTING—INTEREST—RIGHTS OF PARTNER.

1. A finding of fact based on sufficient evidence will not be reversed on appeal.

2. A partner will not be charged with interest on money of the firm in his hands, where the retention has not been fraudulent, and there has been no misapplication of the money.

3. A partner who purchases stock of a corporation in whose business the firm is interested, and pays for the same out of the partnership assets, may buy with his own money stock of the same corporation, where he has reserved to himself the right to engage in business upon his own account of the same character as that in which the firm is engaged.

Appeal from Court of Common Pleas, Washington County.

Bill by H. A. Kelley against John W. Shay and others. From the decree the plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

John W. Donnan, David Sterrett, A. Leo Weil, and C. M. Thorp, for appellant. George A. Jenks, John C. Bane, and Todd & Wiley, for appellee John W. Shay. Edwin S. Craig and Andrew M. Linn, for appellee Greensboro Natural Gas Company.

POTTER, J. The assignments of error in this case are directed in the first instance against the action of the court below in refusing to include in the order for an accounting the transactions of the firm of J. W. Shay & Co. We consider the court's findings of fact as a sufficient answer to this complaint. It has found that the interest of Shay and Kelley, respectively, in the firm of J. W. Shay & Co. were individual interests, and that the partnership of Shay & Kelley was not interested as a firm in the said firm of J. W. Shay & Co.; and further, that upon the sale of the property of Shay & Co., and after the payment of all existing debts of the said firm, "the net balance was distributed and paid to the several members of the firm in proportion to their respective interests, and said firm was dissolved, and its entire assets disposed of and paid out," with the exception of certain tools, cordage, etc., which were bought by Shay and Kelley, respectively. If this finding is correct, it follows that Kelley is not now entitled to any further accounting from Shay for the business of J. W. Shay & Co. Neither do we see any substantial merit in the suggestion that Shay failed to account in accordance with the terms of the order of court, and that instead of so doing he compelled Kelley to assume the burden of proof, and the expense of surcharging and falsifying the books and papers of Shay. The whole matter was referred to the assessor, to be thoroughly sifted and probed, and with full power to call for all accounts, books, vouchers, and papers, so that he might make a complete and searching investigation. His report shows that he did so, and that the opposing contentions and claims of the parties were submitted, supported, and combated to the fullest extent. It is difficult to see how there could be any more thorough sifting of the facts, or how a more full and accurate investigation could be made. No complaint was made by the assessor of any refusal or failure upon the part of Shay to produce books or accounts, or afford any and all information as to the affairs of the parties concerned within his possession. The assessor gave careful consideration to the question of the allowance of interest to Kelley upon the balance found to be due him from Shay, and we are not inclined to disturb the conclusion reached by him as confirmed by the court below. There is much confusion in the authorities as to what is proper in the allowance of interest in partnership accountings, and it

can hardly be held that any fixed rule has been established. The state of the authorities is in fact not such as to justify the deduction from them of any general principles upon this subject. *Lindley on Partnership*, *389. Except where there has been a fraudulent retention or an improper application of money of the firm, it is not the practice of the court to charge a partner with interest on money of the firm in his hands. *Lindley on Partnership*, *391. In *Brenner v. Carter*, 203 Pa. 75, 52 Atl. 178, the following language was approved in the opinion of our Brother BROWN (page 77, 203 Pa., page 178, 52 Atl.): "The Pennsylvania rule on this subject was laid down by Mr. Justice Sharswood in *Gyger's Appeal*, 62 Pa. 78 [1 Am. Rep. 382]. In the settlement of partnership accounts, the allowance or refusal of interest depends upon the circumstances of each particular case; any unbending rule would work injustice in some case. And this rule has been frequently restated. *Jones v. Farquhar*, 186 Pa. 386 [40 Atl. 1134]." See, also, *Carter v. Producers' Oil Co.*, 200 Pa. 579, 50 Atl. 167.

The disposition of the question of interest by the court below seems to be, under all the circumstances of this case, equitable and just. There would be much force in the contention of Kelley as to his right in the stock of the Greensboro Natural Gas Company purchased by Shay with cash if it were not for the agreement by which each partner reserved to himself the right to engage in business upon his own account. The court below in its final opinion puts it thus: "As we have found, it was a part of the terms of the partnership that Shay should be at liberty to engage in business, and take interests, in the same line in which the firm was engaged, on his own individual account. We therefore think that, after taking for the firm the stock which was issued in payment for the firm's half interest in the Gray lease, and holding for it the stock which was paid for with the proceeds of the quarter interest sold to Craig, he was left at liberty, by the terms of the partnership, to subscribe on his own account for a part of the other stock which was to be sold for cash. He did so without any objection on Kelley's part. No part of the funds of the firm can be identified as having entered into and paid for the stock so taken. We decide that the twenty-five shares last above specified belong to and are the individual property of John W. Shay."

With these conclusions we agree, as we do with the final conclusion that Shay's liability as a trustee for Shay & Kelley and McCaulley is limited to 125 shares of the original stock, and a proportionate amount of the new issue.

The assignments of error are overruled, and the decree is affirmed.

(35 R. I. 387)

McGORAN v. NEW YORK, N. H. & H. R. CO.

(Supreme Court of Rhode Island. Aug. 8, 1903.)

RAILROADS—CROSSINGS—HIGHWAYS—AUTHORITY TO CONSTRUCT—INJURIES TO TRAVELER—CONTRIBUTORY NEGLIGENCE.

1. Under Gen. Laws 1896, c. 187, § 47, providing that every railroad corporation operating a railroad in the state shall cause a flagman to be placed where railroads cross public highways, when, in the opinion of the town council, it is necessary for the public safety, and Pub. Laws, c. 834, § 2, declaring that no highway shall be built across any railroad track at grade except by consent of the railroad commissioner, a railroad company is under no obligation to maintain a flagman at a grade crossing over a highway not authorized by the railroad commissioner, though the council has ordered that flagmen shall be provided at all grade crossings within the city limits.

2. A traveler on a highway was injured by a train at a crossing. The view of the track from the crossing was unobstructed for a distance of 1,700 feet in the direction from which the train was coming. From a point 50 feet back from the fence, on the street as he approached the crossing, the view of the track was unobstructed for 600 feet. When the whistle blew about 200 feet away, the traveler was 20 feet from the track, and, without stopping, looking, or listening, he drove along until the wagon was struck by the train. *Held*, that he was guilty of contributory negligence warranting the direction of a verdict for the railroad company.

Action by Margaret McGoran, executrix of William McGoran, against the New York, New Haven & Hartford Railroad Company. Verdict for defendant. Case heard on plaintiff's petition for new trial. Petition denied.

Argued before STINESS, C. J., and DOUGLAS and JOHNSON, JJ.

Hugh J. Carroll, for plaintiff. David S. Baker and Lewis A. Waterman, for defendant.

JOHNSON, J. This is an action of trespass on the case for negligence, brought by William McGoran, in his lifetime, against the New York, New Haven & Hartford Railroad Company, for damages for injuries received by him on the 18th day of November, 1899, while crossing a track of the defendant in Pawtucket, in consequence of his wagon being struck by a train owned and operated by the defendant. On the 2d day of August, 1901, the plaintiff died, and the executrix of his will thereupon entered her appearance in the case. At the trial of the case the presiding justice, on the conclusion of the plaintiff's testimony, directed the jury to return a verdict for the defendant.

The evidence shows that at the time the railroad was built, in 1875, the way which is now Webster street, with the land through which it ran, belonged to Terrence Daly, who, in his conveyance to the railroad company, reserved a right to himself, his heirs and assigns, to use this way over the tracks

which were to be laid down by the railroad company; that Daly sold lots to people along the street, and these people used the way; that in 1893 the street was laid out as a highway by the city of Pawtucket.

Chapter 834, p. 23, of the Public Laws, passed May 2, 1890, provides: "Sec. 2. From and after the passage of this act, no railroad corporation shall lay out or build its road, or lay its tracks across any railroad, street, highway, turnpike, or traveled way at grade, and no street, highway, turnpike, or road shall be laid out or built across any railroad track at grade, except by the consent of the railroad commissioner thereto, expressed in writing: provided, that if said railroad commissioner shall refuse to consent to any such crossing at grade, an appeal may be taken therefrom to the Supreme Court sitting en banc, of the county wherein said proposed grade crossing is located, and the decision of said court shall be final." There is no evidence that the consent of the railroad commissioner was given to the establishment of a grade crossing at the place in question, or that his consent to the same was ever asked until June, 1899; and it appears that, after a hearing, the railroad commissioner, on December 30, 1899, refused such consent. The evidence is that the crossing was used by Daly and his assigns, and by others, from the time the railroad was built to the time of the accident; that there were fences partly across the street on each side of the railroad, with gates, said gates being from 10 to 14 feet in length, sufficient to admit of the passage of only one team at a time; that these gates were usually open, but were occasionally shut; that there was a plank on each side of the outside rails. There was also evidence that an order was made October 21, 1896, by the city council of Pawtucket, that flagmen should be provided at all grade crossings within the city limits. The plaintiff contends that the company was negligent in not having a flagman at the crossing, in compliance with the order of the city council. The statute then in force (chapter 187 of the General Laws of 1896) provided: "Sec. 47. Every railroad corporation, or trustees of such corporation, operating a railroad within the state, shall cause flagmen to be placed wherever railroads cross public highways, whenever in the opinion of the town council it is necessary for the safety of the public." This, however, applied only to crossings over public highways. The establishment of a public highway across the railroad at grade could only be made with the consent of the railroad commissioner, expressed in writing. In the absence of such consent, the railroad company would be under no obligation to maintain a flagman at the crossing.

The testimony, however, fails to show due care on the part of William McGoran at the time of the accident. It appears that the view of the railroad track from the crossing

§ 2. See Railroads, vol. 41, Cent. Dig. §§ 1045, 1060, 1129.

was clear and unobstructed for a distance of 1,700 feet in the direction from which the train was coming, and that from a point 50 feet back from the fence, on the street as he approached the crossing, the view of the track was unobstructed for 600 feet; also that when the whistle blew at Coyle avenue, about 200 feet away, he was 20 feet or more from the track on which the team was struck; that he did not stop, look, or listen, but drove right along until the wagon was struck. The verdict for the defendant was therefore rightly directed.

Petition for new trial denied, and case remanded to the common pleas division, with direction to enter judgment upon the verdict.

(25 R. I. 377)

THOMPSON v. HOXSIE.

(Supreme Court of Rhode Island. July 24, 1903.)

ACTIONS AGAINST ADMINISTRATORS—DEATH OF ADMINISTRATOR—LIMITATIONS—WAIVER.

1. Pub. St. 1882, c. 189, § 8, provides that no action shall be brought against any administrator after three years from the time of grant of administration. Gen. Laws 1896, c. 218, § 14, declares that when an administrator, after qualification, dies without having fully administered the estate, and a new administrator is appointed, the new administration shall be deemed to be a continuance of the preceding administration. Action was commenced against an administrator *de bonis non* within three years of his appointment, but more than three years after the original grant. *Held* that, as the new administration was a continuance of the preceding administration, and more than three years, not including the interim, had elapsed before suit was instituted, limitations were a bar to the action.

2. Under Pub. Laws 1882, c. 189, § 8, providing that no action shall be brought against any administrator after three years from the time of grant of administration, where an action is commenced against an administrator *de bonis non* within three years from his appointment, but more than three years from the original grant, it is of no avail to defeat limitations that the administrator *de bonis non* never filed any statement allowing or denying claims.

3. Under Gen. Laws 1896, c. 215, §§ 2, 3, prescribing the time for the presentation of claims against the estate of deceased persons, where the time within which the plaintiff's claim could be presented had expired prior to its presentation to the administrator *de bonis non*, he has no standing to enforce it by action.

4. Under Pub. St. 1882, c. 189, § 8, providing that no action shall be brought against any administrator after three years from the grant of administration, failure to institute suit on a claim within the time prescribed extinguishes the claim, though the administrator allowed it and promised to pay it.

Action by Mary B. Thompson against William Hoxsie, as administrator *de bonis non* of the estate of William Court Pendleton. Heard on defendant's demurrer to plaintiff's replication. Demurrer sustained.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

John W. Sweeney, for plaintiff. A. B. Crafts, for defendant.

TILLINGHAST, J. The pleadings in this case, up to the present stage thereof, fully appear in the opinion of this court by Stiness, C. J., reported in 24 R. I. 494, 53 Atl. 873. There we sustained the defendant's third plea, which was based upon the special statute of limitations, on the plaintiff's demurrer to said plea, which plea alleged that the plaintiff did not bring her action against Samuel H. Cross, the original administrator, or against William Hoxsie, the administrator *de bonis non*, within three years after the first publication of the notice of Cross' qualification as administrator, and setting up the bar of Pub. St. 1882, c. 189, § 8, which reads as follows: "No action shall be brought against any executor or administrator in his said capacity within one year after the will shall be proved or administration granted, nor after three years from the time of such proof or grant, except for the causes mentioned in section seventeen of chapter one hundred eighty-six, provided notice of his appointment be given according to law, said periods to be reckoned from the time of giving such notice." The plaintiff's demurrer to the defendant's fourth plea was sustained by this court in said opinion. This plea differed from the third in that it set up the bar of two years' limitation under Gen. Laws 1896, c. 218, § 9. It will thus be seen that the court, following *Gunn v. Kelliher*, Adm'r, 20 R. I. 180, 38 Atl. 8, held that, inasmuch as the action was commenced February 15, 1900, which was more than three years after the time when the original administrator, Samuel H. Cross, qualified as such, the action could not be maintained, as said section of the Public Statutes above quoted alone applied, and was a complete bar to the action. The plaintiff now files a replication to said third plea, in which she alleges (1) that she presented her claim to said Cross, as administrator, within the time limited by law; (2) that said Cross allowed her said claim, and promised to pay the same; (3) that after the decease of said Cross, and within the time limited by law, she presented her claim to the administrator *de bonis non*; and (4) that said administrator *de bonis non* never filed in the probate court any statement allowing or denying the validity of plaintiff's claim, and never gave notice that it was disputed. To this replication the defendant demurs on the ground that it is insufficient, invalid, and ineffective.

The argument of plaintiff's counsel in support of this replication is that under the provisions of Pub. St. 1882, c. 189, § 8, the plaintiff could have brought suit upon her claim at any time up to January 15, 1899: this being the time when the three years

¶ 4. Executors and Administrators, vol. 22, Cent. Dig. § 1756; Limitation of Actions, vol. 23, Cent. Dig. § 582.

from the date of the first publication of notice by Mr. Cross expired. He then takes the position, as we understand from his brief, that as Mr. Hoxsie, the defendant, was appointed administrator de bonis non August 1, 1898, under the provisions of the General Laws which took effect February 1, 1896, the case is governed by the provisions thereof, and not by the provisions of the Public Statutes which were in force at the time of the appointment and qualification of the first administrator. And the specific claim made is that section 14 of chapter 218 of the General Laws of 1896, providing for the continuity of time limits through successive administrations, is new, and is not found in said Public Statutes. Said section reads as follows: "When an executor or administrator, after qualification, dies, resigns, or is removed, without having fully administered the estate of the deceased, and a new administrator is appointed, such new administration shall be deemed to be a continuation of the preceding administration, and all limitations which could be claimed for or against the predecessor shall be claimed and enforced by such successor: provided, however, that the time when there is no representative of the estate shall not be reckoned as part of the periods for the presentation or proof of claims or limitations for bringing suits; and such periods, and generally the periods referred to in this and the preceding title, where no provision to the contrary is made, shall be reckoned exclusive of such time." Even conceding, for the purposes of the argument, that this section is applicable to the case before us, it furnishes no support for the position taken. On the contrary, it is directly opposed to such position, in that it clearly provides that the new administration, which is that of Mr. Hoxsie, is merely a continuation of the preceding administration, namely, that of Mr. Cross. And as it appears that more than three years, not counting the interim, had elapsed after the appointment and qualification of Mr. Cross before the suit was instituted, the special statute of limitations hereinbefore referred to is a full and complete bar to the action. But, as held by this court in the former opinion, the case, in so far as it pertains to the estate of William C. Pendleton, the intestate, is governed by said Public Statutes, and not by the General Laws. And, as under said Public Statutes the administrator de bonis non was not obliged to file in the probate court any statement of claims allowed or disallowed by him (see *Barber v. Collins*, 18 R. I. 763, 30 Atl. 798), the plaintiff's allegation in her replication that within the time limited by law she presented her claim to him, and that he never filed any statement allowing or denying the validity thereof, and never gave notice that the claim was disputed, is of no account; for, as argued by defendant's counsel, "presentation alone would avail nothing,

and, unless suit was begun within three years, the claimant would be remediless." But, even assuming again that the plaintiff's claim as against said Hoxsie, administrator, is governed by Gen. Laws 1896, c. 215, §§ 2, 3, as argued by counsel in her behalf, still it is clear that she has no standing in court; for under section 2 of that chapter, construed, as it must be, as directed in section 1, the time within which the plaintiff's claim could be presented to the administrator had expired long prior to its presentation to Hoxsie, as appears in said replication. So that he was not called upon to pay any attention thereto. And, even if he had, his action would have given the plaintiff no standing as a claimant against the estate. Neither under the Public Statutes nor under the General Laws, therefore, has the plaintiff any cause of action against the defendant by reason of that part of the allegations of the replication now under consideration.

We come now to consider the only really new point in the case, namely, the allegation in said replication that Mr. Cross, the first administrator, allowed the plaintiff's claim, and promised to pay the same out of said estate. This raises the question whether an executor or administrator can so waive the special statute of limitations as to bind the estate. We think it is clear that this question must be answered in the negative. The authorities, so far as we are aware, are entirely uniform in holding that "the special statute of limitations, otherwise termed the 'statute of nonclaim,' which limits the time within which an action can be brought against him in his official capacity, is imperative, and cannot be waived." Vol. 7, Am. and Eng. Ency. of L. (1st Ed.) pp. 233, 234, and cases cited; Wood on Lim. (3d Ed.) 428, and cases collected in note 3. The purpose of these special statutes of limitations is to secure a speedy settlement of the estates of deceased persons, and they exist independent of and collateral to the general statute of limitations. In *Atwood v. Bank*, 2 R. I. 196, *Greene C. J.*, in delivering the opinion of the court, quoted the following from Judge Story's opinion in *Pratt v. Northam*, 5 Mason, 95, Fed. Cas. No. 11,376, relating to the object of such a statute: "This statute of limitations as to executors and administrators is not created for their own security or benefit, but for the security and benefit of the estates which they represent. It is a wholesome provision, designed to produce a speedy settlement of estates, and the repose of titles derived under persons who are dead." See, also, *Bank v. Stockholders*, etc., 6 R. I. 154, 75 Am. Dec. 688. In *Wiggins v. Lovering's Adm'r*, 9 Mo. 262, the court say: "Although an acknowledgment by an executor or administrator, after the time limited by the general statute, may revive a debt against a testator or intestate [the decided weight of authority, however, in this country, is now to the contrary—Wood

on Lim. § 190, and cases cited], yet his acknowledgment will not have the effect to take the debt out of the special statute; for he is bound *virtute officii* to plead the latter whenever a debt is claimed which would be barred by it, and therefore no admission or promise can operate to defeat the statute so pleaded. Such statutes are for the benefit of the heirs and devisees, in order to discharge their estates within a reasonable time from the lien of the debts of the deceased." Whether an executor or administrator is bound to invoke the general statute of limitations as a defense to actions brought against him when said defense is available, we are not now called upon to decide; although we may remark in passing that it is generally laid down as the law that he is not bound to plead said statute. See vol. 7, Am. & Eng. Ency. of L. (1st Ed.) pp. 282, 283, and cases cited; Wood on Lim. (3d Ed.) 428; Woerner's Am. Law of Adm. (2d Ed.) vol. 2, p. *842, § 401; *Emerson v. Thompson*, 16 Mass. 429. In a number of states, however, by statutory provision, the executor or administrator is bound to set up the bar of such general statute when it is available as a defense. See Woerner, *supra*, pp. *843-845. While we do not wish to be understood as expressing any definite opinion regarding the duty of an executor or administrator to interpose the bar of the general statute of limitations when available as a defense, yet we will call attention in this connection to the opinion of this court as announced by Blodgett, J., in *Mason v. Taft*, 23 R. I. 388, 50 Atl. 648. See, also, *Fenner v. Manchester*, 6 R. I. 140; *Butler v. Johnson*, 111 N. Y. 212, 18 N. E. 643.

As the cases in support of the position which we have taken relative to the main question now under consideration are entirely uniform, there is no occasion for making further reference thereto. And as the result of said authorities is to the effect that, when such special statute of limitations has run, it absolutely extinguishes the right of the claimant, instead of affecting the remedy merely, as may be the case under the general statute of limitations, nothing remains upon which to base an action like the one before us.

The defendant's demurrer to said replication is sustained, and the case remanded for further proceedings.

(25 R. I. 383)

GALLOWSHAW v. LONSDALE CO.

(Supreme Court of Rhode Island. July 25, 1903.)

INJURY TO EMPLOYE—ELEVATORS—QUESTIONS FOR JURY.

1. In an action for injuries by negligence, statutes passed after the accident cannot be considered.

2. Gen. Laws 1896, c. 108, § 15, requiring automatic warning signals to be attached to elevators not so protected as to be inaccessible from without while moving, is inapplicable

in an action for injuries, where the injury was caused by the pushing of the trapdoor which guarded the elevator.

3. Where the facts are not controverted, or it clearly appears what course a person of ordinary prudence would pursue, or the negligence is clearly defined, no question is presented for the jury.

Tillinghast, J., dissenting.

Action in trespass on the case for negligence by William D. Gallowshaw against the Lonsdale Company. Heard on motion of plaintiff for reargument after entry of judgment for defendant. Motion denied.

Argued before STINESS, C. J., and DOUGLAS, J.

Hugh J. Carroll, for plaintiff. Miller & Carroll, for defendant.

PER CURIAM. Gen. Laws 1896, c. 251, § 11, provides that the appellate division, after considering a petition for new trial, may direct entry of judgment, and make such further orders in the cause as to law and justice shall appertain. The court did not hold that a compliance with the law in regard to elevators was "sufficient in itself to compel a jury to find that the defendant used due care," but it held that the compliance with the statute which furnished a warning being shown, with no evidence of other fault by the defendant, there was no negligence on its part. The statutes of 1901-1902, referred to in the motion for reargument, were passed after the accident, and cannot be considered. Gen. Laws 1896, c. 108, § 15, has no application, as the elevator well was inaccessible from without when the elevator was moving. The death of the boy was not caused by falling into the elevator well, but by the pushing of the trapdoor which guarded it. There is no question for a jury when facts are not controverted, or it clearly appears what course a person of ordinary prudence would pursue, or where the standard of duty is fixed, or the negligence is clearly defined and palpable. *Elliott v. Newport*, 18 R. I. 707, 28 Atl. 838, 31 Atl. 694, 23 L. R. A. 208.

Motion for reargument denied.

TILLINGHAST, J., dissents from the order directing judgment for the defendant non obstante veredicto in this case, on the ground that, under the evidence submitted, it was competent for the jury to find that the defendant was guilty of negligence in not properly guarding the opening in the floor where the elevator came through; and also that it was competent for the jury to find that the plaintiff's minor son, considering his age, and the circumstances under which the fatal accident occurred, was not guilty of contributory negligence.

The verdict of the jury, therefore, ought not to be disturbed.

¶ 3. See Negligence, vol. 27, Cent. Dig. §§ 279, 286, 291, 296.

(35 R. I. 373)

In re OGDEN et al.

(Supreme Court of Rhode Island. July 23, 1903.)

WILLS—CONSTRUCTION—PUBLIC MONUMENTS
—CHARACTER—CONTRIBUTIONS BY
OTHERS—LOCATION.

1. Where testator bequeathed a certain sum to a town for the erection of a "monument" to the memory of the soldiers and sailors who fell in the Civil War, and declared his desire that it should be erected on a triangular piece of land described, the bequest did not authorize the erection of a "memorial or a memorial building."

2. Where testator bequeathed a certain sum to a town for the erection of a soldiers' and sailors' monument, and the will did not require a statement that it was erected by the testator, or contain anything to show that the town might not expend a larger sum than the gift, other persons were authorized to add to the amount of the gift.

3. Where testator bequeathed a certain sum for the erection of a soldiers' and sailors' monument, and stated that his "desire" was that it should be erected on a particular triangular piece of ground in the town, the direction as to the location was precatory, and not imperative.

Petition by John Ogden and others for the construction of the will of Daniel W. Lyman, deceased. Opinion rendered.

Argued before STINESS, C. J., and DOUGLAS and BLODGETT, JJ.

James C. Collins, Jr., for parties.

STINESS, C. J. This petition is filed by direction of the town council of North Providence for instructions with reference to the following bequest in the will of the late Daniel W. Lyman: "To the town of North Providence Five Thousand (\$5,000) Dollars to erect a monument to the memory of the soldiers and sailors who fell or died in the late war, enlisting from this part of the town existing A. D. 1835; and my desire is that the monument be erected at the junction of Olney and Fruit Hill avenues in said town, on a triangular piece of land thereat located." The money has been paid to the town by the executors of the will, and the following questions are asked concerning it: "(1) Must the sum of money received under said will be used in the erection of a monument, using that word in its strict sense, or can said sum of money be used for the erection of a memorial or memorial building? (2) Can money from other sources be added to and united with this fund in the erection of the monument provided for in said will? (3) What are the limitations as to the location within the limits of said town where said monument may be erected?" As the opinion sought is for the benefit of the town, we will not consider the question whether adversary interests are sufficiently represented, in view of the fact that the conclusion to which we have come cannot affect them.

In reply to the first question, we are of opinion that the testator had in mind a monument in the ordinary sense of the word. While it is true that lexicographers include

structures and buildings in the definition of the word "monument," we are required in this case to ascertain, not its possible meaning, but its meaning as indicated by the intent of the testator. As said by Durfee, C. J., in *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198, with reference to testimony offered to explain the meaning of this will upon another point: "The effort is to impose upon the will by extrinsic testimony a meaning which, taking it as it naturally applies to existing facts and circumstances, it does not express. It is an effort which contravenes the fundamental requirement of the law that a will shall be in writing; that is, that it shall be a written expression of the testator's intention." The principle thus announced is the familiar one that the written expression of the testator, taken in its natural sense and use, and applied to existing facts, must control. To ascertain the written expression, a court does not look so much to the etymological scope of a word as to its common meaning and particular use. The word "monument," in common usage, when it relates to a memorial for the dead, means a shaft, column, or some structure more imposing than a mere gravestone. If it were said that a monument had been erected to the memory of one who had died, the natural and immediate conception would be that which we have just stated. In this will there was to be a monument to the memory of the dead. It may be said that the names and services of soldiers can be as well preserved on the walls of a building as on the sides of a monument. This is true. But would one naturally think that a building was intended by a provision for a monument? St. Paul's Cathedral, in London, is often spoken of as a monument to the genius of Sir Christopher Wren; and even on its walls is the well-known epitaph, "Si monumentum requiris, circumspice." It is, doubtless, far more grand and effective as a memorial than any shaft could be; yet if one were to say that he had seen Wren's monument it would hardly occur to another that he did not mean a special shaft. We sometimes speak of a book as a monument to its author, yet an executor in a will would not so understand a direction to erect a monument. These considerations are enough to show that while, in a broad sense, a monument may be a memorial, it does not follow that a memorial may be a monument. It so happens that these two words are used in this will in a way to show the distinction between them. A gift was made to Brown University for a "building to be known as the 'Lyman Memorial.'" To the city of Providence he gave \$10,000 for "a monument in Roger Williams Park, to be called the 'Elisha Dyer Memorial,' erected by his grandson, Daniel Winton Lyman." Here he used both "monument" and "memorial"; the former, doubtless, to denote the character of the structure, and, because it was not the particular monu-

ment to mark the burial place or memory of his grandfather, who was buried elsewhere, the latter word denoted its purpose as a memorial. It is a matter of common knowledge that the burial places of thousands of the soldiers and sailors who died in the Civil War were not known, and special stones to their memory in many cases were not erected. Hence we see in towns and cities all over the land monuments to the memory of soldiers and sailors from a particular place who died in the war. Such was evidently the intention of this bequest, carrying with it the idea of a monument as we commonly use the word, rather than a general memorial structure, in the town where they lived. This idea appears more plainly from the sum given, which, while ample for a monument, would not be enough for an adequate building. It also appears from his expression of desire for its location—a triangular piece of land. A triangle might be large enough to contain a building, but the most obvious impression would be that of a small space suitable for a monument only.

We know of no decided cases which cover the point before us. In *Society of the Cincinnati's Appeal*, 154 Pa. 621, 26 Atl. 647, 20 L. R. A. 323, in regard to a deed from the commonwealth of Pennsylvania to the city of Philadelphia of Independence Square, prohibiting the erection of any building therein, the court said: "The proposed monument is not a building within the meaning of the prohibited condition. A monument may take the shape of a memorial hall or other building, but that is not the general sense of the word, and will not be presumed." In *Spangler v. Gallagher*, 182 Pa. 277, 37 Atl. 832, it was held that a soldiers' monument was not a county building within the meaning of an act requiring contracts to be let to the lowest bidder. Our opinion is that the money must be used for a monument, as such, and not for a memorial or memorial building.

In reply to the second question, we see no reason why others may not add to the fund. The will does not require, as in other bequests, the statement that it is erected by the testator, nor is there anything to show that the town might not expend a larger sum than his gift.

In reply to the third question, we see no limitation in the will as to the location. The testator expresses a desire for a certain location, but he does not require it. The expression is precatory, not imperative. It was evidently intended only as a personal recommendation of a site. As such it is not binding on the town (*Hess v. Singler*, 114 Mass. 56; *Sears v. Cunningham*, 122 Mass. 538), although there are cases where the word "desire" implies a gift or direction; e. g., "I desire all my estate shall be sold, and the proceeds invested," etc. (*Appeal of Philadelphia v. Eisler*, 112 Pa. 470, 4 Atl. 4; *Oyster v. Knull*, 137 Pa. 448, 20 Atl. 624, 21 Am. St.

Rep. 890). The language of this will is not within that class of cases.

We are therefore of opinion that there is no limitation as to the location within the limits of the town.

(25 R. I. 384)

FRANKLIN v. WARWICK & COVENTRY WATER CO.

(Supreme Court of Rhode Island. Aug. 5, 1903.)

MUNICIPAL TAXES—ASSESSMENT BY TOWN—STATUTES—CONSTRUCTION.

1. Under Pub. Laws 1901, p. 367, c. 944, authorizing the town of West Greenwich, by its assessors in office or thereafter elected, to assess a tax, the power to order the assessment is vested only in the town, as the words "by its assessors" relate not to the exercise of the discretion, but to the making of the assessment.

Action by John C. Franklin, collector, against the Warwick & Coventry Water Company to recover a tax. Heard on petition of plaintiff for a new trial. Petition denied.

For former opinion, see 52 Atl. 988.

Argued before STINESS, C. J., and DUBOIS and BLODGETT, JJ.

George T. Brown and Elmer J. Rathbun, for plaintiff. John J. Arnold, for defendant.

STINESS, C. J. The plaintiff's suit to recover a tax assessed by the town of West Greenwich was tried without a jury, and the trial judge gave judgment for the defendant upon two grounds: (1) That the town did not avail itself of the privilege granted by the General Assembly in Pub. Laws 1901, p. 367, c. 944; and (2) that the notice given by the assessors did not conform to the terms of the act. The plaintiff petitions for a new trial.

The first section of the act provided: "The town of West Greenwich, by its assessors in office at the time of the passage of this act, or that shall be thereafter elected, is authorized to assess a tax for the year 1899 against the Warwick and Coventry Water Company, at the rate of \$1.25 on each \$100.00 of the ratable property of said company owned by it in said town at the time the above-mentioned assessment of 1899 was made, according to the full and fair cash value thereof at the time of said last-mentioned assessment." The trial judge found that the town had taken no action at all. The plaintiff argues that the town had no need to act, because the assessors were authorized to act, and hence their act was the act of the town.

We do not think that this construction can be sustained. The authority to make the assessment was expressly given to the town. The town, under the act, could make the assessment or not, as it might decide. The words "by its assessors" relate not to the exercise of the discretion, but to the making of the assessment. This work might be

done either by the assessors in office at the time of the passage of the act, or by those who should thereafter be elected, according to the time when the town should order the assessment. If the town acted at once, the assessors then in office were empowered to make the assessment. If it acted after their term of office had expired, then the assessment could be made by assessors thereafter elected. We do not see how the act can be construed in any other way. It clearly calls for action by the town, because the authority to make the assessment is given to either one of two or more boards of officers. It could not be done by all, and neither one has the right, of its own motion, to exclude the others. The choice must be made by the town. As the trial judge properly said: "The choice between succeeding sets of instruments cannot be made by themselves." The town had two options, at least, under the act—one to decide when it would order an assessment; and the other, consequent upon this, according to the time of the assessment, to which board it would commit the assessment. We are therefore of opinion that the action by a board of assessors alone, without action by the town, was void. Undoubtedly as the plaintiff claims, the town had not to start de novo to assess a tax, but only to order an assessment according to the terms of the act; but authority to do this was vested only in the town by the provisions of the act. When this case was before us on demurrer to the declaration (*Franklin v. Warwick & Coventry Co.*, 24 R. I. 224, 52 Atl. 988), the court overruled the demurrer to the second count, because the count stated, in the words of the act, "The said town by its assessors in office at the time of the passage of said act * * * did, on the 23rd day of December, A. D. 1901, assess a tax for the year 1899 against said defendant." The case was properly stated, but the proof does not sustain the allegation of fact.

As this ground is decisive of the case, it is unnecessary to consider other questions which have been raised.

(72 N. H. 221)

CLAIR v. CITY OF MANCHESTER.

(Supreme Court of New Hampshire. Hillsborough. June 30, 1903.)

MUNICIPALITIES-DEFECTIVE STREETS-NEGLECT OF STREET COMMISSIONERS-LIABILITY OF CITY.

1. Laws 1893, p. 252, c. 264, vests in a board of street and park commissioners full control of the highways in the city of Manchester, and confers on them all powers of the city council and the highway surveyors of the various highway districts of the city. Pub. St. 1891, c. 75, renders towns indictable for neglecting to keep their highways in good repair, and Laws 1893, p. 47, c. 59, makes towns liable to travelers on highways for damages sustained by them from

defects. *Held*, that the city, having knowledge of the inadequacy of a culvert over a stream and a reasonable opportunity to remedy it, cannot escape liability to a landowner for damages sustained by reason of such defect on the ground that the street commissioners were public officers, for whose neglect the city was not liable.

Transferred from Superior Court; Pike, Judge.

Action by George Clair against the city of Manchester. Facts agreed, and case transferred from superior court. Judgment for plaintiff.

August 1, 1892, the mayor and aldermen of the city of Manchester laid out a highway known as "Hall Street," extending across Cemetery brook, a natural water course. By the provisions of chapter 264, p. 252, Laws 1893, a board of street and park commissioners was established for the city of Manchester, and its duties and powers were therein defined. In the summer of 1895, Hall street, as laid out, was constructed by the board, and has since been maintained by them, under the provisions of said chapter; but the culvert over the brook at times was not adequate to carry off the water. February 14, 1900, the water was thrown back, causing the damage of which the plaintiff complains. The defendants and the board knew of the inadequacy of the culvert a sufficient length of time before the damage to the plaintiff to have remedied it by the exercise of ordinary care. The plaintiff was not in fault. If, upon the foregoing facts, the plaintiff is entitled to recover, he is to have judgment for \$275; otherwise there is to be judgment for the defendants.

David W. Perkins, for plaintiff. George A. Wagner, for defendants.

BINGHAM, J. By the special legislative enactment of 1893 (Laws 1893, p. 252, c. 264, § 1) the whole territory of the defendant city was constituted one highway district, and placed under the superintendence of a board of street and park commissioners. The act provides that the board "shall have full charge, management, and control of the building, constructing, repairing, and maintaining of all the streets, highways, lanes, sidewalks, and bridges, and public sewers and drains, and of the public parks and commons, in said city of Manchester, and shall have the expenditure of all appropriations which the city councils of said city shall from year to year vote for such purposes; and all bills for expenditures from the appropriations voted from year to year by the city councils for such purposes shall be approved by said board before the same are paid by the city treasurer. Said board shall for such purposes have all the powers now by law vested in the board of mayor and aldermen, the city councils, and the highway surveyors of the various highway districts of said city." As a result of this

¶ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. §§ 1572, 1587, 1772.

legislation, it is contended that the commissioners are not the agents or servants of the city, but are public officers deriving their authority from the Legislature; that neither the city nor the board of mayor and aldermen can direct or control them in the performance of their duties; and that, being public officers, the city is not responsible for their negligent acts or omissions, or those of their employes, in constructing the highway in question. *Gross v. Portsmouth*, 68 N. H. 266, 33 Atl. 256, 73 Am. St. Rep. 586; *Hall v. Concord*, 71 N. H. 367, 52 Atl. 864, 58 L. R. A. 455. But the fact that the inadequate culvert—a constituent part of the highway—was constructed by the commissioners is not necessarily determinative of the defendants' freedom from liability in this action. Prior to the act in question, towns and cities were made liable by statute (Pub. St. 1891, c. 76; Laws 1893, p. 47, c. 59) for injuries suffered by travelers upon their highways, due to their obstruction, insufficiency, or want of repair, provided the defect or insufficiency was one the town or city ought to have remedied, and it knew, or in the exercise of due care could have known, of the defect or insufficiency and remedied it; and this was so whether the creation of the defect or insufficiency was due to the act or acts of their agents, of public officers, strangers, or to some natural cause. *Johnson v. Haverhill*, 35 N. H. 74, 84, 85; *State v. Dover*, 46 N. H. 452; *Hardy v. Keene*, 52 N. H. 370, 377, 378; *Sides v. Portsmouth*, 59 N. H. 24; *Lambert v. Pembroke*, 66 N. H. 280, 23 Atl. 81. In *Hardy v. Keene*, supra, the proposition was stated as follows: "Whether the defect was caused by the negligence of the surveyor or not, the liability of the town depends upon the further questions whether, under the circumstances, the town were in fault, whether they had or should have had notice of the defect, and whether they had a reasonable opportunity to remove it." Towns and cities were also held liable at common law for damages occasioned an owner of land adjoining a highway, caused by the act of a public officer in obstructing a natural waterway, or by his so constructing the highway as to turn water upon the adjoining land, provided the city or town neglected, after reasonable notice, to remedy the difficulty; that it was not only the duty of the town, in constructing the highway, to provide some suitable and sufficient means by which to care for the water, but, if improperly constructed by a public officer, to remedy the defect after it knew of it and had a reasonable opportunity to do so. *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175; *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464; *Parker v. Nashua*, 59 N. H. 402; *Vale Mills v. Nashua*, 63 N. H. 136; *Haynes v. Burlington*, 38 Vt. 350. The ground upon which liability is predicated is that "when a highway is laid out in a town over the land of

any individual, * * * there is taken from him a right * * * for * * * the public to pass, and also a right to put and keep the land over which the highway is laid in suitable condition for the public travel. This latter right is vested in the town by the law, which imposes upon it the duty of making and maintaining the highway, and consequently, by implication, gives to it everything necessary to the performance of that duty" (*Hooksett v. Amoskeag Mfg. Company*, 44 N. H. 105, 109), "upon the general principle that, when the law gives to any one a right, or imposes on any one a duty, it implicitly gives everything which is necessary to the enjoyment and exercise of that right, or without which that duty cannot be performed" (*Troy v. Railroad*, 23 N. H. 83, 97, 55 Am. Dec. 177); that the statutory obligation of towns and cities to build and maintain highways vests in them an ownership in the highways, and that ownership "imposes upon them a duty towards the owner of adjoining land, which, so far as regards the consequences of their acts and omissions in building and repairing, is not to be distinguished from the duty of an ordinary adjoining proprietor of land with respect to the premises of his neighbor" (*Gilman v. Laconia*, 55 N. H. 130, 131, 20 Am. Rep. 175; *Concord v. Burleigh*, 67 N. H. 106, 36 Atl. 606). This right of ownership in the highways in the city of Manchester is still vested in the city, unless it was the intention of the Legislature, in enacting the law creating the board of street and park commissioners (Laws 1893, p. 252, c. 264), to repeal the provisions of chapter 75 of the Public Statutes of 1891, rendering towns liable to indictment for neglecting to make new highways lawfully established, and for neglecting to keep its highways "in good repair, suitable for the travel thereon," and to repeal the provisions of chapter 59, p. 47, of the Laws of 1893, rendering towns liable to travelers upon highways for damages happening to them by reason of certain defects therein, so far as they pertain to the city of Manchester. And we are of the opinion that it was not the intention of the Legislature, in enacting chapter 264, that the city should be freed from the liabilities and duties imposed by chapter 75 and chapter 59, or stripped of all power to perform those duties; at least, in cases where the commissioners neglect to perform them. The city being charged with the duty of constructing and maintaining highways, the law, in the absence of express authority, by implication confers upon it the power to employ a suitable agency to perform the duty; otherwise, as said in *Henry v. Haverhill*, 67 N. H. 172, 174, 37 Atl. 1039, 1040, this "novel" and "inequitable" situation would be presented: "Legislation imposing upon one body [the board of street and park commissioners] the sole duty of constructing and keeping in repair highways, and sub-

jecting another body [the city] to both civil and criminal liability for defects therein, which it has no power to prevent." Such a result the Legislature could not have contemplated; and as it appears that the culvert did not furnish an adequate passageway for the stream of water that naturally flowed across the highway, and as the city, after it knew of its inadequacy and had a reasonable opportunity to remedy it, suffered it to so continue to the plaintiff's damage, it is liable in this action.

Judgment for the plaintiff. All concurred.

(72 N. H. 219)

STATE ex rel. LITTLE et al. v. CHICKERING et al.

(Supreme Court of New Hampshire. Merrimack. June 30, 1903.)

TRUSTS—CONSTRUCTION—CONDITIONS—POWER OF TRUSTEES.

1. Testator bequeathed the residue of his estate to certain persons as trustees and their successors for the establishment and support of a public academy in a certain town on condition that such academy should be located on a particular street between certain limits on a lot of land owned by testator, unless some other person should give a suitable building lot for the institution within the limits specified. *Held*, that the trustees under such will had no power to erect academy buildings on ground which they acquired from a previous treasurer of the board in settlement of a shortage in his account, though located within the limits prescribed.

Transferred from Superior Court; Wallace, Judge.

Bill by the state, on the relation of George P. Little and others, against Jacob G. Chickering and others, as trustees, to restrain defendants from erecting certain academy buildings on a particular lot of land. Case transferred from superior court. Case discharged.

Streeter & Hollis, for relator. Mitchell & Foster, for defendants.

BINGHAM, J. The controversy in this case relates to the location of a building by the trustees of Pembroke Academy to take the place of the one recently destroyed by fire in the town of Pembroke. The question is presented upon the opening statement of counsel and certain agreed facts, from which it appears that Abel Blanchard, on January 15, 1818, made a will, and by the eighth article thereof bequeathed and devised the residue of his estate to certain persons as a board of trustees, and to their successors, forever, "for the establishment and support of a public school or academy" in the town of Pembroke. The gift was made subject to eight specific conditions, the sixth of which reads as follows: "Said academy shall be located on Pembroke Main street, somewhere between the meeting-house on said street and land owned by Obadiah Hall, now occupied and improved by Willis A. Thompson,

and it is my desire that a building or buildings suitable for the accommodation of said school may be gratuitously erected by the inhabitants of said Pembroke within twelve years from my decease, on the lot of land now owned by me, lying on the easterly side of said street and between lands owned by the Widow Sarah Adams and Timothy Gile, unless some other person shall give a suitable building lot for the use of said institution within the aforesaid bounds. It not being my intention, however, to make the erection of a building or buildings by the inhabitants of said Pembroke within twelve years from my decease as one of the conditions on which I give and devise the rest and residue of my estate as aforesaid." The eighth condition, among other things, provides that the trustees shall have the right, for and during the term of 12 years from the donor's decease, "of making such arrangements with school district numbered one in said Pembroke in relation to the occupancy of the common schoolhouse in said district and the expenditure of the moneys of said institution in connection with the expenditure of the moneys of said district as * * * the * * * trustees and their successors shall consider most conducive to the best interests of said school." Mr. Blanchard having died, the persons named as trustees became incorporated June 25, 1818, under the name of the Trustees of Pembroke Academy. The act of incorporation, after referring in its preamble to the gift of Mr. Blanchard, and to the fact that the inhabitants of Pembroke had subscribed an additional sum of "more than fifteen hundred dollars for the purpose of erecting a suitable building for the accommodation of said school," follows in general outline the provisions of the will. The academy building was not originally erected upon the donor's lot, but upon a lot situated within the limits specified in his will, which was deeded to the academy by Asa Robinson September 12, 1818. This building and lot were used continuously for the purposes of the academy down to June 21, 1900, when the building was destroyed by fire. About 1895 a lot of land known as the "Emery Lot," and adjoining the academy lot, was given to the school, and has since been used in connection therewith. In March, 1901, the trustees came into the possession of about two acres of land situated within the limits specified in the will, through a compromise settlement of a claimed shortage in the accounts of a former treasurer of the academy, and they now propose to erect the academy building upon this lot. This proceeding is brought to restrain the trustees from erecting the building upon the lot thus procured.

It is claimed, first, that, the academy building having been located in 1818 upon a lot donated to the school, and in compliance with the terms of the will, its location cannot now be changed to the lot acquired by

the trustees in settlement of a shortage in their treasurer's account; and, second, that the trustees are actuated by personal and selfish motives, inconsistent with their duties as trustees, and against the best interests of the trust, in purposing to locate the building upon that lot. It does not appear to be necessary to a determination of the controversy, as here presented, to consider the second contention, as it is apparent from a reading of the will that it was the intention of the founder of the trust that the academy building should be located either upon the lot referred to as owned by him on Pembroke Main street, or upon a suitable lot situated within certain defined limits on that street, and to be given to the academy for that purpose; that he expressly declared that the academy building should be located upon such a lot as a condition of his gift; and that he did not intend to leave it to the discretion of the trustees to locate the building upon any lot on said street within the prescribed limits which they might purchase with the trust funds, or might receive in settlement of a shortage in the accounts of their treasurer. That the gift was conditioned upon a compliance with the provisions of the sixth subdivision to article 8, except so far as they related to "the erection of a building or buildings by the inhabitants of Pembroke within twelve years" from the donor's decease, cannot be controverted. It is also clear that the donor purposed to allow 12 years at least in which to raise funds sufficient to erect a suitable building, and, this being done, that the building should be located upon the lot referred to as owned by him, or upon one to be given the academy situated within the prescribed limits. This construction of the will is confirmed by the modifying clause in subdivision 6, which relates simply to the erection of a building within 12 years, and not to the donation of a lot located within the prescribed limits upon which the building was to be erected. In the absence of the modifying clause, it would seem that the gratuitous erection of a suitable building within the 12 years would have been an essential part of the condition. *Foster v. Willson*, 68 N. H. 241, 242, 243, 38 Atl. 1003, 73 Am. St. Rep. 581.

Case discharged. All concurred.

(73 N. H. 240)

LEIGHTON et al. v. CONCORD & M. R. R.
et al.

(Supreme Court of New Hampshire. Hillsborough. June 30, 1903.)

HIGHWAYS — ESTABLISHMENT — DISCONTINUANCE — POWER OF BOARD OF RAILROAD COMMISSIONERS — CHANGE OF LOCATION — NEW HIGHWAY.

1. Pub. St. 1891, c. 159, §§ 13, 14, providing that the board of railroad commissioners may, on petition and hearing, authorize the propri-

etors of a railroad "to change the location of a highway for the purpose of avoiding or improving a crossing of the highway by the railroad," authorizes the board to order the discontinuance of a highway, the necessary effect of a change in the location of highway being the discontinuance of the portion that occupied the old location.

2. Pub. St. 1891, c. 159, § 14, empowering the board of railroad commissioners to authorize the change of a highway to improve or avoid a railroad grade crossing, excepts such cases from the operation of chapter 72, §§ 1, 2, conferring authority upon towns or the court, or towns and the court together, to discontinue highways.

3. Pub. St. 1891, c. 159, § 18, providing that proprietors of a railroad may take and hold land or rights in land necessary to enable them to make changes in highways authorized by the board of railroad commissioners, and the parties shall have like remedies for a change of location, and for the appraisal of damages as in such case, makes provision for the assessment of damages sustained by an owner of land abutting on the portion of a highway discontinued by the board of railroad commissioners.

4. The board of railroad commissioners cannot under Pub. St. 1891, c. 159, providing for the change of location of highways to avoid or improve a railroad crossing, lay out a new highway from a substituted highway, authorized for the purpose of avoiding a railroad crossing, to a new railroad station.

5. The laying out of a new highway from a substituted highway, authorized by the board of railroad commissioners under Pub. St. 1891, c. 159, to a new railroad station, is governed by chapters 67, 68, relating to the laying out of highways.

6. An owner of land damaged by reason of the board of railroad commissioners authorizing a change in the location of a highway, having an ample remedy in having the damages assessed by an appeal from the award, cannot bring certiorari to review the proceedings.

Transferred from Superior Court; Pike, Judge.

Petition for a writ of certiorari by George A. Leighton and others against the Concord & Montreal Railroad and others. Facts agreed, and case transferred from the superior court. Case discharged.

Upon the petition of the Concord & Montreal Railroad, the board of railroad commissioners authorized the corporation to change the location of a portion of a highway in Goffstown where it was crossed at grade by a branch of the corporation's railroad, for the purpose of avoiding the crossing. The change consisted in discontinuing about 1,500 feet in length of the old highway, substituting for it a new highway located southerly of the old, and having a bridge over the railroad. The Concord & Montreal Railroad have filed a location for the new portion of the highway, in accordance with the requirements of the statute, and have taken steps to have the damages assessed for the land taken. Leighton has taken an appeal to the superior court from the award of damages to him by the railroad commissioners and selectmen, and prays that the damages which have accrued to him by the taking of his land and the discontinuance of the old highway may be assessed by a jury. The petition al-

¶ 1. See *Railroads*, vol. 41, Cent. Dig. § 298.

leges that the portion of the highway discontinued passed through land owned by him, and in close proximity to his dwelling house, and furnished the only means of access to the house and appurtenant buildings. The corporation's petition to the board of railroad commissioners for authority to make the change alleged, among other things, that "for the purpose of affording access to the new station to be erected at the junction of its Manchester & North Weare Branch with its Manchester & Milford Branch, it is necessary and for the public interest to lay out a new highway from the highway" contemplated in the change in a northerly direction to land of the corporation on a route particularly described. The board did not attempt to lay out this highway upon that petition, but the corporation subsequently filed a supplemental petition for the purpose, and the board were about to grant its prayer, when further action was suspended pending the determination of their power in the premises.

Taggart, Tuttle & Burroughs, for plaintiffs. John M. Mitchell and Edwin F. Jones, for defendants.

CHASE, J. "The board of railroad commissioners, upon petition of the proprietors of a railroad, after notice and hearing, * * * may authorize the proprietors of a railroad to change the location of a highway or other way for the purpose of avoiding or improving a crossing of the highway by the railroad, or of enabling them to properly construct the railroad; and the proprietors, whenever so authorized, may make such changes." Pub. St. 1891, c. 159, §§ 13, 14. The change under consideration was made under this statute. The plaintiffs allege that the action of the board of railroad commissioners was illegal, because (1) the board had not power to authorize the discontinuance of a highway; (2) if they had such power, it can be exercised only upon assessing the damages suffered by the owners of land bordering upon the discontinued highway; and (3) they had not power to lay out a highway. The position is taken that, if the statute does not authorize the board to assess the damages resulting from the discontinuance of the highway involved in the change of location, the statute is unconstitutional.

1. The statute does not, in express terms, empower the board of railroad commissioners to discontinue, or authorize the discontinuance of, a highway; but the necessary effect of a change in the location of a highway is the discontinuance of the portion that occupied the old location and the substitution thereof of the portion that occupies the new location. If the old portion were not discontinued, there would be no change of location. The change would be simply the creation of a new piece of highway, leaving the old piece in existence, with its objectionable grade crossing. The railroad corporation's burdens

would be increased without removing the cause of danger to public travel. A change in the location of a highway, according to the ordinary meaning of the term, is a removal of the highway from one place to another. After the removal, the highway does not exist in its former place. The Legislature has conferred general authority to discontinue highways upon towns or the court, or towns and the court together (Pub. St. 1891, c. 72); but this does not deprive the Legislature of power to confer the authority upon other bodies or tribunals in special cases, if they see fit. Section 14, c. 159, Pub. St. 1891, confers the authority upon the board of railroad commissioners in cases in which the public good requires the discontinuance of a portion of a highway and the substitution of a new portion, to avoid or improve a grade crossing. Such cases are impliedly excepted from the operation of the general provisions contained in chapter 72. The reason for the exception is apparent. There would be liability to conflict, or confusion in the results, if the matter of changing the location of a highway, or rather of deciding upon a new location, were left to one tribunal (the board of railroad commissioners), and the matter of discontinuing the old highway containing the objectionable crossing were left to another body or tribunal (the town or the court, or both). There would be a great danger that the object in view would be defeated in many instances if the authority were thus divided. The board of railroad commissioners can act only upon petition, and after notice and hearing. Pub. St. 1891, c. 159, §§ 13, 14. The rights of parties entitled to a hearing are as well guarded in this respect as they would be under the provisions of chapter 72. They have no reason to complain because they are sent to this board for a hearing, instead of some other tribunal. That is a matter over which the Legislature have complete control.

2. Is provision made in the statutes for the assessment of the damages suffered by the owners of land bordering upon the discontinued portion of highway? A review of the legislation on the subject will throw some light on this question. Soon after the first railroads were built, towns were empowered to require railroad corporations to secure highway crossings by bridges over their railroad, or gates on the sides of the highway; and, if the requirement was not complied with within six months after notice, the selectmen of the town were directed to cause the rails to be removed from the highway, and the corporation was not allowed to run engines and cars across it for the time being. Laws 1841, p. 541, c. 612; Rev. St. 1842, c. 142, §§ 4, 5. Later, corporations were granted the right of appeal from the action of a town, and also the right themselves to petition the court for authority to erect bridges or gates at crossings when they deemed it necessary for the public safety; and, if

additional land was necessary for the purpose, they were empowered to take it. Provision was made for assessing the damages suffered by individuals by the taking of their land, or the erection of the bridges or gates. Laws 1846, p. 314, c. 335. In 1847 a right of action to recover reasonable damages was given to persons who suffered inconvenience or injury to their lands or rights by an alteration or obstruction of a highway, turnpike, bridge, or private way, made by a railroad corporation in the construction of its railroad over, under, or near such highway, etc., or by a continuance of such alteration or obstruction for 60 days after notice in writing of its existence. But a corporation causing damage was authorized to apply to the road commissioners of the county within 60 days to lay out a substitute for such highway, etc., and they were empowered, after notice and hearing, to lay it out and assess damages as in ordinary highway cases; and if the corporation built the substitute highway in the manner and within the time prescribed by the commissioners, and otherwise complied with the requirements of the statute, no action could be maintained against it. Laws 1847, p. 464, c. 486; *Clark v. Railroad*, 24 N. H. 114. Upon the enactment of the General Statutes these statutes were revised and materially changed in some particulars. Among the changes there may be noted the transfer of the gates to the sides of the railroad, and the substitution of a penalty for failure to comply with a town's requirement, in the place of an interference with the railroad and its operation, but the methods to be employed for improving crossings were not enlarged. Gen. St. 1867, c. 147. The provisions of the General Laws of 1878, c. 161, are identical with those of the General Statutes. In 1885 a new and important remedy was created for making crossings safer. It was provided that "a railroad corporation may alter the course of a highway or other way for the purpose of facilitating the crossing of the same by its road, or of permitting its road to pass at the side thereof without crossing, upon obtaining the written consent of the railroad commissioners, but such consent shall not be given until all parties in interest shall have been duly notified and heard." Laws 1885, p. 295, c. 98, § 8. This was the first introduction into the General Statutes of an express provision for the change of the location of a highway for the purpose of improving railroad crossings, except in cases in which damages were claimed for altering or obstructing highways. Upon the revision of the statutes in 1891, an attempt appears to have been made to consolidate such of these provisions as were retained into a few sections that would cover the whole ground. As has been seen, the prior statutes covered the following cases: (1) Those in which a town required a railroad to bridge the crossing or protect it by gates, and in so doing it was necessary

to raise or lower the grade of the highway; (2) those in which the corporation, of its own motion, wished to do this; (3) those in which damages were claimed of the corporation for altering or obstructing a highway, in which cases the corporation might, under certain circumstances, obtain leave to construct a substitute for the highway, and relieve itself from liability; and (4) those in which the corporation wished to alter the course of the highway for the purpose of improving the crossing. Sections 13, 14, c. 159, Pub. St. 1891, cover the cases mentioned in subdivision 1. There is no provision for the cases mentioned in subdivision 3, for the reason, evidently, that there was no occasion for it. If a corporation desires to alter or obstruct a highway, ample provision is made for obtaining authority to do so, if the public good requires it; if a corporation sees fit to make an alteration without first obtaining authority, the common law affords adequate remedies to the parties injured. After providing a method by which the grade of a highway may be raised or lowered for the purpose of separating it from that of the railroad, both upon the motion of the corporation itself (section 13) and upon the requirement of a town (sections 15-17), and a method by which a change in the location of a highway may be made for the purpose of avoiding or improving a crossing (section 14), provision is made by section 18 as follows: "The proprietors may take and hold such land or rights in land as may be necessary to enable them to make changes in highways as authorized or required by this chapter [sections 13-17] by filing a location thereof as provided for filing the location of a railroad; and the parties shall have like remedies for a change of location and for the appraisal of damages as in such case." They may take not only land, but rights in land, if necessary for the particular purpose. If in raising or lowering the grade of a highway it is necessary to take the right which the owner of adjoining land has to pass between it and the highway, this may be done, although none of his land is taken. So, also, if it is necessary to change the location of a highway, and thereby discontinue a portion of an old highway, the right of the adjoining owner to have the old highway continue may be taken. In this case, if Leighton's right in the discontinued portion of the highway was special and particular by reason of the fact that his land bordered upon it, and so differed from the rights of the public in general (*Cram v. Laconia*, 71 N. H. 41, 51 Atl. 635), this right could be taken as well as land of his over which the substituted highway is laid. There was no practical difficulty in filing the location for the change so that it would show that both land upon which the new highway was to be located and rights in the discontinued highway of owners of land bordering upon it were included in the taking. Indeed, the

description of the substituted highway according to the provision of the statutes "for filing the location of a railroad" (Pub. St. 1891, c. 158, §§ 3, 4), accompanied with a declaration of the purpose to make the substitution, would necessarily imply the discontinuance of the old highway and the taking of the rights of parties therein. No question is made regarding the regularity or character of the location in this case. If any landowner was dissatisfied with the location, he was at liberty, at any time before his damages were assessed, to apply to the railroad commissioners to have it changed; and they were empowered to make a change if they found that the public good required it. Pub. St. 1891, c. 159, § 18; Id. c. 158, § 7.

The location having been made, the parties were entitled to like remedies for the appraisal of damages as in the case of the location of a railroad. Pub. St. 1891, c. 159, § 18. Here it will be noticed that the damages are not limited to those resulting from the taking of land for the substituted highway. The language is broad enough to include all damages resulting from the change to which the parties are entitled. If the corporation cannot settle with the parties, it may petition to the railroad commissioners, and have the damages assessed by a joint board consisting of the commissioners and the selectmen of the town; and they may ultimately be assessed by a jury if either party is aggrieved by the award of the joint board. Id. c. 158, §§ 9-21. If these provisions were not sufficient to authorize the assessment of all damages occasioned by the changes contemplated, a railroad corporation might be required by the action of a town to do what it would find itself incapable of doing because of the want of power to acquire the land, or rights or privileges in land, necessary for the purpose. The raising or lowering of the grade of a highway might in some cases result in the practical discontinuance of the highway, so far as adjoining land is concerned. Moreover, the vote of a town is not the final action that can be had. The railroad corporation may apply to the board of railroad commissioners for a review of the action, and the board may make "such order in respect thereto as they judge the public good requires." It may be that they would find that the public good required a change of location of the highway, instead of a raising or lowering of the grade, and would so order. Whatever their order is, if within the scope of their authority, the corporation must comply with it, or subject itself to the liability of being fined not exceeding \$1,000. Id. c. 159, §§ 15-17. It cannot be doubted

that the Legislature intended to give railroad corporations all the authority that would be necessary to carry these provisions into effect. If the language used in respect to damages were ambiguous, the legislative intent would have controlling weight in removing the ambiguity. There would also be a presumption, to be taken into consideration, that the Legislature intended to adopt methods that do not conflict with the Constitution.

It appears from these considerations that the statute does not have the constitutional defect alleged by the plaintiffs. The board of railroad commissioners had authority to change the location of the highway, and incidentally to discontinue a portion of the old highway for the purpose of abolishing the grade crossing in question.

3. The Concord & Montreal Railroad's petition to the board of railroad commissioners asked the board to lay out a new highway from the substituted highway to a new station, to be erected by the corporation, alleging that it is necessary for the public interest in affording access to the new station. The new highway is no part of the change to be made in the location of the old highway for the purpose of avoiding the crossing, but is an independent matter, designed for a different purpose. If the old highway continued unchanged, there would apparently be the same necessity for a part of the new highway. The board of railroad commissioners are not authorized to lay out a new highway under such circumstances. This matter is governed by the general provisions of the statutes relating to the laying out of highways. Pub. St. 1891, cc. 67, 68.

4. The writ of certiorari is not awarded, though a review of the record of the tribunal shows that there was a defect in the proceedings, if the party seeking redress has another remedy that is ample and convenient. In *re Tucker*, 27 N. H. 405; *Boston & Maine R. R. v. Folsom*, 46 N. H. 64; *Logue v. Clark*, 62 N. H. 184; *Grand Trunk Ry. Co. v. Berlin*, 68 N. H. 168, 170, 36 Atl. 554. If Leighton's damages were not assessed in accordance with his rights, he has an ample and convenient remedy in the appeal from the award, which it seems he has already taken. Pub. St. 1891, c. 158, § 17. As the board of railroad commissioners have not attempted to lay out the highway to the new station, there is no occasion for a writ of certiorari on this account.

The prayer of the plaintiffs' petition should be denied. Case discharged.

BINGHAM, J., did not sit. The others concurred.

(78 N. H. 128)

ROBERTS v. FERNALD.

(Supreme Court of New Hampshire. Strafford. June 30, 1903.)

BANKRUPTCY—ADJUDICATION — COLLATERAL ATTACK—WANT OF JURISDICTION
—NOTICE TO CREDITORS.

1. Where the records of a bankruptcy proceeding in the United States District Court show certain persons "were duly adjudged" bankrupts, the defendants, in assumpsit by the trustee to recover money collected in fraud of the bankruptcy act, cannot show by evidence independently of the records that the claims of creditors were insufficient in amount to give the bankruptcy court jurisdiction, as the adjudication cannot be collaterally attacked.

2. Under Bankr. Act July 1, 1898, c. 541, § 18, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429], providing for notice of a petition for involuntary bankruptcy to the person named as defendant, a creditor who has no notice of the petition cannot attack the decree of adjudication where the records show a regular proceeding, and the fact that his name did not appear on the list of creditors, and that he had no notice of the proceeding, would not affect the court's jurisdiction as to the adjudication, nor the trustees' right to maintain an action against him to recover money collected in fraud of creditors.

Transferred from Superior Court; Young, Judge.

Action in assumpsit by William H. Roberts, trustee in bankruptcy of Mathes Bros., against Frank F. Fernald, administrator, etc. Verdict for plaintiff, and case transferred from superior court, subject to exception. Exception overruled.

August 16, 1901, the defendant brought an action against Mathes Bros., attached property therein, recovered judgment upon default, levied upon the property attached, and had the execution returned as satisfied; all before December 1, 1901. The records of the United States District Court for the District of New Hampshire show that Mathes Bros. "were duly adjudged" bankrupts under the United States bankruptcy act January 2, 1902, upon a creditors' petition filed December 2, 1901, and that the plaintiff was appointed trustee of their estate. Upon these facts a verdict was found for the plaintiff, subject to exception. The defendant offered to prove that the claims of the petitioning creditors in the bankruptcy proceeding did not amount in the aggregate to \$500, that he did not have notice of the pendency of the proceeding, and that his name did not appear in the list of creditors filed therein. The evidence was excluded, subject to exception.

William F. Nason and William H. Roberts, for plaintiff. Arthur G. Whittemore and Frank F. Fernald, in pro. per.

CHASE, J. The only questions discussed by the defendant in his brief are those arising upon the exception to the exclusion of the evidence offered by him, and no other

question has been considered. The evident purpose of this evidence was to show that the United States District Court had no jurisdiction to adjudicate Mathes Bros. bankrupts and appoint a trustee of their estate, so far, at least, as the defendant is concerned. The defendant's first proposition is that the action of the District Court is absolutely void, because the petitioning creditors in that court did not hold provable claims against the alleged bankrupts amounting in the aggregate to \$500, or more, in excess of the value of securities held by them, as required by section 59, subd. "b," Bankr. Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445]. If it appeared from the records of the court that the claims of the petitioning creditors amounted to a less sum than \$500, the defendant's proposition might be tenable. Although the District Courts of the United States are courts of general jurisdiction as to many matters, special and summary powers in relation to bankruptcy are conferred upon them by statute; and, so far as such proceedings are concerned, they have been regarded by courts of high character like courts of special and limited powers, whose jurisdiction will not be presumed in other courts, but must appear from their records to entitle their decrees to recognition. *Morse v. Presby*, 25 N. H. 299; *Horn v. Thompson*, 31 N. H. 562, 571; *Farnam v. Davis*, 32 N. H. 302, 309; *Eaton v. Badger*, 33 N. H. 228, 237; *Haywood v. Charlestown*, 34 N. H. 23, 26; *Carleton v. Insurance Co.*, 35 N. H. 162, 167. But the defendant's offer was not of evidence tending to prove that the records of the District Court show an inadequacy of claims, but of evidence tending to prove the fact independently of the records, and probably in conflict with them. By the forms prescribed by the United States Supreme Court, under the authority of section 30 of the bankruptcy act, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434], the petition should allege that the petitioners have provable claims of the requisite amount, and the nature and amount of each claim should be stated. The allegations of the petition must be verified by the oaths of the petitioners. 172 U. S. Append. 681; Act July 1, 1898, c. 541, § 18c, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]. The "case" states that the records of the District Court show that Mathes Bros. "were duly adjudged" bankrupts. The question was not raised that this record was insufficient to prove jurisdiction. If it is insufficient—if the record of the petition, its service, and other proceedings prior to the adjudication should have been put in evidence—the defendant is not in a position to avail himself of the fact. He should have objected to the evidence on this ground at the trial, when the defect could be, and probably would have been, remedied. As the case is presented here, it must be taken for granted that the records show that the claims of the petition-

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. §§ 49, 142, 143.

ing creditors were sufficient in amount to give the court jurisdiction of the subject-matter, and that the District Court so adjudged. This being so, the adjudication cannot be attacked in this action. If the record is not true, the adjudication may be voidable; but it is not absolutely void, and the defendant must look to the District Court for relief, if he would avoid its consequences. *State v. Kennedy*, 65 N. H. 247, 23 Atl. 431; *Small v. Bentfield*, 66 N. H. 206, 20 Atl. 284; *Pendexter v. Cate*, 66 N. H. 270, 20 Atl. 331; *Spaulding v. Groton*, 68 N. H. 77, 44 Atl. 88.

The defendant also says the proceedings of the District Court were void as to him, because he had no notice of their pendency, and his name did not appear in the list of creditors filed therein. The bankruptcy act does not require notice to be given to creditors of the pendency of a creditors' petition against an alleged bankrupt for an adjudication in bankruptcy. The notice is to be given to the defendant (the alleged bankrupt) in person, or, if this cannot be done, by publication. Act July 1, 1898, c. 541, §§ 18a, 58, 30 Stat. 551, 561 [U. S. Comp. St. 1901, pp. 3429, 3444]. Other creditors may join in the petition after it has been filed, or may appear and oppose the granting of it. Id. §§ 18b, 59f. It is made the duty of the judge to make an adjudication of bankruptcy, or to dismiss the petition, without delay, after the issues are formed or the time for forming them has elapsed. Id. §§ 18d, 18e. The court having jurisdiction of the subject-matter (Id. § 2) and of the alleged bankrupt by the service of notice upon him as required by the act, its decree of adjudication binds him and all persons claiming any interest in the estate through him. Creditors are not deprived of their property by the adjudication without due process of law, within the meaning of the United States Constitution, because they have no personal notice of the proceeding. *Hanover Nat. Bank v. Moyses*, 186 U. S. 190, 22 Sup. Ct. 857, 46 L. Ed. 1113. A creditor who has had no notice of the petition cannot attack the decree of adjudication, provided the records show that the proceedings were according to law. So far as the adjudication is concerned, he is privy in estate with the defendant in the action, and is bound by the adjudication equally with the defendant.

In the proceedings for the settlement of the estate after the adjudication, provision is made for giving creditors notice of the steps to be taken which will affect their interests. The bankrupt is required to file a list of the creditors, verified by his oath, within 5 (now 10) days after the adjudication, unless further time is granted; and, if he fails to do it, the duty is placed upon the referee in bankruptcy. Act July 1, 1898, c. 541, §§ 18b, 39, 30 Stat. 551, 555 [U. S. Comp. St. 1901, pp. 3429, 3436]. In involuntary proceedings, the names of creditors first appear in this list. The first meeting of creditors is

the one called for the appointment of a trustee or trustees, etc. Id. §§ 44, 55. Notice of the meeting is given to the creditors by mail 10 days before the meeting, and also by publication. Id. § 58a. Debts that have not been scheduled in time for proof and allowance, with the name of the creditor if known by the bankrupt, are not affected by the bankrupt's discharge, unless the creditor had actual notice or actual knowledge of the proceedings. Id. § 17. While, under these provisions, the debt of the defendant in this action may not be discharged by the bankrupt's discharge, unless the defendant had actual knowledge of the bankruptcy proceedings, the adjudication of bankruptcy is binding upon the defendant, and carries with it all incidental results. *Morse v. Presby*, 25 N. H. 299, 304, 305. Among these results is the right given to the trustee in bankruptcy to take possession of the bankrupt's estate and to recover property and money of persons into whose possession it has passed in violation of the bankruptcy act. The fact that the defendant's name did not appear upon the list of creditors, and that he had no notice of the bankruptcy proceeding, would not affect the court's jurisdiction in respect to the adjudication of bankruptcy, nor the title of the plaintiff to maintain this action; and consequently the evidence offered in support of the fact was immaterial and rightly excluded.

Exceptions overruled. All concurred.

(72 N. H. 606)

OPINION OF THE JUSTICES.

(Supreme Court of New Hampshire. July 25, 1903.)

OFFICERS—SPECIAL AGENTS FOR ENFORCEMENT OF LIQUOR LAWS—APPOINTMENT—POWER OF GOVERNOR AND COUNCIL.

1. The approval of the Governor and Council required by Laws 1903, p. 83, c. 95, § 5, providing that the board of license commissioners, created by the chapter, regulating the liquor traffic, "with the approval of the Governor and Council, may appoint one or more special agents and fix their compensation," is limited to the determination of the number of special agents to be appointed and their compensation, and does not extend to their appointment.

Answer to question propounded to the Justices of the Supreme Court by the Governor and Councilors.

To the Honorable Justices of the Supreme Court:

The Governor and the Honorable Council desire your opinion upon the following important questions of law arising upon the administration of section 5 of an act entitled "An act to regulate the traffic in intoxicating liquor," approved March 27, 1903 [Laws 1903, p. 83, c. 95]. A part of said section reads as follows: "Said board of license commissioners, with the approval of the Governor and Council, may appoint one or more special agents and fix their compensa-

tion." Does this require the approval of the Governor and Council in the appointment of said special agents, or is the requirement of such approval confined to fixing the number of said special agents and the amount of their compensation?

NAHUM J. BACHELDER,
Governor.

J. FRANK SEAVEY,
ALFRED A. COLLINS,
F. E. KALEY,
S. M. RICHARDS,
A. C. KENNETT,

Councillors.

To His Excellency the Governor and the Honorable Council:

The communication submitted by you does not state the occasion for the request made of us; but, understanding the question to relate to the duty imposed upon the Governor and Council by chapter 95, p. 81, Laws 1903, and assuming that you are now called upon to act thereunder, we respectfully comply with your request, without consideration of the question of our duty to answer abstract questions of law in the absence of definite information establishing the constitutional occasion.

Chapter 95, p. 81, Laws 1903, "An act to regulate the traffic in intoxicating liquors," reversed the policy of the state upon this subject which had been followed for nearly 50 years. In the enactment of the law it was foreseen that questions might arise in the practical administration of the new policy which could not be wisely determined in advance. As to many questions, therefore, a broad discretion was vested in the commission provided for in the act. They were authorized to fix the fee for, and to restrict, define, and limit each license of the first class (section 7, cl. 1), and to prescribe rules for the conduct of the business under licenses of this class (section 28). They were also authorized to determine, within certain limits, the amount of the fee which should be paid for licenses of the sixth, seventh, and eighth classes (section 7), to refuse licenses for the prosecution of the traffic in locations where they considered such business would be detrimental to the public welfare (section 9), and to determine in what cases certain classes of licenses should be issued to be exercised in towns which did not adopt the act (section 31). The board are also required to make investigation by themselves or their agents into any matters in connection with the sale of liquors (section 5), and to make an annual report of the workings of the act and its bearing upon the welfare of the state. It was obvious, when the act was passed, that three commissioners could not personally perform all the duties required of the administrators of the act. It was apparent that a clerical force more or less numerous, and sundry deputies or agents, would also be required for the

proper administration of the new policy. Because it was then unknown to what extent the law would be adopted throughout the state, and for other reasons incident to the trial of an entirely new policy, the requisite number of such assistants could not be forecast with certainty, nor their remuneration be fairly determined. No attempt, therefore, was made to provide definitely the number of such assistants, or to fix their compensation. The provisions upon the subject are found in sections 4 and 5 of the act. The question submitted to us relates only to special agents provided for by section 5; but the language as to the duty of approval by the Governor and Council in the employment of clerks in section 4 is practically identical with that relating to the appointment of agents. Both sections relate to the same subject—the securing of assistants to the commission in the administration; and the similar language must have been understood to have the same meaning in each connection. These provisions are as follows:

"Sec. 4. Said board of license commissioners, with the approval of the Governor and Council, are hereby authorized to employ such clerks as are, in their opinion, necessary for the proper transaction of the business of their office, and to fix their compensation.

"Sec. 5. Said board of license commissioners, with the approval of the Governor and Council, may appoint one or more special agents and fix their compensation. * * * Said special agents may be removed by the board of license commissioners."

The question is whether, under these provisions, the Governor and Council, having approved of the employment of a clerical force at a certain compensation, or having approved of the number of special agents to be appointed and their remuneration, are also required to pass upon the persons selected by the commission as clerks or special agents, and approve or disapprove, as in their judgment such persons are or are not qualified for the positions for which they have been designated. The construction of a statute, as of any written document, is the ascertainment of the meaning of the language to those using it. The object of a statute is to be regarded, and all the parts brought together to ascertain the meaning. *Stanyan v. Peterborough*, 69 N. H. 372, 373, 46 Atl. 191; *Barker v. Warren*, 46 N. H. 124. In the construction of a contract "the inconvenience, hardship, or absurdity which one construction would lead to is often strong evidence in favor of another or different construction involving no objections of that character, because men in general do not enter freely into contracts which are absurd or frivolous, and therefore the knowledge of the court on that subject is evidence of the intention of the parties." *Kendall v. Green*, 67 N. H. 563, 42 Atl. 178, 180. So, in the construction of a statute, the probability that the Legislature intended a work-

able law—a method reasonably certain of effecting the result aimed at—is evidence upon the meaning attached by the Legislators to the language used. *Petition M. & M. R. R.*, 68 N. H. 570, 577, 36 Atl. 545. For the same reason, if there exists a customary method of performing the matter in question known to the parties, so generally followed that the contrary may fairly be considered unreasonable, it is probable that the language, if doubtful, was intended to mean what common usage has considered reasonable; for the probability that, if a contrary course had been intended, explicit language would have been used to declare such intention, is evidence, in the absence of such language, of the meaning attached to the term employed. Generally, it may be said to be considered reasonable that one who has to commit a portion of his work to another, for whose performance he is responsible, should have the power of selecting such subordinate. Such has been the practice in this state. When, in the judgment of the Legislature, an officer required a deputy or clerks, such assistants have been provided for, to be employed or appointed by the officer whose work they were to perform, while their remuneration has been fixed by law, or a stated sum allowed for clerical expenses. The appointment of his deputy by the Secretary of State is provided for by the Constitution (article 68), and his salary is fixed by the statute (*Pub. St. 1891, c. 286, § 4; Laws 1893, p. 5, c. 1, § 1*). The State Treasurer appoints his deputy (*Pub. St. 1891, c. 16, § 15*) at a salary fixed by law (*Pub. St. 1891, c. 286, § 7*), and has an allowance for clerical expenses (*Pub. St. 1891, c. 286, § 6*). The bank commissioners are authorized to employ a clerk at a stated salary. *Laws 1893, p. 7, c. 3, § 1*. The Insurance Commissioner is authorized to employ such clerks as he may require, at an expense not exceeding a sum stated. *Pub. St. 1891, c. 167, § 7*. The Trustees of the State Library appoint the librarian and fix his compensation. *Id. c. 8, § 4*. There is an annual appropriation for clerical service in the Adjutant General's office. *Id. c. 286, § 9*. The State Board of Agriculture appoint a secretary at a fixed salary. *Id. c. 12, § 3*. These are only a few of the instances that might be given. Generally, though not always, the expenditure has been defined or limited; but no case has been found where the appointment of such officers is committed jointly to the Governor and Council and another body. The detectives appointed by the Fish and Game Commission are perhaps nearest in character to the special agents under consideration. Their appointment is placed with the commission. *Id. c. 130, § 8; Laws 1895, p. 462, c. 102, § 1*.

Where the amount of the expenditure necessary for any purpose has been uncertain, it has been usual to authorize the supervision of such expenditure by the Governor and Council. This practice is so common

and well known that citation of examples is uncalled for. In the situation existing at the passage of the act, in view of the broad discretion confided in the commission in other respects and the universal practice in the state, it would naturally be expected that the Legislature would authorize the commission to employ such clerical force and other assistants as should be found necessary, and that they would limit the power of incurring expense for this purpose by placing such expenditure under the control of the Governor and Council. It is, therefore, probable that, if the intention had been to place a greater burden upon the Governor and Council, apt language would have been used to express such intention. If such had been the intention, it would probably have been provided that the commissioners might employ such persons as clerks, or appoint such persons special agents, as should meet the approval of the Governor and Council; or that the Governor and Council and the commission should jointly employ the necessary clerks, or together appoint special agents. Such language was not used. The power of employment and appointment was vested with the commission, and not with the Governor and Council. We think the natural effect of the words used is that the approval of the Governor and Council is essential to the power of appointing, but does not relate to the manner of its exercise. If there be any doubt in this respect, there can be none as to the legislative intention when the purpose of the appointment and the previous practice in such matters are considered. The clerks and agents provided for in the two sections are confidential employes of the commissioners. For the successful performance of the delicate duties intrusted to the commission it is necessary that their subordinates should be entirely in harmony with them. To secure such result, the power of selection by the commissioners is essential—a fact recognized by the general practice in like cases. The Governor and Council have no duties to perform in the administration of the act. No reason is perceived why their approval should have been considered of importance in the matter. The supposition that the Legislature, with the broad powers vested in the commission, thought it unsafe to permit them to employ agents or clerks unless the individuals were approved by the highest executive officers in the state, involves an absurdity fatal to the contention. Such a provision might be used to cause the positions, as they become vacant from time to time, to be filled only by members of the party in power, and to hamper the efforts of the commission for an impartial enforcement of the law; but there is no evidence that the Legislature had any purpose in view except to provide for the wise administration of the new policy.

It may be contended, from the slight difference in language in the two sections, that

the approval of the Governor and Council in section 4 was limited to the power to employ, as it is there said that the commission, with such approval, are "authorized and empowered to employ" clerks, while the language of section 5 that with such approval the commission "may appoint" agents indicates that the approval extends to the exercise of the power in the latter case. But the point, if made, does not seem well founded. If any doubt could arise from the change in words, such doubt is removed by the express provision that "said special agents may be removed by the board of license commissioners." This power of removal is without limitation, and may, therefore, be exercised without cause at the pleasure of the commission. The approval of the Governor and Council is not essential to such action. The failure to give them any control over it is evidence of great weight (which, if there were no other, might well be regarded as conclusive) tending to establish that the Legislature understood the individual agents held their positions from the commission, and not from the Governor and Council. An interpretation of the statute which would give to one party authority to finally determine who should be appointed agents for another party, in the conduct of business over which the former had no control, subject to practical revocation at will by such other, appears so unreasonable and so ill adapted to effectuate the legislative purpose, and is so contrary to the practice in such matters heretofore, that the conclusion appears inevitable that such was not the legislative intention. Our answer to the question submitted is that the approval required of the Governor and Council by section 5, c. 95, Laws 1903, is confined to the determination of the number of special agents to be appointed and the amount of their compensation.

FRANK N. PARSONS.
WM. M. CHASE.
JAMES W. REMICK.
GEORGE H. BINGHAM.

Not having been able to confer with the other justices upon the question submitted by your excellency and the honorable council, or to properly consider it, I beg leave to be excused from the duty of returning an answer.

REUBEN E. WALKER.

(4 Pen. 308)

STAR LOAN ASS'N v. MOORE.

(Superior Court of Delaware. Kent. May 7, 1903.)

LOAN ASSOCIATION — ASCERTAINMENT OF VALUE OF SHARES AND AMOUNT DUE FROM BORROWING MEMBERS—EFFECT OF PAYMENT—PRESUMPTION OF RECEIPT OF PAYMENT—EVIDENCE—RECORDS.

1. A plaintiff in an action by *scire facias*, who takes issue on defendant's pleas of set-off,

statute of limitations, and accord and satisfaction, waives his right to move to strike out such pleas.

2. A paper purporting to be the charter of a corporation, which does not show that it is a certified copy of the recorded act, but merely purports to show that it came from the Secretary of State and had been recorded, is not admissible in evidence.

3. Where, in an action by a corporation, its president testified that a certain book contained the by-laws of the association which had been used and recognized generally by the members, and that there was no set of by-laws copied into the minutes, the book as containing the by-laws was admissible in evidence.

4. It was competent for the stockholders of a loan association, for the purpose of winding up the business of the association, to make a final estimate of the value of the shares of stock, and to ascertain the amount to be paid by each borrowing member in discharge of his indebtedness, after deducting therefrom the valuation of the stock so estimated.

5. Where the stockholders of a loan association, for the purpose of winding up its business, made a final estimate of the value of the shares of stock, and ascertained the amount to be paid by each borrowing member, and a borrowing member paid the amount so ascertained, he was discharged from the indebtedness, while, if such ascertainment was not final, but subject to modification by the subsequent disposition of the real estate belonging to the association and the collection of the debts due to it, then such payment by the borrowing member would not be a discharge.

6. The possession by a debtor of the evidence of a debt such as a bond, or mortgage, or a receipt in full payment thereof, is *prima facie* evidence of payment, if unexplained.

Action by the Star Loan Association, a corporation under the laws of Delaware, against William A. Moore. Verdict for defendant.

The pleas were payment, set-off, statute of limitation, and accord and satisfaction.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Levin Irving Handy, for plaintiff. R. R. Kenney, Arley B. Magee, and Henry Ridgely, Jr., for defendant.

Before the jury was called, Mr. Handy, for plaintiff, moved to strike out all the above pleas except payment.

LORE, C. J. Have you taken issue on these pleas?

Mr. Handy: Yes, sir; replications and issues.

LORE, C. J. Do you now wish leave to amend, or to demur to these pleas, or what is your application?

Mr. Handy: I do not think it is necessary to demur, but my application is for leave to withdraw the replications, and to move to strike those pleas out.

LORE, C. J. We cannot strike them out as they now stand, because you have taken issue on them, and the case is at issue on those pleas; you have pleaded over and waived. If you had made this motion before you took issue, the court would entertain it.

¶ 6. See *Payment*, vol. 29, Cent. Dig. §§ 100, 220, 233.

but we cannot do it now. We refuse to strike out the pleas.

Mr. Handy: I offer in evidence the act of incorporation of plaintiff association. There is no affidavit filed by the defendant denying the existence of the corporation.

BOYCE, J. It is admitted in evidence.

Mr. Handy: I desire not only to prove the existence of the corporation, but the powers of same, and offer in evidence the original charter.

Mr. Kenney: We object, on the ground that the evidence that he should produce is the record evidence of such a paper. The law requires that it shall be recorded in one of the counties of this state.

BOYCE, J. Is it a certified copy of the private act of incorporation?

Mr. Handy: Yes, sir.

BOYCE, J. Is there anything in the statute authorizing you to put that in evidence, when, to make it effective, it is required to be recorded?

Mr. Handy: If I understand the law, the way to prove a private act passed by the Legislature is to produce before the court from the office of the Secretary of State a certified copy of the act there on file. I have here the certificate of the recorder of deeds that this has been recorded.

BOYCE, J. This is neither a record nor certified copy of a record. There is nothing which shows this paper to be a certified copy of the recorded act. All it purports to show is that this paper, which came from the Secretary of State, has been recorded. We do not think it is admissible in evidence.

Mr. Handy served the following notice upon defendant's counsel: "You are notified, as attorneys for William A. Moore, to produce at 10 a. m. on Wednesday, May 6, 1903, at the trial of the case of Star Loan Association vs. William A. Moore, the published copy of the by-laws of the Star Loan Association, which copy was given to William A. Moore by said association, and used by said Moore as member of said association, and bound up by payments as such member made by said Moore."

Ridgely, of counsel for defendant, asked a ruling of the court as to whether or not the above was a proper subject to be covered by the general rule of law as to notice to produce. The object of the notice to produce was to admit, upon failure of production of the original, secondary evidence. The notice served in the present case was to produce a copy, not an original. If a copy is produced, is that copy then to be admitted in evidence? If so, it is in direct violation of the fundamental rule of evidence, which is that only the original of a paper can be proved until you can account for the absence of the original. It is, therefore, manifest that a notice to produce can refer only to an original paper.

BOYCE, J. The book which in the dis-

cussion has been alluded to purports to contain the by-laws of the association, which were recognized and used by the defendant as a member thereof.

Counsel for defendant thereupon produced a book stating that it was produced simply as a book that was in the possession of defendant at the time the notice was served, but not as a book which was acted upon according to the notice served, which notice was curiously, and, in their judgment, improperly, worded.

Mr. Handy: I offer in evidence the printed portion of this book produced, which is the by-laws.

Counsel for defendant objected to a portion of the book being offered in evidence, contending that under the notice to produce the whole book must be put in evidence, including the receipts written therein by the secretary of the loan association.

Harry Emmons, a witness produced by plaintiff, was called to the stand, and testified that the by-laws printed in a certain small book in the hands of the witness were the by-laws of the Star Loan Association, and were such during the membership of William A. Moore in said association. The witness was further questioned as follows:

By Judge BOYCE: Q. Have you any record of the adoption of the printed by-laws contained in the book now produced as the by-laws of the Star Loan Association? A. There is no record so far as I know. To the best of my knowledge these books constitute the by-laws, and there is no copy inserted in the minutes so far as I know.

By Judge SPRUANOE: Q. Are the by-laws as contained in that book the by-laws which have been promulgated by the association, and used and recognized generally by the members ever since Mr. Moore has been a member of the association? A. So far as I know, they have. My membership commenced in 1893, and these by-laws published in these books are the only by-laws I have ever had any knowledge of.

By Mr. Ridgely: Q. Do you mean to say that that book contains a printed copy of the by-laws, or the by-laws adopted by the corporation? A. I say that the by-laws of the corporation are in this book, and the only evidence we have of the by-laws of this association are these by-laws printed in these books, of which this is one. Q. About how long has that association been in existence? A. I think it was organized somewhere in the sixties. Q. Have you seen the minutes of the association in the sixties? A. No; I have not seen them. Q. Can you say positively, then, that there were no other by-laws adopted except what were contained in these printed copies? A. I say there are no other by-laws of the association except these by-laws published in these books, so far as I have any knowledge. There is no

set of by-laws copied into the minutes, so far as I have ever been able to examine the minutes, and I have examined them.

Mr. Ridgely further objected to the admission of the printed by-laws contained in the book on the ground that the secretary was the proper person to prove the fact that the by-laws offered in evidence were the original by-laws written in the minutes of the association, notwithstanding the testimony of the witness, who was president of the association; and that, therefore, it had not been proved that the proposed by-laws were the original by-laws of the association.

BOYCE, J. In the case of Lockwood et al. v. Mechanics' National Bank, 9 R. L. 308, 11 Am. Rep. 253, it was held that a by-law informally adopted may be subsequently ratified, and without any record of adoption may be approved by the usage and acts of the bank and the persons dealing with it. And we also find in 2 A. & E. Ency. of Law (1st Ed.) 709, that by-laws may be adopted without the use of the corporate seal, and no entry in writing is necessary, as their existence may be established by custom, or by acquiescence in a course of conduct by those authorized to enact them. In support of that is this note: "In the case of Union Bank v. Ridgely, 1 Har. & G. (Md.) 324-413, it was shown by oral testimony alone that for many years the rules and regulations headed 'By-Laws,' and contained in one of the books of the bank, had been uniformly acted upon as the by-laws of the bank, although no entry in writing anywhere appeared showing their adoption. It was, however, said by Buchannan, C. J., 'No reason has been shown in argument, nor can we perceive any, where their adoption may not be proved as well by the acts and uniform course of proceedings of the corporation, as by an entry or memorandum in writing.'" We admit the book in evidence as containing the printed by-laws of the association, and no objection is made to the admission likewise of the receipts for the payment of dues, etc., also contained in the book.

BOYCE, J. (charging jury). This action was brought by the plaintiff, the Star Loan Association, a corporation of the state of Delaware, against the defendant, William A. Moore, upon a mortgage dated February 21, 1887, given by the defendant to the plaintiff, conditioned for the payment of the principal sum of \$1,000, with lawful interest thereon from the 10th day of February, 1887. At the time of the execution of said mortgage the defendant transferred to the plaintiff, as collateral security for the mortgage, five shares of the stock of the tenth series of said association, held by him, and also a policy of fire insurance on the mortgaged premises. The plaintiff claims that there is due on the said mortgage, as the balance of the principal

debt, the sum of \$180.75, with interest thereon from the 1st day of October, 1899; and it ascertains that balance as follows:

Amount of mortgage debt.....	\$1,000 00
Interest on principal debt from July 1, 1898, to Oct 1, 1899.....	75 00
Total amount due.....	\$1,075 00
Subject to the following credits:	
Value of each of the said five shares of stock, to wit, \$164.11, making	\$ 820 55
And the three cash payments made as follows:	
Jan. 6, 1899.....	20 00
Feb. 4, 1899.....	20 00
March 25, 1899.....	23 70
Making a total credit of.....	\$ 864 25
Leaving a balance of.....	\$ 210 75

The total amount now claimed to be due on said mortgage, debt and interest, is the sum of \$219.62.

The defendant, on the other hand, claims that he has fully paid the principal debt and interest of said mortgage, and that nothing is due from him thereon. That he made a final settlement of the mortgage on the 25th day of March, 1899, with John F. Miller, then secretary of the association, at which time he alleges that he paid him the sum of \$33.70, the balance then due on said mortgage. And that at the same time the said Miller surrendered to him the said mortgage and the accompanying bond, with receipts in full payment thereof indorsed on each of them, and also the policy of fire insurance. He alleges that he paid the said mortgage and accrued interest in the following manner: By surrendering the said five shares of stock, each at the value of \$185.84, as was ascertained and determined by the stockholders at an annual meeting held on July 7, 1898, aggregating in value the sum of \$929.20; and, further, by the three cash payments made subsequently to the said meeting, aggregating \$73.70. It will thus be seen that the contention between the parties is as to the amount which should be credited to the defendant as the value of said five shares of stock.

It is conceded that article 22 of the by-laws, which provides a method by which the value of the shares of stock of the association may be credited to a debt for which they may be held as collateral, has no application to this case under the evidence adduced. The plaintiff claims that the true value of the stock by which the defendant could make a full and final settlement of his mortgage and interest was not and could not be accurately and definitely ascertained until after the sale of the real estate held by the association, and that the value of said stock was not so ascertained until October 1, 1899, and that then when it was so ascertained it was found to be of the value of \$164.11, and not of the value of \$185.84, as claimed by the defendant. The defendant justifies his claim of the credit of said stock at \$185.84 per share and the last three cash payments made

by him as in full payment of the mortgage, for the reason that the stockholders of said association at their said annual meeting held on the said 7th day of July, 1898, for the purpose, as he alleges, of winding up the affairs of said association, ascertained the value of the shares of stock of the tenth series of said association to be the said sum of \$185.84, and that for the purpose aforesaid they further ascertained the sums or balance due from the several borrowing members of said association; and in doing so they determined that there was then due on said mortgage of the said defendant, after deducting the aforesaid valuation of his said shares of stock therefrom, the sum of \$70.80. He further alleges that he was notified in writing of the action taken at said annual meeting, and that in pursuance thereof he made a final and full settlement of his mortgage debt and interest by the three cash payments already alluded to; the last having been made on the 25th day of March, A. D. 1899.

The plaintiff claims that, whatever may have been the estimate of the value of said stock at the said stockholders' meeting held on July 7, 1898, Miller, the secretary, had no authority to adopt such valuation as the amount to be credited on said mortgage, and to accept the said sum of \$70.80, then found to be the balance due on said mortgage, together with interest thereon, in full payment and discharge thereof; and that the action of the stockholders at said annual meeting in estimating the value of the stock and ascertaining the balance due from defendant on said mortgage was not a final determination of the amount actually due upon said mortgage, entitling him to make a final settlement upon that basis and in discharge of said mortgage, but was made for the purpose of suspending the payment of dues until the final disposition of the real estate held by the association, it being contended that the estimated value of the shares of stock thus ascertained having in part at least been determined by the estimated value then placed upon the real estate of the association, and not by a final disposition thereof. It was competent for the stockholders at the said annual meeting of July 7, 1898, for the purpose of winding up the business of the association, to make a final estimate of the value of the shares of stock of said association, and to ascertain the amount to be paid by each borrowing member of the association in discharge of his indebtedness to the association, after deducting therefrom the valuation of the shares of stock so estimated by the stockholders. And if at said meeting a valuation of the shares was made, and the balance due from the borrowing stockholders was ascertained and determined, and the defendant, in pursuance of such action of the stockholders, has paid to the association the amount so ascertained to be the balance of his indebtedness to the association, then and

in that event such payment would be in full discharge of the mortgage and he would be entitled to a verdict. If the ascertainment alleged then to have been made was not final so far as it related to the liability of borrowing members but was as to them subject to modification by the subsequent disposition of the said real estate and the collection of the outstanding debts then due the association, then the settlement alleged to have been made by the defendant on the 25th of March, A. D. 1898, would not discharge the mortgage.

The possession by a debtor of the evidence of a debt (such as a bond or mortgage) or a receipt in full payment thereof is prima facie evidence of payment, if unexplained; but there is no such presumption if the circumstances under which he got possession of the evidence of the indebtedness or under which he procured a receipt in full payment thereof are fully disclosed by the evidence.

It is conceded that the minutes of July 7, 1898, have been altered since they were first written. The alteration so made was done in such a manner as to leave no doubt upon an inspection what the entry therein was as first written, and likewise what change was intended to be effected in the minutes by the erasures and interlineations. It is for you to determine under all the evidence whether the entry as first made or as changed by the erasures and interlineations correctly recorded the action of the stockholders at said meeting.

Verdict for defendant.

(206 Pa. 179)

PETER ADAMS PAPER CO. v. CASSARD.

(Supreme Court of Pennsylvania. May 18, 1903.)

MARRIED WOMEN—CONTRACTS—LAW OF ANOTHER STATE—PRESUMPTIONS.

1. Under the married woman's act of June 8, 1893 (P. L. 344), every restriction imposed by the common law upon the capacity of a married woman to contract has been removed, except that she cannot become accommodation indorser, maker, guarantor, or surety for another, and cannot, without her husband's joiner, convey or mortgage her real estate.

2. Where, in an action against a married woman, the affidavit of defense shows that the contract was constructively made in New York, and was a contract of suretyship for the husband's debt, void under the laws of Pennsylvania, and the law of New York on the subject was not proven, it will be presumed that the wife's disability in such state was the same as in Pennsylvania.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Peter Adams Paper Company against Linda R. Cassard. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

¶ 1. See *Husband and Wife*, vol. 24, Cent. Dig. § 345.

Franklin Swayne, for appellant. Charles F. Stiltz and Humbert B. Powell, for appellee.

DEAN, J. Plaintiff brought this suit against defendant to recover \$3,077.76, which amount was an indebtedness of her husband, Henry L. Cassard, for which she had become surety. The husband had purchased for himself from the paper company certain quantities of paper on credit. Before shipping the paper, the wife delivered to the company this writing: "September 9th, 1898. Peter Adams Paper Company, New York City—Gentlemen: In consideration of your selling your paper to Harry L. Cassard, I agree to be responsible for all paper sold to him to the extent of three thousand dollars, the guaranty to continue until notice to the contrary. Yours, very truly, Linda R. Cassard. Lindamore, Charles St. Ave., Baltimore, Md." After receipt of this writing, plaintiff delivered paper to the husband, and charged the same to him on its books, the account running to December 1, 1899, at which date the wife wrote to the company, offering to pay \$322.26 cash on the account, and for the balance to give 11 notes jointly with her husband, each payable one month after date. She did pay the cash, but the notes were never given. This suit was then brought against the wife, this defendant, for the balance. The statement avers that the said contract was duly received and accepted in New York, and that the paper was furnished the husband; that defendant gave no notice withdrawing from her contract of suretyship; that plaintiff sold to the husband relying on the contract of the surety; that afterwards in New York she made the payment of \$322.26 in cash, and promised to deliver the notes before referred to, which promise she wholly failed to keep. The defendant made affidavit of defense, averring that she is a citizen of Pennsylvania, residing in Philadelphia with her husband; that the letter creating the suretyship was written by her husband, and signed by her at his request; that no part of the indebtedness was hers, but was wholly the husband's, and that this was well known to the plaintiff when it received the writing; that the wife received no value whatever in consideration of the contract. Thereupon plaintiff took a rule for judgment for want of a sufficient affidavit of defense. Afterwards, upon hearing, the court below made the rule absolute, and we have this appeal by defendant.

It is very clear that if this contract had been made in Pennsylvania the wife would not have been bound because of contractual incapacity. By our act of 1848 and the many acts since, every restriction imposed by the common law upon the capacity of a feme covert to contract has been removed except in two cases: (1) She cannot become accommodation indorser, maker, or

guarantor or surety for another. (2) She cannot, without her husband joins, convey or mortgage her real estate. The act of 1893 (the latest act on the subject, relieving the wife from contractual disability) expressly make these two exceptions. These exceptions have been fully sustained by this court in *Patrick v. Smith*, 165 Pa. 526, 30 Atl. 1044, and in *Wiltbank v. Tobler*, 181 Pa. 103, 37 Atl. 188. Both hold that under the act in the two instances noted the married woman in the first has no power whatever to contract, and in the second she has no power, unless in the express mode pointed out by the act of assembly. But it is evident from the record that this contract, at least constructively, was made in New York; its enforcement only is sought in the courts of Pennsylvania. The general rule is "that the validity of a contract is to be determined by the law of the state in which it is made, and not by the law of the state in which it is sought to be enforced." What, then, is the statute of New York as to the power of a married woman to contract? No power more unrestricted than that of Pennsylvania is averred in the statement. She avers her coverture. Her disability is at once established. A statute exempting her from the disability must be averred. On hearing of the rule to show cause, the court could then peruse it, and determine; but without the averment it could not do even this, at this stage of the case. It may be this contract is entirely good in New York, the place where it was made; if so, the plaintiff must aver and prove it, otherwise the court will presume the wife's disability is the same in New York as here. We do not determine the extent of this married woman's liability in either fact or law; we only decide that on a suit in Pennsylvania there was not sufficient on this record for the court below to determine it on a rule for judgment for want of a sufficient affidavit of defense.

We think the affidavit of defense was sufficient as against the statement filed. The judgment is therefore reversed, that such further proceedings may be had in the court below as to right and justice appertain.

(206 Pa. 199)

DIVES et al. v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Supreme Court of Pennsylvania. May 18, 1903.)

INDEMNITY INSURANCE—CONSTRUCTION OF POLICY—PLEADING—ELECTION BETWEEN COUNTS.

1. An employer's indemnity policy provided that it should recover no losses for injuries to any person unless his wages were included in the estimate of wages set forth, and he was on duty at the time of the accident in an occupation at the place mentioned in the schedule. The application for the policy stated that the estimated pay roll did not include the wages paid by subcontractors. Before the application

was signed the word "not" in such item was stricken out, and the answer was written "Yes." In the schedule attached to the policy the word "not" was not stricken out, but the answer "Yes" was written after the item, as in the application. *Held* that, if the insured was compelled to pay the damages for an injury to an employé of a subcontractor, the company was liable therefor, as such wages were included in the estimated wages.

2. Where, in an action on two contractors' liability policies, plaintiffs declared in separate counts on each of them, in one claiming that the person insured was their employé, and under the other that he was not, and the defendant pleads to the declaration, his motion to compel the plaintiff to elect, made at the beginning of the trial, comes too late.

Appeal from Court of Common Pleas, Berks County.

Action by Josiah Dives and George S. Pomerooy against the Fidelity & Casualty Company of New York. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Cyrus G. Derr and Edwin A. Jones, for appellant. Jefferson Snyder and A. K. Stauffer, for appellees.

BROWN, J. When about to erect a store building in the city of Reading the appellees applied to the appellant, a casualty company, for insurance against loss for injuries sustained by employés and others during the erection of the building. Two applications were made by the insured, and two policies were issued in pursuance of them. The company had two forms of policies, one known as the "Contractors' Employers' Liability Form," and the other as the "Contractors' Public Liability Form." The policies issued to the appellees were in these respective forms.

In the opinion of the court, directing judgment to be entered for the plaintiffs, it was properly said: "The plaintiffs were not, strictly speaking, 'contractors,' but owners. In order, however, to obtain the insurance they desired conformably to the practice of the defendant company, they signed an application for a policy in each of the two forms, in each application declaring that the estimated pay roll did include wages paid by subcontractors, and giving at the same figures both the estimated average number of persons to be employed and the estimated pay roll, which admittedly included all workmen to be employed by contractors, except those concerned with the erection of certain iron work already contracted for. * * * Indeed, it would seem that the common sense as well as legally correct treatment of this case requires that the two policies issued to plaintiffs be regarded as constituting part of, and as intended formally to evidence, one single and entire transaction, the substance and effect of which were to obtain and afford insurance against liability for injury to all per-

sons who should have occasion lawfully to be in or about the building in the course of its construction, and exposed to any of the dangers incident thereto, and fairly within the language of either policy, and who, in case of injury, would have a right of action against the plaintiffs. That is what the plaintiffs sought from and in their applications proposed to the defendant company. That is what they paid for. That is what, upon a broad and reasonable view of the situation of the parties and of the obvious purposes they were providing for, and also upon a fair construction of the policies tendered to and accepted by the plaintiffs, they had a right to believe they had obtained. And that, therefore, is what the defendant ought to be held to, upon the familiar and enlightened principle that, so long as courts of justice are called upon to administer contracts, they must be expected to administer them as nearly as may be according to the very intention and understanding that were present in the minds of the parties when they made them. *Barnhart v. Riddle*, 29 Pa. 92, 97." The learned judge, however, was of the opinion that the plaintiffs were entitled to recover on the first or "Contractors' Employers' Liability Form" of policy, and in this he was manifestly correct.

Clause "b" of the policy is: "This policy does not cover loss from liability for injuries as aforesaid to, or caused by, any person, unless his wages are included in the estimated wages hereinafter set forth, and he is on duty at the time of the accident in an occupation hereinafter described, at the place or places mentioned in the schedule." From this it is clear that the defendant company itself defined the persons who were to be regarded as "employés" under the terms of the policy, for the clause cannot be read otherwise than that any person whose wages were included in the estimated wages set forth in the schedule was, for the purpose of the protection intended by the policy, to be considered as an "employé" of the insured, no matter what may be the strict and literal meaning of the word when standing alone. Turning to the estimated total annual wages set forth in the schedule, they are found to be \$10,000, and the estimated average number of employés 75. These items, incorporated by the insurance company in its policy, are taken totidem verbis from the application upon which the policy was issued.

Paul Albert, who was injured and for whose injuries the appellees paid him, was actually employed by Burkhart Bros., who had the contract for doing the brickwork. Item 8 in the blank application presented to the insured was as follows: "The estimated pay roll does not include the wages paid by subcontractors." Before the application was signed, the word "not" in this item was stricken out, and the answer was "Yes." We have, then, the application stating distinctly that the wages paid by subcontractors were

included in the estimated wages given to the insurance company, and, in unmistakable language, the intention of the insurer, as found in clause "b" of its policy, was that it included every employé who, under subcontractors, was helping to erect the building.

To avoid this plain covenant to indemnify the insured from loss arising from injuries sustained by Paul Albert, the insurance company points to item 8 of the schedule in the policy, which, with a single exception, is in the exact words of item 8 of the application. The exception is that in the schedule the word "not" is not stricken out, and the contention of the appellant is that, as the answer "Yes" appears in that item, the insured represented to the company that the estimated pay roll did not include the wages paid by subcontractors.

Whether the insurance company, in undertaking to embody the application in its exact words in the policy, failed, intentionally or otherwise, to strike out the word "not" in item 8 of the schedule is immaterial, for the only sensible interpretation to be put upon that item in the schedule, which must be regarded as a question and answer, is that the insured said to the insurer that the estimated pay roll did include wages paid by the subcontractors. "Yes, the estimated pay roll does include the wages paid by subcontractors." The professional or lay mind would read this as the only intelligent answer given and intended to be given to the question, and, to say the least, it is an unwarranted play upon the word "Yes" to give it, in the connection in which it is used, the import asked for by the insurer. Item 8 in the application literally and distinctly states that the estimated pay roll includes the wages paid by subcontractors; item 8 in the schedule does the same in a slightly different form, for both express what was testified to by John E. Lewis as having been "clearly understood" by him and the representative of the insurance company at the time the application was signed. We need only add that the court below, in entering judgment for the plaintiffs, simply read the application and the policy issued in pursuance of it as they were written.

The first assignment of error is that the court below refused defendant's motion, made at the beginning of the trial, "that the plaintiffs be directed to elect on which of the two counts of the declaration they would proceed." In the statement of the questions involved on this appeal we are not asked to consider the one raised by this assignment, and, as it does not seem to be seriously pressed in the printed argument, we overrule it. We could give no better reason for doing so than the following, taken from the opinion of the court below in entering judgment on the verdict: "They [the appellees] had declared separately upon each of the two policies held by them, under the one

claiming that the person injured was their employé, and under the other that he was not. It may very well be that this method of stating their case was not in perfect accord with the requirements of the practice act of May 25, 1887, P. L. 271. But defendant had without objection pleaded to the declaration, and indeed was raising no question as to its propriety in form or substance, and there seemed to be no reason why, in fairness to defendant, the discretion to compel an election, if still exercisable, should be then exercised; nor is there any reason apparent now for supposing that any harm may have been done by the refusal to exercise it. If the defect were such as to forbid a judgment for plaintiffs in the case, that circumstance would have been taken advantage of by a motion in arrest of judgment. *Sidwell v. Evans*, 1 Pen. & W. 383, 387 [21 Am. Dec. 387]."

Judgment affirmed.

(206 Pa. 166)

**COMMONWEALTH ex rel. WADSWORTH
v. SHORTALL.**

(Supreme Court of Pennsylvania. April 17, 1903.)

**MARTIAL LAW—WHAT CONSTITUTES—DUTY
OF SOLDIER—HOMICIDE.**

1. Where a governor of a commonwealth issues a general order calling out the militia to suppress violence and maintain the public peace in a district affected by a strike, it is a declaration in such district of qualified martial law.
2. The powers of the commanding officer put in operation by martial law, exercised for the preservation of order and security of life and property, are limited only by the necessities and exigency of the situation, and in this respect there is no difference between a public war and domestic insurrection.
3. A soldier is bound to obey the orders of his superior officer where such orders do not clearly show their own illegality, and such orders will be a protection to the soldier.
4. Where a member of the militia called out to suppress disorder, without malice, in performance of his supposed duty, and under the order of an officer, commits a homicide, he is excusable unless it was manifestly beyond the scope of his authority, and he must have known that the act was illegal as a man of ordinary understanding.
5. Evidence examined in connection with a homicide by a member of the militia which had been called out to preserve the public peace, and held insufficient to make a prima facie case.

Petition for writ of habeas corpus on behalf of Arthur Wadsworth against William Shortall, a constable who had him in custody under a warrant of arrest for homicide, issued by a justice of the peace in Schuylkill county. Writ granted, and relator discharged.

Argued before MITCHELL, DEAN; FELL, BROWN, MESTREZAT, and POTTER, JJ.

Frederic W. Feltz and John F. Whalen, for relator. M. P. McLoughlin, Dist. Atty., and George Dyson, for respondent.

¶ 4. See *Army and Navy*, vol. 4, Cent. Dig. § 79; *Homicide*, vol. 26, Cent. Dig. § 134.

MITCHELL, J. A somewhat full statement of the facts will be conducive to the proper understanding of the case.

During the summer of 1902 a strike, beginning with a labor union known as the United Mine Workers of America, spread through nearly the whole of the anthracite coal region in Pennsylvania. As time progressed it was accompanied with increasing disorder and violence on the part of the strikers and their sympathizers, so that threats and intimidation, not only of men, but of their women and children, rioting, bridge burning, stoning and interference with railroad trains, destruction of property, and killing of nonunion workmen, became of frequent occurrence. The communities affected were either in secret sympathy with these acts or lacked the courage to put an end to them. Among the places where the disorder was greatest was Shenandoah, in Schuylkill county. There the police and the sheriff in attempting to preserve the peace were overpowered and beaten by mobs of strikers and several citizens killed. The sheriff having called upon the governor, the latter first ordered out a portion of the militia, and subsequently, on further call, the entire division of the National Guard, on October 6, 1902, by general order No. 39.

The text of this order, which is important, is as follows: "In certain portions of the counties of Luzerne, Schuylkill, Carbon, Lackawanna, Susquehanna, Northumberland and Columbia, tumult and riot frequently occur and mob law reigns. Men who desire to work have been beaten and driven away and their families threatened. Railroad trains have been delayed and stoned, and tracks torn up. The civil authorities are unable to maintain order and have called upon the Governor and Commander-in-Chief of the National Guard for troops. The situation grows more serious each day. The territory involved is so extensive that the troops now on duty are insufficient to prevent all disorder. The presence of the entire division, National Guard of Pennsylvania, is necessary in these counties to maintain the public peace. The Major General commanding will place the entire division on duty, distributing them in such localities as will render them most effective for preserving the public peace. As tumults, riots, mobs, and disorder usually occur when men attempt to work in and about the coal mines, he will see that all men who desire to work, and their families, have ample protection. He will protect all trains and other property from unlawful interference, will arrest all persons engaging in acts of violence and intimidation, and hold them under guard until their release will not endanger the public peace, and will see that threats, intimidations, assaults, and all acts of violence cease at once. The public peace and good order will be preserved upon all occasions and throughout the several counties, and no interference

whatsoever will be permitted with officers and men in the discharge of their duties under this order. The dignity and authority of the state must be maintained, and her power to suppress all lawlessness within her borders be asserted."

Under this order the Eighteenth Regiment, being part of the troops under command of Brigadier General Gobin, was stationed in and near Shenandoah. Several houses occupied by nonunion men had been dynamited and attempts made upon others. On October 8th, therefore, General Gobin issued the following order: "At 5:30 p. m. a detail of one corporal and six men should be put at the house of Barney Bucklavage, No. 1118 West Coal street; this house was dynamited on the night of October 6th and is occupied by a woman and four small children, and for the present I deem it best to guard it; my instructions to the guard have been that they shall keep a sentry at the front door sitting inside the house with the door ajar, and one sentry sitting just outside the rear door under the porch, and if any attempt is made to dynamite them, or they are shot at, or stoned, or any suspicious characters prowling around, particularly in the rear of the house, who fail to halt when directed by the guard, the guard shall shoot, and shoot to kill."

The relator, Arthur Wadsworth, was a private in Company A of the Eighteenth Regiment, in service there, and in the evening of October 8th was posted as sentry in the front yard of the Bucklavage house, just outside the door, with orders to halt all persons prowling around or approaching the house, and if the persons so challenged failed to respond to the challenge after due warning "to shoot, and shoot to kill." About 11:30 o'clock he discovered a man approaching along the side of the road nearest the house, and called, "Halt!" The man continued to advance toward the gate. Wadsworth called again, "Halt!" The man continued to advance. Wadsworth then touched the door, and said, "Corporal of the guard." He then called, "Halt!" and again, "Halt!" The man by this time had opened the gate, and was coming into the yard, when Wadsworth, in accordance with his orders, fired, and the man, whose name was afterwards found to be Durham, fell to the ground dead.

A coroner's inquest was held, and the jury found that "the shooting was hasty and unjustifiable," and recommended that the matter be placed in the hands of the district attorney for investigation. In the meantime, on complaint before a justice of the peace, a warrant had been issued for the arrest of Wadsworth, and after the return of the regiment from service he was arrested at his home in Pittsburg by the respondent, a constable of the borough of Shenandoah. A writ of habeas corpus was allowed by the presiding justice of this court, and, the commonwealth not making any charge

higher than manslaughter, the relator was admitted to bail pending the argument of the case.

These are all the material facts, and they are undisputed. The only appearance of question is in the testimony of some of the witnesses at the inquest that the deceased was outside the gate when they saw him after he had fallen. The relator and some others of the guard testified that the deceased had opened the gate and entered, but staggered back several steps after the shot was fired.

The issue of general order No. 39 by the Governor was a declaration of qualified martial law in the affected districts. In so characterizing it we are not unmindful of the eminent authorities who have declared that martial law cannot exist in England or the United States at all, or, at least, according to the more moderate advocates of that view, not in time of peace. Thus in *Ex parte Milligan*, 71 U. S. 2, 127, 18 L. Ed. 281, it is said in the opinion of the majority of the court, "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." But, in the dissenting opinion in the same case, Chief Justice Chase convincingly distinguished three classes of military rule, which are thus summarized by Judge Hare in his lectures on American Constitutional Law (page 930): "Military law, then, consists of the rules prescribed legislatively for the government of the land and naval forces, which, operating both in war and peace, and defined by Congress, are an offshoot of the civil or municipal law. Military government is the dominion exercised by a general over a conquered state or province. It is therefore a mere application or extension of the force by which the conquest was effected, to the end of keeping the vanquished in subjection, and, being a right derived from war, is hardly compatible with a state of peace. Martial law is the right of a general in command of a town or district menaced with a siege or insurrection to take the requisite measures to repel the enemy, and depends for its extent, existence, and operation on the imminence of the peril and the obligation to provide for the general safety. As the offspring of necessity, it transcends the ordinary course of law, and may be exercised alike over friends and enemies, citizens and aliens."

Many other authorities of equal rank hold that martial law exists wherever the military arm of the government is called into service to suppress disorder and restore the public peace. So far as any of the questions in the present case are concerned, the difference is one of terms rather than of substance, and is material chiefly in regard, first, to the jurisdiction of courts martial or military commissions over citizens not in the military or naval service, nor engaged in recognized war; or, secondly, to

the responsibility of officers or soldiers giving or acting under military orders, when not in actual war, to be called to account in the civil or criminal courts. With the first of these matters we are not now concerned, and the second will be discussed in its due order.

Order No. 39 was, as said, a declaration of qualified martial law. Qualified, in that it was put in force only as to the preservation of the public peace and order, not for the ascertainment or vindication of private rights, or the other ordinary functions of government. For these the courts and other agencies of the law were still open, and no exigency required interference with their functions. But within its necessary field, and for the accomplishment of its intended purpose, it was martial law, with all its powers. The government has and must have this power or perish. And it must be real power, sufficient and effective for its ends, the enforcement of law, the peace and security of the community as to life and property.

It is not unfrequently said that the community must be either in a state of peace or of war, as there is no intermediate state. But from the point of view now under consideration this is an error. There may be peace for all the ordinary purposes of life, and yet a state of disorder, violence, and danger in special directions, which, though not technically war, has in its limited field the same effect, and, if important enough to call for martial law for suppression, is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war. The condition in facts exists, and the law must recognize it, no matter how opinions may differ as to what it should be most correctly called. When the civil authority, though in existence and operation for some purposes, is yet unable to preserve the public order and resorts to military aid, this necessarily means the supremacy of actual force, the demonstration of the strong hand usually held in reserve and operating only by its moral influence, but now brought into active exercise, just as the ordinary criminal tendency in the community is held in check by the knowledge and fear of the law, but the overt lawbreaker must be taken into actual custody.

When the mayor or burgess of a municipality finds himself unable to preserve the public order and security, and calls upon the sheriff with the posse comitatus, the latter becomes the responsible officer, and therefore the higher authority. So if, in turn, the sheriff finds his power inadequate, he calls upon the larger power of the state to aid with the military. The sheriff may retain the command, for he is the highest executive officer of the county, and if he does so ordinarily the military must act in subordination to him. But if the situation goes beyond county control, and requires the full power of the state, the Governor intervenes

as the supreme executive, and he or his military representative becomes the superior and commanding officer. So, too, if the sheriff relinquishes the command to the military, the latter has all the sheriff's authority, added to his own powers as to military methods.

The resort to the military arm of the government, therefore, means that the ordinary civil officers to preserve order are subordinated, and the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander. To call out the military, and then have them stand quiet and helpless, while mob law overrides the civil authorities, would be to make the government contemptible, and destroy the purpose of its existence.

The effect of martial law, therefore, is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned, there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful.

"Whatever force is necessary for self-defense is also lawful. This law, applied nationally, is the martial law, which is an offshoot of the common law, and, although ordinarily dormant in peace, may be called forth by insurrection or invasion. War has exigencies that cannot readily be enumerated or described, which may render it necessary for a commanding officer to subject loyal citizens, or persons who though believed to be disloyal have not acted overtly against the government, to deprivations that would under ordinary circumstances be illegal; and he must then depend for his justification, not on the laws of war, but on the necessity which, as has been here seen, may warrant the taking of life, and will therefore excuse any minor deprivation." Hare, *Am. Constitutional Law*, lect. xlii, p. 924.

"When a riot assumes such proportions that it cannot be quelled by ordinary means, and threatens irreparable injury to life or property, the sheriff may call forth the posse comitatus and exercise an authority as their chief which can hardly be distinguished from that of a general engaged in repelling a foreign enemy or subduing a revolt. Arms may be used as in battle to bear down resistance, and if loss of life ensues the circumstances will be a justification. The measure does not, however, cease to be civil, or fall beyond the rules which apply when a house is entered in the night by burglars, or a traveler shoots a highwayman who demands his money. Nor will it change its character because the military are called in and the sher-

iff delegates his authority to the commanding officer. As Lord Mansfield showed in the debate on the Lord George Gordon riots in 1780, soldiers are subject to the duties and liabilities of citizens, although they wear a uniform, and may, like other individuals, act as special constables or of their own motion for the suppression of a mob, and if the staff does not suffice employ the sword. The intervention of the military does not introduce martial law in the sense in which the term is understood under despotic governments, and even by some distinguished jurists, because, agreeably to the same great magistrate and the settled practice in England and the United States, they are liable to be tried and punished for any excess or abuse of power, not by the martial code, but under the common and statute law." Hare, *Am. Const. Law*, lect. xli, p. 906.

This last quotation illustrates and explains the difference in the application of the term "martial law," which has given so much apparent trouble to some of the text-writers. There is no real difference in the commander's powers in a public war and in domestic insurrection. In both he has whatever powers may be needed for the accomplishment of the end, but his use of them is followed by different consequences. In war he is answerable only to his military superiors, but for acts done in domestic territory, even in the suppression of public disorder, he is accountable, after the exigency has passed, to the laws of the land, both by prosecution in the criminal courts and by civil action at the instance of parties aggrieved. On this all the authorities agree, and the result flows from the view that martial law in this sense is merely an extension of the police power of the state, and therefore, as expressed by Judge Hare in the quotation supra, an "offshoot of the common law, which though ordinarily dormant in peace may be called forth by insurrection or invasion." See *Republica v. Sparhawk*, 1 Dall. 357, 1 L. Ed. 174; *Mitchell v. Harmony*, 13 How. (U. S.) 115, 14 L. Ed. 75; *Ford v. Surget*, 97 U. S. 594, 24 L. Ed. 1018; and English cases cited in 2 Hare on *Const. Law*, c. xli.

In determining the responsibility for such acts, the courts proceed upon the principle of the common law as applied in issues of false imprisonment, self-defense, etc., that the acts must be judged by the appearance of things at the time. "It is not less clear that although the justification must be based on necessity, and cannot stand on any other ground, it will be enough if the circumstances induce and justify the belief that an imminent peril exists, and cannot be averted without transcending the usual rules of conduct. For when the exigency does not admit of delay, and there is a reasonable and probable cause for believing that a particular method is the only one that can avert the danger, it will be morally necessary, even if the event shows that a different and less ex-

treme course might have been pursued with safety." Hare, Const. Law, p. 917.

"It is the emergency that gives the right, and the emergency must be shown before the taking can be justified. In deciding upon this necessity, the state of the facts as they appear to the officer at the time he acted will govern the decision, for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing or the necessity urgent, he is justified in acting upon it, and the discovery afterwards that it was false or erroneous will not make him a trespasser." Taney, C. J., *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75.

And, while the military are in active service for the suppression of disorder and violence, their rights and obligations as soldiers must be judged by the standard of actual war. No other standard is possible, for the first and overruling duty is to repress disorder, whatever the cost, and all means which are necessary to that end are lawful. The situation of troops in a riotous and insurrectionary district approximates that of troops in an enemy's country, and in proportion to the extent and violence of the overt acts of hostility shown is the degree of severity justified in the means of repression. The requirements of the situation in either case, therefore, shift with the circumstances, and the same standard of justification must apply to both. The only difference is the one already adverted to, the liability to subsequent investigation in the courts of the land after the restoration of order.

Coming now to the position of the relator in regard to responsibility, we find the law well settled. "A subordinate stands, as regards the application of these principles, in a different position from the superior whom he obeys, and may be absolved from liability for executing an order which it was criminal to give. The question is, as we have seen, had the accused reasonable cause for believing in the necessity of the act which is impugned, and in determining this point a soldier or member of the posse comitatus may obviously take the orders of the person in command into view as proceeding from one who is better able to judge and well informed; and, if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong with the responsibility incident to disobedience, unless the case is so plain as not to admit of a reasonable doubt. A soldier consequently runs little risk in obeying any order which a man of common sense so placed would regard as warranted by the circumstances." Hare, Const. Law, p. 920.

The cases in this country have usually arisen in the army and been determined in the United States courts. But by the articles of war (article 59), under the acts of Con-

gress, officers or soldiers charged with offenses punishable by the laws of the land are required (except in time of war) to be delivered over to the civil (i. e., in distinction from military) authorities, and the courts proceed upon the principles of the common (and statute) law. *U. S. v. Clark* (C. C.) 31 Fed. 711. The decisions, therefore, are precedents applicable here.

A leading case is *U. S. v. Clark* (C. C.) 31 Fed. 710. A soldier on the military reservation at Ft. Wayne had been convicted by court martial, and when brought out of the guardhouse with other prisoners at "retreat" broke from the ranks, and was in the act of escaping, when Clark, who was the sergeant of the guard, fired and killed him. Clark was charged with homicide, and brought before the United States District Judge, sitting as a committing magistrate. Judge Brown, now of the Supreme Court of the United States, delivered an elaborate and well-considered opinion, which has ever since been quoted as authoritative. In it he said: "The case reduces itself to the naked legal proposition whether the prisoner is excused in law in killing the deceased." Then, after referring to the common-law principle that an officer having custody of a prisoner charged with felony may take his life if it becomes absolutely necessary to do so to prevent his escape, and pointing out the peculiarities of the military code, which practically abolish the distinction between felonies and misdemeanors, he continued: "I have no doubt the same principle would apply to the acts of a subordinate officer, performed in compliance with his supposed duty as a soldier; and unless the act were manifestly beyond the scope of his authority, or were such that a man of ordinary sense and understanding would know that it was illegal, that it would be a protection to him, if he acted in good faith and without malice."

In *McCall v. McDowell*, 1 Abb. (U. S.) 212, Fed. Cas. No. 8,873, where an action was brought by plaintiff against Gen. McDowell and Capt. Douglas for false imprisonment under a general order of the former for the arrest of persons publicly exulting over the assassination of President Lincoln, the court said: "Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law will excuse a military subordinate, when acting in obedience to the order of his commander; otherwise he is placed in a dangerous dilemma of being liable to damages to third persons for obedience to the order, or for the loss of his commission and disgrace for disobedience thereto."

* * * Between an order plainly legal and one palpably otherwise there is a wide middle ground, where the ultimate legality and propriety of orders depend or may depend upon circumstances and conditions, of which it cannot be expected that the inferior is in-

formed or advised. In such cases justice to the subordinate demands, and the necessities and efficiency of the public service require, that the order of the superior should protect the inferior, leaving the responsibility to rest where it properly belongs, upon the officer who gave the command." The court, sitting without a jury, accordingly gave judgment for Capt. Douglas, though finding damages against Gen. McDowell.

In *U. S. v. Carr*, 1 Woods, 480, Fed. Cas. No. 14,732, which was a case of the shooting of a soldier in Fort Pulaski by the prisoner, who was sergeant of the guard, Woods, J., afterwards of the Supreme Court of the United States, charged the jury: "Place yourselves in the position of the prisoner at the time of the homicide. Inquire whether at the moment he fired his piece at the deceased, with his surroundings at the time, he had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened to ripen into mutiny. If he had reasonable ground so to believe, then the killing was not unlawful. But if, on the other hand, the mutinous conduct of the soldiers, if there was any such, had ceased, and it so appeared to the prisoner, or if he could reasonably have suppressed the disorder without the resort to such violent means as the taking of the life of the deceased, and it would so have appeared to a reasonable man under like circumstances, then the killing was unlawful. But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required."

In *Riggs v. State*, 3 Cold. 85, 91 Am. Dec. 272, the Supreme Court of Tennessee held to be correct an instruction to the jury that "any order given by an officer to his private which does not expressly and clearly show on its face, or in the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him."

These are the principal American cases, and they are in entire accord with the long line of established authorities in England.

Applying these principles to the act of the relator, it is clear that he was not guilty of any crime. The situation, as already shown, was one of martial law, in which the commanding general was authorized to use as forcible military means for the repression of violence as his judgment dictated to be necessary. The house had been dynamited at night and threatened again. With an agent so destructive, in hands so lawless, the duty of precaution was correspondingly great. There was no ground, therefore, for doubt as to the legality of the order to shoot. The relator was a private soldier, and his

first duty was obedience. His orders were clear and specific, and the evidence does not show that he went beyond them in his action. There was no malice, for it appears affirmatively that he did not know the deceased, and acted only on his orders when the situation appeared to call for action under them. The unfortunate man who was killed was not shown to have been one of the mob gathered in the vicinity, though why he should have turned into the gate is not known. The occurrence, deplorable as it was, was an illustration of the dangers of the lawless condition of the community, or of the minority who were allowed to control it, and must be classed with the numerous instances in riots and mobs where mere spectators and even distant noncombatants get hurt without apparent fault of their own.

Whenever a homicide occurs, it is not only proper, but obligatory, that an official inquiry should be made by the legal authorities. Such an inquiry was had here at the coroner's inquest, and if there were any doubt about the facts we should remand the relator to the custody of the constable under his warrant, for a further hearing before the justice of the peace. But there was no conflict in the evidence before the coroner, and the commonwealth's officer makes no claim here that anything further can be shown. The facts, therefore, are not in dispute, and the question of relator's liability depends on whether he had reasonable cause to believe in the necessity of action under his orders. As said by Judge Hare, citing Lord Mansfield, in *Mostyn v. Fabrigas*, 1 Cowper, 161: "The question of probable cause in this as in most other instances is one of law for the court. The facts are for the jury; but it is for the judges to say whether, if found, they amount to probable cause." Hare's Const. Law, 919.

In *U. S. v. Clark* (C. C.) 31 Fed. 710, already cited, Mr. Justice Brown said: "It may be said that it is a question for the jury in each case whether the prisoner was justified by the circumstances in making use of his musket, and if this were a jury trial I should submit that question to them. * * * But as I would, acting in (that) capacity, set aside a conviction if a verdict of guilty were rendered, I shall assume the responsibility of directing his discharge."

This court, either sitting as a committing magistrate or by virtue of its supervisory jurisdiction over the proceedings of all subordinate tribunals (*Gosline v. Place*, 32 Pa. 520), has the authority and the duty, on habeas corpus in favor of a prisoner held on a criminal charge, to see that at least a prima facie case of guilt is supported by the evidence against him. In the relator's case the facts presented by the evidence are undisputed, and on them the law is clear and settled. If the case was before a jury, we should be bound to direct a verdict of not

gully, and to set aside a contrary verdict if rendered. It is therefore our duty now to say that there is no legal ground for subjecting him to trial, and he is accordingly discharged.

The relator, Arthur Wadsworth, is discharged from further custody under the warrant held by respondent.

(206 Pa. 184)

SOHRADER v. BEATTY.

(Supreme Court of Pennsylvania. May 18, 1903.)

DECEDENT'S ESTATE—CLAIM FOR SERVICES—PRESUMPTION OF PAYMENT.

1. Where the head of a house assumes relations of intimacy with his servant, and takes her out riding, and by what he says and does indicates an intention to marry her, the presumption on his death that she had been regularly paid, according to the custom of the locality in which her services were rendered, cannot be invoked.

Appeal from Court of Common Pleas, Montgomery County.

Action by Emma Elizabeth Schrader against James Beatty, administrator of Samuel R. Beatty. From a judgment of the superior court reversing the judgment for defendant, he appeals. Affirmed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Montgomery Evans, John Eckstein Beatty, John M. Dettra, and James B. Holland, for appellant. N. H. Larzelere, Gilbert Rodman Fox, and M. M. Gibson, for appellee.

BROWN, J. Judgment was entered for the defendant by the court below, non obstante verdicto, because it was of opinion that the presumption that the plaintiff had been paid by the decedent in his lifetime had not been overcome. On appeal to the superior court, the judgment so entered was reversed, and the judgment there was for the plaintiff on the verdict, because that court was of opinion that sufficient evidence had been submitted to the jury to justify their finding that the presumption had been overcome that the plaintiff had been paid, and for the additional reason that, "upon the testimony, her personal relations to the decedent can scarcely be regarded as those of a servant, conclusively presumed, in first instance, to have received periodic payments during her employment." On this appeal we will consider only the question whether the relations of the appellant to the deceased were of such a character as to take the case out of the general rule that the wages of servants are presumed to be regularly paid.

The plaintiff's claim, as set forth in the statement of her cause of action, is for services rendered as housekeeper for the decedent, and if the evidence submitted showed that they were those simply of housekeeper, and that she sustained no other relation to

the decedent, the judgment of the court below would have to be sustained, under the authority of *Taylor v. Beatty*, 202 Pa. 120, 51 Atl. 771, where our Brother MESTREZAT, speaking for all of us, said: "It is the character of the services rendered, and not the term applied to the person performing them, that determines whether or not she is a servant, within the rule that a servant's wages are presumed to be paid periodically. It is immaterial that the employé is called a 'housekeeper.' That term does not definitely define the duties of the servant, nor is its meaning sufficiently certain to exclude extrinsic evidence as to the services actually performed by the employé. One of the standard English dictionaries defines a 'housekeeper' to be 'a woman who oversees the work and servants in a house, either as a mistress or as an upper servant.' As said by Mr. Justice Peckham, in delivering the opinion of the court in *Edgecomb v. Buckhout*, 146 N. Y. 332, 46 N. E. 991, 28 L. R. A. 816: 'Generally speaking, we know that the term "housekeeper" has reference to services performed in the taking care of a house, in connection with the inmates residing therein; but exactly what special and particular duties are to be regarded as embraced within the term must almost always be decided by the duties which are actually performed under the agreement as made.' " According to the testimony submitted to the jury, the relation of this plaintiff to the decedent was different from that sustained by him to Sarah Jane Taylor, the appellant in the case referred to. In charging the jury, the learned trial judge instructed them that, in determining the question whether the presumption had been overcome that the plaintiff had been paid, they should take into consideration the relations that existed between her and the decedent. He said, among other things: "What were their relations? How did he treat her? What did he think of her?" In the same connection, he called attention to the testimony that the decedent contemplated marrying her; one witness having testified that he said: "She will be all right some day, anyhow. She will be mine." While we will not impair, but always enforce, the rule that there is a presumption that domestics are regularly paid, weekly, biweekly, or monthly, according to the custom of the locality in which they render services to their employers, it can have no application when the head of the house assumes relations of intimacy with his servants, taking a girl employed by him out riding into the parks, and, by what he says and does, indicates an intention to marry her. In such a case, the strict rule applicable to purely business relations cannot be invoked by the master, for the intimacy of his personal relations with his servants necessarily involves him in laxity in his business relations with them. An illustration of the truth of this is found in the present case. Instead of paying the plaintiff regular

ly, there must have accumulated in the hands of the decedent at one time the sum of \$93, which he paid for a set of furniture for her. The testimony of B. D. Block as to this is: "Mr. Beatty came to our store to select some furniture, and looked all around. We did not have anything to suit him. He said he wanted a solid mahogany set. I offered to go to the factory in Philadelphia with him. I went to see him in Conshohocken. He then called Miss Schrader. He said it was Lizzie's; she was buying it. He and Miss Schrader and I went to Philadelphia, and selected a set. I sent the bill to Mr. Beatty, and he paid it. It was \$93. The bill was dated November 23, 1896." At another time the decedent paid \$100 to a physician for professional services rendered to the plaintiff.

The finding of the jury having been in favor of the plaintiff, we must assume that they not only believed the testimony as to the relations between her and the deceased, but that the intimacy was of such a character as to overcome the presumption that she had been paid. The instruction of the learned trial judge should have been, not that the jury might regard the relations between the parties as sufficient to overcome the presumption of payment, but that, if the testimony was believed, the case was taken out of the rule that the master is presumed to regularly pay his servants at stated periods. This rule is for the protection of a master and his estate, and is never relaxed when the relation between him and his employé are those purely of master and servant; but when he establishes and maintains new and different relations to his servant during the continuance of the service, he himself takes his case out of the rule. There is no longer any reason for its application. The presumption that servants are regularly paid naturally arises from the general custom of regularly paying servants at stated periods, when the relations between them and their employer are of the ordinary character of master and servant. The servant, as a rule, needs his money as he earns it, and the master, knowing this, as a rule, pays him weekly or monthly. If he does not so pay without demand from the servant, the presumption is that the demand is made, and that the master then pays. But when, as in this case, a man makes a companion of the girl or woman in his employ, and, by what he says and does, indicates an intention to marry her, it is not natural that either he or she should longer regard the relations between them as of a strictly business character, involving prompt and regular payment for the services rendered. The freedom between them soon becomes freedom in their business relations, and the presumption of regular payments and settlements disappears. In affirming the judgment of the superior court, we repeat what we said in Ranninger's Appeal, 18 Pa. 20, 12 Atl. 511: "The presumption of payment which might ordinarily arise

in the case of a domestic servant would not, we think, be applicable in such a case."

The judgment of the superior court in favor of the plaintiff on the verdict for \$1,316.60 is affirmed, which judgment will bear interest from March 25, 1901.

(206 Pa. 220)

RHYMER v. FRETZ.

(Supreme Court of Pennsylvania. May 18, 1903.)

INJUNCTION—PUBLIC NUISANCE—SPECIAL DAMAGES.

1. A bill will not lie to enjoin the enlarging of a frame building immediately opposite plaintiff's residence, where the bill discloses that the erection would endanger the property in the vicinity, and that the use for which it was intended would prevent plaintiff and his neighbors from fully enjoying their property, without any allegation of an injury special to plaintiff.

Appeal from Court of Common Pleas, Philadelphia County.

Action by James L. Rhymer against Tobias L. Fretz for an injunction. Decree for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, FELL, MESTREZAT, BROWN, and POTTER, JJ.

George F. Deiser and George H. Nitzsche, for appellant. James S. Clifford, for appellee.

MESTREZAT, J. James L. Rhymer, the plaintiff, owns and resides on the premises at No. 1732 North Front street, in the city of Philadelphia. Pursuant to an ordinance of the select and common councils of the city, approved November 8, 1892, granting him permission, Tobias L. Fretz, the defendant, erected a frame building, to be used for religious purposes, on the lots at Nos. 1731 and 1733 North Front street, directly opposite the premises and residence of the plaintiff. By a subsequent ordinance, approved February 18, 1901, the ordinance of November 8, 1892, was amended so as to authorize Fretz to enlarge the frame building he had erected. After the defendant had begun the work authorized by the amended ordinance, the plaintiff filed this bill against him as superintendent of Gospel Mission, 1731 and 1733 North Front street, to restrain him "from continuing the erection upon said premises of said frame structure." The bill avers that "since the erection of the original frame building upon the premises the Gospel Mission has been the resort of disreputable characters, who congregate in the neighborhood, and are a nuisance to the peace and safety of this neighborhood. Various acts of nuisance have been committed within the past six months, and the frame structure has been partially diverted from its high religious purpose by the maintenance of a saw-mill and woodyard, and for the purpose of operating the same a boiler and engine are

¶ 1. See Nuisance, vol. 37, Cent. Dig. § 144.

used." The reason assigned for the relief prayed for is found in the seventh paragraph of the bill, and is "that the erection of said frame structure, and the uses to which it is being put, viz., the working of a sawmill and woodyard, and the operating of a steam boiler and engine, will jeopardize the safety and endanger property in this vicinity from fire, and by reason thereof, together with the unlawful gathering of persons in the neighborhood, will deprive himself [the plaintiff] and his neighbors of the full enjoyment and proper use of their property and home." The court below entered a decree "that a permanent injunction issue, restraining the defendant from erecting the building authorized by the ordinance of 1901." The entry of this decree is the subject of the sixth assignment of error.

It is well settled law that a public nuisance cannot be suppressed or enjoined at the suit of a private individual unless he has sustained some damage or injury which is clearly special to himself, and apart from that which the general public sustains. Mr. Wood, in his work on Nuisances (section 648, 3d Ed.), citing numerous authorities to sustain the text, states the rule as follows: "An individual, in order to be entitled to a recovery for injuries sustained from a public nuisance, must make out a clear case of special damages to himself, apart from the rest of the public, and of a different character, so that they cannot fairly be said to be a part of the common injury resulting therefrom. It is not enough that he has sustained more damage than another. It must be of a different character, special and apart from that which the public in general sustain, and not such as is common to every person who exercises the right that is injured." In *Mechling v. Kittanning Bridge Co.*, 1 Grant, Cas. 416, Lowrie, J., speaking for this court, said: "Private citizens have no right of action, either in law or equity, for the suppression of a public nuisance, unless on averring and proving some special damage to themselves. * * * For a nuisance that is merely a public wrong, only a public action can be brought, and that must be done by the proper public functionaries." Applying this rule to the facts averred in the bill, it is clear that the court below could not give the plaintiff the relief he seeks. His only complaint is that the erection of the building, and the uses to which it will be put, "will jeopardize the safety and endanger property in this vicinity from fire, and by reason thereof, together with the unlawful gathering of persons in the neighborhood, will deprive himself and his neighbors of the full enjoyment and proper use of their property and home." In this averment there is no allegation that by the construction and use of the building the plaintiff will sustain any damage special to himself, or that his property will be subjected to any other or greater danger than that of his neighbor. The danger from fire and the deprivation of

the enjoyment and use of property are therefore, as alleged in the bill, common to all the property and persons residing in the vicinity of the proposed structure. The anticipated injury or damage to the property of the plaintiff by the erection of the building will be the same in character and degree as that which will result to the property of every other person in the neighborhood. In fact, there would be greater danger to the property on the same side of the street, and immediately adjacent to the Mission building, than to the residence of the plaintiff. As appears from the bill, this "is a residential neighborhood of valuable private houses," and hence the property in the entire neighborhood, being of the same character, will be jeopardized to the same extent and degree as that of the plaintiff, which is his private residence. This is a fact not only averred in the bill, but found by the learned trial judge in his fourth finding of fact, as follows: "That the erection of a frame building in the location authorized by the ordinance of councils would increase the danger of fire to the residences and other buildings in the immediate neighborhood, including that of the plaintiff." We are of opinion that the bill avers no facts showing any danger or injury likely to result from the erection of the proposed structure which is special to the plaintiff and not common to all the property owners in the vicinity, and that therefore it was error to grant the injunction, at the instance of the plaintiff, restraining the defendant from erecting the building.

The sixth assignment of error is sustained, the decree is reversed, and it is ordered that the bill be dismissed at the cost of the appellee.

(206 Pa. 243)

NATIONAL BANK OF BOYERTOWN v. FRIDENBERG et al.

(Supreme Court of Pennsylvania. May 18, 1903.)

BANKS—AUTHORITY OF CASHIER—ESTOPPEL TO DENY.

1. Where a cashier of a bank was authorized to buy and sell stock, and his authority was apparently general as to the character of the securities he was to purchase, and as to whether they were to be on margins or cash, and he opened an account in the name of the bank with certain brokers, and bought and sold stock both for cash and on margins, and large profits were made for the bank on the cash transactions, it could not claim, where the cashier subsequently absconded, that it was not liable for the losses on the margin transactions.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by the National Bank of Boyertown against Samuel M. & M. Samuel Fridenberg. From a decree dismissing the appeal, plaintiff appeals. Affirmed.

Brégy, J., found the facts to be as follows:

"On July 19, 1900, the cashier of the plaintiff bank opened an account with the defendant brokers in the name of 'The National Bank of Boyertown.' The first transaction was the purchase of one hundred shares of Union Pacific at fifty-seven and five-eighths, which was paid for in full in a few days. The second was a purchase of two hundred shares of American Tobacco at ninety-three and three-quarters, also paid for in full in a few days. (This transaction was on July 31, 1900.) These stocks were sold in a few weeks at a profit, and from that time on stocks and bonds were bought and sold when it was thought wise to do so. For quite a while these speculations were made with the express authority of the president and directors of the bank. In fact, it is admitted that all the purchases of stocks and bonds that were paid for in full a few days after they were bought are properly chargeable to the bank. In many cases the securities bought would not be taken away from the brokers' possession by the bank, but would be held by the defendants till the bank wanted them or ordered them sold. In October, 1901, the cashier absconded, and it was then discovered that he had not only speculated as he was specially authorized to do, namely, by paying in full for his purchases, but that he had bought stocks and bonds without paying for them, upon the strength of the securities in the hands of the brokers defendant. This sort of speculation was without the knowledge of the president of the bank or the directors. The president of the bank received some \$165,000 worth of securities from the defendants after the cashier's flight; ordered the remaining stocks, etc., bought by the cashier's order to be sold. The balance resulting from this sale, less the amount due upon the various transactions, the bank declines to receive, claiming more. The question turns upon whether the bank is bound by the acts of the cashier. The bank claims that it is only bound by the purchases that the cashier made when he paid for them in full (what is known as an 'outright purchase'), and that the purchases otherwise made do not bind it. I cannot agree to that contention. The bank authorized its cashier to speculate. It sent no notice to the defendants of any limitation of the manner of it. The bank received large sums as the result of many fortunate ventures, and finally ordered the balance of stocks, etc., on hand, sold out, and the account closed. I think this course of conduct bound the bank for all the transactions of its cashier, it being remembered that every purchase and sale was made for the account of the National Bank of Boyertown on the books of the defendants. I also think the cashier has power to bind the bank for purchases and sales of its securities, and that the order to sell out the remaining stocks and bonds was an express affirmation of all that he had done.

55 A.—61

"For these reasons, I grant the motion to dismiss the bill."

Argued before MITCHELL, FELL, MESTREZAT, BROWN, and POTTER, JJ.

R. C. Dale and C. H. Ruhl, for appellant.
R. O. Moon and E. Cooper Shapley, for appellees.

MESTREZAT, J. The plaintiff's bill was properly dismissed on the facts found and stated in the two opinions filed by the learned trial judge. The bill avers, and it is conceded, that the defendants, who were brokers doing business in the city of Philadelphia, were employed by Mory to buy and sell securities for the plaintiff bank. The account was opened in July, 1900, in the name of "The National Bank of Boyertown," and ran till October, 1901. The defendants had a previous individual account with Mory, but it was closed more than a year prior to the opening of the account with the bank. It is not denied that Mory had authority to purchase and sell stocks and bonds for the bank. It is found as a fact that the bank authorized the cashier to speculate in stocks, without any limitation as to the manner of doing so, and that it received large sums as the result of fortunate speculations during the running of this account. After Mory, the cashier, had absconded, in October, 1901, the president of the bank received from the defendants securities aggregating \$165,000, and ordered the brokers to sell all the remaining stocks and bonds held by them for the plaintiff, which was done, and the balance due the bank on the account was remitted to it. An itemized account of all the stock transactions between the plaintiff and the defendants was furnished by the latter to the bank prior to the filing of this bill. The defendants had no private account with Mory, but all their dealings with him subsequent to July 19, 1900, were for and in the name of the bank. There was but one account of these transactions kept by the defendants, and it contained all the securities purchased and sold through Mory from July 19, 1900, when the account was opened, until it was closed, in October, 1901.

This bill was filed for an accounting and to compel the defendants to deliver to the plaintiff bank any securities that might be found owing it. It is claimed by the plaintiff that the account should include only such securities as were purchased and sold for cash, and should exclude all stocks and bonds not paid for in full at the time of the purchase. The former transactions are alleged to be legitimate; and the latter, speculative and on Mory's individual account. The plaintiff has accordingly made two accounts from the account furnished it by defendants—the only account kept by them—and annexed the two accounts to its bill; one containing the transactions admitted to

be legitimate, and carried on by Mory for the bank, and the other alleged to be speculative, and containing transactions carried on for the private account of Mory. It is averred that these accounts were "wrongfully merged into one account" by the defendants. But there is no sufficient evidence to sustain this averment, or to warrant the conclusion that the defendants knew the purchase and sales of any of the securities were on Mory's individual account. The defendants had no reason to believe that the bank had confined Mory to cash transactions in his stock dealings on its account. The authority of the cashier in the matter was apparently general, and without limitation as to the character and amount of the securities he was empowered to purchase, and as to whether the transactions should be on margin or for cash. Even if the financial standing of Mory had been discredited in the conversation between Wallick and the defendants, proof of which was rejected, it afforded no reason for the latter believing Mory was not authorized to act for the bank in all of the stock transactions subsequent to the date the account had been opened, when it is conceded he had the authority to purchase and sell stocks for cash through the defendants as brokers. His standing for honesty and integrity was vouched for by the bank, by its employing him as its cashier. His financial condition might be a reason for the defendants refusing to deal with him on his individual account, but it was no evidence of a limitation of his authority to act for a bank of which he was cashier, and which admitted his authority to deal for it in securities. We think the plaintiff must accept the account as a whole, and that there is no reason shown by the evidence for excluding the transactions involving the losses. As said by the learned judge: "There is no equity in the division of what was one account, as far as the defendants were concerned, into two, and thus pocket the profits of one kind of transactions, and cast upon the defendants, not the loss of others, but the failure to make more profits than it would have made if certain other transactions had not taken place."

The decree is affirmed.

(206 Pa. 227)

DAILEY v. FREY et al.

(Supreme Court of Pennsylvania. May 18, 1903.)

MARRIAGE—EVIDENCE—CERTIFICATE.

1. Where, in a bill for partition, the issue is raised as to the lawful marriage of plaintiff's parents, a certificate of marriage was admissible to identify the parties, in connection with evidence that it was produced from the custody of plaintiff's father, and claimed by him as his marriage certificate, though the name of plaintiff's father was Sharpe, and the name in the certificate was Shaw.

2. In a bill for partition, where the validity of the marriage of plaintiff's parents was de-

nied, evidence held sufficient to establish validity.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Margaret Dailey, guardian of Amelia B. Sharpe, against John Frey and Julia Frey. Decree for plaintiff, and defendants appeal. Affirmed.

Ralston, J., found the facts to be as follows:

"The bill avers that Amelia Bradley Sharpe, born August 25, 1885, is the daughter of Frederick Sharpe and Margaret Bradley Sharpe, who was the daughter of Daniel Bradley, who were married on September 10, 1884; that Margaret Bradley Sharpe died on or about September 8, 1885, intestate, married, and leaving to survive her the minor, Amelia Bradley Sharpe. Daniel Bradley died on November 4, 1892, intestate, leaving a widow, Ellen Bradley, three children, Julia Frey, Charles Harry Bradley, and Elizabeth Bradley, and a grandchild, Amelia Bradley Sharpe, in whom his real estate vested. Charles Harry Bradley died on October 21, 1894, and Elizabeth Bradley died on February 21, 1894, both intestate, unmarried, and without issue. Ellen Bradley, the widow, died on October 15, 1896. The bill prays for a partition of the real estate. The answer denies that Frederick Sharpe was married to Margaret Bradley, and alleges that Margaret Bradley was married to Thomas McClain on May 22, 1883, and remained his lawful wife until her death.

"The sole question to be determined is whether Frederick Sharpe and Margaret Bradley Sharpe were lawfully married as averred in the bill. The complainant's counsel produced a marriage certificate which had been given him by Frederick Sharpe. Amelia Bradley Sharpe testified that she had seen her father hand it to him. William Sharpe testified that Frederick, his brother, had shown him this same certificate in 1886 after the death of Margaret Bradley Sharpe. Mrs. Manship, the widow of the clergyman performing the ceremony, testified that her husband was dead; that the certificate was in his handwriting, as was also a record kept by Mr. Manship, which she produced. The certificate showed that Frederick Shaw and Margaret Josephine Bradley were married on September 10, 1884. Witnesses testified that Frederick Sharpe and Margaret Bradley Sharpe lived together; that, shortly after the birth of Amelia Bradley Sharpe, Margaret returned to the house of her father, Daniel Bradley, where she died; that she was buried from her father's house as Mrs. Sharpe, Frederick Sharpe being present and recognized as her widower. The child remained in Daniel Bradley's family until the death of Daniel and Ellen Bradley, and shared in the distribution of Daniel Bradley's personal estate. These facts are, in the opinion of the court, sufficient to establish the identity of the

Frederick Shaw mentioned in the certificate with Frederick Sharpe, and prove the marriage between Frederick Sharpe and Margaret Josephine Bradley. The defense is that, even if such a marriage was contracted, it was void, because the woman was at that time married to another man. To establish this, it was shown that on May 22, 1883, Thomas McClain was married to Maggie Bradley. There were several families of Bradleys living in the same neighborhood. No witnesses could identify the Maggie Bradley named in the certificate with Margaret Josephine Bradley, with the exception of Julia and John Frey, the defendants. They both testified that Margaret (Mrs. Frey's sister) had told them that she was married to Thomas McClain; that they had seen them together. The court thinks that the testimony is not sufficient to establish the marriage of Margaret Josephine Bradley with Thomas McClain, and thereby to annul the marriage of Frederick Sharpe with Margaret Josephine Bradley, and declare Amelia Bradley Sharpe to be a bastard. The court finds that Frederick Sharpe and Margaret Josephine Bradley were lawfully married on September 10, 1884; that Amelia Bradley Sharpe, their daughter, is a legitimate heir to her grandfather, Daniel Bradley, and is entitled to share in his estate. A decree will be entered as prayed for in the bill."

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

D. Webster Dougherty, for appellants.
Michael J. Ryan, for appellee.

PER CURIAM. To a bill for partition of lands formerly of one Bradley between plaintiff's ward, a granddaughter of Bradley, and defendant, a daughter, the answer denied the legitimacy of the plaintiff. This was equivalent to a plea of non tenent insimul, and, there being no other facts in dispute, the judge, apparently by agreement, proceeded to determine the case on this single issue.

The defendants denied plaintiff's legitimacy on two grounds: First, that her parents had never been married; and, secondly, that at the time of the alleged marriage the mother was the wife of another man. All the assignments of error go to the admission and weight of the evidence on these two points. Without discussing them in detail, it is sufficient to say first that there was evidence enough to support the finding of a marriage between plaintiff's parents. The certificate of marriage, though not in itself evidence of that fact, was offered in connection with testimony that it was procured from the custody of plaintiff's father, and claimed by him as the certificate of his own marriage. It was therefore within the principle of *Hill v. Hill's Adm'r*, 32 Pa. 511, and was admissible as tending to show the identity of the parties notwithstanding the variation in the name.

The second question is more difficult.

There was considerable evidence of a previous marriage. But opposed to it was the evidence of the reception of the parents of the appellee by her mother's family as married, the acknowledgment of the husband and the treatment of the appellee from her birth as a legitimate child, the entire absence of any appearance or question of the alleged first husband during the whole life of the alleged wife, the possibility of confusion as to the two Bradley families, and finally the presumption in favor of innocence as to the alleged bigamy. The judge, weighing all the evidence, found the marriage of appellee's parents to be valid, and we have not been convinced that he was in error.

Judgment affirmed.

(206 Pa. 260)

In re MEGARY'S ESTATE.

Appeal of EGE.

(Supreme Court of Pennsylvania. May 18, 1903.)

WILL—WHAT CONSTITUTES—POWER TO REVOKE.

1. A paper duly executed in conformity with the wills act was substantially as follows: "To Whom It may Concern: This is to certify that, in consideration of the fact" that the stepdaughter of testatrix had attended to her business for 20 years without charge, "Now, therefore, be it known that I desire and so affirm that my stepdaughter shall receive" as compensation "two thousand dollars—the aggregate amount of one hundred dollars per year for the period of twenty years to date. I also wish it to be understood that the above-mentioned compensation shall not affect any right that she may have as devised to her in any will or testament of mine that may be in force at the time of my decease." The paper remained in the possession of the stepdaughter until her stepmother's death. *Held*, that it should have been admitted to probate as a will.

2. Where an instrument testamentary in its character was delivered to the person beneficially interested, and no present interest passed, it did not destroy the testator's power of revocation, but took effect only after the death of the testator, if not revoked.

Appeal from Orphans' Court, Cumberland County.

In the matter of the estate of Sarah Megary. Appeal by Anna J. Megary Ege from a decree dismissing the appeal from the register of wills. Reversed.

Argued before MITCHELL, DEAN, FELL, MESTREZAT, and POTTER, JJ.

F. E. Beltzhoover, E. M. Biddle, Jr., and H. M. Zug, for appellant. Conrad Hambleton, J. G. Fletcher, F. H. Hoffer, W. J. Zacharias, and Gillan & Gillan, for appellees.

MESTREZAT, J. This is an appeal from the decree of the court below dismissing an appeal from the decision of the register of wills, refusing to admit to probate the following written instrument:

"To Whom It May Concern: This is to certify that in consideration of the fact that my stepdaughter Anna J. Megary Ege has shar-

ed her home with me and attended to my business, correspondence &c., for me since the decease of my husband, William C. Megary, and that she has made no charge for said courtesies during said period of time.

"Now, therefore, be it known that I, Sarah Megary, desire and so affirm that my said stepdaughter shall receive as compensation for said services out of my estate a sum of money or its equivalent that shall aggregate two thousand dollars—the aggregate amount of one hundred dollars per year for a period of twenty years to date.

"I also wish it to be understood that the above-mentioned compensation shall not affect any right that she may have as devised to her in any will or testament of mine that may be in force at the time of my decease.

"Witness my hand and seal this twenty-third day of November, A. D. 1899.

"Sarah Megary. [Seal.]

"Witnesses:

"L. A. Brownawell.

"Mrs. Mary Frymier."

It is shown by the testimony of the two subscribing witnesses that the paper was signed by Mrs. Megary in their presence when she was of sound mind. It is conceded that the instrument was executed in conformity with the wills act of 1833, and it is not alleged that Mrs. Megary at the time lacked testamentary capacity, or was influenced in any way in signing the paper. The register refused to admit the writing to probate on the ground that it was not a testamentary disposition of property. The correctness of this interpretation of the paper by the register, approved by the court below, is the single question for consideration here.

At the time she executed the instrument, Mrs. Megary had passed her eighty-sixth year. She was a widow without children, and for a more than a quarter of a century, during her widowhood, had made her home with Mrs. Ege, the only child of her husband by a former marriage. From the testimony returned with the record it is apparent that the amount named in the paper offered for probate was at least half of her estate, which consisted of railroad and other stocks. The writing was signed at the residence of Mrs. Ege on one occasion when Mrs. Megary was leaving home to make a visit to some of her friends.

We have no doubt that the paper in question is testamentary in character. Its language and the circumstances surrounding its execution and preservation lead to the conclusion that Mrs. Ege was not to receive the \$2,000 until after Mrs. Megary's death. While it recognizes the kindness of Mrs. Ege in gratuitously sharing her home with Mrs. Megary since the death of the latter's husband, and the desire to compensate Mrs. Ege for her services, yet there is no acknowledgment of an existing liability, nor a promise to pay any sum for the courtesies extended to her by her stepdaughter. No

present interest in or claim on the \$2,000 passed to Mrs. Ege by any provision of the instrument, and hence no action could have been maintained by her against Mrs. Megary in the latter's lifetime to recover the money. Omitting from the second paragraph (the operative and disposing part of the instrument) the words which may be treated as surplusage, that paragraph reads as follows: "I, Sarah Megary, desire and so affirm that my said stepdaughter shall receive out of my estate a sum of money or its equivalent that shall aggregate two thousand dollars." Stripped of verbiage, such is the operative language of the paper under consideration. It expresses no intention to assume a personal liability. It is a command to the parties to whom it is addressed, who are evidently the persons interested in the settlement and distribution of Mrs. Megary's estate after her death, that the beneficiary named in the instrument shall at that time receive the money out of the estate. The words "shall receive" plainly denote a disposition of the subject-matter to take effect or become operative in the future. They bear no other reasonable interpretation. We think it is clear from the context that the term "estate" refers to the property that the maker of the paper should possess at the time of her death. The entire language of the clause in question excludes the idea of an intention to create a present indebtedness, or to assume any liability whatever.

Aside from the instrument itself, the circumstances surrounding its execution and preservation sustain the position that its operation was to be postponed until after the death of the maker. The principal of Mrs. Megary's estate was small, and the income derived from it was scarcely sufficient to support her if she lived in the most economical manner. Without a clear intention expressed to the contrary, it cannot be presumed that she intended in the paper in question to dispose of her property without any consideration, and thus deprive herself of the means of her own support. Such, however, is the effect of the appellee's interpretation of this paper, as it was either a legal obligation for the payment of \$2,000, or a testamentary disposition of it.

It is urged by the learned counsel for appellee that the instrument was given as an obligation to secure payment for services rendered, and was delivered to Mrs. Ege, who retained possession of it until Mrs. Megary's death, and that therefore it was irrevocable, and hence not testamentary. As already observed, neither the instrument itself, nor the circumstances surrounding its execution and preservation, justifies the conclusion that it created an obligation on the part of Mrs. Megary to pay Mrs. Ege \$2,000. And the fact of its delivery to Mrs. Ege, and that she had the possession of it, does not destroy its revocability. "It has never been supposed," says Paxson, J., in *Wilson v. Van*

Leer, 103 Pa. 600, "that the delivery of a testamentary paper to the person beneficially interested, where no present interest passes, destroyed the testator's power of revocation. It is still ambulatory, to take effect only after death in case it is not revoked."

It is also contended that the last paragraph of the paper shows that the instrument was not testamentary, but an obligation for the payment of the sum named in it. We do not think that clause of the instrument sustains the contention. It is merely precautionary, and was intended to disclose the intention that Mrs. Ege should receive out of Mrs. Megary's estate, after her death, not only the \$2,000, but any additional sum that might be given her by "any will of mine that may be in force at the time of my decease." Any bequest to Mrs. Ege in a subsequent will in force at the testatrix's death was to be regarded as cumulative to the one given her in this instrument.

As a will, this paper is irregular in form, and was most inartificially drawn. These facts, however, will not deprive it of its testamentary character, if it is a disposition of property to take effect after death. As said by Williams, J., in *Patterson v. English*, 71 Pa. 454: "No formal words are necessary in order to make a valid will. The form of the instrument is immaterial, if its substance is testamentary. A gift or bequest after death is of the very essence of a will, and determines a writing, whatever its form, to be testamentary. Whether a writing is a will, or not, does not depend upon the maker's declaring it to be a will at the time he executes it, but upon its contents." The instrument in question was clearly a disposition of property to take effect after death, and was therefore of a testamentary character. Hence the refusal to admit it to probate was error.

The decree of the court below and the decision of the register of wills are reversed, and it is now ordered, adjudged, and decreed that the register admit to probate, when duly proven, the paper dated November 23, 1899, and signed by Sarah Megary; the costs of this appeal to be paid by the appellees.

(206 Pa. 224)

SPAULDING v. BULLOCK.

(Supreme Court of Pennsylvania. May 18, 1903.)

INSANITY—LIABILITY OF COMMITTEE—EXPENDITURES.

1. Pending the traverse of the return of the inquisition in lunacy, the committee of the lunatic sold personalty belonging to his estate, and filed an account, which was confirmed, and the balance shown by it distributed and paid out under report of an auditor and the decree of the court. *Held* that, after the finding of the inquisition is reversed, the alleged lunatic cannot maintain trespass against the committee to recover the value of his personalty.

Appeal from Superior Court.

Action by Hanford L. Spaulding against Charles E. Bullock. From a judgment of the superior court affirming a judgment for defendant, plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

J. T. McCollom and T. S. Hickok, for appellant. J. W. Stone and Lee Brooks, for appellee.

FELL, J. The committee of the alleged lunatic was in lawful possession of his property, charged with the duty to manage it, and to apply as much of the income thereof as should be necessary to the payment of debts and the support of the lunatic; and he was empowered, in case the income was insufficient, to apply, under the direction of the court, as much of the principal of the personal estate as was necessary for these purposes. The power to use the principal necessarily implied the power to sell, and the only irregularity was in the failure of the committee to obtain an order of court for that purpose. The whole matter was in the control of the court, whose officer the committee was, and the subsequent ratification of his action gave to it the same validity that the previous authorization would have given. We agree with the view expressed in the opinion of the superior court (20 Pa. Super. Ct. 301), that the approval and confirmation of the account of the committee by the court of common pleas was an adjudication that was conclusive on the plaintiff.

The judgment is affirmed.

(206 Pa. 226)

DE LONG v. DELANEY.

(Supreme Court of Pennsylvania. May 18, 1903.)

PHYSICIAN—ACTION FOR NEGLIGENCE—EVIDENCE.

1. Where, in an action against a physician for failing to use a tourniquet after an accident, there was no evidence from any witness competent to express an opinion that a tourniquet should have been used, or that the tight bandage applied by defendant was not fully equivalent, it was not error to direct a nonsuit.

Appeal from Court of Common Pleas, Lycoming County.

Action by Mary A. De Long against William E. Delaney. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

W. M. Stephens, for appellant. Seth T. McCormick, and Frank P. Cummings, for appellee.

PER CURIAM. Plaintiff's husband had his leg badly crushed in attempting to board a railroad train near Cammal station, and defendant, a physician, was called in on the emergency to treat him. Defendant rendered the first aids to the wounded man,

washed and dressed the wound, bandaged the leg, and then relinquished the case to the family physician, who was expected, and arrived by the same train on which defendant left. The injured man remained under the care of the family physician for about two hours, and then was put on a train and taken to the hospital at Williamsport, where his leg was found to have bled profusely, and where he died a few hours later from loss of blood. At the trial the plaintiff proved the foregoing facts; gave some evidence that a tourniquet was an instrument in common use among physicians for stopping the flow of blood, and that it had not been used by the defendant. Plaintiff then rested her case, and the court entered a nonsuit.

The negligence relied on by appellant is the failure to use a tourniquet. But there was no evidence at all, from any witness competent to express an opinion, that a tourniquet should have been used, or that the tight bandage applied by defendant was not fully equivalent—in short that there was any negligence shown. The jury could only have made an uninformed guess. Negligence cannot be found in that way.

Judgment affirmed.

(206 Pa. 234)

ELLWANGER et al. v. MOORE et al.

(Supreme Court of Pennsylvania. May 18, 1903.)

FERI FACIAS—ATTACHMENT AGAINST HEIR.

1. Testator, by will, left his estate for his three sons under a spendthrift trust, and provided that the survivor should take the whole estate, and that upon his death it should go to a charity. His executors were directed to sell the estate. The testator died within 30 days from the making of his will, and the charitable bequest failed because thereof. *Held*, that an attaching creditor of one of the sons, all being alive, has no right to a fieri facias on his judgment, and to sell the undetermined interest of one of the sons accruing to him by failure of the charitable bequest, but must pursue his remedy in the orphans' court.

Appeal from Court of Common Pleas, Philadelphia County.

Action by George Ellwanger and William C. Barry, trading as Ellwanger & Barry, against A. H. Moore, in which the Fidelity Trust Company and others appeared as garnishees. From an order discharging the rule to strike off a writ of fieri facias, the trustees of Andrew M. Moore appeal. Reversed.

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Richard C. Dale, O. Percy Bright, and Simpson & Brown, for appellants. John M. Gardner and V. Gilpin Robinson, for appellee Albert H. Moore. C. E. Morgan and Charles E. Morgan, Jr., for other appellees.

MESTREZAT, J. Andrew M. Moore died January 26, 1898. By his last will and testa-

ment, dated January 21, 1898, and probated February 10, 1898, he appointed the Fidelity Trust Company, Joseph F. Sinnott, and Walton Pennewill his executors and trustees, to whom letters testamentary were granted by the register of wills of Philadelphia county. After making certain specific bequests, the testator directed that all the residue of his estate, real and personal, should be divided into three equal parts or shares, and the one-third part thereof he bequeathed to his executors and trustees to pay the net income and interest thereon to his son Albert H. Moore, for life, with clauses creating a spendthrift trust, and after the death of his son Albert the net income of said one-third of his estate was to be paid to his sons Henry G. Moore and George M. Moore, or the survivor of them, for life, in the same manner as the testator had directed said income to be paid to his son Albert during his life. At the death of the survivor of his three sons the said one-third of his residuary estate was bequeathed to his executors and trustees, "with full power and authority to found and maintain such charitable or educational institution or institutions, in my name, as they, in their discretion, may deem wise, proper, and expedient." The remaining two-thirds of his residuary estate he disposed of in a similar manner, each of his other two sons being the primary beneficiary of one-third thereof. The testator having died within one calendar month of the execution of the will, the bequest over to charity failed, and as to it there was an intestacy. The twelfth paragraph of the will contained the following provision: "I hereby authorize, empower, and direct my said executors and trustees herein named, and the survivors or survivor of them, as soon as and whenever after my decease they may deem it convenient and proper to do so, to sell and dispose of any or all of the real and personal property of which I may die seized and possessed, either by public or private sale or sales, for the best price or prices that can be gotten for the same." Ellwanger & Barry, the plaintiffs in this action, obtained a judgment against Albert H. Moore in the court of common pleas No. 2 of Philadelphia county, on which, January 27, 1902, they issued an attachment execution, and served the executors and trustees under the will of Andrew M. Moore, deceased, as garnishees. Interrogatories were filed, and in answers thereto, filed June 12, 1902, the garnishees give the dates of the will, of its probate, and of the death of the testator; refer to the eleventh clause of the will as defining the interest which the testator's sons take thereunder; admit that the garnishees are the trustees under the will of the deceased, that Albert H. Moore is named therein, and that the three sons are the heirs at law of the deceased, and are all living; and set forth that the amount of the principal of the estate of Andrew M. Moore now held by the gar-

nishees as trustees under the terms of the will exceeds \$1,000,000. The plaintiffs entered a rule "to show cause why judgment should not be entered in favor of the plaintiffs and against the * * * trustees under the will of Andrew M. Moore, deceased, garnishees, on their answers to interrogatories for the sum of \$1,757.64; with interest from November 14, 1899, to be levied of the interest of the defendant in the estate of said decedent." This rule was marked absolute, and a fieri facias was issued, commanding the sheriff "that of the defendant's undivided vested interest in remainder in the estate of Andrew M. Moore, deceased, in the hands, possession, or control of the Fidelity Trust Company, Joseph F. Sinnott, and Walton Pennewill, trustees under the will of the said Andrew M. Moore, deceased, garnishees, in your bailiwick, you cause to be levied as well the sum of \$2,074.37," etc. The garnishees then entered a rule on the plaintiffs to show cause why the fieri facias should not be stricken off. This rule was discharged. The garnishees have, therefore, taken this appeal, and assigned for error the action of the court below in making absolute the rule against them for judgment and in discharging the rule of the plaintiffs to show cause why the fieri facias should not be stricken off.

This attachment was issued pursuant to the provisions of the act of April 13, 1843 (P. L. 233; *Purd. Dig.* 836, pl. 51), supplemented by the act of April 10, 1849 (P. L. 619; *Purd. Dig.* 837, pl. 52). The former act provides that any interest which any person may have in the real or personal estate of any decedent by will or otherwise, which is subject to foreign attachment by the act of July 27, 1842 (P. L. 436), shall be subject to be attached and levied upon in satisfaction of any judgment in the same manner as debts due are made subject to execution by the act of June 16, 1836 (P. L. 755); "and the same rights in all respects which the debtor may have, and no greater in any respect whatever, are hereby placed within the power of the attaching creditor." The act of 1849 (P. L. 620) authorizes the issuing of the attachment "at any time after the interest which any person or persons may have in the real or personal estate of any decedent shall have accrued by reason of the death of such decedent." It is conceded that the spendthrift trust in favor of Albert H. Moore, created by his father's will, is not subject to this attachment. And we need not concern ourselves in this controversy with the question what, if any, interest in the residuary estate vested in Albert H. Moore at his father's death and was subject to the attachment. The judgment of the court below against the garnishees did not define the interest or determine that Albert H. Moore had any interest in the residuary estate. Whatever it was, the enjoyment and possession of it were postponed until after the death

of the last survivor of the testator's three sons. The right acquired to his interest, therefore, by purchase, attachment, or otherwise, would be merely the right to demand and receive of his father's executors his distributive share of the estate on final settlement.

The only question we need determine here is the right of the attaching creditor to issue a fieri facias on his judgment, and sell the undetermined and unascertained interest of Albert H. Moore in the estate of his father which accrued to him by reason of the failure to take effect of the charitable bequests in the will. It is earnestly contended by the learned counsel of the appellees that the legislation regulating the proceedings by attachment execution authorizes the issuing of a fieri facias and a sale thereon of the interest of Albert H. Moore in his father's residuary estate. But we think this position is untenable. As we have seen, the testator directed his executors and trustees to sell and dispose of his real and personal property, and hence there can be no doubt that the will effected a complete conversion of the estate. The interest, therefore, of Albert H. Moore in the residuary estate, was not an interest in any personal property or real estate, but an interest in the money into which the testator had directed his property to be converted. The judgment creditor could not reach this interest by a common-law fieri facias, and hence he was compelled to resort to the statutory proceeding of an attachment execution. The effect of an attachment is to transfer to the attaching creditor the rights of the defendant in the decedent's estate. *Lorenz's Adm'r v. King*, 38 Pa. 93. "The attachment of this legacy," says Lowrie, C. J., in *Strong's Ex'r v. Bass*, 35 Pa. 333, "does not alter the quantity of the rights and duties of the parties in relation to it; but only transfers to the plaintiffs the responsibility which before was due to the legatee. No essential element of the relation between the executor and the legatee is affected by the proceeding. It merely substitutes the legatee's creditor instead of the legatee himself." Not only has judicial construction defined the rights of a creditor attaching a legacy or an interest in a decedent's estate, but the statute of 1843, under which this attachment was laid, expressly declares that "the same rights in all respects which the debtor may have, and no greater in any respect whatever, are hereby placed within the power of the attaching creditor." The attachment execution in this case had accomplished its purpose as declared by the statute when the judgment was entered against the garnishees. The attaching creditor then stood in the shoes of his debtor, and was armed with the necessary authority to demand and receive of the executors and trustees whatever interest the debtor might have as a distributee of his father's estate. No fieri facias or other writ of execution was

required to invest the plaintiffs with the rights of the debtor in the decedent's estate. Such a writ, therefore, was not necessary to carry into effect the purpose of the attachment, and to make it available to the creditor. The position of the appellees would have force, and would be correct, if the attachment had been laid against personal property or real estate. Then the *fiel facias* would be necessary to reach and realize on the debtor's interest in the property. An attachment execution is in substance, if not in form, an execution (*Wray v. Tammany*, 13 Pa. 393), and when it has at any stage of the proceedings transferred the property of the debtor, or his right or interest therein, to his creditor to the extent of satisfying the debt, it has accomplished its purpose.

The judgment as entered by the plaintiffs against the garnishees was not molded so as to show the money or effects of the defendant in the hands of the trustees, nor the quantity of his interest in the residuary estate of the testator. Neither did the answers to the interrogatories disclose this information. They simply gave the amount of the principal of the estate that was held by the trustees under the will. In this condition of the record, the plaintiffs, having by their attachment succeeded to the rights of the defendant against his interest in decedent's estate to the extent of their claim, must enforce their judgment against that interest, the amount of which can only be determined by the orphans' court. *Maurer v. Kerper*, 102 Pa. 444. That court has the exclusive jurisdiction to ascertain the amount of the estates of decedents, and to order their distribution among those entitled, creditors as well as legatees and distributees. *Hammett's Appeal*, 83 Pa. 392; *Maurer v. Kerper*, *supra*; *Yocum v. Commercial Nat. Bank*, 195 Pa. 411, 46 Atl. 94. Hence, on the final settlement and distribution of the estate of Andrew M. Moore by the orphans' court, the plaintiffs may have determined the interest of Albert H. Moore, the defendant, therein, and enforce their rights to said interest acquired by this attachment proceeding.

The order discharging the rule to strike off the writ of *fiel facias* is reversed, and the rule is now made absolute, and the writ is set aside. The judgment of the court below against the garnishees is so far modified as to restrain its collection until the interest, if any, of the defendant in the estate of Andrew M. Moore is due and payable; and, as thus modified, the judgment is affirmed, the costs of this appeal to be paid by the appellees.

(206 Pa. 220)

MITCHELL v. SPAULDING.

(Supreme Court of Pennsylvania, May 18, 1903.)

INSANITY—INQUISITION—SETTING ASIDE—
SALE OF REALTY—NOTICE.

1. Where an inquisition in lunacy is shown by the record to have been set aside, a title there-

after given to real estate by a lunatic is valid, though the inquisition is subsequently reinstated.

2. Act June 13, 1836, § 18 (P. L. 595), gives the court of common pleas jurisdiction to order a sale of the real estate of an alleged lunatic after return of an inquisition finding him insane, after notice of the application for the sale to the next of kin of the lunatic capable of inheriting, or of some one representing the next of kin, if he is a minor. *Held*, that service on the father of the minor, who is not a guardian, nor of the blood of the alleged lunatic, is insufficient.

3. A notice to the next of kin of the alleged lunatic of an application for sale of the realty of the lunatic of two days only, where such next of kin resides in another state, is insufficient.

4. In an action against an infant, he can only appear by a guardian, either general or ad litem.

Appeal from Superior Court.

Action by Charles W. Mitchell against Allen A. Spaulding. From a decree of the superior court reversing a judgment for defendant, he appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

J. W. Stone, Lee Brooks, and W. C. Sechrist, for appellant. J. T. McCollum and T. S. Hickok, for appellee.

MITCHELL, J. The title of appellant rests upon proceedings by which the property of a man, not only living, but present, and contesting the right to interfere with him, was taken away from him without even a hearing. Such a title challenges close scrutiny. It is true that the condition of one non compos mentis demands for his own sake that the judgment of others be substituted for his, and the law must provide even for the case of a *prima facie* appearance of lunacy. This the statute has done with great care and regard for the rights involved, and every requirement intended for their protection must be strictly observed. *Bennett v. Hayden*, 145 Pa. 586, 23 Atl. 255. In the present case they were scarcely observed at all. The proceedings from their inception show most discreditable irregularities. The order of sale was improvidently made, the learned judge admitting in his opinion that the pendency of the traverse was not brought to his knowledge, and that, if it had been, the sale would not have been authorized. But, notwithstanding the irregularity, he felt himself compelled to hold that the court had jurisdiction to make the order, and therefore that the purchaser took a good title. In this view the superior court did not concur, and we have now this appeal from its decision.

The order of sale was fatally defective for want of jurisdiction of the court to make it. The inquisition of lunacy at the time of the sale under it was void on its face. It was returned signed by only five jurors summoned by the sheriff. It had an additional signature, but not that of any one known to the proceeding. The statute

requires that there shall be not less than six jurors of those duly summoned. Nearly two years after the sale, the inquisition was set aside by the court for this patent illegality. A few months later, however, it was reinstated, and the return allowed to be amended upon affidavits that the superfluous name was really signed by a juror duly summoned, and acting as one of the inquest, but that at the time he was so stupid, or drunk, or careless that he wrote the signature "B. J. Whitman" instead of his own name, "B. J. Davidson." The reason is not expressed in this exact phrase in the application to amend, but this is the plain English of it. The facts are admitted. The right to make such an amendment upon the extraordinary story told, and after that lapse of time, may well be questioned. But it is not necessary to be determined now, as it is clear that it could not be done to the prejudice of intervening rights, and this becomes material, because the plaintiff bought during the interval. When plaintiff bought from Spaulding, if he went to the record, he found an inquisition of lunacy, a traverse, and then the inquisition itself set aside and vacated for patent illegality, and nothing to show that he would not get a clear title from his grantor. When the defendant bought at the committee's sale, on the contrary, he was bound to look at the record on which the validity of his title would depend, and, if he did so, he found an inquisition clearly illegal on its face, that gave the court no jurisdiction whatever to order the sale. But the record shows a further defect of jurisdiction, and the one on which the superior court rested its decision. Act June 13, 1836, § 24 (P. L. 597), provides that "no order for the sale of real estate shall be granted, unless it appear that due notice of the intended application was given to the wife, if any, and the next of kin of the lunatic capable of inheriting the estate." The giving of such notice is a jurisdictional fact, which must appear affirmatively on the record. As was well said by the learned judge of the superior court: "This requirement is not merely directory; it absolutely prohibits the making of the order, unless the provisions of the section have been complied with. The Legislature, no doubt, recognizing the danger involved in the exercise of the jurisdiction which they conferred, and the helplessness of the person whose property was to be sold, made the exercise of the power absolutely dependent upon notice to the next of kin, and, that there might be no mistake as to who were entitled to notice, defined the term 'next of kin' as the persons 'capable of inheriting the estate.' This requirement involves no hardship. The person whose property is to be sold is incapacitated, and notice must be given to those who would inherit his estate if he died at that time. This is a safeguard against the abuse of power, without full inquiry as to the facts." In *Bennett v. Hayden*,

145 Pa. 586, 28 Atl. 255, it was held that notice to the wife of the lunatic was not notice to the minor children, and, no other notice appearing in the petition for leave to sell, the purchaser took no title as against the children, who brought ejectment after the death of their father. In the present case, the record showed upon its face that a minor son of Ella M. Phillips, a deceased sister of the lunatic, was one of the next of kin, within the meaning of the statute, and entitled to notice. The petition was presented and the order of sale made the same day, October 2, 1896, and the petitioner recites "that on the thirtieth day of September, 1896, he sent by registered letter notice of this intended application to be made on Friday, October 2, 1896, to Amarilla Griswold and Frank Phillips, father of an infant son of Ella Phillips." A notice of only two days to a party in another state to appear and defend what is practically an adverse suit is no notice at all. Even under the loosest construction, it could not be held to be the "due notice" which the statute requires. But insufficient as the notice was in point of time, it was not given to any proper person. The party entitled to notice was the infant. Notice to the father was a nullity, under the direct ruling in *Bennett v. Hayden*, supra. There is no evidence that he had assumed the position of next friend, and, even if he had, it would have been insufficient. An infant may sue by *prochein ami*, because all the risk he runs is that of being amerced for costs *pro falso clamore suo*, and costs the next friend assumes to pay for him. But as a defendant he incurs the risk of loss of part of his estate, and for that reason he can only appear by some one under the obligations and responsibility of a guardian, general or *ad litem*. An appearance by next friend is unauthorized. *Swain v. Fidelity Ins., etc., Co.*, 54 Pa. 455; *Troubat & Haly's Practice*, § 2170. The defects in the inquisition and in the petition for sale being thus apparent on the face of the record, and going directly to the jurisdiction of the court, the cases relied on by appellant as to collateral attack on the judgment have no applicability.

It was argued by appellee that, pending the traverse, the court had no jurisdiction to sell the real estate, except in case of necessity, which should appear as a fact in the proceedings. The language of section 18 of the act of 1836 (P. L. 595), defining the powers of the court while the traverse is pending, covers only the authority of "management and safekeeping" of the estate, while the larger authority to sell for maintenance or payment of debts is in subsequent sections. And notwithstanding general expressions in some of the cases that management must include the power of sale, no case has yet arisen in which the power to sell while a traverse is pending was involved, or has been directly passed upon. As it

is not necessary to do so now, we express no opinion on it.

The judgment of the superior court is affirmed.

(206 Pa. 219)

In re RICHMOND'S ESTATE.

(Supreme Court of Pennsylvania. May 18, 1903.)

WILLS—MENTAL INCAPACITY—EVIDENCE.

1. Evidence in proceeding to contest a will for mental incapacity *held* insufficient to establish such a claim.

2. The adverse opinion of an expert of high professional standing as to the mental capacity of testator is of no value where such witness has no personal acquaintance with the testator, and the hypothetical case put to him is based on facts which are disputed.

Appeal from Orphans' Court, Lycoming County.

In the matter of the estate of W. D. Richmond. From a decree dismissing an appeal from the register of wills, Frank C. Richmond appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

T. M. B. Hicks, for appellant. Seth T. McCormick, for appellee.

PER CURIAM. The testimony of the physician, who had known the testator for 25 years, and who attended him in his last illness up to and including the making of the will, and that of the attorney, who had also been his counsel previously, and who drew the will in testator's presence, from instructions given him in person while the two were alone together, show convincingly that the testator was in full possession of his mental faculties, and was exercising them under his own volition. In addition to this, the undisputed evidence is that the testator continued in the transaction of his regular business until two days before the making of his will. A case so established can only be overcome by clear, definite, circumstantial, and weighty evidence of facts not reconcilable with the possession of testamentary capacity. There is no such evidence in this case. The testimony on the part of contestant is mostly as to trifling peculiarities of action, such as increasing irritability, not answering questions (a not uncommon habit of silent and reserved men), and what some of the witnesses thought was a lack of attention to what he was doing. One expert of apparently high professional standing gave an adverse opinion as to testamentary capacity, but it was rendered worthless by the fact that he had no personal acquaintance with the testator, and the hypothetical case put to him was based largely on facts which were disputed. The beneficiary was not in the house when the will was made, and it was shown affirmatively that he knew nothing of it or its provisions. He was

the testator's business associate, if not partner, and testator, who was a bachelor, with no relatives in the city, had gone to his house on the suggestion of the doctor. On the whole case, no court could have permitted a verdict against the will to stand.

Decree affirmed, at the costs of the appellant.

(206 Pa. 245)

BALDWIN v. PENNSYLVANIA FIRE INS. CO.

(Supreme Court of Pennsylvania. May 18, 1903.)

INSURANCE—POLICY—CANCELLATION—ACTION.

1. A partnership consisting of two persons owned a policy of insurance covering a building and the merchandise therein. On dissolution of the partnership one partner took the merchandise and the other the real estate, under an agreement that the policy should be changed to cover their several interests. Four days after dissolution the partner taking the real estate died, of which the surviving partner informed the insurance agent. It was agreed that the company should issue two new policies, one to the surviving partner on the merchandise and one to the deceased partner on the building, to be dated as of the day of the dissolution. When the attorney of the decedent received the policy, he sent it back to the agent, with a request that it should be made out to the estate of the deceased, but the agent insisted that it was properly made out. On a second request to change the name of the insured the agent adhered to his first opinion, and asked whether the attorney wished the policy canceled; and he stated that he did not, but would call and see him about it. The property was destroyed by fire, and the insurance company alleged cancellation of the policy on the building, but in a suit on the policy did not show cancellation in the manner prescribed by the policy. *Held*, that the contract as to the new policy was complete, and the insurance company was liable for the loss.

2. Where an insurance policy was taken out for the insured or his legal representative, a suit thereon can be sustained in the name of the administrator of the decedent, subject to the jurisdiction of the probate court to distribute the proceeds.

Appeal from Superior Court.

Action by C. L. Baldwin against the Pennsylvania Fire Insurance Company. Judgment for defendant was affirmed by the superior court, and plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

John McGahren, for appellant. Henry A. Fuller, for appellee.

DEAN, J. In 1897 John L. Bulford and H. M. Hatfield conducted a mercantile business in Dallas, Luzerne county, in name of H. M. Hatfield & Co. They were joint owners of the building in which the business was conducted. On May 5, 1897, the defendant issued to them a policy of insurance against loss by fire for the term of three years, in which the building was insured for \$1,000 and the merchandise therein for \$2,000. On November 1, 1897, the partnership was dis-

¶ 1. See Evidence, vol. 20, Cent. Dig. § 2396.

¶ 2. See Insurance, vol. 22, Cent. Dig. § 1562.

solved on account of the falling health of Bulford, who sold and transferred his interest in the merchandise to Hatfield, and Hatfield sold and conveyed all his interest in the building to Bulford; at the same time they agreed that the insurance policy should be changed to accord with their several interests, the insurance on the building to be assigned to Bulford and on the merchandise to Hatfield, the latter to arrange the formalities with the insurance company, and have it consent to and ratify the transfer. Four days after the dissolution of the partnership Bulford died, and four days after his death Hatfield called upon the agents of the insurance company, and informed them fully of all that had occurred. He did not have the policy, because thieves had entered the store soon after the dissolution of the partnership and had taken it, but the agents had an abstract or duplicate of it. The agents were willing to carry out the arrangement between Bulford and Hatfield as to the transfer, and suggested that the policy should be treated as surrendered, and that the company issue two new policies, one to Hatfield on the merchandise and one to Bulford on the building, and that the two should be dated as of the day of dissolution of the partnership and the day on which it was agreed their interests should be severed. Hatfield concurred in this suggestion, and it was at the same time agreed that the policy for the Bulford interest should be mailed to Mr. Foster, Bulford's attorney. When Foster received it, he noticed that it was made out to Bulford as the insured. He thought this was a mistake, for, although Bulford was living at the date of it, he had died before it was delivered. He therefore sent it back to the agents to have it made out to the estate of Bulford. The insurance agents persisted in their opinion that, the policy being dated in the lifetime of Bulford, it was properly made out, and remailed it to Foster, who, on receiving it, persisted in his opinion that it should be made out to the estate of Bulford, and again sent it by messenger to the agents, with instructions to explain fully to them that when the policy was written Bulford was dead, although alive when dated. The agents adhered to their first opinion, and asked the messenger whether Foster wanted the policy canceled. He answered that Foster did not want it canceled, and that Foster would call and see them about it in a few days. He did call, but failed to see the agents. Matters remained in this condition, when, less than a year afterwards, a fire occurred, which destroyed both building and merchandise. Foster, as attorney for the Bulford estate, notified the company of the loss, and made claim for indemnity on the building. The company denied liability on the ground that the policy had been canceled before the fire. Thereupon the administrator of Bulford brought this suit. At the trial the facts were developed as we have stated them. The

court of common pleas, being of opinion that there was no contract between the parties, because their minds had never assented to the same thing, nonsuited the plaintiff, who appealed to the superior court. That court affirmed the judgment, holding that "a policy of insurance is a contract, and, until the negotiations of the parties have brought them to such a stage where it may fairly be said they have agreed upon something, no contract exists"; and it held that under the evidence both parties had not agreed, and there was no contract of indemnity to Bulford on the building. On allowance of this court, an appeal from the judgment of the superior court comes before us. In substance, the error assigned is the decision of the court that no contract existed.

We think the decisions of the common pleas and the superior court as to what in this case, on the evidence, constituted the contract, were wrong. The policy on the partnership property was issued to the partnership on May 5, 1897, for a three-years term, in the sum of \$3,000, and the full amount of the premium for the term paid. Six months afterwards, on November 1st, the partnership was dissolved. Under the terms of the contract the partners could surrender the policy and claim the unearned premium, which, counting the whole term as 36 months, would be just five-sixths of what they had paid; or they could, with the company's consent, accept individual policies for the remainder of the term for their respective interests, and continue the insurance; or the company could return the unearned premium, if it so chose, and cancel the policy. This is the clause in the policy on the subject of cancellation: "This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium."

At the time of the dissolution it was agreed between the partners that the policy should be continued in force, but that, with consent of the company, their respective interests—Bulford's on the building and Hatfield's on the merchandise—should be indorsed upon it. At the same time Bulford appointed Hatfield his agent to see the company's agent and attend to the matter. Four days afterwards, before Hatfield had time to attend to it, Bulford died; but Hatfield two or three days afterwards called upon the agent, and fully informed him of the agreement between him and Bulford, and of Bulford's death. Both insured and insurers desired a continuance of the indemnity for the remainder of the term; but the agent suggested that the best

form to carry out the arrangement was to issue two policies, one to Hatfield for \$2,000 on the merchandise and one to Bulford for \$1,000 on the building, and date both the day of dissolution of the partnership. This was assented to by Hatfield, and he left with the understanding that the policies were to be mailed. Afterwards the agent mailed Bulford's policy, made out in his name, to his attorney, Foster. He never delivered Hatfield's, but the company paid his loss just as if the policy had been delivered. Now, this contract for the extension of the indemnity was complete when Hatfield left the agent's office. Hatfield, the agent of Bulford, appointed by Bulford before his death to attend to this very matter, had performed fully his duty. The agent did not want the policy canceled or surrendered. He wanted to continue the risk; did not want to pay back five-sixths of the premium already in the company's hands. He goes further, and, in accordance with his own suggestion, mails the policy for Bulford's interest in Bulford's name to his attorney, Foster. But the policy mailed to Foster was not the contract; it was only the written evidence of the contract made between Hatfield and the agent of Bulford to extend the indemnity for the balance of the term. We suppose a fully authorized agent of the Bulford estate could afterwards have formally canceled the contract made by Hatfield, but nothing less than clear and positive evidence of an intention to do so would have had that effect. The company gave no notice of its intention to cancel, as required by the contract, nor did it return nor offer to return five-sixths of the premium—a preliminary to cancellation—as the contract required. We can take no other view of the evidence than that the contract of indemnity was complete when Hatfield and the agent both agreed to it, and the agent, by consent of Hatfield, retained for the company the unearned premium.

Was the contract afterwards rescinded or canceled by the company or by consent of Foster, the attorney? The company could cancel it just one way at any time. That was by five days' notice to the representative of the estate of its intention to do so and return of five-sixths of the premium. It gave no notice and offered to return no premium. As to Foster, the attorney, we doubt whether his duties as attorney embraced that of canceling a policy of insurance upon a building of his deceased client. But, even if he had such authority, the evidence wholly failed to show an intention on his part to cancel. He wanted some change made in the name of the insured, but the messenger distinctly told the insurance agent that Mr. Foster did not want the policy canceled, but would call and see him about it; and it so remained until after the fire. From the evidence, Foster wanted it his way and the insurance agent wanted it his—the way he and Hatfield had first agreed upon. It would be

a travesty upon justice to permit the bickerings of these two agents about an immaterial matter to fritter away and destroy a part of a dead man's estate.

The suit can be sustained in the name of the administrator. It may be, on a distribution, the orphans' court will hold that the proceeds of the policy shall go to the heirs to the real estate; but the policy itself stipulates that wherever the word "insured" occurs it shall be held to include the legal representative of the insured. Although the money represents a loss on real estate, it is now turned into money, and may be sued for by the administrator. When in his hands, the orphans' court can properly make distribution.

The judgment of the superior court is reversed; the judgment of the common pleas is reversed, and a procedendo is awarded. On a retrial it is directed that the law be announced as we have indicated, and the evidence, in so far as it appertains to the issue, be submitted to a jury.

(201 Pa. 305)

BOBB v. UNION TRACTION CO.

(Supreme Court of Pennsylvania. May 18, 1903.)

INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.

1. Where a motorman, on reaching a street crossing with his car, failed to look for an approaching car, and a collision resulted, he was guilty of contributory negligence, preventing recovery.

Appeal from Court of Common Pleas, Philadelphia County.

Action by James Bobb against the Union Traction Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Thomas A. Fahy, for appellant. Thomas Leaming and Russell Duane, for appellee.

FELL, J. The plaintiff was a motorman in charge of one of the defendant's cars, which was running south on Twenty-Second street. When it reached the north side of Market street, which is crossed by Twenty-Second street at right angles, he stopped at the crossing to let passengers get off and on. When signaled to go on, he looked both ways, and saw a car approaching from the east on Market street, on the north track, which is 20 feet from the curb. This car was 150 feet from the place where the tracks crossed. He then started his car, and proceeded slowly at the rate of a mile and a half an hour across Market street without looking again. A collision occurred, in which his car was struck about the middle by the Market street car. When he started from the crossing, the Market street car was within 60 feet of the Twenty-Second street tracks, running on a down grade at the rate of five miles an hour,

and the motorman had lost control of it. If the plaintiff had looked again before attempting to cross the track, he would have seen the Market street car within 20 feet of him, and would have observed the ineffectual attempts of its motorman to stop it. It was his duty to look again, notwithstanding that the rules of the company gave him the right of way. We have repeatedly held that the duty of persons walking or driving at a street crossing to look for an approaching car is imperative, and that it is not performed by looking when first entering the street, but continues until the track is reached. *Burke v. Union Traction Co.*, 198 Pa. 497, 48 Atl. 470, and cases there cited; *Pieper v. Union Traction Co.*, 202 Pa. 100, 51 Atl. 739. This rule is equally imperative in the case of motorman, and the one first reaching a street crossing with his car may not go on, and, by casting the whole burden of care on the other, imperil the property of the company and the lives of the passengers in his car. The court was clearly right in entering a nonsuit on the ground stated—that the plaintiff was negligent in attempting to cross Market street without looking again for a car. There are other grounds on which a nonsuit would be sustained, but we rest the affirmation of the judgment on this one, in order that there may be plain and distinct notice of the duty of motormen in this regard.

The judgment is affirmed.

(206 Pa. 287)

SUTLIFF v. PENNSYLVANIA R. CO.
(Supreme Court of Pennsylvania. May 18, 1906.)

RAILROADS—INJURY TO PERSON ON TRACK.

1. Evidence in an action for injuries received while on the track of a railroad company held to sustain verdict for plaintiff.

Appeal from Court of Common Pleas, Luzerne County.

Action by Wells Sutliff against the Pennsylvania Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

Henry W. Palmer, for appellant. John T. Lenahan and E. F. Cooke, for appellee.

FELL, J. The only error assigned is the refusal of the court to direct a verdict for the defendant on the ground of contributory negligence. The defendant owns a covered wooden bridge, 800 feet long, which spans the Susquehanna river at Nanticoke, and is used for the transportation of its cars and by the public on the payment of tolls. The eastern approach to the bridge is an elevated trestle 900 feet long, 21 feet wide, and 20 feet high, on one side of which are the railroad tracks, and on the other a passageway for wagons. The bridge is not wide enough to allow its

use by cars and wagons at the same time, and on the approach the space between the side of a car and the wheels of a wagon passing it is only three or four feet. Because of the impossibility of cars and wagons passing on the bridge, and the great danger in their passing on the approach, a safety gate is placed at the eastern end of the approach. This gate is lowered when the bridge is in use for the passage of trains, and raised when the bridge is open to the public. This use of the bridge was understood by the plaintiff, who, having paid toll, and finding the gate raised, drove on the approach. After proceeding about 700 feet, he was stopped by a line of wagons which had been halted near the end of the bridge. It appeared that some of the cars of a coal train that was being pushed across the bridge in the direction the plaintiff was going had been derailed at the west end of the bridge. In order to clear the track, the train had been cut, and at the time the plaintiff was stopped, a part of the train was being drawn out of the bridge by an engine running with its tender in front. The plaintiff testified that he got off the wagon, and stood on the railroad tracks, and then for the first time saw this train as the engine was coming out of the bridge; that it approached and passed him at the rate of eight or ten miles an hour, and that he was injured in the attempt to hold his horses. This is the testimony that the court had to consider in passing on the request for instructions. We see nothing in it that would warrant the withdrawal of the case from the jury. The plaintiff drove on the approach with notice, because of the position of the gate, that the bridge was open and safe for travel. The engine was then half way across the bridge, and if the plaintiff could have seen it, his natural assumption would have been that it was going in the same direction he was, and that he could proceed in safety. When he first saw that he was in danger, he had neither time to turn around nor space in which to do so, as the engine was within 200 feet of him, and the approach to the bridge was too narrow to admit of his turning his wagon. Of course, the fact that the gate was up would not release him from the charge of contributory negligence if he went on notwithstanding an obvious danger which he saw or should have seen. But this view of the case was fully covered in the charge, in which it was said: "Although the pole or gate was raised, still it was Mr. Sutliff's duty to exercise reasonable care to see that there was no danger or apparent danger on the bridge. * * * If you believe he saw the engine on the bridge, had reason to believe it would return, and found he was in a bad place, and could with reasonable skill and effort extricate himself from the place, it was his duty to do so."

The judgment is affirmed.

(206 Pa. 254)

MILLER v. WILKESBARRE GAS CO.

(Supreme Court of Pennsylvania. May 18, 1903.)

GAS—REFUSAL TO SUPPLY—DEFAULT OF FORMER TENANT.

1. Where a gas company is given the right of eminent domain, and chartered for the purpose of supplying gas to a city and its inhabitants, it is bound to supply gas to any citizen, and cannot refuse such supply to a tenant because of his refusal to pay a former tenant's gas bill, though there was a resolution or by-law of the company to that effect.

2. In an action against a gas company by a saloon keeper to recover for refusal of the gas company to furnish gas, the jury cannot include in its verdict a recovery for loss of profits, where there is no evidence of his profits before the gas was turned off or his profits thereafter, or any evidence on which to base an inference of loss of profits.

Appeal from Court of Common Pleas, Luzerne County.

Action by William H. Miller against the Wilkesbarre Gas Company. Judgment for plaintiff. Defendant appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

Henry A. Fuller, for appellant. James L. Lenahan and William Goeckel, for appellee.

DEAN, J. In November, 1896, Miller, the plaintiff, became tenant of a house and lot in Wilkesbarre, known as "Farr's Hotel." When he took possession, the former tenant, when he left the premises, was in arrears on his gas bills to the amount of \$15.73, which had been furnished by this defendant company. Plaintiff himself, during his occupancy in the month of November, had incurred an additional bill of \$9.02. He was willing to pay and offered to pay his own bill, but refused to pay the arrears of the tenant who preceded him. The defendant refused the offer, and notified Miller unless he paid the whole bill his meter would be taken out. Soon after, defendant's agent went to the hotel, and again demanded payment of the whole bill. The plaintiff again offered to pay his own bill, \$9.02, and tendered therefor a \$10 gold coin, but refused to pay the bill of the former tenant. The tender was refused. Defendant then took out the meter, which was its property. For 11 months plaintiff was without gas, and used for illuminating purposes oil lamps. He then brought this suit against defendant for damages. In his statement he averred that: (1) Defendant was a corporation, chartered under the general act of April 20, 1854 (P. L. 780), for the purpose of supplying the public of the borough of Wilkesbarre and such individuals residing therein as might desire the same with gas, and under its charter for many years supplied the hotel occupied by plaintiff with gas for lighting purposes. (2) That in the month of December, 1896, without any legal cause or justification, the de-

fendant removed from the hotel the gas meter theretofore placed therein, thereby depriving plaintiff of the use of the gaslight, and damaging him in the amount of \$3,000. The defendant pleaded the general issue, and the case came on for trial. The defense was: (1) Defendant had a right to remove the meter, because its charter imposed no obligation upon it to furnish gas to any particular individual to whom it did not choose to furnish it. (2) It had a right to remove the meter in default of payment by the prior tenant. (3) Plaintiff had adduced no sufficient proof of any loss sustained by removal of the meter. (4) Plaintiff, on the evidence, is not entitled to recover for loss of profits in his business as damages for the removal of the meter. There were other assignments of error, altogether thirteen in number, but as concerns this appeal the discussion of them can be embraced under these four heads.

As to the charter obligations of defendant, its duty to the public and to members of that public is so fully discussed in opinion by Justice Rice, *Stern v. Wilkes-Barre Gas Company*, 2 Luz. Leg. Reg. 449, that it would be a mere repetition of his views for us to again go over that ground. He discusses in his opinion the obligations of this very charter, and demonstrates clearly the result of his conclusions thus: "When, therefore, the respondent was incorporated for the express purpose of supplying gas to the city, and such individuals residing therein as might desire the same, and for this purpose was given the right of eminent domain, we conclude that the Legislature had a public purpose in view beyond, but not inconsistent with, the respondent's gain and profit; and that from the nature of the declared purpose for which it was created, taken together with and explained by the nature of the extraordinary privileges which were granted to carry out that purpose, a legal duty is implied; and, further, that a resident of the city, coming within the conditions of the question stated at the outset, has a right such as can be enforced by mandamus." Therefore defendant not only had the power, under its charter, to supply gas to the public, but it also took on itself the obligation to supply it to the general public, and also, in the words of its charter, to supply it "to such individuals residing therein [that is, in the borough], and in the immediate vicinity, as may desire a supply of the same." The defendant was bound to supply the plaintiff with gas if he desired the same. That he did desire it cannot be questioned; that defendant refused to supply it cannot be questioned.

Can the refusal be justified on the second ground of defense? The prior occupant of the same premises owed \$15.75, and defendant demanded that this amount be also paid, or the meter should be taken out. Plaintiff absolutely refused to pay this amount. That

¶ 1. See Gas, vol. 24, Cent. Dig. § 7.

a municipality or corporation furnishing water or gas may, by ordinance or by-laws, make reasonable rules and regulations to insure the payment of bills—among others, that of stopping the supply unless all arrearages are paid, whether owing by the tenant in possession or his predecessors—has been settled. *Girard Life Insurance Co. v. Philadelphia*, 88 Pa. 393; *Brumm's Appeal* (Pa.) 12 Atl. 855. But there must be notice to or knowledge of the incoming tenant of such rule. In case of a municipality the regulation must be by ordinance. Of this all have actual or constructive notice. In case of a quasi public corporation, such as this defendant, the regulation ought to be by resolution or by-law, or at least by actual notice. The incoming tenant must somewhere be able to find out, before he enters upon possession, his liability. If by merely entering into possession he assumes payment of another man's debts, he should have that knowledge, or the means of it. In the case before us there was no evidence of such rule on part of this company. The first notice plaintiff had that he was held answerable for the former tenant's bill was the demand upon him for it when he offered to pay his own bill. This was not sufficient to charge him. Therefore we hold that on the undisputed facts in this case the demand for the back bills at that late date was illegal.

The next question raised by the assignments is as to the sufficiency of the proof of damages. The period that might be covered by the evidence is from December 26, 1896, when the meter was removed, to November 17, 1897, when this suit was brought, about 11 months. The verdict was for \$2,500, or about \$7 per day damages. There was nothing in the case calling for punitive damages. Plaintiff could only claim to be made whole. What, in money, had he actually lost by the wrongful act of defendant? He was entitled to no purely speculative profits. Plaintiff's evidence on this question seems to us somewhat vague, nor is the charge of the court so clear as to guard the jury from guessing at what ought to have been made reasonably certain. Nor does the learned judge himself seem very sure of his ground, for in his opinion on the motion for a new trial he says: "I was not satisfied at the trial, nor am I now satisfied, that the plaintiff's proof of the amount of damages sustained by him was clear and satisfactory as from the nature of the case ought to have been adduced." In the charge he submitted the evidence to the jury, saying to them: "If you should decide that plaintiff is entitled to recover in this case, the thing which has bothered me most, as you evidently have noticed, is the question whether plaintiff has shown such clear specification of damage sustained by him on account of the turning off of his gas as, under the law, would warrant me in submitting the question to you." The court, it seems, might well have been

in doubt as to its duty in this particular. The plaintiff himself testified that the greater part of his profits accrued from sales of liquor at the bar. The substitution of lamps for gas burners would only change the kind of light. The customer would not necessarily be deterred from taking his drink because he must now swallow by the light of an oil lamp, whereas he formerly took it by the light of a gas jet. We understand that he might not be able to fix with exactness his loss, but, if he could not adduce evidence that would warrant a jury in fixing it to a reasonable certainty, that is his misfortune. It is no reason why a jury should be permitted to guess at the amount. He testifies that while he burned gas his gross receipts, except on Saturdays, were \$20 to \$22 per day, and on Saturdays \$65; that by lamp light they were about half this; that the profit was 60 per cent. From what he says, obviously, this was a guess on his part, for he says he kept no book whatever; that he never put down his receipts or expenses; that he kept no bank account; that he put in his pocket whatever money came in; did not keep a bank account; he could not tell the exact amount taken in any one day of the eleven months, or in the month before the meter was taken out. Surely, this was not the best evidence he might, as a prudent man, have had, for he knew immediately after the meter was taken out he would claim damages. He could, then, with some reasonable certainty have proven the receipts for the first month, and his daily accounts would have shown what they were afterwards. Although he knew he would claim that defendant should pay to him a large amount of money, he took no means whatever to preserve evidence to show the justice of his claim. He practically guesses at his receipts, expenses, and profits, and this is all the testimony there was on the subject. Surely he bought his liquors from wholesalers, and paid for them. Their books would show what he bought the month before the meter was removed and what the succeeding 11 months. Deducting what he had on hand at the end of that period would show his sales. No evidence of this kind was offered. Another significant fact is that he agreed to pay rent for the premises at the rate of \$360 per year when the meter was in. After it was taken out he rented the next year at the rate of \$480. This does not indicate a loss of custom. We think there was no sufficient evidence to warrant the jury in assessing plaintiff's supposed loss of profits as damages, and that when the learned judge instructed the jury that they might find for plaintiff, on the evidence, all damages which he had proven "in a clear and satisfactory way," was error; for he had not proven in a satisfactory way any loss of profits. His evidence on that point was wholly insufficient, and for that reason the judgment is reversed.

We will not say that he is entitled to only nominal damages. If his expenses for lighting by lamps was greater, or his payment for services increased, his damages may be more than nominal, but they are not more by any sufficient evidence of loss of profits.

The tenth assignment of error is sustained. It is as follows: "(10) The court is requested to instruct the jury the plaintiff is not entitled to recover for loss of profits in his business. Answer: Refused." This should have been affirmed.

The judgment is reversed, and a *venire facias de novo* awarded.

(206 Pa. 270)

BOWMAN et al. v. KNORR.

(Supreme Court of Pennsylvania. May 18, 1903.)

ANTENUPTIAL AGREEMENT—CONFLICTING PROVISIONS OF WILL.

1. An antenuptial agreement provided that the wife should be entitled to one-third of the income of her husband's estate for life, and, in addition thereto, as much of the principal as in her judgment was necessary for her comfortable support. The husband thereafter executed a will by which the enjoyment of one-third of the income was reduced from life to widowhood, with the proviso that "this will, so far as my wife is concerned, is according to the antenuptial agreement hereto attached." *Held*, that the wife was entitled to the custody of the whole estate, or the proceeds of any sale thereof, notwithstanding she took out letters testamentary under the will.

Appeal from Court of Common Pleas, Columbia County.

Action by Bowman and others, to the use of George W. Vansiclen, against Samuel Knorr. From an order dismissing the exceptions to the auditor's report, Mary A. Knorr and Mildred Knorr Smith appeal. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

L. E. Waller and C. W. Miller, for appellant. John G. Freeze, for appellee.

FELL, J. An antenuptial agreement between the testator and the appellant, who became his second wife, provided that, if she survived him, she should receive, in lieu of dower and all claims under the intestate laws, one-third of the income of his real and personal estate for life; "and, in addition thereto, so much of the principal as in her judgment shall be necessary for her comfortable maintenance; but that at her death all property not consumed by her which she shall receive through this marriage shall go to his children, and not to hers, others than such as may be the issue of the marriage herein contemplated." Six years after the marriage, the testator executed a will, which gave her one-third of the income of all of his estate as long as she remained a widow, with remainder to his children. Of this will she was made executrix, with power to sell the real estate, if she should deem it advis-

able to do so, during the minority of his children, and to apply the income and principal to the maintenance of herself and them. The will provided that she should not be required to file an inventory, and ended with this clause: "This will, so far as my wife is concerned, is according to antenuptial agreement dated October 6, 1876, hereto attached." Letters testamentary were granted to her, and she managed the estate for 11 years, when the real estate was sold by the sheriff under proceedings on a mortgage given by the decedent. The auditor appointed to make distribution of the fund arising from the sale reported that one-third of the fund should be paid to the widow upon her entering security, or, in default thereof, should be invested, and the income thereof paid to her. One-third was awarded to one of the two children of the testator, and the remaining third was awarded to a judgment creditor of the other child. This report was confirmed by the court.

The distribution made entirely ignores the antenuptial agreement. This agreement was valid, and it has not been set aside nor abrogated by the will. Without the assent of the appellant, it could not be set aside, and there is no ground for the inference either of an intention on the part of the testator to set it aside, or of her assent that this should be done. The will gives her exactly the same interest, as to the amount of the estate she takes, as the agreement does, and with power to sell and to use the principal for maintenance. The only change is in the period of enjoyment, from life to widowhood. Why this was made, or whether it was merely an oversight, we need not consider, in view of the express declaration of the testator that, as far as his wife was concerned, these instruments were in accordance with each other.

The decree of the court is reversed, and it is directed that the fund be awarded the widow in accordance with the provisions of the antenuptial agreement.

(206 Pa. 272)

BOWMAN et al. v. KNORR.

(Supreme Court of Pennsylvania. May 18, 1903.)

JUDGMENT—LIEN.

1. A judgment obtained in an action against an executrix, commenced more than five years after the death of decedent, was not a lien on the real estate of the decedent, so as to entitle the assignee of the judgment to participate in the proceeds of the sale of the land on foreclosure.

Appeal from Court of Common Pleas, Columbia County.

Action by Bowman and others, to the use of George W. Vansiclen, against Samuel Knorr. From an order dismissing exceptions to the auditor's report, B. B. Brower appeals. Affirmed.

Samuel Knorr died on March 2, 1889, seized of certain land. Lloyd S. Wintersteen sued Mary L. Knorr, executrix of Samuel Knorr, deceased, in 1894, and secured a judgment for \$20,167.68, which by renewals amounted to \$26,372.73. The land was sold in foreclosure on a mortgage executed by the decedent in his lifetime. The auditor decided that the Wintersteen judgment was not a lien, and was not entitled to participate in the fund.

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

John G. Freeze, for appellant. O. W. Miller and L. E. Waller, for appellees.

FELL, J. The appellant is the assignee of a judgment obtained on an action against an executrix which was commenced more than five years after the death of the decedent. As the debt was not a lien on the real estate from the sale of which the fund arose, the auditor was right in disallowing the claim.

The decree confirming the auditor's report on this subject is affirmed.

(206 Pa. 277)

COMMONWEALTH v. LENOUSKY.

(Supreme Court of Pennsylvania. May 18, 1903.)

CRIMINAL LAW—EVIDENCE—HARMLESS ERROR.

1. Error in the admission of evidence on a trial for murder is harmless, where the only statement contained in the testimony which could affect defendant injuriously was abundantly established by other testimony, and was virtually admitted by the defendant.

2. Testimony of an absent witness, given at a preliminary hearing before a justice, is inadmissible on the trial of an indictment for murder, where the prisoner was not represented by counsel at the preliminary hearing, and was not notified of his right to cross-examine.

Appeal from Court of Oyer and Terminer, Luzerne County.

Peter Lenousky was convicted of murder in the first degree, and appeals. Affirmed.

Indictment for murder. It appeared that Anthony Senik, a miner, was murdered in the Exeter mines. Peter Lenousky and Victor Zorambo were arrested for the killing, and each charged the other with the murder. The testimony tended to show that they combined to do the killing for the purpose of robbery. The court admitted in evidence the stenographic testimony of Barney Polkitts, given at a preliminary hearing. The court charged in part as follows: "Gentlemen: Whether Anthony Senik was murdered is a fact for your determination. There seems to be no question, however, that such is the fact. He was found with his skull crushed, and near him the bloody ax which in all likelihood was the weapon used to commit the crime. There was nothing

about the chamber to indicate death by accident. To those of us who live in the anthracite coal fields, and who know the dangers to life and limb which the anthracite miner is bound to face in the ordinary pursuit of his calling, there is an added horror in the thought that it can be possible that out of the darkness of the mine may come to him sudden death at the hands of the robber and the murderer."

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

P. L. Drum and C. B. Lenahan, for appellant. B. R. Jones, for appellee.

FELL, J. At a preliminary hearing before a magistrate, at which the prisoner was present, a witness was called by the district attorney, and testified on behalf of the commonwealth in the language spoken and understood by the prisoner. Three weeks before the trial in the oyer and terminer, this witness left the place where he had resided for several years, and a diligent search made by the court's officers failed to disclose where he had gone. At the trial, under objection made by the prisoner's counsel, the stenographic notes of the testimony of this witness, duly verified by the interpreter and the stenographer, were read to the jury. The admission of this testimony is the subject of the first assignment of error, and gives rise to a question of grave importance in the administration of the criminal law. Its admission is not sanctioned by section 3, Act May 23, 1887 (P. L. 158), because it was not taken in a court of record; and, if it was admissible, it is for reasons irrespective of that act. Testimony of this kind has been admitted in cases where the right of cross-examination had been exercised or had been waived. In *Brown v. Commonwealth*, 73 Pa. 821, 13 Am. Rep. 740, the notes of the testimony of a deceased witness for the commonwealth, taken at a hearing before a justice of the peace, were read to the jury. It does not appear in the report of the case that the witness was cross-examined, but, in referring to this case, it is said in the opinion in *McLain v. Commonwealth*, 99 Pa. 86, that the prisoner was represented by counsel, and "full opportunity was thus given for cross-examination of the witness." In *Commonwealth v. Keck*, 148 Pa. 639, 24 Atl. 161, on a trial for murder, the admission of proof of testimony of a deceased witness, taken before a committing magistrate at a preliminary hearing, was sustained, on the ground that the testimony was taken in the presence of the prisoner and his counsel, and the witness was cross-examined. These cases go to the extent only of approving the admission of the testimony where the right of cross-examination has been exercised, or where it has been waived, with knowledge on the part of the prisoner, presumed from the presence of his counsel, that he had the

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1234.

right. In this case the prisoner was not represented by counsel, and was not informed of his right to cross-examine. The only testimony on this point is that of the magistrate, who when he was asked what opportunity, if any, the defendant had to cross-examine the witness, answered: "He had an opportunity, if he wanted to; he was there; he listened to the whole thing; he understood it." But this opportunity amounted to nothing. The prisoner was a foreigner, acquainted with the language of the witness, but not with that in which the proceedings were conducted, and ignorant of their nature and of his rights under them. There could be no waiver without knowledge, and the circumstances all indicate that the prisoner did not know of his right. In admitting the testimony, the court went a step in advance of the rule established by our cases. This we are unwilling to sanction. The admission of this testimony does not, however, call for a reversal of the judgment. The only statement contained in it that could by any possibility affect the prisoner injuriously was, that his pipe was found in the mine near the face of the chamber in which the murder was committed. That a pipe that once belonged to the prisoner was found at this place was abundantly established at the trial by other testimony that was entirely uncontradicted, and the prisoner himself admitted on the witness stand that the pipe was his, but claimed to have loaned it to Zorambo, who, he alleged, was in the chamber. When this testimony was offered, no objection was made to it on the ground that any part was incompetent, or elicited by leading questions. A motion was afterwards made to strike it out for these reasons. The court then allowed the counsel for the prisoner an opportunity to examine the testimony, and to make specific objections to any part of it. This was not done, and the motion was not pressed.

The second assignment of error does not require notice. The case was carefully and ably tried, and the record discloses no error, except in the admission of the testimony referred to.

The judgment is affirmed, and it is directed that the record be remitted to the court of oyer and terminer of Luzerne county for the purpose of execution.

(206 Pa. 274)

WRIGHT v. EUREKA TEMPERED COPPER CO.

(Supreme Court of Pennsylvania. May 18, 1903.)

PARTIES—AMENDMENT—ERROR IN NAME.

1. Where an amendment is asked to bring in a new party after the running of limitations, it will be denied.

2. A corporation known as the copper "company" had failed, and its property was sold

by the sheriff. A new corporation, known as the copper "works," succeeded to the property and the business of the copper company. Plaintiff was injured while in the employ of the copper works. In an action therefor, the defendant was named in the writ as the copper "company," and the writ was served on the manager of the copper "works," but the sheriff, following the words of the writ, returned it as served on the manager of the copper "company." The error was discovered after limitations had barred a new action. *Held*, that plaintiff should have been allowed to amend the record by striking out the word "company," and inserting the word "works."

Appeal from Court of Common Pleas, Erie County; Walling, Judge.

Action by Charles S. Wright against the Eureka Tempered Copper Company. From an order discharging rule to amend record, plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, MESTREZAT, and POTTER, JJ.

George H. Higgins, for appellant. George A. Allen and Hinckley & Rice, for appellees.

FELL, J. The Eureka Tempered Copper Company is a corporation that was engaged for a number of years in business in North East, Erie county. Its property was sold by the sheriff in 1896, and since then it has not done any business, but still exists as a corporation. In December, 1896, the Eureka Tempered Copper Works was chartered, and this corporation succeeded to the business of the copper company. In 1899, the plaintiff, while in the employ of the copper works, was injured, and in 1901, three days before his right of action was barred by the statute of limitations, he brought this suit to recover damages. Through a mistake of counsel, the defendant named in the writ was the copper "company" instead of the copper "works." The service of the writ was made on the manager of the latter corporation, but the sheriff, following the words of the writ, returned it as served on the manager of the copper company. The error in the name was not discovered by the plaintiff until a few days after the statute of limitations had barred a new action. The plaintiff then obtained a rule to show cause why the record should not be amended by striking out the word "company" and inserting the word "works," and on the same day the sheriff petitioned for leave to amend his return, so as to show service on the manager of the copper works. This appeal is from the order of the court discharging the rule to amend, and dismissing the sheriff's petition.

Statutes of amendment are liberally construed to give effect to their clearly defined intent, to prevent a defeat of justice through a mere mistake as to parties or the form of action. Amendments, however, will not be allowed to the prejudice of the other party, where the statute of limitations has run, by introducing a new cause of action, or bringing in a new party, or changing the capacity

§ 1. See Limitation of Actions, vol. 33, Cent. Dig. § 541.

in which he is sued. *Trego v. Lewis*, 58 Pa. 463; *Commonwealth ex rel. v. Dillon*, *81 Pa. 41; *Grier v. Northern Assurance Co.*, 183 Pa. 334, 39 Atl. 10; *Peterson v. Delaware River Ferry Co.*, 190 Pa. 364, 42 Atl. 935; *Garman v. Glass*, 197 Pa. 101, 46 Atl. 923. A party whose name it is asked to amend must be in court. If the effect of the amendment will be to correct the name under which the right party was sued, it should be allowed; if its effect will be to bring a new party on the record, it should be refused after the running of the statute of limitations. In this case there is no dispute as to what was intended and what was actually done in bringing the suit. The plaintiff had never worked for the copper company. His counsel knew of the existence and the history of both companies, that one had gone out of business, and had been succeeded by the other. He intended to draw a *præcipe* for a writ against the copper works, and, by mistake, wrote the word "company," instead of "works." He served the right party—the manager of the copper works—and thus brought that company into court, but under a wrong name. The mistake in bringing the suit was in the name of the party actually summoned, and not in suing the wrong party, and the amendment should have been allowed.

The judgment is reversed, with a *procedendo*.

(206 Pa. 306)

WHEELER et al. v. KNUPP et al.

(Supreme Court of Pennsylvania. May 18, 1903.)

TAX SALE—PURCHASE BY AGENT—PAYMENT OF TAX.

1. Where taxes on unseated land had been regularly assessed, and an agent of the owner bought in the land at a tax sale, and before maturity of the deed paid the taxes, and they were accepted by the treasurer, the agent's tax title thereon cannot be sustained.

Appeal from Court of Common Pleas, Warren County.

Action by N. P. Wheeler and John Dusenbury against W. J. Knupp and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

J. H. Osmer, N. F. Osmer, and W. J. Knupp, for appellants. D. I. Ball, W. D. Brown, and W. E. Rice, for appellees.

PER CURIAM. This was an ejectment in the court below for the undivided half of about 100 acres of land in Watson township, Warren county. The case was here before, and is reported in *Knupp v. Syme*, 200 Pa. 489, 50 Atl. 210. We held in that case, reversing the judgment, that the evidence that the tax, on default of payment of which the land had been sold at treasurer's sale, had been in fact paid before the maturity of the treas-

urer's deed, and that this was equivalent to a redemption; consequently, Hodges took nothing by the alleged treasurer's deed purporting to be on a sale for taxes of 1848. A motion for a reargument of that case was made. It in substance advanced all the additional reasons put forth now for a change in the judgment. Upon full and careful consideration, we overruled the motion, and refused to disturb the judgment for plaintiffs. On that record being remitted to the court below, the defendants in case at once brought ejectment, as they (there having been but one judgment) had a clear legal right to do. At the trial the court was of opinion there had been such change in the proof as warranted a different result, and directed a verdict for plaintiffs in this suit, which is equivalent to a reversal of our judgment in the first one. While the learned judge of the court below disclaimed any disrespect towards, or any intentional disregard of the opinion of, this court in the former case, we think possibly his settled belief of the correctness of his own opinion in the first case, to some extent, perhaps, warped his judgment in this. After a careful perusal of the testimony before us, and a comparison with that in the former case, we see no substantial change in the material facts as we then found them, and on which our judgment was based. The appellants' eleventh assignment of error is therefore sustained, the judgment is reversed, and judgment is now entered for appellants in this court and for defendants in the court below.

(206 Pa. 312)

McCOLLUM et al. v. CARLUCCI

(Supreme Court of Pennsylvania. May 18, 1903.)

PARTNERSHIP—WRONGFUL DISSOLUTION—ACTION FOR DAMAGES.

1. One partner can sue another for damages resulting from dissolution of the partnership, wrongfully brought about by the bad faith of the defendant, though the partnership accounts must be adjusted by an action of account rendered or by bill in equity.

2. An action against a partner will lie for breach of contract and wrongful dissolution, where the evidence was that defendant had advised the men employed by the firm in a quarry, on a statement that the partnership had ceased to exist, to sue for their wages, and sell out the partnership property on their judgments, which he purchased at execution sale, and had obtained a lease of the farm on which the quarry was located, and obtained judgment against plaintiff for default in the rent, and had otherwise interfered with plaintiff in carrying on the business.

3. The measure of damages in an action against one partner for wrongful dissolution of partnership is not plaintiff's share of the profits which defendant made on thereafter carrying on the business, but the value of the partnership to the plaintiff.

Appeal from Court of Common Pleas, Susquehanna County.

Action by A. H. McCollum and A. B. Smith, executors, against Frank Carlucci.

Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

G. P. Little, W. W. Watson, R. B. Little, and S. L. Tiffany, for appellant. A. H. McCollum, for appellees.

BROWN, J. If this suit were for an accounting by Carlucci, the appellant, to the estate of Lord, his late partner, the judgment would have to be reversed. Partnership accounts must be adjusted and settled, and the liability of one partner to another ascertained, by an action of account render or by a bill in equity. *Ferguson v. Wright*, 61 Pa. 258; *Leidy v. Messinger*, 71 Pa. 177; *Crow v. Green*, 111 Pa. 637, 5 Atl. 23; *Murray v. Herrick*, 171 Pa. 21, 32 Atl. 1125. The cause of action, as set forth in plaintiff's statement, is that the appellant broke all of his covenants in the partnership agreement, and this suit is not for an accounting, but for damages resulting to Lord from the dissolution of the partnership, wrongfully brought about by the bad faith and broken promises of Carlucci. In other words, the claim of Lord's estate is not for a share of the profits of the business which he and Carlucci, by their agreement of December 2, 1890, were to carry on, nor is it for an accounting from Carlucci as a partner. The contention of the plaintiff below was that, as a result of the broken promises of Carlucci, the partnership was wiped out, and profits that might have come from the business were never realized. If Carlucci had kept faith with Lord, and the partnership had continued, whether profitable or unprofitable, the accounts between the partners would have to be settled in the regular way. The finding of the jury has sustained Lord's contention that the partnership was wrongfully dissolved by Carlucci, and the representatives of his estate are not asking for an accounting, but for damages resulting from Carlucci's broken covenants and wrongful dissolution of the partnership. The remedy for the wrong sued for is neither an action of account nor bill in equity, but is in assumption on the broken contract. *Addams v. Tutton*, 39 Pa. 447.

The jury were instructed by the learned trial judge, first, that before Lord could recover, it was incumbent on him to show he had performed all of his covenants, and had been willing to go on and work the quarry, and pay one-half of the debts and expenses; and, secondly, that the evidence would have to satisfy them that Carlucci had wrongfully dissolved the partnership. Without referring to the testimony in detail, it is sufficient to say that a careful examination of it has persuaded us that the jury were justified in their finding that Lord had performed his covenants, and that Carlucci had not only not done so, but had will-

fully and wrongfully dissolved the partnership. As evidence of his willful purpose to wrongfully force the dissolution, the court, under *Addams v. Tutton*, supra, properly allowed the plaintiff to show that the defendant had advised the men who had been employed by the firm to bring suits against it, obtain judgments, and sell out the partnership property, which he himself purchased; that he said the partnership was at an end; that he obtained an assignment of the lease of the quarry to Lord, as well as of the farm on which the quarry was located, and entered judgment against Lord for default in payment of rent, and issued execution on it; that he purchased the farm, and, with a new partner, opened a quarry close to the Lord quarry, and was operating it at the time of the trial; and that, when Lord sold stone to get money to pay the men, he notified the parties to whom stone had been sold not to pay him.

We have discovered no error in any of the rulings on offers of evidence, and the only other question is as to the correctness of the court's instructions on the measure of damages, which were: "Now, as to the value of this contract, you cannot go to work and evolve prospective profits, and figure up what should be the speculative profits in the future, but the question is, what was that contract worth to Mr. Lord? That is the measure of damages. Not what it would sell for, but what was it worth? That is something which is very hard to determine. In the first place, we think if he dissolved the contract wrongfully, without any cause, he should be required to pay nominal damages for its dissolution, and whatever actual damages Mr. Lord sustained by reason of it. Those damages are not the value of the quarry. What would this firm make out of the quarry in running it? If they both ran it and performed the covenants of this lease, was there any profit in running it? If so, what was the share of the profits of Mr. Lord, the plaintiff? But you cannot figure up his share of the profits, and say that is the actual damages. You will take the value of the contract itself; arrive at it by such method of figuring as you can, and determine what was the value of this article of copartnership to Mr. Lord at the time of the dissolution of the contract. That is the basis upon which you are to work in awarding damages. * * * In ascertaining the value of the partnership, of course you may take into consideration what was done there that year—the business that the partnership did—and ascertain as best you can what the value of that partnership was to Mr. Lord, if any, provided you find that Mr. Carlucci wrongfully dissolved the partnership, and render your verdict in a gross sum for the amount that you shall find that he was damaged, with interest from the date of the damage sustained, or from the dissolution of the firm, up to this date." It

would have been difficult for the court to have given more definite instructions under the testimony in the case, and, as the defendant did not ask anything more definite, the charge on that point ought not to be complained of.

The verdict was for \$4,000. On a motion for a new trial, the careful judge, feeling that the damages were in excess of what was warranted by the evidence, and that the jury might have, to some extent, misunderstood the instructions as to the measure of damages, reduced the verdict to \$1,800. There was evidence that Lord had made about \$2,000 above expenses in operating the quarry the year before he entered into the contract with Carlucci, and, in the exercise of its discretion in disposing of the rule for a new trial, the limit in reducing the verdict was reached by the court below. As the case was fairly and properly tried, under adequate instructions to the jury, and no injustice has been done to the appellant, in view of the reduced verdict, the judgment entered below is affirmed.

(206 Pa. 280)

KNUPP v. BARNARD et al.

(Supreme Court of Pennsylvania. May 18, 1903.)

BOUNDARIES—ESTABLISHMENT—SURVEYS—MARKS—LOCATION.

1. The marks of a block of land consist of the marks, if such are found, of every tract of the block, and the marks, if originally intended as corners for a particular tract, become marks for locating the entire block.

2. The location of a block of surveys may be established by a single undoubted monument of the block on the ground; if there be no others, by the courses and distances in the return. The interior tracts must then be located relatively wholly from the return of the block, but the return may show marks for the corners of the interior tracts. If these be found on the ground, they establish the lines of these interior tracts, though this may to some extent disturb the lines of the block.

3. Where the location of two contiguous tracts of a block depends upon the position of the interior line of the block, and the evidence as to the marks of the survey is conflicting, the question is for the jury.

Appeal from Court of Common Pleas, Warren County; Lind, Judge.

Action by W. J. Knupp against Frank B. Barnard and E. Pequignot. Judgment for defendants, and plaintiff appeals. Affirmed.

The court charged in part as follows:

"Now, gentlemen of the jury, the question which you are to determine is where this land is located. The plaintiff claims that the Jacob Kortman tract and the Henry Bozar tract, and in fact all of these tracts, should be located by what is known or termed in

law a 'block survey.' You will understand by this that in the early settlement of this state, and in the early acquisition of titles, a person who desired to obtain title to a certain quantity of land made application to the commonwealth, and filed his application in the land office; and, while he himself was not able to obtain more than a certain quantity of land, he made application in the name of others, in the name of different members of his family and other persons, for the quantity of land which he desired, and the rights of the nominal applicants were transferred to the person making the application, and thus one person was enabled to obtain a large number of warrants or land. In this case James Willson applied for a large number of warrants—much larger than is represented on the plaintiff's map—and those warrants were placed in the hands of the deputy surveyor, Alexander McDowell, whose duty it was to go and survey those warrants upon the ground. His duty was, as we understand the law, to survey each one of those warrants and mark them on the ground; but that was not always done. Sometimes the deputy surveyor only ran the outward lines of a block of warrants, and then, when that was done, that became a block in the legal acceptance of the term. Where a large number of warrants or batch of warrants were run and marked on the ground in addition to running the exterior lines of the block, it became and was called a block in the popular sense of the term.

"To bring this definition more clearly before you, I desire to refer to the definition of blocks as defined by the late Judge Williams of the Supreme Court in the case of Ferguson v. Bloom, 144 Pa. 549, 23 Atl. 49. Judge Williams was known to be an able land lawyer, and, speaking of the manner in which warrants were granted by the commonwealth and the manner in which the surveys were made, he states: 'When more land was desired than could be included in one tract, the person wishing to buy made application in the names of the members of his family, his servants and employes, as well as his own. When this happened, the deputy surveyor would sometimes locate the entire batch of warrants in a body as one tract, and such a body of surveys, made at one time, for one owner, was called a "block." If the surveyor discharged his duty, and marked the lines of each tract, the word "block" was sometimes used to describe the body of lands held by one owner; but in such cases the location of the tracts comprising the block was made on what may be called the "individual system." If only exterior lines of the block were marked, the location of the separate tracts was practicable only upon what we have called the "block system."' Further defining these two systems, he says: 'If no tract corners are marked on the block lines, they must be run in accordance with the returns of survey. If

§ 1. See Boundaries, vol. 3, Cent. Dig. § 190.

corners are to be found on the block lines, these will control the courses and distances given in the returns, and the interior lines must be protracted across the block in accordance with them.' Further he states: 'In *Mock v. Astley*, 13 Serg. & R. 382, it was said a foundation for its application in any given case must be laid by showing two facts: First, the existence of a block must be established "by the production of documents showing title to the whole body. This shows a grant by the commonwealth of her title to the whole body composing the block. Next, the evidence must show that the tracts composing the alleged block were located in a body without interior lines." After reciting other cases, he says: 'Upon the authority of these cases, and upon the principle, it is clear that, if there are any interior lines on the ground, they are of equal value with external ones, as they are equally the "footprints of the surveyor," made at the location of the tracts, and for interior members of the block. The general rule is that, when there is work on the ground, made for and peculiar to a given tract, such work will control the location of the tract and fix the places of its lines.' Again: 'We have thus two systems for ascertaining the proper location of a survey—the natural and general one, which rests on such of the original marks made for the tract as can be found, and on the legal presumption arising from the return of survey as to such as cannot be found; and the block system, which is applicable where no internal lines were run, and where, therefore, no marks exist to guide in the location of internal tracts or lines, except such as may be found on the exterior of the block.'

"Now, gentlemen of the jury, from the definitions which I have read to you from the decision of the Supreme Court in *Ferguson v. Bloom*, which is almost the last case in which the systems are clearly defined by the Supreme Court, you will see that a legal block—in the legal sense I mean now—is where the exterior lines only are run and marked upon the ground. However, in the popular sense in which a block is used, it may be used where not only the exterior lines of the block or batch of surveys are run and marked upon the exterior lines, but the warrants themselves, composing the batch of surveys, the lines or corners are marked, and sometimes the lines are run upon the ground.

"With these definitions in mind, let us turn to what is called here by the plaintiff a 'block of surveys,' and see to which of these systems it belongs. The plaintiff has furnished us with a certified copy of a connected draft of warrants lying between the Randolph Spangler on the north and the James Murray on the south. His map, which you see before you, goes farther in the block than this connected draft, and his surveys went farther north, or up the Allegheny

river, than the Randolph Spangler warrant. This connected draft—and the same thing is shown by the copies of the separate warrants—shows the courses and distances running south along the Allegheny river, along all of these warrants. It shows the corners for the warrants marked by trees named in the surveyor's return of survey on a large number of the warrants on the east along down the Allegheny river. I think there are seventeen of the warrants shown on this connected draft, and some ten of them contain calls for marked trees. On the west there are still more calls for marked trees at the corners of these respective blocks, and I think only three of the warrants are without calls for corners. From these facts, gentlemen, it would appear that this batch of warrants as laid out by the deputy surveyor and as returned by him into the land office would not fall within the definition of a legal block. Because of these calls for marked trees along on these, separate warrants were actually made by the surveyor upon the ground; then many of these warrants, if not all of them, could be located by marks upon the ground. If this batch of surveys, then, are to be treated, in the location of one of the warrants, as a block in the legal acceptance of a block, it is because these corners cannot be found now upon the ground sufficient to locate the warrant under consideration.

"The plaintiff has called a number of experienced surveyors, who have made a survey not only of the warrants to which we have called your attention, but also of other warrants in the same batch, lying to the north. They have testified to finding a hemlock tree, which is now down, but the stump or butt of the tree has been blocked, and it counts back to the survey made by Alexander McDowell of these batch of warrants in 1795. That is at the north corner of the Randolph Spangler as you see it upon the map. The surveyors have gone north, and have found one or more trees or marks, as I recollect it, north of that, which counted back to 1795. Coming back to the hemlock, the northwest corner of the Randolph Spangler, the surveyors on the part of the plaintiff have traced a line from that point in a southerly direction, or south along these various warrants, to the James Murray tract or warrant. They testified, all of them, I think, that they found no marked corners which go back to the survey of 1795 on that line. The plaintiff has also given in evidence copies of surveys made of warrants granted by the commonwealth to different persons lying to the west—the Eben Owens, the David Beaty, the Michael Gorman, and perhaps one other. And it is claimed that these warrants, although junior, located at a later period of time from the James Wilson warrants, call for the James Wilson warrants, and call for the warrants, namely, the John Kortman, Peter Kortman, Henry Kortman, Isaac Kort-

man, and Jacob Kortman. And that they having been surveyed by a deputy surveyor of experience, who was the county surveyor of this county for many years, A. H. Ludlow, is evidence of where these warrants are located, and evidence to support his claim that the warrants are located farther north than the defendants claim, and that the Henry Bozar is where the defendants claim the Jacob Kortman to be. And in the David Beaty survey it is claimed that the call is for the Henry Bozar. The words written at the east of the David Beaty on the survey are 'D. Beaty,' and that is the piece of land which lies in the western part of the Jacob Kortman, as placed upon the map of the defendants, and that being in the Jacob Kortman it is claimed that this is a call for the Jacob Kortman. And taking the calls made by Andrew H. Ludlow when he located the David Beaty and the Eben Owens, it is claimed on the part of the plaintiff that it supports his theory of the location of these lots.

"Now, gentlemen of the jury, if there are no marks upon the ground by which the Jacob Kortman and the Henry Bozar can be located, then we say to you that we think resort may be had to the principles applicable to a block, and, locating these warrants in that way, the Randolph Spangler is the oldest warrant—that is, not going farther north than that—and that is sufficient for the purposes of applying the principles of a block survey. That is the older survey. That calls for the John Kortman, which is the next one south. That must be located, then, south of the Randolph Spangler. And the principle invoked applies that after twenty-one years there is a legal presumption that the warrant has been located as returned by the deputy surveyor. That legal principle, then, would locate the John Kortman south of the Randolph Spangler, and so with each one going south.

"But it is claimed on the part of the defendants that the Jacob Kortman and the Henry Bozar warrants can be located by marks found upon the ground, or the evidence of the marks which the deputy surveyor made in 1795, which they have given you. The evidence which the defendants have produced to support this is of a white oak, which white oak is called for as the northwest corner of the Henry Bozar and the southwest corner of the Jacob Kortman. O. W. Beaty is produced as a witness, and testifies that he was on the ground with a surveyor named John Fuellhart, in 1865, to run out the piece of land lying as shown by the defendants' map in the western part of the Jacob Kortman tract; and he says they went to a white oak tree, which was then standing, and started at that point, and from that white oak they made the survey of what is termed the D. Beaty piece of land, in the western part of the Jacob Kortman. He states that Fuellhart commenced his sur-

vey there; that he ran around and marked that piece of land as described; that he had known of the white oak tree being there upon the ground for some time before that; that he had seen it when going to school. If I remember correctly, he states that it was marked with three notches—I don't know that he mentioned the number, but it was marked with notches—and I think he said notches to the north, to the south, and to the east. You will remember that, gentlemen, for yourselves. Mr. Henry Fuellhart is called, and he testifies that he was on the ground later with his father, John Fuellhart, and that they went to the same corner—same tree—and that his father said that was the southwest corner of the Jacob Kortman warrant. He states that his father said he had blocked it. He states that they ran a line through to the Allegheny river; perhaps ran around the entire piece first, and then ran south, and then ran a line through to the river. You will remember what he stated as to what he found upon that line, and that his father pronounced that the south line of the Jacob Kortman tract; which should be, if it was, the north line of the Henry Bozar, because they call for each other, and must be located together. Now, gentlemen of the jury, I am not going to take the time to go over all of this evidence. You must remember it for yourselves. Title papers are given in evidence, deeds which have been admitted in evidence, showing the declarations of parties who had knowledge of the lines and parties who owned the lands. Those deeds and the declarations have been commented upon by counsel, and we will not go over them.

"We say to you, gentlemen of the jury, if you find that the white oak stump which is now found there upon the ground, and which is testified to by a number of surveyors on the part of the defendants, and it was also stated by O. W. Beaty—I understand that that tree was cut down later, after he was there in 1865 with Mr. Fuellhart—if you find from all the evidence that that white oak stump was of the tree marked by Alexander McDowell as and for the southwest corner of the Jacob Kortman and the northwest corner of the Henry Bozar, then we say to you as a matter of law that the legal presumption will attach (that is, the legal presumption that after twenty-one years a survey is supposed to be on the ground as returned by the deputy surveyor), and the line must be run from that stump according to the courses in the return of survey to the Allegheny river, and that would constitute the line between the Jacob Kortman and the Henry Bozar and the line between the plaintiff's and the defendants' land. The Jacob Kortman survey could be closed by the application of that principle. The line would then be extended up the Allegheny river, according to the courses and return of survey, and then westerly from the Allegheny

river according to the courses until it met a line extending northward from the white oak, according to its courses, and thus the survey would be joined. Now, gentlemen, this fact is for you. We give no expression at all as to what we might think about it. We have no right to. The question is for you to determine.

"The defendants, in support of their position, further give evidence of a pine tree which is called for in the Robert Tolbert as the northwest corner of the Robert Tolbert and as the southwest corner of the William Tolbert. Mr. Whittekin, an experienced surveyor, is called as a witness, who testifies that in 1882 he was making a survey for a man by the name of Shamburg, and he was at that pine tree; that he blocked it and counted it, and it counted back to the survey of 1795. He states that he has been there since, and that the tree is down, nothing there but the stump, and part of that stump has been brought here by the plaintiff, and you have heard the evidence that has been given in relation to it. The defendants have also given evidence of having run a line from that pine eastward to the Allegheny river, and finding no marks that dated back to the survey of 1795, but finding a marked line there. And this has been received in evidence as bearing upon the question whether that pine tree was the original tree marked by Alexander McDowell. Now, gentlemen of the jury, what are the facts in relation to that tree? Is that the tree? If so, then the Robert Tolbert and the William Tolbert could be located from that tree by applying the principle to which I have referred, and which was so clearly explained by Judge Furst, who last addressed you, and who read from a decision of the Supreme Court. It is for you to determine these facts.

"It is claimed on the part of the defendants, and there is evidence to show, that from the pine to the white oak there is sufficient distance to locate all the warrants between the Robert Tolbert and the Henry Bozar. The defendants have given evidence to show, from measurements made by the surveyors, that between the white oak, the northwest corner of the Henry Bozar, and the white oak at the jog in the southwest corner of the Jacob Spangler, there is sufficient land to fill all of these warrants, and considerable more.

"As we have said to you, gentlemen of the jury, the lines and marks upon the ground, the corners marked upon the ground, are the highest and best evidence, and that courses and distances must give way to the actual markings made upon the ground, when they can be found, or the existence of them can be shown by testimony which is satisfactory to the jury. The existence of these corners where they have disappeared must be proven by testimony which is clear and which is satisfactory to the jury."

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

A. O. Furst, D. I. Ball, and J. W. Wiggins, for appellant. W. B. Rice, W. W. Wilbur, and Perry D. Clark, for appellees.

PIER CURIAM. The contention in this issue turned on conflicting evidence as to the location of two tracts of land—the Henry Bozar and Jacob Kortman warrants, surveyed and returned in 1795. Both were part of a large block of 76 warrants taken out in that year by James Wilson. It is conceded on both sides that their position in the block is that of contiguous tracts having as a division an interior line of the block which on the return of survey, as defendants claim, is a line running from a post on the Allegheny river, the eastern boundary of the block, west 522 rods to a white oak marked on the return as a monument on the western line of the block. This, then, by the return, is also fixed as the southwestern corner of the Kortman and the northwestern corner of the Bozar. The plaintiff claimed title to about 125 acres, part of the Bozar. The defendants claimed the same land under the Kortman, and the conflicting claims are determined by a proper location of the dividing line which defendants claim runs from the white oak to the river. The plaintiff claims that the white oak line is not the true interior line of division between the Bozar and Kortman, but that the true line is one tract north of it. There was a mass of conflicting evidence tending to establish each side of the controversy, and the question of fact was submitted to the jury by the learned judge of the court below in a very full and impartial charge. The jury found for defendants, and plaintiff appeals, preferring 18 assignments of error.

We have examined them carefully, and find no error which would warrant a reversal. Under no view of the evidence could the court have withheld it from the jury. Taking the general lines and return of the block as the evidence, and the only evidence, of the relative location of those two tracts, the weight of it would probably sustain plaintiff's claim. But the marks of a block consist of the marks, if such are found, of every tract of the block, and the marks, if originally intended as corners for a particular tract, become marks for locating the whole block. The simple question is, did the early surveyor, in locating the block, make the marks of these two surveys at that date as members of the block? He may establish his leading warrant by undoubted monuments maintained to this day. In running his long block lines from these monuments he may mark corners on these lines for the lines of interior tracts. In running these block lines now, it may be found that these corners are not just where designated in the block lines as returned. The distance from the leading

warrant may be longer or shorter than that in the block line. It may not be in the exact course. But this variance of itself does not destroy its significance as a monument. It only demonstrates what is well known—the looseness and want of accuracy in the early surveyors, and the negligence exhibited by them in plotting and returning their surveys. In that day land in Warren county was cheap. Now the production of millions of dollars worth of oil from beneath it has made it very high-priced. But nevertheless, we are compelled, in ascertaining titles, to take into consideration the loose methods of the early surveyors, otherwise we may make disastrous mistakes. Here, we do not undertake to decide that beyond doubt the line from the white oak to the river was the true dividing line between the two tracts. To our minds, the evidence is not clear; but there was competent evidence adduced by defendants that it was. The jury believed it, as they had the right to do, and we cannot disturb their verdict.

We do not concur in the distinction made by the learned judge of the court below between a popular block of surveys and a legal block. The location of a block of surveys may be established from a single undoubted monument of the block on the ground, if there be no others, by the courses and distances in the return. The interior tracts must then be located relatively wholly from the return of the block; but the return may show marks for corners of the interior tracts. If these be found upon the ground, they establish the lines of these interior tracts, although this may to some extent disturb the lines of the block. Such a location of an interior tract of a block, although it may somewhat change the course of the exterior line as plotted in the return, or shorten that line running from the leading warrant, yet giving effect to that fact does not disregard the established rule that a member of a block cannot be wrested from its position and be located outside of it. It is not thereby wrested from the block, but its position is relatively the same as in the return, although one of the exterior lines of the block has been for a short distance deflected from its course to accord with the established monuments on the ground of the interior tract common to it and the block of which it is a member. But there can be no block of surveys, in either a popular or legal sense, where the tracts are not contiguous. It was not intended by us in *Ferguson v. Bloom*, 144 Pa. 549, 23 Atl. 49, nor in any other case, to change or modify the law as long settled governing the location of a block of surveys and the different members of a block. While we do not concur with what the learned judge of the court below says on this subject, or rather his understanding of the language of the cases cited, we can only say that his instruction did plaintiff no harm, for he distinctly told the jury that

they must be controlled in their verdict by the evidence of the marks made in 1795 on the ground.

All the assignments of error are overruled, and the judgment is affirmed.

(204 Pa. 307)

BAROLAY v. BARCLAY.

(Supreme Court of Pennsylvania. May 25, 1903.)

LIMITATIONS—PLEADING—DEMURRER—STATEMENT.

1. The defense of limitations must be pleaded, and cannot be raised by demurrer, either at the common law or under Proc. Act May 25, 1887 (P. L. 271).

2. Where, in an action on a note brought after the period of limitations, the statement avers that defendant always refused to pay the note, an amended statement, filed by leave of the court, alleging facts sufficient to remove the bar of the statute, is the only one before the court, and it is error to sustain a demurrer to the amended statement, because inconsistent with the original statement.

Appeal from Court of Common Pleas, Philadelphia County.

Action by William K. Barclay against John K. Barclay. Judgment for defendant, and plaintiff appeals. Reversed.

The record showed that the suit was brought on a promissory note for \$6,400, dated July 30, 1888. The writ issued April 1, 1901. In the original statement plaintiff averred "that the defendant has always refused to pay the amount of said note, or any part thereof." The defendant demurred on the ground that the action was barred by limitations. The court permitted an amended statement alleging that the said promissory note was duly presented for payment at No. 407 Locust street, and payment on the same duly demanded of a proper person according to the tenor of said note, but payment thereon was refused; and thereafter at various times within six years of the time when this suit was brought defendant admitted his liability to the plaintiff therefor, and acknowledged to the plaintiff's agent that the above note was an existing indebtedness, and that he was liable thereon to the plaintiff for the amount thereof, with interest, but defendant has never paid the same, or any part thereof, wherefore this suit is brought. A demurrer to the amended statement was sustained.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Henry Budd and George Gluyas Mercer, for appellant. W. B. Bodine and G. W. Pepper, for appellee.

MITCHELL, J. The procedure act of May 25, 1887 (P. L. 271), introduced clumsy and unscientific methods into the legal statements of the parties, by the plaintiff of his

¶ 1. See *Limitation of Actions*, vol. 32, Cent. Dig. § 670.

cause of action and by defendant of his defense, but it did not go so far as to overturn and confuse the fundamental principles of pleading by requiring the plaintiff to set out his evidence or anticipate the defense. The statute of limitations is a defense upon facts, and must be pleaded. It cannot be made by a demurrer which raises only an issue of law. It is not a defense absolute, of which the court will take judicial notice on the plaintiff's presentation of his case, either in his declaration or at the trial; for, if the defendant does not choose to make it, it is not a part of the case at all. And the only way the defendant can make it is by plea. A single illustration will suffice. At the trial the plaintiff might prove the signature of defendant, put the note in evidence, and rest with a completed case. If defendant gave no evidence, the verdict must be for plaintiff, without regard to the date of the note. And if defendant had not pleaded the statute of limitations he could not make that defense. The act of 1887 has made no change in this respect. It is very notable that neither the court below nor the learned counsel for the defendant appear to have remembered that the act expressly recognizes the plea of the statute of limitations. Section 7, after providing that non assumpsit shall be the general issue, continues: "The defendant in the action of assumpsit shall be at liberty, in addition to the plea of non assumpsit, to plead payment, set-off, and also the bar of the statute of limitations." Under this provision, as at common law, the bar of the statute of limitations is not raised by the general issue, but must be specially pleaded. The act directed that "special pleading is hereby abolished," but it was a vain and futile direction, which abolished only the name; the substance is inherent in the nature of litigation, and cannot be destroyed by the reforming panacea for imaginary ills, of calling things essentially different by the same name. Some glimmering of this fact seems to have entered the mind of the Legislature in passing the act. The general intent undoubtedly was, badly as it was carried out, to simplify and make the pleadings more direct, so that each side should know the exact point of controversy raised by the other. The general issue on a promissory note meant in plain terms that defendant never promised to pay. But, if plaintiff came to trial prepared to prove the promise, and was there met by an admission of the promise by the signature, but a denial of any promise within six years, he was at an unfair disadvantage by a defense of which he had no notice. To prevent this injustice, the act expressly retained special pleading as to the statute of limitations. Both on the general principles of pleading, therefore, and on the express provisions of the procedure act, the court below was in error in sustaining the defense of the statute of limitations on a demurrer.

It was even more pronounced error to sustain the demurrer to the amended statement. That statement, having been allowed and filed, was the only one before the court, and it set up a good cause of action, even under the erroneous view of the court in requiring it. The inconsistency with the first statement was purely formal and theoretical. A promise (in words) to pay, and a refusal (in fact) to do so are not practically inconsistent, and unfortunately not unknown in common experience. But even if the inconsistency had been substantial, and had appeared on the face of the amended statement, it was not demurrable. Neither declarations nor pleas are required to be consistent. Nothing could be less so than non assumpsit and payment, yet they are allowed to be joined under the statute as well as at common law. The common counts for goods sold and delivered, and for goods bargained and sold, but refused to be accepted, were nearly always joined, and there is no good reason why they should not both be used now in the same statement. If the fact of delivery or refusal to accept is the one really in controversy, the plaintiff must be allowed to state his cause of action in both ways, or be subject to the risk of failing on the want of correspondence between the allegation and the probata. The case of *Guarantee Trust, etc., Co. v. Farmers', etc., Bank*, 202 Pa. 94, 51 Atl. 765, has no bearing on this, as that was an action in tort, and, by the agreement of parties, was decided on the fundamental and controlling question as to when the statute of limitations began to run.

Judgment reversed, and demurrer directed to be overruled, with leave to defendant to plead issuably.

(206 Pa. 317)

McFARLANE & CO. v. KIPP et al.

(Supreme Court of Pennsylvania. May 18, 1903.)

RES JUDICATA—JUDGMENT ON SET-OFF.

1. In an action by a firm, defendants set up a claim, and secured a certificate in their favor, on which judgment was entered, and thereafter sued one of the plaintiffs in the first suit, and two other persons, alleged to be partners, but not parties plaintiff in the first suit, on the same cause of action. *Held*, that the suit could not be maintained.

Appeal from Court of Common Pleas, Bradford County.

Action by James McFarlane & Co. against H. B. Kipp and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

A. T. Freedley, D. C. De Witt, and I. McPherson, for appellants. William Maxwell, Rodney A. Mercur, James H. Coddington, and William T. Davies, for appellees.

¶ 1. See Judgment, vol. 30, Cent. Dig. § 1144.

BROWN, J. In 1893, Hiram Frisbie and Horace Kipp, trading as Hiram Frisbie & Co., brought suit against James McFarlane & Co. in the court of common pleas of Bradford county to December term, 1893, No. 331, to recover damages for an alleged breach of a lumber contract. When the case came to trial there was a verdict rendered on April 17, 1901, in favor of the defendants, under their plea of set-off, for \$10,644.78. While that suit was pending, the appellants, on June 7, 1899, in the same court, brought suit against H. E. Kipp (who was the Horace Kipp in the other suit), G. W. Kipp, and E. F. Kizer, trading as Hiram Frisbie & Co. and G. W. Kipp & Co. This second suit was for precisely the same claim for which the plaintiffs, as defendants in the former suit, had, under their plea of set-off, recovered a judgment against Hiram Frisbie and Horace Kipp, trading as Hiram Frisbie & Co. The verdict of the jury in the second suit was for \$11,421.82. Instead of pleading in abatement in the first suit that G. W. Kipp and E. F. Kizer, now alleged to be copartners of Frisbie and H. E. Kipp, had not been named as plaintiffs, the defendants went to trial, electing to stand on their plea of set-off to recover a judgment against the plaintiffs on the record. It is true that in an anomalous way they did try, after the verdict and certificate had been returned in their favor, to insert the names of G. W. Kipp and E. F. Kizer as plaintiffs, and succeeded in doing so; but the whole proceeding was so grossly irregular that we reversed the judgment entered against G. W. Kipp and Kizer, and ordered their names to be stricken from the record. *Frisbie v. McFarlane*, 196 Pa. 116, 46 Atl. 358, 79 Am. St. Rep. 696. In the present case the question reserved by the court was whether the plaintiffs can now recover on their claim, which is the identical one used by them in their recovery against one of the present defendants, plaintiff in the suit to December term, 1893, No. 331. Having been of opinion that the plaintiffs could not use their claim a second time for the purpose of obtaining a second judgment against the firm of Hiram Frisbie & Co. and Horace E. Kipp, the judgment was directed to be entered for the defendants non obstante veredicto, and the only question for our consideration is the correctness of the judgment so entered.

McFarlane & Co. had but one cause of action against the firm of Hiram Frisbie & Co., whoever may have composed it. Instead of enforcing it in the present suit, they saw fit to do so under their plea of set-off in the former one, in which H. E. Kipp, as a member of the firm, was one of the plaintiffs. By that plea, when they insisted upon a certificate in their favor, which they received from the jury, they became the actors, and, having recovered once against Horace E. Kipp upon the joint contract of the copartnership, neither he nor any of the others

jointly bound with him, but who may not have been joined with him as a plaintiff, can be subjected to a suit by the defendants against him and them for identically the same thing that was the subject of their set-off. This present suit is against him as well as them, and, being for the joint liability, judgment cannot be only against them. It must be against all of them or in favor of all of them. But, if against all of them, there will be two judgments against Kipp on the same claim. The acts of April 6, 1830 (P. L. 277), and April 11, 1848 (P. L. 536), providing when copartners not served or included in one suit can be sued in another, have no application to a case like this, and the question before us will be disposed of without regard to them, according to the common-law rule upon the subject.

By their election to recover under their plea of set-off in the first suit the appellants were as effectually bound as if they had recovered on the same cause of action in another suit in which they were the plaintiffs. Even if they had not known, when they put in their plea, who composed the firm, their subsequent discovery of who the real members were could not give them a new cause of action. The breach of the contract was their cause of action, and the discovery of other partners could not give them a new substantive cause of action. *Smith v. Black*, 9 Serg. & R. 142, 11 Am. Dec. 686. In that case, in which it was decided that a judgment recovered against one partner is a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered until after the judgment, Duncan, J., said: "No principle is better settled than that a judgment once rendered absorbs and merges the whole cause of action, and that neither the matter nor the parties can be severed, unless, indeed, where the cause of action is joint and several, which certainly actions against partners are not. *Transit in rem judicatam.*" * * * I am of opinion that the law will not suffer this splitting up either of actions or severing of persons, and that, where the cause of action is a joint one, a judgment once rendered extinguishes the original cause of action, and is a bar, not only to a subsequent action brought against the same persons, but against all others; that the judgment puts an end to all litigation on the subject-matter of the action; and that a discovery of a new party or the happening of new damages does not give a new cause of action." "It must be considered settled that, if the known partner is sued, and judgment and execution against him, without satisfaction, a dormant partner, afterwards discovered, cannot be made liable." *Anderson v. Levan*, 1 Watts & S. 334. The doctrine in England and in this country as to the effect of a suit and judgment against one of two or more partners or joint contractors is announced in *Mason v.*

Eldred, 6 Wall. 231, 18 L. Ed. 783: "The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons bars an action against the others, though the latter were dormant partners of the defendants in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause." In support of this doctrine, among many other authorities to which attention could be called, reference is made to the following: *King v. Hoare*, 13 Meeson Welsby, 494; *Sessions v. Johnson*, 95 U. S. 847, 24 L. Ed. 596; *United States v. Ames*, 99 U. S. 35, 25 L. Ed. 295; *Ward v. Johnson et al.*, 13 Mass. 148; *Robertson v. Smith*, 18 Johns. 459, 9 Am. Dec. 227; *Wann v. McNulty*, 7 Ill. 355, 43 Am. Dec. 58.

The appellants, having recovered once against Horace E. Kipp, cannot do so again for identically the same claim in this suit against him and others now alleged to be his copartners, and the judgment in favor of the defendants non obstante veredicto is affirmed.

(206 Pa. 303)

GRAY et al. v. CITIZENS' GAS CO. OF PORT ALLEGHANY.

(Supreme Court of Pennsylvania. May 18, 1903.)

SPECIFIC PERFORMANCE—REMEDY AT LAW—DISMISSAL.

1. A bill for specific performance will not be dismissed merely because complainant has a remedy at law, unless it is shown that his remedy is adequate.

2. Where a bill for specific performance is dismissed on the ground that complainant had a remedy at law, and on appeal the record is so insufficient that it cannot be determined that the remedy was adequate, the decree will be reversed.

Appeal from Court of Common Pleas, McKean County; Lindsey, Judge.

Bill by John G. Gray and Carl R. Bard against the Citizens' Gas Company of Port Alleghany. From a decree dismissing the bill, plaintiffs appeal. Reversed.

Errors assigned were as follows: (1) The learned court erred in refusing to take jurisdiction of the case. (2) The learned court erred in dismissing the plaintiff's bill, for the reasons contained in the fourth section of the twenty-ninth paragraph of defendant's answer, which section is as follows: "That

specific performance of a contract of this character cannot be enforced, for the reason that the contract is continuous, lasts for so long a time as gas can be procured from the territory which the People's Gas Company had at the date of the making of said contract or thereafter acquired, and would require a constant supervision and oversight by the court, which supervision and oversight by the court it is impossible to give, and would involve a large amount of detail as to the matter of the number of wells to be drilled, size of lines to be laid, quantity of gas to be furnished, and other matters relating to the corporate business of defendant company, which the court has neither the time nor power to supervise, conduct, or control." (3) The learned court erred in dismissing plaintiff's bill, for the reasons contained in the fifth section of the twenty-ninth paragraph of defendant's answer, which section is as follows: "That the plaintiff by its own bill shows that it has an adequate remedy in law, said bill assuming to estimate the damages which have been sustained, and thereby showing to the court that the damages are capable of ascertainment, and therefore the plaintiff, if it has suffered any damage, can be compensated in an action." (4) The learned court erred in dismissing plaintiff's bill.

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

John G. Johnson, H. N. Rose, Sheridan Gorton, and Thomas F. Richmond, for appellants. F. D. Gallup, George A. Berry, and Robert L. Edgett, for appellee.

PER CURIAM. The question raised in this case is not alone whether plaintiff has a remedy at law, for that remedy it clearly has, but whether, in view of the facts, it is an adequate one. It may be conceded that the time is not very remote in our judicial history when a wronged party sought the intervention of equity, and he could be truthfully met by the reply, "You have a remedy at law in action for damages," such reply would have been the end of his bill; he would have been turned out of court for want of jurisdiction. But this answer is no longer conclusive as to the jurisdiction. Courts now go further, and inquire whether, under the facts, the remedy at law is not vexatiously inconvenient, and whether it is so proximately certain as to be adequate to right the wrong complained of. In this case the court below, giving only very meager reasons, and without citing a single authority, dismissed plaintiff's bill for want of jurisdiction. The learned judge says he had before him very full briefs of the opposing counsel, and his decree is based on his conclusions from these briefs. What they contained by way of reason and authority we are not informed. It is simply impossible on this appeal to satisfactorily review the question at issue from the record before us. The court below should have all the material facts, either found or agreed upon, before it, preliminary to its de-

cree, and so should we. Necessarily, our opinion now must be brief, for we must carefully avoid prematurely intimating a decision, before the facts necessary to an intelligent and lawful decree are before us. We can only say now that the court may or may not have jurisdiction. We do not know.

The appeal is sustained, and decree reversed. It is directed that the bill be reinstated, and the record be remitted to the court below for further proceedings, as suggested in this opinion.

(206 Pa. 281)

CONTAS v. CITY OF BRADFORD et al.
(Supreme Court of Pennsylvania. May 18, 1903.)

ORDINANCE—CONSTRUCTION—FIRE LIMITS.

1. Where a city ordinance provided that within certain limits no buildings should be "constructed or reconstructed," except of incombustible materials, a change in the wooden building by putting in a new front of galvanized iron and ceiling of steel and roof of slate, and an increase of height of six feet and two inches, is not affected thereby, the words "constructed or reconstructed" not prohibiting an owner from repairing his wooden buildings standing within such fire limits.

Appeal from Court of Common Pleas, McKean County.

Bill by A. Contas against the city of Bradford and others. From a decree for plaintiff, defendants appeal. Affirmed.

The following is the opinion of the court below, filed by Morrison, P. J.:

"Findings of Fact.

"(1) By written stipulation dated October 25, 1902, signed by the solicitors for all parties, it is agreed that the hearing in this case shall be a final one, the printing of the bill and answer by defendant being waived, and it being agreed that the case is regularly at issue. It is further agreed, if an injunction issue, the bail shall be \$100.

"(2) The plaintiff is the owner in fee of a lot of land situated on the south side of the Main street, in the city of Bradford, and having erected thereon a two-story double-boarded building twenty feet wide in front on Main street and extending back eighty feet. This building rests on stone piers, and has wooden sills and floors, and a wooden ceiling, and shingle roof, and the outsides of the building covered with wooden siding. It was constructed about twenty years ago, and has become somewhat decayed, and needed new sills, new first floor, and the ceiling needed strengthening by new joists; it needed a new roof and required painting.

"(3) The plaintiff made a parol contract with Frank S. Slattery to make the following repairs upon said building: To put in new joists and sills for the first floor, and a new floor, a new steel ceiling, a new gal-

vanized iron front and galvanized bay window; to raise the building by splicing at the bottom, next to the sills, two feet and six inches, so that the storeroom on the first floor would be two feet six inches higher than at present; to paper the building upstairs, and paint it, and put on new shingles or slate roof, and to put in new piers for the foundation if it was found that they were needed. No changes were to be made in the external sides of the building. The walls were to remain outside as they were, except the raising of the same two feet six inches. The building was not to be widened or lengthened. The back room upstairs was to be made into a kitchen. The external appearance of the building was to remain the same, except the galvanized iron front.

"(4) The plaintiff's lot and building is within the fire limits of the city of Bradford, and is covered by ordinance of the city of Bradford No. 907, the material part of which, so far as this case is concerned, is as follows: 'Within which no building shall hereafter be constructed or reconstructed except of brick, stone, iron or other incombustible material,' etc. This ordinance is authorized, and is in accordance with the act of assembly approved May 23, 1889 (P. L. 293, art. 5, § 3, cl. 40), as amended by the act of assembly of May 16, 1901 (P. L. 284, § 14).

"(5) That plaintiff, being about to have the repairs mentioned above made upon his building, was stopped by the city authorities on the ground that what he was doing was reconstruction of his wooden building, and was, therefore, in violation of the said ordinance and the acts of assembly.

"(6) The expense of constructing the plaintiff's building entire would be about \$3,500, but the cost of the contemplated repairs was only \$1,500.

"The plaintiff has asked us to find the following facts and conclusions of law:

"Facts.

"(1) The work to be done by the plaintiff, as shown by the testimony in this case, does not amount to a reconstruction of the building described in plaintiff's bill. Answer. Affirmed.

"(2) That said work, as shown by the evidence in this case, is not a reconstruction of said building, but simply a repairing of the same. Answer. Affirmed.

"Conclusions of Law.

"(1) The ordinance of said city of Bradford, to wit, Ordinance No. 907, approved November 26, 1901, and the act of assembly approved May 23, 1889, in pursuance of which said ordinance was passed, do not prohibit the repairing of wooden buildings within the limits prescribed by said ordinance. Answer. Affirmed.

"(2) That said ordinance, and the act of assembly upon which the same is predicated, being in derogation of the common-law right

¶ 1. See Municipal Corporations, vol. 38, Cent. Dig. § 1337.

of the plaintiff to use his property as he deems proper, must be construed strictly against the city. Answer. Affirmed.

"(3) Under the law and facts in this case the plaintiff is entitled to the injunction prayed for. Answer. Affirmed.

"Defendant's Requests for Findings of Fact.

"(1) That the defendant city of Bradford has, by Ordinance No. 907, approved November 26, 1901, prescribed certain fire limits within which no building shall be constructed except of brick, stone, iron, or other incombustible material, with the outer walls thereof eight inches in thickness in a building less than twenty feet to the eaves, twelve inches in thickness in a building less than forty feet and more than twenty feet in height, and four inches additional thickness for each additional twenty feet in height; and also with the roof covered with tin, iron, slate, or other fireproof material. Answer. Affirmed.

"(2) That the plaintiff is the owner in fee of a certain lot of land with building thereon erected, known as No. 28 Main street, in the city of Bradford, and within the fire limits prescribed by said Ordinance No. 907, approved November 26, 1901. Answer. Affirmed.

"(3) We do not quote defendant's request No. 3 in full here, for the reason it is not in accordance with the evidence, and we cannot affirm it, but it will be filed and answered in the negative.

"(4) The building now standing was built over twenty years ago. Answer. Affirmed.

"(5) The building is now unoccupied and unfit for occupancy. Answer. Affirmed.

"Conclusions of Law Asked by Defendant.

"(1) That the work which the plaintiff had undertaken to perform upon building No. 28 Main street, in the city of Bradford, is a construction or reconstruction of a building, such as is prohibited by said Ordinance No. 907, of the city of Bradford, approved November 26, 1901. Answered in the negative.

"(2) That the plaintiff is not entitled to the relief prayed for. Answer. Refused.

"(3) That the plaintiff's bill in this case should be dismissed, with costs. Answer. Refused.

"Discussion.

"The sole question in this case depends upon the legal meaning of the word 'reconstruct,' as used in Ordinance No. 907 of the city of Bradford. Words of a statute, unless in some way controlled by the context, are to be considered in the ordinary and popular acceptance of the terms used. Statutes or ordinances thereunder in derogation of the common-law right of the citizen, and depriving him of his common-law right to use and enjoy his property, are to be considered most strictly against the public and in favor of the citizen. Penal statutes or ordinances, or ordinances and statutes penal in their

character, are to be considered most strictly against the public and in favor of the citizen.

"Now, let us look at the meaning of the words 'construct' and 'reconstruct.' Webster says: 'Construct. To put together in their proper place and order the constituent parts of; to build; to form; as, to construct an edifice; to build.' 'Reconstruct. To construct again; to rebuild; to form again or anew.' The Century Dictionary: 'To construct again; to rebuild.' In *De Wald et al. v. Woog*, 158 Pa. 497, 27 Atl. 1088, the word 'reconstruct' seems to have been judicially considered. In that case the old structure was an old-fashioned two-story house, and it seems to us the changes made were much more important and extensive than those contemplated by the plaintiff in this case; yet it is held that it was not a reconstruction, or a new building, or a rebuilding. In this case *Landis' Appeal*, 10 Pa. 379, is cited. In this case *Coulter, J.*, says, on page 380: 'In the common understanding and language of the people, when we speak of the erection or construction of a house or building we mean the erection of a new house or building, not the rebuilding of an old one.' It is a maxim with the courts that statutes in derogation of the common law must be construed strictly. *Cooley's Constitutional Limitations*, p. 60; *Broom's Maxims*, p. 33. Penal statutes must be construed strictly in favor of the accused. *Bucher v. Commonwealth*, 103 Pa. 528; *Gallagher v. Neal*, 3 Pen. & W. 183; *Cake v. Jacoby*, 2 Wkly. Notes Cas. 391. Statutes for regulation of trade, imposing fines and forfeitures, are to be construed strictly as penal, and not liberally as remedial laws. *Commonwealth v. Shopp*, 1 Woodw. Dec. 123. A municipal ordinance imposing a penalty must be construed according to its spirit and intent. An act may be within the limit, and yet no violation of the ordinance. *Philadelphia v. Wright*, 4 Phila. 138. In our opinion, the proper legal construction of the words 'construct' and 'reconstruct,' found in the act of May 23, 1889 (P. L. 293), as amended by the act of May 16, 1901 (P. L. 234, § 14), and embodied in the ordinance of the city of Bradford No. 907, is to prohibit the construction or building of a wooden structure within the limits fixed by the ordinance; that the word 'reconstructed' simply has the legal effect of preventing any evasion of the prohibition created by the words 'no building shall hereafter be constructed'; that is to say, the ordinance cannot be evaded by claiming the right to reconstruct or rebuild a wooden building which had been demolished or destroyed, either by accident or design. But the words 'constructed or reconstructed' cannot be construed to prohibit an owner from repairing his wooden building which stands within the fire limits. And we are clearly of the opinion that the repairs contemplated by the plaintiff, as set out in our findings of fact, do not amount to construction or re-

construction within the meaning of the law. The building will not be materially enlarged; in fact, it will be no wider and no longer than when the repairs were begun. It will be two feet and six inches higher; but the new front will be galvanized iron, and the ceiling and wainscoting will be steel, and certainly this reduces the fire risk, and the roof will be slate in place of wooden shingles. To say that the contemplated repairs amount to a reconstruction or constructing again or rebuilding of the wooden structure seems to us putting a forced and unusual meaning upon these terms. If to put a new front in a building and a new ceiling and a new roof and painting the building is a reconstruction of a building, then we do not understand the meaning of these terms. Having reached this conclusion, it follows that the plaintiff is entitled to repair his building, and that the action of the city in refusing to permit him to do so is illegal, and must be restrained. We are not, however, disposed to restrain the city from preventing the plaintiff from putting shingles on the building for a roof, and say that the roof must be of slate or some other noninflammable material."

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

F. P. Schoonmaker, for appellants. George A. Berry and Robert L. Edgett, for appellee.

PER CURIAM. We can add nothing to what has been so well and concisely said in demonstration of the correctness of his judgment by the learned judge of the court below. All the assignments of error are overruled, and the judgment is affirmed on the opinion of the court below.

(306 Pa. 277)

POTTER COUNTY WATER CO. v. BOROUGH OF AUSTIN et al.

(Supreme Court of Pennsylvania. May 18, 1903.)

MUNICIPAL CORPORATION—WATER SUPPLY—CONTRACT—CONSTITUTIONAL LAW.

1. Where a borough, in 1897, contracted with a water company to supply the borough with water for fire purposes, and the citizens with water for domestic purposes, it could not thereafter violate its contract by the erection of waterworks.

2. Act May 8, 1901 (P. L. 140), entitled "An act to provide a supply of water for the use of the public, either by the erection and operation of waterworks or by contract," is unconstitutional as to section 2 of that act, so far as it tends to avoid existing contracts.

Appeal from Court of Common Pleas, Potter County.

Bill by the Potter County Water Company against Austin borough and others. From a decree for plaintiff, defendants appeal. Affirmed.

The following opinion was filed in the court below:

"Findings of Fact.

"(1) I find as a matter of fact that on October 16, 1897, the borough of Austin passed an ordinance authorizing and empowering one John P. McIntyre, acting for himself, or for a corporation formed for supplying water in the borough of Austin, his successors and assignees, to construct and maintain waterworks in said borough.

"(2) I find as a matter of fact that by said ordinance the said McIntyre, or his assigns, should file with the borough clerk within sixty days a written acceptance of the terms of the ordinance, and within one year should have the water plant in successful operation, and on filing said acceptance was to be deemed a contract between the borough and McIntyre and his successors. This also is averred in the plaintiff's bill, and not denied in the defendants' answer.

"(3) I find as a matter of fact that on October 16, 1897, John P. McIntyre filed with the borough clerk an acceptance of the provisions of the ordinance above cited.

"(4) I find as a matter of fact that soon after what is called the Potter County Water Company, the plaintiff in this case, was chartered, and that John P. McIntyre then assigned and transferred all his right and interest to the privilege to him granted by said ordinance of October 16, 1897, to said company.

"(5) I find as a matter of fact that the ordinance above stated, in its first section, granted the right to John P. McIntyre, or his assigns, to lay all pipes necessary for the transportation of water for 'public and domestic purposes' in said borough.

"(6) I find as a matter of fact that the line of pipe called the 'iron line' had been previously constructed by private individuals in said borough, and that, having been transferred to the borough by the private parties, the said borough agreed to deliver to said McIntyre the free and uninterrupted possession of said 'iron line,' and that McIntyre agreed to furnish water for fire purposes free for the fifteen hydrants then located in said borough, and that the borough agreed to rent of McIntyre such additional hydrants as might be necessary for fire protection for the term of the ordinance, and pay the said McIntyre or his successors an annual rental of \$15 each for such additional hydrants.

"(7) I find as a matter of fact that soon after the acceptance of said ordinance and the incorporation of the Potter County Water Company that the said water company proceeded to construct and operate a water plant in the borough of Austin, laying pipes, putting in hydrants, and furnishing water to the people of Austin for domestic purposes, and to the public for fire purposes; said work being completed within one year, as re-

¶ 2. See Constitutional Law, vol. 10, Cent. Dig. § 379.

quired, and is being operated by the Potter County Water Company to the present date.

"(8) I find as a matter of fact that after the filing of the plaintiff's bill in this case, and the granting and service upon them of the rule to show cause why preliminary injunction should not issue, to wit, on June 17, 1901, the borough council passed an ordinance providing for an election to be held on July 30th for the purpose of determining whether an indebtedness of \$19,789.40 should be incurred for the purpose of erecting a water system for said borough of such capacity as may be required to supply water for fire purposes and to supply its citizens with pure spring water for fire and domestic use.

"(9) I find that this election was advertised and held, and a majority voted in favor of such increase of indebtedness.

"(10) I find as a matter of fact that no actual work has yet been done upon the ground in the construction of said plant, but that the authorities of the borough intend so to do, and that the borough council has advertised for bids for bonds of the borough, the avails of the sale of said bond to be used in the construction of said plant.

"(11) I do not find from the evidence that the borough of Austin is indebted in any amount whatever, but I do find that the assessed valuation of said borough is \$282,620.

"(12) I find that the iron line was turned over to the plaintiffs by the borough, as was required by the ordinance of 1897, and was connected with the other lines of the plaintiff company, and that the plaintiff has furnished water through the said lines, as required by the ordinance of 1897.

"(13) I find, as a matter of fact, that some time in the year 1893 or 1894 some citizens of Austin borough, who were styled the 'Board of Trade,' entered into an agreement with the Messrs. Goodyear (a lumber manufacturing company at Austin), by which it was agreed that the committee should lay a pipe some half a mile or mile long down through the Goodyear piling grounds for the protection of his lumbermen from fire; in consideration of which the Goodyears were to locate car shops at Austin. This line was built, and appears to have been connected with the plaintiff's lines. This line was not laid in the streets of Austin, but is entirely on the lands of Goodyear. It appears from the evidence to be managed and controlled by the Goodyears, and I do not find anything in the evidence connecting the Potter County Water Company with the transaction.

"Findings of Law.

"Answers to the request of the counsel for the plaintiff for findings of law:

"(1) That the facts proved in this case show such a contract and proceedings between the borough of Austin and the Potter County Water Company as prevents the borough from erecting a municipal water plant of its own for supplying itself with water for fire

purposes or its citizens with water for domestic purposes. Answer. This request is answered in the affirmative.

"(2) That the said borough cannot erect a municipal water plant to supply its citizens with water for domestic purposes or to supply for fire purposes under the provisions of the act of assembly approved May 3, 1901 (P. L. 140), as the same is unconstitutional for the reason that the title gives no notice of the provisions contained in the second section of said act. Answer. This request is answered in the affirmative so far as to declare the second section of the act of 1901 so far as it attempts to avoid existing contracts unconstitutional, but we decline to declare the whole of said act unconstitutional for the reasons assigned in this request.

"(3) That the borough cannot erect a municipal water plant to supply its citizens with water for domestic purposes under the provisions of the act of assembly approved May 3, 1901 (P. L. 140), as the same is unconstitutional for the reason that the second section of the same is unconstitutional. Answer. I affirm the third request so far as to declare the second section of the act of 1901 unconstitutional as to contracts existing at the time of its passage.

"(4) That the borough cannot erect a municipal water plant to supply its citizens with water for domestic purposes or to supply water for fire purposes under the provisions of the act of assembly approved May 3, 1901 (P. L. 140), for the reason that the said act is prospective only, and does not apply to this case, where a contract existed at the time of the passage of the act of assembly, and is still in force; that, if the act should be held not to be prospective, but to apply to this case, or cases like this, where contracts existed for the supply of water between a borough and a water company at the time of the passage of the act and still existing, it is unconstitutional as impairing the obligation of contracts under the tenth section of the first article of the Constitution of the United States. Answer. This request is affirmed so far as to declare the second section of the act of 1901 unconstitutional so far as it violates existing contracts.

"Discussion.

"This case is but a repetition of No. 1, September term, 1902. In that case I have filed a short opinion, giving my conclusions of the law as applicable as well to this case as to the one where it was filed. It is difficult to tell why two cases should be brought and tried at great length between substantially the same parties involving the same questions. Such practice leads to confusion, more than it aids in determining either law or facts. The evidence was given in full in both cases, answers having been filed in both cases, and at the last hearing it was agreed by and between the parties that the case should be decided by the court the same

as though upon the final hearing of the bill, as nothing could be gained by intermediate appeal. I think the ordinance of October 18, 1897, construed with the acceptance by McIntyre and the subsequent construction and operation of the water plant, concludes the borough. It was an exercise of the right formerly in the borough, and the borough cannot disregard the contract and destroy the \$40,000 invested in the water plant. I think further that the second section of the act of assembly of 1901 is unconstitutional so far as it undertakes to affect the contract then existing between the water company and the borough, and that the plaintiff is entitled to an injunction restraining the borough from constructing a water plant either for fire or domestic service, as the ordinance above cited clearly applies to the one as much as the other.

"The counsel for the plaintiff will prepare and submit an injunction in this case restraining the borough from constructing a water plant for the purpose of furnishing water either for fire or domestic service."

Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

W. I. Lewis and F. E. Baldwin, for appellants. Walter Lyon and Seibert & Lillibridge, for appellee.

PER CURIAM. The decree of the court below in this case is clearly right for the very manifest reasons set out by the learned judge of that court in his opinion filed. On that opinion the decree is affirmed.

(65 N. J. E. 172)

COLONIAL WOOLEN CO. v. TRENTON WATER POWER CO.

(Court of Chancery of New Jersey. Oct. 3, 1903.)

EASEMENTS—CONVEYANCE—RESTRICTIONS—TAILRACE—EXCESSIVE DISCHARGE OF WATER—INJUNCTION—MILLS.

1. In a suit for an injunction to restrain defendant from discharging water into a tailrace running over plaintiff's land it appeared that defendant claimed the right of so doing because of the delineation of the tailrace on a map of the lands, made by the former owner, under whom plaintiff claimed, and defendant also claimed that plaintiff's title gave him no property rights in the tailrace itself. *Held*, that such questions being purely legal ones, and an action pending in which they could be determined, an injunction would be awarded restraining the discharge of an amount of water dangerous to plaintiff's premises, and the suit retained until the questions were determined at law.

2. An amendment to defendant's answer would be allowed, setting up the pendency of the action at law, on payment of costs.

Suit by the Colonial Woolen Company against the Trenton Water Power Company. Complainant awarded an injunction restraining the excessive discharge of water into a tailrace across its lands.

John C. Montgomery, for complainant. James Buchanan, for defendant.

55 A.—63

REED, V. C. The complainant is the owner of a woolen mill on the northeast corner of Union and Cass streets in Trenton. The original mill, known as the "Saxony Mill," seems to have been a brick structure, built some 60 years ago. Frame buildings have also been used in connection with the brick structure for a period almost as long. Alongside of the easterly side of the original mill ran a stream of water which had its origin up near Warren street, and ran near Federal street, by the mill, to the Delaware river. About the time the mill was built, the canal of the water power company, now owned by the defendant, was extended down to the westerly side of the mill. The machinery of the mill was run by a water wheel fed by water led in upon it from this canal through a raceway leading from the canal into the mill. The water, after use upon the wheel, was discharged into the stream already mentioned, and passed through it into the Delaware river. The unused water of the canal was for many years discharged through a raceway which supplied water to the water wheel of the New Jersey Iron & Steel Company. When the New Jersey Iron & Steel Company sold out to the American Bridge Company, the raceway was closed, and since then the canal of the water power has been filled up south of the defendant's mill. The canal now terminates just south of the raceway that leads to defendant's mill, with no outflow at its southern end. About three years ago a 36-inch pipe was laid above the mill, leading from the canal of the defendant into this stream, or the bed of what had been this stream. The purpose of laying this pipe was to draw off the debris which settled in the canal when the water was not discharged through the raceway of the complainant, which debris would have otherwise settled to the bottom of the canal, lessening its depth, and, in consequence, its capacity as a reservoir. The complainant had complained that the quantity of water was insufficient to run its wheel. Last April, a disagreement having arisen between the parties respecting the rate to be paid for water furnished to complainant, the gates of the raceway were closed, and the complainant was deprived of its water power. The only outlet from this branch of the canal was thereafter the 36-inch pipe. This pipe was at times opened to its entire capacity, and by reason of the volume of water so sent down the bed of the stream, which had become a tailrace, the complainant insisted that the foundations of the frame portion of their mill were washed out, and at times its dyeing tubs were inundated, to the injury of goods in them, and to their damage in arresting the work of the mill. It is to restrain the venting of this water through the 36-inch pipe into this stream or tailrace that this bill is filed.

The defendant asserts a right to vent its

waters into this stream or tailrace, which runs through the complainant's property. It appears that in 1838 George M. and Benjamin Coates, who owned a tract of land adjoining the raceway of the water power company, then the Trenton Delaware Falls Company, had a map of the land plotted. This map was entitled "Plan of Mill Sites and Building Lots on the Raceway of the Trenton Delaware Falls Co., New Jersey." Upon it was delineated a tailrace running from the reservoir at Federal street to Cass street. This tailrace, as plotted, ran through the property of the complainant where the water now flows, and, so far as can be ascertained, in the same course as the original stream already mentioned. On September 1, 1840, George M. and Benjamin Coates sold lots 50 and 51, as plotted upon this map, to Andrew Allison. In his deed there is a reference to the map, although there is no direct mention of the tailrace plotted thereon. Upon these two lots Allison built the Saxony Mills, now owned by the complainant. On August 27, 1845, the Coateses entered into an agreement with the water power company, by which the latter were permitted to waste and discharge water from its canal into this tailrace, and to "widen, deepen, and improve the same." This agreement was never recorded, and was made, as is perceived, after the Coateses had sold lots 50 and 51, now owned by the complainant. Afterwards other lots were sold by the Coateses by reference to the plotting, some of which are now owned by the complainant. There is nothing to show that the complainant had notice of the rights of the defendant to vent its water through this tailrace other than the map itself, to which reference was made in the deeds, and the configuration of the ground itself. Defendant, however, insists that the delineation of the tailrace upon the map was notice to the complainant that there was a right of flowage through this tailrace, and that this tailrace was a conduit for the use of the waste water from defendant's canal. Defendant also claims that the deed for lots 50 and 51 passed no property rights in the tailrace itself, and therefore the complainant has no footing to complain of the flowage of water through it.

These are purely legal questions, and, in my judgment, should be settled in an action at law. An action is now pending in which these questions can be determined. This suit will be retained until these questions are in this manner settled. In the meantime I am of the opinion that there should be an injunction against the use of the 36-inch pipe to its full capacity. From the testimony, and from personal inspection of the tailrace since the hearing, through which was flowing a stream of water vented by the partly open pipe, I am convinced that damage is likely to accrue to complainant's

property if water is discharged in quantities equal to the full capacity of the pipe. I should think that not more than one-third of its capacity was in use when I saw it, and that seemed to be sufficient for all present needs of the water power. I will advise an injunction against discharging a larger quantity than this until the determination of the right to discharge it all shall be adjudicated at law. I will allow the amendment to the answer setting up the pendency of the action at law upon payment of costs of the motion and the costs of filing a replication to the amended answer.

(65 N. J. E. 167)

HEMSLEY v. MARLBOROUGH HOTEL CO.

(Court of Chancery of New Jersey. Sept. 29, 1903.)

VENDOR AND PURCHASER—DEEDS—RESTRICTIONS—GENERAL SCHEME—EVIDENCE—INJUNCTION.

1. The original deed of dedication of a tract of land showed a street with lots on each side, but there was no statement as to any restriction against erecting buildings within a certain distance of the street, and deeds made by the owners of lots sold on the westerly side of the street contained no such restriction, though deeds subsequently made to lots on the easterly side contained such a restriction. *Held*, that it was not shown that there was a "general scheme or plan" whereby such a restriction was to apply as to all the lots abutting on such street.

2. Where the owners and dedicators of a tract of land, in selling lots on one side of a street, placed in the deeds a restriction against the erection of any buildings within a certain number of feet of the street, if such fact evinced a "plan or scheme" to restrict buildings from being placed within such distance of the street on that side thereof, it could not be enforced by a grantee of one of the lots on the other side of the street, but only by a grantee of a lot on the side of the street to which the plan applied.

3. Where the owner of a lot on the westerly side of the street deeded certain lands on the easterly side, lying north of the grantor's lot, a restriction in the conveyance against the erection of a building within a certain number of feet of the street showed no intention that the covenant should inure to the benefit of the grantor's lot.

4. A grantee held a lot under a deed which restrained the placing of a building within certain limits, but he erected a building so that the bay window in the upper story encroached beyond the limits, and a pillar encroached slightly, and built a walk beyond the limits. *Held*, that the encroachments being in part trivial and unintentional, and it appearing that other buildings had encroached substantially beyond the limits, and remained unmolested, a mandatory injunction to compel the removal of the encroachments would be refused.

5. Where the owner of a lot conveyed a nearby lot on the opposite side of the street, with a covenant that no building should be erected within certain limits without the consent of the "grantor or her heirs," the absence of a building within which limits insured light and air to the grantor's lot, the phrase "or her heirs" indicated that the benefit of the stipulation was not to attach to the grantor's lot, but inured to her and her heirs.

Suit by Frederick Hemsley against the Marlborough Hotel Company for a mandatory injunction to restrain the violation of restrictive covenants in a deed. Bill dismissed.

See 52 Atl. 1182.

Joseph H. Gaskill, for complainant. C. L. Cole, for defendant.

REED, V. C. The parties to this suit are the same as those in the case reported in 62 N. J. Eq. 164, 50 Atl. 14. The former suit was brought to enforce by injunction a restrictive covenant, and the purpose of this suit is to restrain the violation of two other restrictive covenants respecting the same property. The facts upon which the relief is asked can be more quickly apprehended by the use of the diagram in the report of the preceding case.

The complainant is the owner of lot No. 1—the Disston cottage lot—and lots Nos. 2 and 3, shown upon the diagram. The defendant is the owner of lots 14 to 25, inclusive. Upon a part of this property the defendant has erected a hotel known as the Marlborough. It is insisted that this hotel is so constructed as to infringe two covenants, binding upon the owners of the land upon which it is erected. The first asserted violation is that the hotel has been built within 15 feet of Park Place; and the second, that the building has been extended more than 200 feet beyond the southerly boundary line of a lot known as Amelia R. Sparks' lot, looking towards the ocean. There is no doubt that the defendant was bound by restrictions of the kind mentioned. It seems, also, that in erecting the building the bay windows in the upper stories encroached upon the 15-foot strip of land, that a pillar slightly extended beyond the 200-foot limit, and that a walk, elevated from 11 to 14 feet, has been built from the piazza of the hotel to the municipal board walk, entirely beyond the limit mentioned in the covenant.

The primary question, assuming that the covenant is enforceable by some one, is whether Mr. Hemsley has the right to compel its observance.

I will first speak of the 15-foot covenant, which appears in the deeds for the defendant's property in these words: "No building whatever, shall ever be erected on said lot of ground, within the space of fifteen feet from Park Place." This covenant was never entered into with Mr. Hemsley, but was contained in deeds from the predecessors in the title which Mr. Hemsley holds, who made conveyances of portions of the land now owned by the defendant. The complainant rests in his right to enforce this covenant upon two grounds: First, upon the existence of a general plan that a 15-foot space upon Park Place should be kept clear of buildings; second, that he bought his

property from Mary Disston after she had sold property to the defendant by a deed in which the restriction was put for the benefit of her remaining property, now owned by the complainant. To determine the question thus raised, it is essential to trace the devolutions of the titles of the properties involved. The original tract of land plotted upon the diagram was owned by Hamilton Disston and George F. Lee. On May 28, 1879, they made a deed of dedication of a street 60 feet in width, labeled "Park Place," and of a park labeled "Brighton Park." Nothing was said in the deed respecting the present restriction. Also on May 28, 1879, Disston and Lee sold lot 1—the Disston cottage lot—to Mary Disston. This deed did not contain the 15-foot restriction. On the same day Hamilton Disston sold to Lee his undivided interest in lots 2, 3, 4, 5, and 6, north of the Disston cottage lot. In this deed there was no mention of the restriction. On September 11, 1879, Lee conveyed these lots to Mary Disston by a deed containing this covenant. By deed of September 10, 1879, but acknowledged by one of the grantors on September 11, 1879, Disston and Lee sold lots 15 and 16 to Amelia R. Sparks, and the deed contained the covenant. Mary Disston, it is perceived, then owned all the property on the east side of Park Place, consisting of the Disston cottage, without restriction, and of lots 2, 3, 4, 5, and 6, impressed with the restriction. Disston and Lee owned all the lots on the westerly side of Park Place, except lots 15 and 16, which two lots had been sold to Amelia R. Sparks, impressed with the restriction. Thereafter all the deeds from Mary Disston or her representative, and all the deeds from Lee and Disston, for property bounding upon Park Place, contained the 15-foot restrictive covenant. Mary Disston sold the westerly half of lots 4, 5, and 6, bounding on Park Place, to F. A. Park, on February 10, 1881, by deed containing the covenant. Her interest in lots 1, 2, and 3 passed to the complainant by a deed dated October 1, 1893, made by the executors of Mary Disston, which deed contained the covenant. It is perceived that there is no evidence of a plan respecting the 15-foot retrocession from Park Place, except such as can be discovered in the deeds actually executed. Nothing of it appears in the dedication deed, or upon the map filed with it. Now, it is to be observed that, if the plan can be evolved from the deeds themselves, it must be confined to the easterly side of Park Place. The first deed, putting the title of lots 2, 3, 4, 5, and 6 on the westerly side, which had been held in common by Disston and Lee, passing the title to Lee in severalty, contained no restriction. Nor was the restriction contained in the deed from Disston and Lee to Mary Disston for the Disston cottage lots. The absence of the restriction from these deeds is fatal to the theory of the existence of a general plan

covering the grounds including these lots. Respecting the lots on the easterly side of Park Place, as already observed, all the deeds from Disston and Lee contained the covenant. But if it be conceded that this fact alone is sufficient to establish the existence of a plan, the scope of which is evidenced by what was actually contained in the deeds (upon which question no opinion is expressed), it is apparent that, inasmuch as the scheme includes the lots on that side of Park Place only, the right to enforce the covenant by virtue of such a plan resides only in a grantee of one of those lots. It follows, therefore, that the complainant obtained no right to enforce the covenant, as the assignee of Mary Disston, by virtue of the existence of any plan.

The remaining question is whether, as a subsequent grantee of Mary Disston, the complainant can successfully assert a right to enforce the covenant. The answer to this question depends upon the solution of another query, namely, whether the covenant contained in the deed of Mary Disston to the Female Academy was inserted for the benefit of the property now owned by the complainant. This query arose in the preceding case, already mentioned, in respect to the dwelling-house covenant, which, in respect to the present question, seems to stand upon the same footing as the present covenant. In that case the conclusion was reached that there was no evidence of an intention that that covenant was made for the benefit of lots 1, 2, and 3. The same consideration leads to a similar conclusion in this case. If, however, Mrs. Disston or the complainant had ever been equipped with the right to enforce this covenant, it would hardly seem equitable to do so now by means of a mandatory injunction. The encroachments of the main building are trivial and unintentional. The encroachments of the bay windows are substantial. But in view of the encroachments of the porches of the other buildings upon the 15-foot strip, on the same side of Park Place, which have remained unmolested, I think that an injunction commanding the removal of the projections complained of should be refused.

The remaining question involves the other covenant. This covenant was contained in one deed only—that of Mary Disston to the Female Academy, a predecessor in the title of the defendant. The words of this covenant are, "No building or improvement of any kind shall be erected on said lot of ground more than two hundred feet, without the consent of Mary Disston or her heirs, beyond the southernmost boundary line of the lot of Amella R. Sparks looking towards the ocean." This stipulation seems to differ from the preceding in the particular that the erection upon the 200 feet was forbidden without the consent of Mary Disston or her heirs. The last words, however, instead of exhibiting an understanding be-

tween the parties that the stipulation was for the benefit of the Disston cottage lot, in my judgment, indicate the direct opposite. It seems to me to exhibit an intention that Mary Disston should retain a limited control over the use of the 200 feet for the benefit of herself and her heirs. It may be that the clause was inserted because Mary Disston expected to live in the Disston cottage, and that while living there she desired to be protected against any interception of view or air over the 200 feet. But she retained in herself and her heirs the right to release the covenants or its assigns from the burden of the covenant, whether she should or should not remain the owner of the Disston cottage. The permanence of the stipulation depended upon a subsequent agreement between Mary Disston or her heirs, and not upon the ownership of the 200-foot strip. The benefit of the stipulation did not become attached to the Disston cottage, and did not pass to the purchaser of that land.

The bill should be dismissed.

(55 N. J. E. 28)

ALWARD v. ALWARD.

(Court of Chancery of New Jersey. Sept. 29, 1908.)

DIVORCE—DESERTION.

1. When a husband leaves his wife without indicating at the time, by word or act, that he intended to desert her, such intent may be established by proof justifying the inference that he thereafter remained alive, and free and able to return to her.

(Syllabus by the Court.)

Bill by Anna E. Alward against Lewis P. Alward for divorce. Decree for complainant. James J. Bergen, for petitioner.

MAGIE, Ch. In this cause, which was undefended, the master to whom the matter was referred reported that petitioner's proofs made out the willful and continued desertion charged in the petition. Upon examination of the proofs it appeared that defendant at the time of the alleged desertion was living with petitioner, and was employed by a railroad company. On that morning he left the place of residence as if to go to his work, and did not indicate by any word or act that he did not intend to return. He did not take with him or remove any of his clothes or belongings. From that time he remained absent, and without communicating with his wife, the petitioner. In the case of *Sweeney v. Sweeney*, 62 N. J. Eq. 357, 50 Atl. 785, the evidence disclosed that the husband, who was charged with desertion, had left his wife under similar circumstances, and had remained away for the statutory period. A divorce was refused on the ground that such evidence was insufficient to establish willful and obstinate desertion, in the absence of proof from which it could be found or inferred that the husband remained alive, and was free and

able to return to his wife if he desired to do so. In the case in hand the evidence clearly shows that petitioner, upon the failure of defendant to return on the day he left, immediately set on foot a search for him. The search was made by her and friends of both parties. It was apparently made in good faith, and it was continued and persisted in for a reasonable time. It included an examination of places in which his body would be likely to be found if he had met with accident in his dangerous employment, or if he had taken his own life. It also included places where he had been accustomed to resort. A careful review of the evidence satisfies me that it justifies the inference that defendant remained alive. If that inference be adopted, the evidence showing that he was last seen in a locality in this state not far from his residence, in his ordinary condition of health, justifies the further inference that he was free and able to return to his wife if he desired to do so. His continued and unexplained absence thereafter brings the case within the doctrine laid down in *Sargent v. Sargent*, 33 N. J. Eq. 204, 38 N. J. Eq. 644, to the effect that a husband who had left his wife without any word or act indicating intent to desert her was shown to have entertained that intent by proof that he was alive, and able to return to her if he chose, but that he had continuously remained away from her.

The master's report will be affirmed, and a decree made.

(65 N. J. E. 730)

WILSON et al. v. AMERICAN PALACE CAR CO. OF NEW JERSEY et al.

(Court of Errors and Appeals of New Jersey. Sept. 22, 1903.)

EQUITY—JURISDICTION—DETERMINATION—SERVICE ON DEFENDANT.

1. A defendant is entitled to raise by plea the question of the jurisdiction of a court of equity, and to demand in limine the judgment of the court whether he should answer the bill.

2. Such a plea, showing lack of jurisdiction over the defendant, need not, in our practice, designate another tribunal in which he may be sued.

3. When the object of a bill in equity is to affect the claims of the defendant to property which is not located within the state, and the defendant is not a resident or citizen of the state, or is a foreign corporation, which has not subjected itself to the jurisdiction of the state, the court can require jurisdiction over the defendant only by service of process or notice within the state, or by the voluntary appearance of the defendant.

Swayze, Vredenburg, Vroom, and Green, JJ., dissenting.

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by Wallace Wilson and others against the American Palace Car Company of New Jersey and others. Decree for plaintiffs (54 Atl. 415), and defendants appeal. Appeal dismissed.

Edward Q. Keasbey, for complainants.
Robert H. McCarter, for defendants.

DIXON, J. The bill in this case was filed by several stockholders in the American Palace Car Company of Maine, on behalf of themselves and such other stockholders as should come in, to restrain the American Palace Car Company of New Jersey from disposing of the property and assets of the Maine company, which, it alleged, had been transferred to the New Jersey company in August, 1897. By an amendment of the bill made in September, 1901, the Maine company was made a party defendant, and afterwards, by a supplemental bill, the American Palace Car Company of New York and George A. Denham, one of its incorporators and directors, were brought into the suit as defendants. For the purpose of objecting to the jurisdiction of the court, these three defendants have filed a joint and several plea, averring that none of them has any property or claims any right to any property within this state; that the property concerning which the suit is brought is not located within the state; that Denham is a resident and citizen of the state of Massachusetts; that the corporations exist under and by virtue of the laws of the states of Maine and New York, respectively, and have never made application for the right or privilege of transacting business under the laws of New Jersey; that neither of them has, or ever had, any office, agent, agency, or place of business within this state; and that no process or notice of the suit has been served upon any of these three defendants within the state. Not denying any of these averments, the complainants have procured an order overruling the plea and requiring the defendants to answer the bill, and from that order this appeal is taken.

The right of a defendant to raise the question of the jurisdiction of a court of equity, and to demand in limine the judgment of the court whether he should answer the bill, is clear. If the matter showing lack of jurisdiction appear on the face of the bill, the question is to be raised by demurrer; if not, a plea setting forth the matter is the proper course. Story's Eq. Pl. §§ 712, 714. Commonly, in former times, such a plea in the English courts of general jurisdiction was required to name another court in which the complainant might lawfully seek the relief desired, but this practice sprang out of the fact that those courts regarded every person as subject to their jurisdiction, unless he could designate a particular tribunal wherein, as a special privilege, he was to be sued. But in this country that fact cannot be predicated of either the federal or the state courts, or even of the governments under which they exist. The judicial authority over persons belonging to the Union is confined by the terms in which it has been delegated, and that belonging to each state is limited by the restriction which the federal Constitution im-

poses. Hence, when a plea to the jurisdiction of a federal court shows the defendant to be outside of the delegated authority, or such a plea in a state court shows him to be within the restricted class, it becomes unimportant whether any other tribunal can afford the relief sought. Moreover, no such special privilege as was required to oust the general jurisdictions in England exists among us. Accordingly, in the latest form book, issued by a gentleman presumably skilled in practice, we find that the designation of another tribunal in such a plea is omitted. 1 Loveland's Forms of Fed. Prac. 47. The reason given in the court below for the order in question was that it was necessary or proper for the complainants to make these persons defendants in the bill, and that they ought to have an opportunity to defend the suit. This may be conceded, but it by no means follows that they can be obliged to submit to the jurisdiction, or that their presence is necessary to enable the court to deal with the rights of other parties in the suit. Mr. Daniel, in his excellent book on Chancery Practice, makes the following statements, which are supported by the cases to which he refers: "It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject ought generally, either as plaintiffs or defendants, to be made parties to the suit, or ought, by service upon them of a copy of the bill or notice of the decree, to have an opportunity afforded of making themselves active parties in the cause, if they should think fit." 1 Dan. Ch. Pr. (6th Am. Ed.) 190. "The strict application of this rule in many cases creates difficulties which have induced the courts to relax it." *Id.* 191. "When a person who ought to be a party is out of the jurisdiction of the court, that fact, being stated in the bill and admitted by the defendant or proved at the hearing, is in most cases a sufficient reason for not bringing him before the court, and the court will proceed without him against the other parties, as far as circumstances will permit." *Id.* 150, 152. "Where a suit affects the rights of persons out of the jurisdiction, the court will, in some cases where there are other parties concerned, proceed against those other parties; and, if the absent persons are merely passive objects of the judgment of the court, or their rights are incidental to those of the parties before the court, a complete determination may be obtained without them." *Id.* 149. In *Smith v. Hibernian Mine Co.*, 1 Sch. & Lef. 238, Lord Redesdale said: "The ordinary practice of courts of equity in England, when one party is out of the jurisdiction and other parties within it, is to charge the fact in the bill that such person is out of the jurisdiction,

and then the court proceeds against the other parties, notwithstanding he is not before it." These citations sufficiently indicate that in the system of equity jurisprudence which we have inherited there may be cases wherein the court lacks jurisdiction over persons whom, if they were within the jurisdiction, it would be necessary to bring into the cause; and that, while it is proper to afford such persons an opportunity to come in, yet, if they will not consent, the court does not require that they be included as apparent parties, and will proceed without them as far as justice dictates.

It remains, therefore, only to determine whether the matters stated in this plea show the defendants to be beyond the compulsory jurisdiction of the court, and, if they do, then formally to dismiss the defendants from the controversy in which they declare themselves unwilling to participate. Although our statutes have long contained provisions according to which the Court of Chancery may make decrees against absent defendants with the same effect as if they were present, yet it must be remembered that since the adoption of the fourteenth amendment of the federal Constitution in 1868 New Jersey has not possessed sovereign power in this regard. The clause in that amendment declaring that no state should deprive any person of life, liberty, or property without due process of law annulled such of our statutes as authorized judicial proceedings not in harmony with that injunction. What that injunction requires, in order to render valid the judgments and decrees of courts affecting these rights of persons, has been already decided by the Supreme Court of the United States, so far as our present purpose is concerned. In *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, it was held that the term "due process of law," when applied to judicial proceedings which were not in the nature of a proceeding in rem, required that the defendant in a state court should be brought within the jurisdiction either by service of process within the state or by his voluntary appearance; and in *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222, the same rule was declared as to foreign corporations. The stringency of the rule was exemplified in *Pennoyer v. Neff*. There Neff, owning land in Oregon, but not residing in the state, was sued therein by Mitchell upon a money demand, and the court ordered that service of the summons should be made upon him by publication in a newspaper. After such publication, and his failure to appear, judgment was rendered against him, in execution of which his land was sold to Pennoyer. All these proceedings were in accordance with the statutes of Oregon, yet the federal Supreme Court decided that Neff's title was undisturbed, because he had not been cited by due process of law. Thus, even the title to land, which is peculiarly a subject of local regulation, is protected by this supreme law. No

doubt, when the object of a suit is to enforce a specific lien upon property of the defendant within the state, or when the court obtains control over such property, or when the status of a citizen of the state is the subject for adjudication, a state court may be authorized, after reasonable effort to notify the absent defendant, to enforce the claim of the plaintiff respecting such property or status. In such cases the court acquires a jurisdiction quasi in rem sufficient to support the limited judgment. But the jurisdiction must precede the adjudication. The judgment cannot be made valid by the fact that steps might be taken to enforce it. In the present case there is nothing on which such limited jurisdiction can be predicated. The suit is, as equity suits generally are, in personam, and according to the uncontroverted averment of the plea, even the property to which the bill alleges these defendants are inequitably making claim is not within the state. Nor have the corporate defendants, by transacting business within the state, or by availing themselves of any right or privilege conditionally granted by our laws, become subject to any special mode of acquiring jurisdiction over them. *Fitzgerald Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608.

On this record we are constrained to adjudge that these defendants have not been brought before the court by due process of law; that, therefore, they are not obliged to answer the bill, and should be dismissed.

SWAYZE, VREDENBURGH, VROOM, and GREEN, JJ., dissent.

McALPIN et al. v. UNIVERSAL TOBACCO CO. et al.

(Court of Chancery of New Jersey. Sept. 21, 1903.)

APPEAL—ORDER FOR EXAMINATION OF BOOKS—STAY PENDING APPEAL.

1. In a proceeding against a corporation, a stay pending appeal from an order directing the corporate officers to permit complainants to make an examination of such books and papers of the company as they may desire will be granted, where the refusal of the stay will deprive the company of the benefit of its appeal, and the order appealed from is open to objections which the company may properly present on appeal.

Bill by Edwin A. McAlpin and others against the Universal Tobacco Company and others. Application to stay proceedings under an order for the examination of the books of defendants pending appeal. Granted.

Robert H. McCarter and Wheeler H. Peckham, for the motion. Gilbert Collins, opposed.

MAGIE, Ch. The bill in this cause prays that an agreement entered into by certain holders of stock of the defendant corporation, providing for a "voting trust," should be declared void or set aside by decree, and the

defendant corporation should be decreed to issue certificates of its stock to such of the beneficial owners thereof as should surrender the voting trust certificates held by them, and that an election of directors should be thereupon ordered, or, in the alternative, that two persons who now hold the position of voting trustees under said agreement should be removed as trustees, and proper trustees should be appointed in their place by the court, or chosen by the beneficial owners of the common stock of the corporation under direction of the court, and that in the meantime a receiver should be appointed to manage the affairs and conduct the business of the corporation. It further prays that the issue and negotiation of certain bonds of the corporation should be restrained, and the mortgages on which it was proposed to issue them should be canceled, and that certain of the defendants should be compelled to surrender bonds which had been already issued. There is a general prayer for further relief. In the prayer for process, the injunction asked was limited to the issue, negotiation, and delivery of such bonds, and to the assignment and disposal of such as had been issued. Upon filing the bill, an order to show cause was allowed, why an injunction should not be issued and a receiver appointed pending the proceedings, as prayed for. During the hearing of the order to show cause, the vice chancellor, presiding, advised a further order to the following effect, viz.: That the officers and directors of the defendant company do permit the complainants' counsel, under the direction of one of the masters of this court, and with the aid of such clerks and accountants as said master may select, or as may be selected by the complainants with his approval, to make an examination of such of the books, vouchers, and papers of the company as said counsel may desire, and to take copies thereof, and that the examination should be made at the office of the company in New York, unless the books, vouchers, and papers were produced in New Jersey, when the examination should be there made. A notice of an appeal from this order for examination of books, vouchers, and papers has been given, and the present application is for an order staying proceedings under the order for such examination, to allow the appeal to be presented before the examination is required to be permitted.

This application practically concedes that the appeal does not, ipso facto, stay proceedings under the order appealed from, but that such stay must be obtained by an order of this court, or by the order of the Court of Errors and Appeals. In considering the question thus presented, I am not to review the order appealed from, or to determine whether or not it was rightly made. All that I am to consider is whether there are objections to the order which can be presented on the appeal, and which raise a fair question respecting its validity. If I find there are such questions which may be thus presented, I am further to

consider whether a stay pending the presentation of such questions ought to be interposed.

Preliminarily, I take up the objection presented against a stay, viz., that this is not an order from which an appeal will lie. If this position is clearly correct, and if no reasonable question can be raised in respect to its correctness, no stay should be allowed, for an appeal from such an order would be sham and frivolous. But if a reasonable argument may be made for the appeal, I am not at liberty to deprive the appealing party of the opportunity of presenting the question, if to refuse the stay will practically deprive him of the benefit of his appeal. I do not deem it essential to examine the evidence now before the vice chancellor, who is hearing the order to show cause. The order appealed from was made as an incident in the progress of the proceedings, upon a petition of the complainants. Two grounds were stated therein upon which the order was asked. One ground was that an examination of all the books and papers of the corporation was essential to enable the complainants to make propositions for the reorganization of the corporation. The other was that an examination of such books and papers would furnish evidence in the pending proceedings. This petition was properly treated by the vice chancellor as a mere motion for the order. The order made thereon may be supported on the grounds thus presented, or on any other grounds which furnish support to it.

The first of the two grounds stated in the petition is so manifestly incapable of supporting such an order that it was abandoned on the argument before me, and it was not contended that the order could be supported thereon. The contention before me has been that the order was sustainable on the other ground, viz., that the court has power to require one of two contending parties, in an issue pending before it, to disclose to the other evidence in its possession which is relevant to the issue, and which the moving party desires to present to the court. It was not contended that the order could be supported on any other ground. I am unable to discover any other ground on which it could have been made. But the contention further is that the order, on the ground thus relied on, was so manifestly proper to be made, that no reasonable objection can be presented thereto, and that the appeal is therefore manifestly frivolous. I have reached the conclusion that the appeal cannot be pronounced to be frivolous, because there are grounds of objection to the order presenting serious questions, which the appealing party has a right to have reviewed by a court of review.

While the bill has not been answered, and the cause is therefore not at issue, there is an issue before this court raised upon the

order to show cause. According to the practice of this court, that order is asked upon the bill and its accompanying affidavits, and upon other affidavits admitted before the vice chancellor. It is contested by the defendants by counter affidavits admitted and now before the court. The question at issue is whether such an injunction as prayed for by the bill is proper to be made, and whether pending the further proceeding a receiver should be appointed. In that contest each party is entitled to present evidence, and the court may undoubtedly require the production of evidence within the control of one party, and relevant to the issue, and desired by the other party. An order for the production of such evidence, and nothing more, may possibly be an order which cannot be reviewed on appeal. If such an order is appealable, I think no order should be made to stay the production of evidence thus directed to be produced. But there is a question whether the order appealed from is an order for the production of evidence. It does not direct the production of any specific evidence pointed out and shown to be relevant to the issue under trial. It is a direction to the defendants, who are officers of the corporation, to produce all the books, vouchers, and papers of the corporation which complainants' counsel may call for, and to permit copies thereof to be made, without reference to their relevancy to the issue pending. It may be argued that it is not an order for evidence, but rather, at the best, an order permitting a search for evidence, in which, incidentally, all the transactions and business of the corporation are laid open, not only to counsel and officers employed, but eventually to the public. I do not pronounce upon these objections, or determine their validity. It is sufficient to say that I deem them to present serious questions proper to be reviewed.

This determination does not necessarily require the stay applied for to be granted. Whether it should be granted depends upon whether its refusal, and the consequent permission to proceed under the order appealed from, will deprive the party appealing of the benefit of his appeal. It seems to be obvious that the refusal of the stay will deprive the appealing party of the benefit of his appeal, and that the order appealed from is open to objections which the appealing party may properly present on its appeal. If a stay be denied, the examination required by the order will proceed, and a subsequent reversal of the order will be of no avail to defendants.

It results that a stay will be allowed, extending to the next session of the Court of Errors and Appeals.

MERRITT v. JORDAN.

(Court of Chancery of New Jersey. Sept. 14, 1903.)

APPEAL—STAY OF EXECUTION—GROUNDS.

1. Where the delay in presenting an appeal has been occasioned by steps taken in good faith and with reasonable diligence for the purpose of exhibiting the whole case, an application not seeking to discharge the lien of an execution, but to stay the realization of the money by sale pending the appeal, will be granted.

Bill by Enoch C. Merritt against Patrick J. Jordan. Application to stay sale under execution pending appeal. Granted.

Samuel M. Roberts, for complainant. Frederick A. Rex and Judge Pancoast, for defendant.

GREY, V. C. (orally). I am satisfied, without hearing counsel for the defendant, that there should be a stay in this case pending the appeal. The cause has been strongly litigated. Claims and counter-claims have been in dispute between the complainant and defendant as to the amount of money due from one to the other. The vice chancellor who heard the case was of opinion that there ought to be an account stated before a master. A reference was made, and the parties appeared before a master and strenuously fought there, each contending that he owed nothing to the other, and that the other was indebted to him. The master reported favorably to the complainant. Exceptions were taken to that report, and upon the coming in of the exceptions they were just as strenuously fought, always on the single question whether any money was due from one to the other. The master's report was subsequently affirmed by final decree. The decree was made on January 29, 1902, and, on the 4th of February next after, an appeal was taken. The defendant who took the appeal was of the opinion that the condition of the record was not broad enough to enable him to show to the Court of Appeals all that he thought was necessary to present his equity, and so he withdrew the appeal, not for the purpose of abandoning it, but for the purpose of broadening it by a rehearing if he could get it. For some reason which does not appear by any record, the rehearing was refused. So that the case then stood, that there was a decree made on January 29th, from which an appeal was taken on the 4th day of February, which was abandoned solely for the purpose of a rehearing; the rehearing was refused, and either on that day or the next day the appeal was reinstated. The complainant in the suit, who has the master's report, and the decree in his favor, has is-

sued execution. He has on that execution secured a levy. There does not seem to be any question that the property levied on is fully sufficient to satisfy that \$1,100, the amount due the complainant. The present application does not seek to discharge the defendant's goods or lands from the lien of the levy, but to stay the realization of the money by sale of the defendant's property until the defendant has brought the present appeal to a hearing in the Court of Appeals, to ascertain whether the vice chancellor was mistaken in his decision. It seems to me that, reserving the lien of the complainant under his levy, the defendant has an equity to have the sale of his property stayed. Otherwise, if the complainant is allowed to prosecute this execution, and to sell out the defendant's property, he may put the proceeds in his pocket, and when the defendant takes his appeal at the next term of court, if he succeeds in having the vice chancellor's decree reversed, the benefit of his appeal will be defeated. He would have to seek restitution, and take his chances of finding the complainant and getting his money back. It is quite obvious that such a course ought not to be allowed, unless there is some appearance of bad faith on the part of the appellant. The Court of Appeals recognized this in the case cited by counsel for complainant. *Allen v. Hopper*, 24 N. J. Law, 514. Judge Elmer says: "I am entirely satisfied that the court out of which the execution issues is the proper tribunal to determine whether it is apparent that the writ of error was issued in bad faith, or for the mere purpose of delay; otherwise the execution would always be delayed until the writ of error could be returned." The "otherwise" here referred to is the usual practice in case of appeal. It would be most extraordinary to permit a party who is successful below to realize pending an appeal the whole fruit of the litigation, and put the money in his pocket, so that when the appeal was subsequently heard the decree of the appellate court, if favorable to the appellant, would be of little value. The effort for a rehearing, and other steps which have occasioned delay in presenting the appeal, were, I think, taken in good faith, and with reasonable diligence, for the purpose of exhibiting the whole case as claimed by the appellant.

An order should be made staying advertisement or sale under the execution, and any further proceedings thereon; the lien of the levy to remain unaffected pending the appeal, provided the appellant shall set the cause down and have it on the list for hearing at the next stated term of the Court of Appeals. If he does not do that, I shall feel at liberty to revoke this order.

(65 N. J. E. 728)

STATE MUT. BUILDING & LOAN ASS'N
v. O'CALLAHAN.(Court of Errors and Appeals of New Jersey.
Sept. 9, 1903.)BUILDING ASSOCIATION—MORTGAGE FORE-
CLOSURE—DECREE OF SALE.

1. Upon the foreclosure by a building and loan association of a mortgage made to it by the defendant to secure a principal sum, with interest, an interlocutory decree pro confesso was taken, and an order of reference made to a master to report the amount of the principal and interest due. The master, in addition to these amounts, reported as also due to the complainant a sum of over \$2,000 for "dues, fines, and premiums in arrears," for which a final decree was entered. The defendant thereupon petitioned the Court of Chancery to correct its decree before the sale of the mortgaged premises to satisfy it, which prayer was denied, "without prejudice to the defendant to renew the application after the sale of the premises."

Held, that the merits of the defendant's petition should have been passed upon before the execution of the decree by the sale of the mortgaged premises.

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill by the State Mutual Building & Loan Association against Edward A. O'Callahan. From an order refusing to stay certain proceedings, defendant appeals. Reversed.

Warren Dixon, for appellant. E. A. Armstrong, for appellee.

GARRISON, J. Upon a bill filed to foreclose a mortgage given by the defendant to the complainant, a decree pro confesso was entered against the defendant, and an order of reference made to a master, "to ascertain and report the amount due to the said complainant for principal and interest upon the mortgage held by it upon the premises mentioned and described in the said bill of complaint."

Upon the coming in of the report of the master, and the entry of a final decree for the amount therein reported to be due upon the mortgage, it became apparent that the master had gone beyond the direction of his order of reference, in that, in addition to the amount of principal and interest due upon the complainant's mortgage, he had reported as likewise due thereon a sum in excess of \$2,000 for "dues, fines, and premiums in arrears," for which it is claimed no warrant existed either in the bill of complaint, or the decree pro confesso, or in the order of reference, or in the mortgage itself; the bond that accompanied the mortgage being apparently the only security taken by the complainant for the payment of these extra charges.

A final decree having been made for the amount so reported to be due, the defendant exhibited to the Court of Chancery his petition setting out the above facts, and praying that, before the sale of the mortgaged premises to satisfy such decree, it be opened

and corrected so as to make it conform to the interlocutory decree and the order of reference that had been made in the cause.

An order to show cause, with the required stay, was in the first instance allowed, but this subsequently was discharged by the order of the court, "without prejudice to the defendant's right to renew the application after the sale of the premises," the proceedings under the writ of fieri facias to be no longer stayed.

From this order the defendant has appealed upon the ground that the merits of his application for the correction of the final decree ought to be passed upon before its execution.

To this it is replied that the order is one that is not appealable; that the defendant, by permitting an interlocutory decree to be taken by confession, is bound by the order of reference made thereunder; that his application is addressed solely to the discretion of the chancellor, and is, at most, a matter of grace, to be granted only upon equitable terms as to redemption, which are not tendered by the petitioner.

We think that the order is appealable. In effect, it denied to the defendant the right to have an erroneous decree corrected until after his property had been sold to satisfy it. It possessed, therefore, in this respect, the character of finality, unless it be denied that the right in question was of a substantial nature. The right of a defendant to have the decree against his property judicially settled before its enforcement is a substantial right of the most elemental character. *Point Breeze Ferry Co. v. Bragaw*, 47 N. J. Eq. 298, 20 Atl. 967.

In the orderly course of a foreclosure suit, the right of the owner of the equity of redemption to have the debt for which his property is pledged definitely ascertained and declared before the pledge is sold to satisfy it is of the very essence of the proceeding. At no time is it a mere matter of grace, unless by his own conduct the debtor has made it so. In the present case the defendant had done nothing to vary or forfeit his rights in this respect. He had a right to assume that the decree that went against him by confession would follow the prayer of the bill and the terms of his mortgage, and, if he be deemed to have consented to the order of reference that was in fact made, and to such final decree as might be based thereon, such consent would conclude him only to a report and to a decree that were within the four corners of such reference. He was not bound to anticipate that the master would report upon matters that had not been referred to him. The case stands, therefore, in effect, as if the proposition was to hold back the master's report until after the sale of the mortgaged premises, and then, by final decree, to fix the amount for which the property had been pledged. This situation, which was brought to the attention of the

Court of Chancery by the defendant's petition, resulted in no wise from any wrongful conduct upon his part, but solely from the unwarranted act of the master in traveling outside of the plain terms of the reference that had been made to him. It was the defendant's right to have this misconduct corrected, and the cause restored as if it had never occurred. He was not obliged to tender terms, for he was asking for no favors; neither was he required to demonstrate to the court that it would be beneficial to him to have his rights respected. Being free from fault, the merits of his application should have been passed upon before the execution of the final decree in its incorrect form.

The appeal from the final decree has, for obvious reasons, not been considered. The defendant pursued the proper course in bringing the matter to the notice of the court in which the cause was pending. We are dealing now with the action of the court below upon such application, and not with the final decree which it is still holding under advisement.

The order discharging the order to show cause must be set aside, and the cause be remitted to be proceeded with from that point in the court below in accordance with the views herein expressed.

(65 N. J. E. 232)

ADAMS v. REYNOLDS et ux.

(Court of Chancery of New Jersey. Sept. 15, 1903.)

MORTGAGE FORECLOSURE—DESCRIPTION OF PROPERTY—AMENDMENT.

1. Where the proceedings in a foreclosure suit accurately describe a portion of the mortgaged premises, and are carried through to advertisement and sale, and deed by the sheriff conveying that portion to a purchaser, this court will not, at the instance of the purchaser from the sheriff, amend the bill of complaint to include a part of the mortgaged premises which had been omitted by the description in the foreclosure proceedings, and direct the sheriff to deliver to the purchaser a deed for the portion of the mortgaged premises which was neither advertised nor sold.

(Syllabus by the Court.)

Bill by Charles R. Adams against James Larkin Reynolds and wife. Decree for complainant. Petition of purchaser at foreclosure sale. Denied.

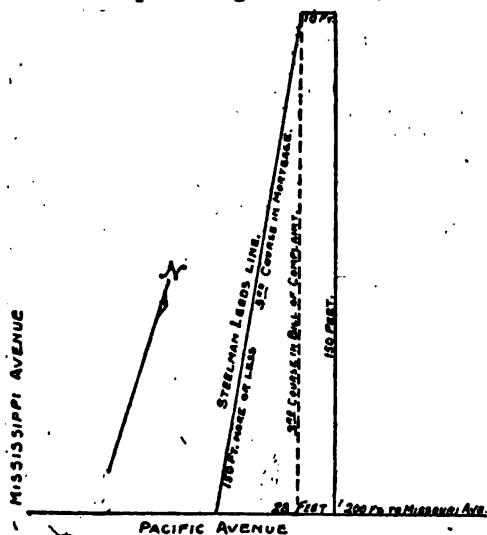
A mortgage was given upon two lots of land in Atlantic City. The second lot is described in the mortgage as follows: "Also beginning at a point in the north line of Pacific avenue two hundred feet west of the westerly line of Missouri avenue; thence (1) northwardly and parallel with Missouri avenue one hundred and fifty feet; (2) westwardly and parallel with Pacific avenue ten feet, more or less, to Steelman Leeds line; thence by the said Steelman Leeds line south one hundred and fifty feet, more or less, to Pacific avenue; thence east by said Pacific

avenue twenty-eight feet six inches, to the place of beginning." A bill to foreclose or sell these lots under this mortgage was filed in this court. In drawing the bill of complaint, the second lot was described as follows: "Also, beginning, at a point in the north line of Pacific avenue, two hundred feet west of the westerly line of Missouri avenue; (1) northwardly and parallel with Missouri avenue one hundred and fifty feet; (2) westwardly and parallel with Pacific avenue ten feet, more or less, to Steelman Leeds line; (3) southwardly and parallel with Missouri avenue one hundred and fifty feet, more or less, to the north line of Pacific avenue; thence (4) eastwardly parallel with Pacific avenue twenty-eight feet six inches, more or less, to the place of beginning." A decree pro confesso was taken against the defendants, and on September 17, 1900, final decree was entered, "that the said mortgaged premises be sold," etc., not specifically describing them. The execution, sheriff's advertisement, and deed all gave the same specific description of the second lot by metes and bounds, as was given in the bill of complaint. The property sold did not produce the amount due on the mortgage. Mr. Israel G. Adams, the purchaser, was not a party to the foreclosure suit. Mr. Adams accepted his deed, and some time afterwards sought to insure the title to the premises purchased by him, and was advised by the title company to which he applied that the description of the second lot set forth in his deed from the sheriff varied materially from the description of that lot in the mortgage. Mr. Adams has filed a petition in the foreclosure suit setting forth the mistake in the description of the third course of the second lot, which began in the bill of complaint, and continued through all the subsequent steps of the foreclosure suit. He prays, first, that a decree may be made in that suit amending the description of the second tract as set forth in the bill of complaint, so that it shall describe that tract correctly, as in the mortgage; secondly, that the sheriff of Atlantic county be decreed to execute and deliver a new deed to him (Adams), describing the premises as they are described in the mortgage. An order was allowed, directing that the defendant show cause why the prayer of the petition should not be granted, and providing for either personal service, if that could be made in this state, or, if not, for service by publication. Upon the coming in of the order, the petitioner, Adams, filed affidavits showing that the defendants could not be found, and that personal service could not be made upon them, and that due publication of the order to show cause was made in accordance with the order. The defendants have not appeared. The application for the amending decree is *ex parte*.

C. L. Cole, for petitioner, *ex parte*.

GREY, V. O. The mistake occurred in describing the third course of the second lot of

the mortgaged premises in the bill of complaint, and subsequent proceedings in the foreclosure suit. The following diagram shows the correct description as set forth in the mortgage, and the erroneous one in the foreclosure proceedings:



The black lines show the description as given in the mortgage.

The description in the bill of complaint is the same, as to the first and second courses.

The third course in the bill of complaint returns to Pacific avenue by the dotted line. This is the mistake which runs through all the foreclosure proceedings.

It will be noticed that the description in the foreclosure suit is a complete description of a tract of land. It will "close," as the surveyors phrase it. It includes a part only of the mortgaged second lot, but is complete as to that part. This is not a case which seeks to correct the mistake of an officer in executing a writ. The sheriff made no mistake. He advertised and sold the lot which he was ordered to sell. The judgment in a foreclosure suit is that the defendants stand debarred and foreclosed of their equity of redemption in the said mortgaged premises, "when sold as aforesaid by virtue of this decree." The description of the second lot in the foreclosure proceedings was an efficient description of a part of that lot, and the sale and conveyance of that part has cut off the defendants' equity of redemption therein; but the proceedings, though correctly carried through to a sheriff's deed, as to one part of the second lot, omitted to describe or refer to or include the residue of that second lot, and as to this omitted portion the foreclosure suit has no legal force or effect to cut off the equity of redemption of the defendants. They were not invited to answer as to this part. They permitted no decree to be taken pro confesso against this part; no order for its sale was made, no execution issued; directing the sheriff to sell it. He neither advertised

nor conveyed it, nor had he any right to do so under the proceedings in the suit. The effect of the foreclosure, as conducted, was that a part only of the mortgaged premises has been sold, and it raised only a part of the mortgage money. The equity of redemption of the defendants in the remainder was not affected by those proceedings, and may yet be sold to raise the balance of the mortgage money.

The petitioner prays a decree amending the description in the bill of complaint to conform to the description in the mortgage, and that the sheriff may be decreed to make and deliver to him a new deed, describing the premises as in the mortgage. Nothing is asked in the way of amendment of the execution or the advertisement of sale. To make an amending decree in this way would, in effect, foreclose the defendants' equity of redemption in the portion of the mortgaged premises omitted from the proceedings, without notice to them, and without advertising that portion for sale. The petitioner is not a party to the foreclosure suit, yet he asks that the pleadings and proceedings in it be amended. He is not in the position of a purchaser who prays the aid of the court to enforce its decree for sale, as in cases of applications for writs of assistance. He is applying to have the court alter the proceedings in a matter of substance in such manner that he may get by his purchase more property than the defendant was notified would be sold, more than was advertised to be sold, and more than the purchaser bought. I cannot see that the petitioner, a stranger to the litigation, has any status to make such a motion. Irrespective of this latter criticism of the petitioner's position, there is no justice in the proposition on its merits.

The prayer of the petition is refused.

(55 N. J. R. 633)

HOYT v. HANCOCK, Comptroller.

(Prerogative Court of New Jersey. Sept. 5, 1903.)

COLLATERAL INHERITANCE TAX.

By a will which took effect while the provisions of the collateral inheritance tax act of 1893 (Laws 1893, p. 367) were in force, testator created a fund, the income of which was payable to a sister for life, with power of appointment of the principal by her will. By her will, which took effect in 1895, the life beneficiary appointed the principal to be paid to her husband, who survived her. *Held*:

1. That the interest of the husband must be considered as having been acquired as of the time the instrument creating the power of appointment took effect.

2. That such interest was taxable under the provisions of the act of 1893, and could be appraised by an appraiser appointed by a surrogate, when it became vested by the will of the donee of the power.

The act of 1893 was repealed by the collateral inheritance tax act of 1894 (Laws 1894, p. 318), except so far as its provisions were reenacted in the latter act, and the repealer was declared not to surrender any remedies, powers,

rights, or privileges acquired by the state under any previous act. *Held*, further:

3. That the state's right to tax the interest acquired by the husband remained unrepealed, and could be enforced.

(Syllabus by the Court.)

Appeal by Ezra P. Hoyt from an assessment in favor of William S. Hancock, comptroller. Affirmed.

Alvah A. Clark, for appellant. The Attorney General, for respondent.

MAGIE, Ordinary. By the will of Warren Ackerman, deceased, who died August 28, 1893, domiciled in Union county, the residue of his estate was committed to trustees, to divide it into as many shares as he might have brothers, sisters, nephews, and nieces who should survive him, and to set apart for each of them one of such shares, and pay the income thereof to him or her during his or her natural life, and on the death of any such brother, sister, nephew, or niece, to pay the principal of said share as he or she might direct by his or her duly executed will and testament. Mary S. Hoyt, a sister of the deceased, and the wife of Ezra B. Hoyt, survived the testator, and died on March 25, 1895, leaving a last will, by which she appointed her said husband as the person to receive the principal of her share under the provisions of the will of Warren Ackerman. In December, 1895, the surrogate of the county of Union had an appraisal and assessment made upon the estate of the appellant, which he acquired under the appointment of his wife's will. Appellant protested against the assessment, and prosecutes this appeal to vacate it and set it aside.

It is conceded by counsel, and it is undoubted law, that the interest which Ezra P. Hoyt took by such appointment is related back and referable to the instrument which conferred the power of appointment, which instrument was the will of Warren Ackerman, which took effect August 28, 1893. At that time the collateral inheritance tax act of 1893 (Laws 1893, p. 367) was in force. If the death of the testator had antedated the act of 1893, the provisions of that act would not have operated to impose a tax upon the interest which Ezra P. Hoyt acquired by the appointment, for that interest is to be considered as acquired at the time of the will taking effect. Such was the decision of the Court of Appeals of New York under similar legislation. *Matter of Harbeck*, 161 N. Y. 211, 35 N. E. 850. But since the testator's will took effect while the provisions of the act of 1893 were in full force, the first question is whether, by those provisions, the tax now complained of can be enforced.

Appellant's counsel first points out that the second section of the act of 1893 does not provide for such a case as that now before us, and this is quite correct. That section is wholly inapplicable to this case. It

is the first section of the act upon which the state must rely to sustain this tax, and there can be no question that it does cover the case, unless the further contention of counsel is effective. That contention is that the act does not provide for the imposition of a tax which cannot be determined at the death of the testator, and this contention is put upon the language of the fourth section of the act, providing that all taxes imposed by this act shall be due and payable at the death of the testator. But this contention cannot prevail. It ignores the phrase contained in that section that the tax imposed by the act shall be due and payable at the death of the testator unless otherwise provided. It also fails to take account of the provision of section 13 to the effect that, in order to fix the value of property subject to the tax, the surrogate or register of the Prerogative Court shall "appoint an appraiser as often as and whenever occasion may require." Legislation substantially identical with the act of 1893 was enacted in New York, and its construction came before its Court of Appeals. The conclusion reached was that the provisions of section 4 did not indicate a legislative intention to exclude from this form of taxation interests arising under such testamentary provisions, nor prevent such a construction of section 13 as would bring such a case as that now before me within the provisions of the act. *Matter of Stewart*, 131 N. Y. 274, 36 N. E. 184, 14 L. R. A. 836. This conclusion is reasonable, and I do not hesitate to adopt it and apply it to the construction of the act of 1893. If, therefore, the act of 1893 continued in force up to the date of the imposition of this tax, I entertain no doubt that the tax should be upheld. But the act of 1893 was superseded and repealed by the collateral inheritance tax act, approved May 15, 1894 (Laws 1894, p. 318). If the repealer was without any saving clause, there could be no doubt that the tax in question would be invalid, because such a repealer would abolish the machinery by which the assessment could be laid, and such special taxes as these can only be imposed by the machinery provided by the Legislature. But the repealer of the act of 1893 was not without a saving clause. The repealer was of all acts or parts of acts inconsistent with the provisions of the act of 1894, "except so far as herein re-enacted," and the provisions for the imposition of the assessment were all practically re-enacted. Besides, by the provisions of section 23, in which the repealer is contained, there was a saving clause. The language of it is not happily chosen, but, in my judgment, the proper construction is that the repealer should not be considered "to surrender any remedies, powers, rights or privileges acquired by the state under any act heretofore passed." Under the construction I have given to the act of 1893, a right was acquired by the state to impose a tax upon the interest acquired by one who was

appointed by the will of the life beneficiary to receive a share of a fund under a power of appointment. By that act the state acquired power to enforce the right thus obtained. The act further provided remedies for the enforcement of that right. When the Legislature saved the rights and powers and remedies of the state under previous acts, I think the repealer in no respect deprived the state of power to enforce such a tax.

It results that the assessment must be affirmed.

(60 N. J. L. 532)

STATE v. MacQUEEN et al.

(Supreme Court of New Jersey. Sept. 12, 1903.)

CRIMINAL LAW—CHALLENGES—CONFESSION—REVIEW—REASONABLE DOUBT—JOINT INDICTMENT.

1. Under section 81 of the Criminal Procedure Act (P. L. 1898, p. 896), where two or more defendants are jointly indicted and tried, they together, and not severally, are entitled to 10 peremptory challenges.

2. The finding of a trial court that a defendant's confession was voluntarily made is a finding of fact not reviewable on ordinary writ of error, if there be any legal evidence to support it.

3. Questions of law not appearing by the bills of exceptions to have been raised in the trial court will not be considered on ordinary writ of error.

4. If a reasonable doubt of guilt is raised, even by inconclusive evidence of an alibi, the defendant is entitled to the benefit of it.

5. Where two defendants are tried together upon an indictment charging that they, with many other persons unknown, committed a riot, and the defendants are severally convicted, a trial error that affects only one of the defendants will not work a reversal of the conviction as to the other defendant.

(Syllabus by the Court.)

Error to Court of Quarter Sessions, Passaic County.

William MacQueen and Rudolph Grossman were convicted of riot, and bring error. Affirmed as to MacQueen and reversed as to Grossman.

Argued before GUMMERE, C. J., and FORT, HENDRICKSON, and PITNEY, JJ.

Robert E. Van Hovenberg, for plaintiffs in error. Eugene Emley, Prosecutor of the Pleas, for the State.

PITNEY, J. The defendants were jointly indicted (together with another party, who was not apprehended) for a riot committed on the 18th day of June, 1902, at the city of Paterson. They were tried together in the Passaic quarter sessions, and were severally convicted and sentenced to imprisonment. They pray reversal of the convictions on the ground of alleged trial errors. The case comes here upon bills of exceptions sealed according to the common-law practice. The exceptions must, therefore, be considered and disposed of according to the ordinary rules.

¶ 1. See *Jury*, vol. 31, Cent. Dig. § 612.

The liberal practice allowed by section 136 of the Criminal Procedure Act (P. L. 1898, p. 915), which permits the appellate court to consider whether the plaintiff in error on the trial below suffered manifest wrong or injury either in the admission or rejection of testimony, whether objection was made below or not, or in the charge of the court, or in the denial of any matter by the court which was a matter of discretion, whether a bill of exceptions was sealed or not, cannot be invoked by the plaintiffs in error, because they have not brought up the entire record of the proceedings had upon the trial, as required by section 136, and have not specified (otherwise than by the ordinary assignments of error) the causes relied upon for reversal, pursuant to section 137 of the same act. The first two exceptions were taken during the selection of the jury, and are intended to raise the question whether, when two defendants are jointly indicted for a misdemeanor, and are tried together, they are severally entitled to 10 peremptory challenges—20 in all—or whether the defendants together are entitled to only 10 such challenges. The first exception appears to have been waived, the juror in question having been subsequently excused by consent. Moreover, the bills of exceptions disclose that both defendants united in the two challenges whose denial is the subject of the exceptions. It is therefore fair to assume (there being nothing in the record to show the contrary) that they both united in interposing the 10 peremptory challenges previously allowed. If each defendant had participated in these 10 challenges, each had exhausted the utmost right of challenge that is claimed. And so, in strictness, the record discloses no denial by the court below of the right that is asserted. But, supposing the question to be fairly raised, this court has already decided it adversely to the contention of the plaintiffs in error. The right of peremptory challenge in criminal cases is regulated by sections 80 and 81 of the Criminal Procedure Act (P. L. 1898, p. 896). Section 81 deals with cases like the present, and it has been held that, where two or more defendants are jointly indicted and tried, they together, and not severally, are entitled to 10 peremptory challenges. *State v. Rachman*, 68 N. J. Law, 1205, 53 Atl. 1046.

The third exception relates to the admission in evidence, over objection by the defendants, of a statement made by the defendant MacQueen to a witness Shane, who arrested MacQueen in New York, and brought him to Paterson. Shane was asked: "Q. Had you any conversation with him going from New York to Paterson? (Objected to on the ground that he was under arrest when being brought here.) Q. By the Court: What he said was entirely voluntary? A. Yes, sir. Q. By Mr. Ward (defendants' counsel): He was then being brought here on requisition? A. Yes, sir. Q. On this very

charge? A. Yes, sir." Thereupon the trial judge held that the question was admissible, and allowed the testimony of the witness as to the conversation between him and the defendant MacQueen to go to the jury. When, upon the trial of an indictment, objection is made to the admission of a statement made by the prisoner while in custody, on the ground that the statement was not voluntarily made, but was induced by means of threats or promises, it is the duty of the trial judge to proceed to try the question of fact whether the statement was voluntary. The defendant is at liberty to introduce evidence upon this issue if he desires, or he may rest upon the evidence introduced by the state. The issue is for the decision of the trial court, and not of the jury, and the determination is not reviewable on ordinary writ of error if there be any legal evidence to support it. In order to admit a statement thus made by a prisoner in custody, it is not, in this state, essential to show that the prisoner, before making the statement, was informed that he was not under compulsion to speak, or was told that anything he might say would be used against him. *State v. Hernia* (N. J. Err. & App.) 53 Atl. 85. See, also, *Roesel v. State*, 62 N. J. Law, 216, 41 Atl. 408; *Bullock v. State*, 65 N. J. Law, 557, 47 Atl. 62, 86 Am. St. Rep. 668; *State v. Hill*, 65 N. J. Law, 626, 47 Atl. 814; *State v. Young*, 67 N. J. Law, 223, 51 Atl. 939; *State v. Gruff* (N. J. Err. & App.) 53 Atl. 88. In the present case the defendants saw fit to rest their objection to the admissibility of the statement upon the brief testimony of Shane, just quoted. It is manifest that the ruling of the trial judge was not unsupported by evidence.

The fourth exception was sealed during the examination of the defendant MacQueen. Under cross-examination by the prosecutor of the pleas he was shown a newspaper article in manuscript, entitled "The Propaganda in Paterson," which he admitted was written by him in order to be sent to a newspaper in England, "as a description of what was going on." He stated that the article was not completed, and that it was "just a hasty sketch that I started to write to send to a newspaper." Defendants' counsel thereupon objected to the reading of the article, on the ground that it was unfinished, and that an article written for a newspaper after the happening of the alleged crime is not in the nature of a confession, and cannot be used against the defendant. The court expressed the opinion that, where defendant makes an admission respecting the transaction in question by writing an account of it for a newspaper, such newspaper article is an admission by the defendant, and proceeded to say: "In that sense I will admit any question concerning this article, it being accompanied with the explanation that it is unfinished." To this ruling exception was taken and sealed. The ruling relat-

ed to the admission of questions on cross-examination, and not to the admission of the newspaper article in evidence. We think the ruling was correct; but, if otherwise, it does not appear to have done harm, for no evidence appears to have been introduced pursuant thereto.

The fifth bill of exceptions discloses simply the following colloquy between counsel for the defendants and the prosecutor of the pleas: "By Mr. Ward: How did the state come into possession of the article? Mr. Emley: I am not answering questions. Mr. Ward: Then I object on the ground that it was taken from him. They could not use that class of evidence against the defendant. I object unless it was voluntarily given by the defendant. The Court: I will overrule the objection." Whereupon the exception was sealed. What the objection related to does not appear. The bill of exceptions does not disclose that the document had as yet been offered. If the objection was to the cross-examination of MacQueen with respect to the article, the objection is groundless. If it was intended to question the admissibility of the newspaper article on the ground that it was not voluntarily surrendered by the defendant, the record does not disclose any basis for the objection. It was not incumbent upon the state to show from whom the article was obtained. There was no pretense that in the writing of the article MacQueen was under any influence of fear or hope. Therefore what he had written was admissible like any other statement made by him. "The ground on which a confession made by the accused under promise of favor or threats of injury is excluded as incompetent is not because any wrong is done to the accused in using them, but because he may be induced by the pressure of hope or fear to admit facts unfavorable to him without regard to their truth." Per Depue, C. J., in *Bullock v. State*, 65 N. J. Law, 557, 566, 47 Atl. 62, 86 Am. St. Rep. 668. See, also, *Roesel v. State*, 62 N. J. Law, 216, 41 Atl. 408. The reason for the rule wholly fails when the offer is to introduce in evidence a written statement prepared by the defendant previous to his arrest. The fact (if it were a fact) that MacQueen had intended to add something to what had been written did not render the writing any the less evidential. But the exception itself is altogether too vague to be seriously treated as raising any legal question for our review.

The sixth exception was taken to the ruling of the trial judge in permitting the prosecutor to read in evidence the newspaper article in question. Just prior to its admission MacQueen had stated, in answer to a question asked on cross-examination, that the writing referred to a "general movement of the working class." He was asked whether he had included in it any criticism of the violence that took place in Paterson on the day of the riot, June 18th. MacQueen answered: "I don't know whether there was specially

anything or not. As I have said, it is unfinished. Q. Look at it. A. I don't want to read it. It is unfinished. Q. By Mr. Ward (defendants' counsel): How did they get it? A. They stole it from me when they arrested me. They rifled my pockets, and took everything I had; even private letters. By Mr. Emley: I will read the article. By Mr. Ward: I object. By the Court: I will allow the reading of the article." Whereupon counsel for the defendants prayed an exception, and the court sealed the same accordingly. This exception has been discussed by counsel for the plaintiffs in error as if it raised some question of a violation of rights secured by the fourth and fifth amendments to the federal Constitution; the former of which prohibits "unreasonable searches and seizures," and the latter declares, among other things, that no person "shall be compelled, in any criminal case, to be a witness against himself." The case of *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, is cited as an authority. It is, however, established that the first ten amendments of the Constitution of the United States are limited to the sphere of the federal government, its courts and officers, and constitute no prohibition upon the states. *Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672; *Smith v. State of Maryland*, 18 How. 71, 76, 15 L. Ed. 269; *Spies v. Illinois*, 123 U. S. 131, 166, 8 Sup. Ct. 21, 31 L. Ed. 80. The prohibition of unreasonable searches and seizures is embodied in the Constitution of this state, art. 1, pl. 6. But this instrument contains no declaration like that above quoted from the fifth amendment. With us the proof of confessions and admissions made out of court by persons accused rests upon common-law principles. *State v. Zdanowicz* (recently decided by our Court of Errors and Appeals) 55 Atl. 743. It would seem that a written confession must stand on the same basis as one made orally, and that neither form of confession (where voluntarily made) is to be excluded on the theory that its use in evidence is equivalent to compelling one to be a witness against himself. As to the mode in which the document now in question was obtained, it is very generally held that papers unlawfully procured, even by means of unjustifiable search or seizure, are nevertheless admissible if evidential per se. 1 Greenl. Ev. § 254a, citing *Legatt v. Tollervay*, 14 East, 302; *Jordon v. Lewis*, 14 East, 305, note; *Commonwealth v. Dana*, 2 Metc. (Mass.) 329, 337. See, also, *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085; *Siebert v. People*, 143 Ill. 571, 32 N. E. 431; *Trask v. People*, 151 Ill. 523, 38 N. E. 248; *Bacon v. United States*, 97 Fed. 35, 40, 38 C. C. A. 37, 40. And it would seem that after arrest made the person of the accused may properly be examined without a search warrant, in order to find evidence of his guilt, and that such an examination would not be deemed an unreasonable search.

But we must decline to pass judgment up-

on these questions, for the reason that they were not presented to or passed upon by the court below. No ground whatever was stated for the objection that was overruled when the trial judge admitted the newspaper article in evidence. The whole of the bills of exception may be searched in vain for anything in the form of a certificate or statement by the judge disclosing that there was at any time presented to his mind, and by him decided, the question whether the use of this paper in evidence violated the right of the defendant to be secure against unwarrantable searches and seizures, or his immunity from being compelled to be a witness against himself. The sixth exception discloses not a word, even, of argument by counsel in support of his objection. The bills of exceptions already discussed contain, it is true, objections based on various grounds that are more or less vaguely suggested rather than stated. For instance, "that the article was written by MacQueen for a newspaper; that it was not evidence; that he says it is unfinished; that an article written by a man after the happening of the act for which he is being tried is not in the nature of a confession; that it is nothing but an article for a newspaper, which cannot be used against him under this charge of riot; that, if it was taken from him, that could not use that class of evidence against the defendant; I object unless it was voluntarily given by the defendant." But these were merely arguments upon matters then pending, or supposed to be pending, for the court's decision. Rulings were thereupon made, which, as already seen, were correctly made. It is going too far to say that the trial judge is under a duty to remember everything that is thus suggested or stated in argument upon one point, and apply it to the decision of an objection raised at a later period in the trial, when that objection is unaccompanied by the suggestion of any grounds for its making. As already remarked, this case comes here on a strict bill of exceptions. Every presumption is in favor of the correctness of the result reached below, unless by the exceptions it is made to appear that some ruling injurious to the defendant was made by the trial judge, in violation of some legal principle that was presented at the time for his consideration. An exception taken to the overruling of an objection, for which no reason is given at the time, is entirely futile. This view has been so often reiterated by our court of last resort as to require no argument at this time for its support. *Trade Ins. Co. v. Barracloff*, 45 N. J. Law, 543, 46 Am. Rep. 792; *Garretson v. Appleton*, 58 N. J. Law, 386, 391, 37 Atl. 150; *Consolidated Traction Co. v. Behr*, 59 N. J. Law, 477, 37 Atl. 142; *Ottawa Tribe v. Munter*, 60 N. J. Law, 459, 38 Atl. 696.

The seventh exception is a general one taken to the whole of the charge of the trial

court to the jury, under section 140 of the criminal procedure act (P. L. 1898, p. 916) which permits such an exception without specification at the time of any particular ground or grounds for the exception, and without specification of the portions of the charge to which exception is taken. By section 141 of the same act it is provided that, where such general exception has been taken, error may be assigned upon any portion of the charge. And under section 142, if upon the hearing of the case upon writ of error it shall appear that any error of law has been committed in any part of the charge to the prejudice or injury of the defendant, it is the duty of the court of review to reverse the judgment. Under this statutory practice we are confined, of course, to those portions of the charge that are mentioned in the assignment of errors, and are not to reverse unless the error is seen to have worked prejudice or injury to the defendant in maintaining his defense. In determining the latter question the effect of the entire charge is to be taken into consideration, as well as the particular language that may be objected to. *State v. Zdanowicz*, supra. The charge discloses that numerous witnesses on the part of the state had testified to the actual presence of both defendants in the mob at the time of the riot; that the acts of riot were abundantly proved; that MacQueen did not dispute his presence with and leadership of the mob, but asserted that, instead of encouraging violence, he preached and talked against it. The defendant Grossman, however, had testified that he was not in the city of Paterson on the 18th of June, and had supported the alibi by the production of a number of witnesses who had testified to his presence in New York on that day. The first assignment of error that relates to the charge is that the whole charge was contrary to law, and injurious to the interests of the defendants. This assignment is so vague as plainly to violate the spirit of sections 140, 141, and 142 of the criminal procedure act, already mentioned, and exhibits no ground for reversal. *State v. MacQueen* (N. J. Sup.) 55 Atl. 45.

Another assignment, however, deals with the refusal of the judge to charge as requested upon the question of alibi. He was asked to charge that if upon the whole case the testimony raised a reasonable doubt that the defendants were present when the alleged crimes took place, they should be acquitted. Another instruction requested was: "That the defendant is not bound to prove an alibi beyond a reasonable doubt. If upon the whole case the testimony raises a reasonable doubt that the defendant was present when the crime was committed, he should be acquitted." As MacQueen admitted his presence, these requests were pertinent only to the case of Grossman. Both requests were refused, with comments that

gave the jury to understand that, while a defendant asserting an alibi was not bound to prove it beyond a reasonable doubt, he must establish it by a clear preponderance of evidence. The impression left upon the jury must have been that the evidence tending to show the absence of Grossman was to be disregarded, unless it outweighed that which tended to prove his presence at the scene of the riot. But whatever goes towards proving an alibi (although it falls short of establishing it) at the same time tends to throw doubt upon the commission of the crime, where the presence of the defendant is essential to guilt. And if a reasonable doubt of guilt is raised, even by inconclusive evidence of an alibi, the defendant is entitled to the benefit of that doubt. *Sherlock v. State*, 60 N. J. Law, 31, 37 Atl. 435. The same principle applies where a defendant introduces evidence tending to establish his good character, in order to show the improbability of his guilt. *Baker v. State*, 53 N. J. Law, 45, 20 Atl. 858. The instructions to the jury upon the question of alibi were erroneous.

The eighth and last exception discloses that when the jury was about to retire counsel for the defendants objected to their taking with them into the jury room the newspaper article written by the defendant MacQueen, and already referred to. No ground was suggested as a basis for the objection, and so, for reasons already given, the objection was futile. Under section 182 of the practice act (Gen. St. p. 2563) papers read in evidence, though not under seal, may be carried from the bar by the jury. The provision originated in an act passed November 10, 1797, entitled "An act relating to juries and verdicts" (Paterson's Laws, p. 261). This court has already decided that the transfer of the enactment into the practice act did not affect its previous signification, and that it is error for a court to refuse to allow the jury to take with them from the bar the exhibits read in evidence at the trial. *State v. Raymond*, 53 N. J. Law, 260, 21 Atl. 328.

It will thus be seen that the only error appearing in the record is one that occurred in the instructions to the jury respecting the alibi—a question with which the defendant Grossman was alone concerned. The indictment charges that these defendants, with 100 and more other persons unknown, committed the riot. Although the agency of several persons is essential to the crime of riot, it needs not that all named in the indictment be shown to have participated, if it be charged that other persons, unknown, sufficient to constitute the requisite number, took part. Under the present indictment either of the plaintiffs in error might have been convicted while the other was acquitted. The legal ascertainment of the guilt of Grossman is therefore not essential to the guilt of MacQueen. *Wharton, Am. Crim.*

Law, §§ 431, 434, 435. The record shows that the jury found them severally guilty, and that they were severally sentenced.

There being no error in the record by which MacQueen is aggrieved, his conviction should be affirmed. As to Grossman, there should be a reversal, with award of a venire de novo.

(4 Pen. 411)

TAYLOR v. ADDICKS.

(Superior Court of Delaware. New Castle. Sept. 26, 1903.)

BOOK ACCOUNT—SERVICES OF ATTORNEY IN ONE ITEM.

1. An account for services of an attorney in a suit extending over more than seven years, charged in one item, is not the subject for a judgment on affidavit of demand at the first term as a book account regularly and fairly kept under the statute.

Action on a book account by Carter Berkeley Taylor against John Edward Addicks. Judgment for plaintiff for want of affidavit of defense refused.

Argued before LORE, C. J., and PENNEWILL and BOYCE, JJ.

John Biggs, for plaintiff. Walter H. Hayes, for defendant.

LORE, C. J. This is an action on a book account, which is as follows:

"July 1, 1903.

"John Edward Addicks, to Carter Berkeley Taylor, Dr.

"To professional services rendered from May 9, 1893, down to and including October 23, 1900, in suit in equity, brought by the Mayor and Council of Wilmington, etc., vs. John Edward Addicks, John G. Baker, Frederick P. Addicks, Simon B. Conde, and Samuel Austin; subsequently the Mayor and Council of Wilmington et al., vs. John Edward Addicks and Oxy-Hydrogen Company, in the Court of Chancery of the State of Delaware\$2,500

2,500"

Mr. Biggs, for the plaintiff, moved for judgment for plaintiff for want of affidavit of defense. Mr. Hayes, for defendant, objects that the above-stated item is not the subject for the recovery of judgment on affidavit of demand at the first term, as a book account regularly and fairly kept under the statute, and asks that judgment be refused.

In Sloan v. Grimshaw, 4 Houst. 326, this court held that plans of an architect for the erection of a building, charged in one item of \$100, was not properly chargeable in a book account, or to be proved by a copy of it appended to an affidavit of cause of action. The item in this case is for professional services as an attorney, running from May 9, 1893, to October 23, 1900, a period of

over seven years, in one unitemized charge of \$2,500, under date of July 1, 1903. We can see no difference in principle between the services of an architect in plans for building a house, charged in one item in lump, and those of an attorney charged in one item in lump, for services in one suit, extending over seven years, and necessarily embracing many items. Where such charge is not itemized, or is incapable of being itemized, it does not come under our statute, and judgment may not be had upon it at the first term upon an affidavit of demand as a book account regularly and fairly kept.

Judgment is therefore refused.

(4 Pen. 29)

STATE v. FINLEY.

(Court of General Sessions of Delaware. New Castle. Feb. 5, 1902.)

ASSAULT AND BATTERY—PUNISHMENT—DISCRETION OF COURT

1. 22 Del. Laws, p. 493, c. 204, relating to the punishment for one convicted of assault on his wife, gives the court discretion to impose either a whipping, or a fine and imprisonment.

James F. Finley was indicted for assault and battery on his wife, and entered a plea of guilty. Fined \$50 and costs, and committed to the workhouse until payment thereof.

The defendant was indicted at this term for assault and battery upon his wife, and entered a plea of guilty. The defendant, through his counsel, made the following statement of facts to the court: That he was an engineer in the employ of the Pennsylvania Railroad Company, and had been such for a number of years; that he had been married 24 years, and had a family of six children; that the alleged assault took place on the 23d day of December, 1901, while he was engaged in moving his family from Seventh and Orange streets to No. 102 West Seventh street, in the city of Wilmington; that while he, perhaps, used more violence toward his wife than was necessary, yet he could establish to the satisfaction of the court that he had for a long time been seriously troubled with his wife, from the fact that she had been using intoxicating liquors to excess for years, so much so that she had been, on more than one occasion, arrested and brought before the municipal court of the city of Wilmington, and there fined for drunkenness; that she had habitually neglected her family while the defendant was attending to his duties on the railroad as engineer, leaving a seven year old child, with a small baby, alone in the house for 24 hours at a time; that on the day of the assault his wife was drinking, and they got into some dispute, in which she cursed him and called him vile names and struck him; and that he then struck her. The previous good character of the defendant for peace and good order was admitted. The state

also admitted that the injuries to the wife were not of a permanent character.

Argued before LORE, C. J., and PENNEWILL and BOYCE, JJ.

Herbert H. Ward, Atty. Gen., for the State.
John F. Lynn, for defendant.

LORE, C. J. The sentence of the court in your case, James F. Finley, is that you forfeit and pay a fine of \$50; that you pay the costs of this prosecution; and you are now committed to the custody of the board of trustees of the New Castle county workhouse until this sentence is carried into effect.

We want to say that the statute approved February 22, 1901 (22 Del. Laws, p. 493, c. 204), under which the prisoner is fined, gives the court the discretion of whether they will impose the whipping in such cases, or not. We may impose the whipping, or we may fine and imprison, in the discretion of the court.

The new law vests in the trustees of the New Castle county workhouse all the powers heretofore vested in the sheriff, but, until some further order is made by the court, this fine will be paid to the clerk of the peace.

(4 Pen. 55)

DONOHUE v. WILMINGTON CITY RY. CO.

(Superior Court of Delaware. New Castle.
Feb. 27, 1902.)

STREET RAILWAY—COLLISION WITH TEAM—
NEGLIGENCE—PLEADING.

1. The declaration in an action against a street railway company, alleging that defendant so negligently operated its car that it ran into plaintiff's wagon on the street, sufficiently pleads the negligence.

Action by Edward Donohoe against the Wilmington City Railway Company for injury to plaintiff's wagon. Defendant demurs to the declaration. Demurrer overruled.

The declaration contained but one count, which set forth, *inter alia*, the following: "That the said defendant on the 17th day of August, A. D. 1901, at the city of Wilmington aforesaid, so negligently and carelessly operated one of its said cars that thereby the said car ran into and upon a certain wagon of the said plaintiff, which was then and there, lawfully, and in the exercise of due care and caution on the part of the driver thereof, on one of the public streets of the said city, to wit, on Market street, and thereby the said wagon of the said plaintiff was greatly injured, damaged, and destroyed," and by reason thereof the plaintiff was put to large expense in and about the repair of said wagon, to wit, in the sum of \$200, etc. The defendant demurred to the above declaration upon the following grounds, *viz.*: (1) That the said declaration does not set forth, allege, or describe any particular kind

of carelessness or negligence; (2) that said declaration merely sets out a conclusion of law. *King v. Wil. & New Castle Elect. Ry. Co.*, 1 Pennewill, 452, 41 Atl. 975.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

William S. Hilles, for plaintiff. Walter H. Hayes, for defendant.

LORE, C. J. This is a very different case from that of *King v. The Wilmington & New Castle Electric Railway Company*. The narr. specifically sets forth that the defendant company negligently ran into the plaintiff's wagon, and describes the negligent act. Demurrer overruled.

(4 Pen. 34)

CARPENTER v. WEBB.

(Superior Court of Delaware. New Castle.
Feb. 17, 1902.)

EXECUTOR'S DEED—SUFFICIENCY—EXECUTION OF POWER.

1. A deed reciting A., the grantor, to be the executor of E., and, following the description of the land, reciting that E., seised of said premises, made his will, directing his executor to sell said premises, and appointed A. sole executor, said deed being proved and recorded, is sufficient as an execution of the power of sale, though in other respects in the form of conveyance of an individual interest, A. having no individual interest.

Amicable action between Joseph L. Carpenter, Jr., as plaintiff, and Thomas S. Webb, as defendant. Judgment for plaintiff.

Case stated filed, showing, *inter alia*, the following facts: By the will of Emmor Pierson, it was ordered and directed that certain real estate therein described should be sold by his executor therein named at such times and on such terms and conditions as he should think best for the interest of the testator's estate, and the testator authorized and empowered his executor to deed and convey the real estate therein mentioned, in fee simple, to the purchaser or purchasers, as fully and as effectually as he himself could do in his lifetime, and directed that the proceeds of the sale of such lands should constitute and be considered a part of the residue of his estate. He then gave, devised, and bequeathed to his brother Amos Pierson all of the residue of his estate, and named his said brother Amos Pierson as the sole executor of his last will and testament. The said Amos Pierson on the 7th day of March, A. D. 1866, together with the widow of the said Emmor Pierson, executed a deed of conveyance of the lands which the testator directed to be sold; the widow of the said Emmor Pierson joining therein to release her right of dower. This deed recited Amos Pierson as the executor of the last will and testament of his brother Emmor Pierson, and following the descriptions of the lands therein conveyed is the following, to wit: "And the said Emmor Pierson so seised thereof of the aforesaid premises in his lifetime made and

published his last will in writing, wherein and whereby (among other things) he directed his executor to sell that part of his real estate which is described in said will (being the same as now conveyed to the said Joseph Wright) and appointed his brother Amos Pierson (party hereto) as sole executor thereof; the said will bearing date the twelfth day of December, A. D. 1864, being duly proven and remaining of record in the register's office in New Castle County aforesaid." The said will was proved October 6, 1864. In all other respects the deed was in the usual form that was used for the conveyance of the grantor's individual estate in the land therein conveyed. It was agreed that the executor took under the will no individual interest in the real estate.

Argued before LORE, C. J., and PENNEWILL and BOYCE, JJ.

Francis H. Hoffecker, for defendant.

I object to the sufficiency of the deed as an execution of the power of sale, because it does not expressly state that the estate conveyed was the interest of Emmor Pierson at and immediately before the time of his decease. The power given in the will by the testator to his brother was a simple, naked power; and the latter, in conveying under the will, should have conveyed all the right, title, and interest of the testator at and immediately before his decease. No interest passed to the executor thereunder. In *re Moses Journey's Estate*, 7 Del. Ch. 1, 44 Atl. 795.

J. Harvey Whiteman, for plaintiff.

By the will of Emmor Pierson, Amos Pierson has no interest in the real estate in question in his own right. He was the devisee of a power to sell specific lands, and undertook to execute that power when he sealed and delivered the deed in question. The land therein mentioned is the precise land he was directed to sell. He recites himself as the executor of Emmor Pierson "in the premises of the said deed," and, following the description of the land, refers to his power under the will of Emmor Pierson to sell said lands. This reference to the power is of itself sufficient to convey the estate of the testator in the lands therein described. *Terry v. Rodahan*, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420. But the power may be executed without reciting it, provided that the act shows that the devisee had in view the subject of the power. 4 Kent, Com. 335; 1 Sugden on Powers, 356; *Drusadow v. Wilde*, 63 Pa. 170. The intention to execute a power will sufficiently appear (1) when there is some reference to the power in the instrument of execution; (2) where there is a reference to the property which is the subject-matter on which execution of the power is to operate; and (3) where the instrument of execution would have no operation, but would be utterly insensible and absurd, if it was not the execution of a pow-

er. *Terry v. Rodahan et al.*, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420; *Hamilton v. Crosby*, 32 Conn. 342; *Bingham's Appeal*, 64 Pa. 345; *Drusadow v. Wilde*, 63 Pa. 170; *Keefer v. Schwartz*, 47 Pa. 503; *Allison v. Kuntz*, 2 Watts, 185; *White v. Hicks*, 43 Barb. 64; *White v. Hicks*, 33 N. Y. 383. As the deed of Amos Pierson meets all the tests by which the execution of a power is determined, it is respectfully submitted that judgment be given for the plaintiff according to the terms of the agreement between the plaintiff and defendant.

LORE, C. J. We think there is enough on the face of the deed, which is made part of the case stated, to show that this party was attempting, however informally it may have been, to execute a power. He had, it is conceded, no interest in his own right in the lands, but had a right to convey under that power; and, while the power is very awkwardly and inartistically expressed, we think it is sufficient.

And now, to wit, this 17th day of February, A. D. 1902, the within and foregoing case stated having come on to be heard, and having been argued by counsel for both parties at the bar of the court, and the court having maturely considered the same, it is hereby ordered, adjudged, and decreed by the court (the said court being of the opinion that the deed of Amos Pierson and Susan H. Pierson, said deed bearing date the 7th day of March, A. D. 1866, and recorded in the office for recording deeds in and for New Castle county, state of Delaware, in Deed Record D, vol. 8, p. 421, etc., conveyed the fee-simple title of said lands to Joseph Wright, the grantee named therein) that judgment be entered for the plaintiff against the defendant for six cents, besides costs of suit.

Judgment for plaintiff, for six cents.

(4 Pen. 31)

STATE v. COOK.

(Court of General Sessions of Delaware. New Castle. Feb. 7, 1902.)

LASCIVIOUS CONDUCT—INDICTMENT.

1. An indictment charging that defendant unlawfully, lewdly, and lasciviously played with S., a female child under the age of 16 years, sufficiently apprises defendant of the specific charge.

Robert Cook was indicted for lewd and lascivious conduct. Verdict of guilty.

Argued before PENNEWILL and BOYCE, JJ.

Herbert H. Ward, Atty. Gen., and Robert H. Richards, Dep. Atty. Gen., for the State. L. Irving Handy, for defendant.

The indictment charged that the defendant on the night of the 23d of December, 1901, "unlawfully, lewdly, and lasciviously" played with one Gracie Ellen Sandy, a fe-

male child under the age of 16 years, at the latter's home, in the city of New Castle.

Mr. Handy, for defendant, moved to quash the indictment on the ground that it did not fully inform the defendant of the nature and character of the offense he was called upon to meet, but merely stated a conclusion of law.

PENNEWILL, J. The court hold that the language of the indictment is sufficient to apprise the defendant of the specific charge which he has to meet; and, after all, that is the test. It will be observed that the language used is not only that Robert Cook played with a female child, not only that he unlawfully played with her, but that he unlawfully, lewdly, and lasciviously played with Gracie Ellen Sandy, a female child, etc. We think, therefore, that it comes within the rule laid down in the case referred to, where the charge was for having sexual intercourse; and we think this has definitely and specifically informed the defendant of the charge which he is to meet, as the indictment did in that case. The motion, therefore, is denied.

After the prosecuting witness, Gracie Ellen Sandy, had testified that the defendant had committed the offense charged on the night of Monday, December 23, 1901, she was asked by the deputy attorney general to detail what the defendant did when he came into her room the next morning before he had dressed. This was objected to by counsel for defendant as irrelevant, being a separate and distinct offense, committed on a different date from that laid in the indictment. Objection overruled and question allowed.

The witness was further asked by the deputy attorney general if there was anything the matter with her after the 23d of December, 1901. Objected to by counsel for defendant as irrelevant. Objection sustained. Q. After this morning, when you say that Mr. Cook came to your room and played with you, did he ever come back to you anywhere and do any such thing? (Objected to by counsel for defendant as irrelevant; citing the unreported case of *State v. Cunningham*, being an indictment for using a female child for the purpose of sexual intercourse, where a similar question had been ruled out by the court.)

Mr. Richards, Deputy Attorney General: We offer this evidence for the purpose of proving, within a very limited period of time, other acts of a lascivious and lewd nature, as going to show the intent of the defendant at the time the offense charged in the indictment was committed.

PENNEWILL, J. We think, under the ruling in the case of *State v. Cunningham*, that this question is inadmissible.

PENNEWILL, J. (charging jury). The respective counsel have not asked the court to

instruct you upon any question of law, for the reason, we presume, that there are no questions of law involved in this case. The question to be determined is simply one of fact, and it is for your determination alone. Robert Cook, the defendant, is charged in this indictment with unlawfully and lewdly and lasciviously playing with Gracie Ellen Sandy; she, the said Gracie Ellen Sandy, being then and there a female child under the age of 16 years. The indictment is based upon a statute of this state which was passed February 21, 1881, being chapter 545, § 1, vol. 16, Laws Del. (Rev. Code 1852, p. 956, amended in 1893), which, as amended by chapter 128, p. 192, vol. 20, Laws Del., provides that, if any person shall lewdly and lasciviously play with any female child under the age of 16 years, he shall be deemed guilty of a misdemeanor. If you should believe from the testimony in this case, beyond a reasonable doubt, that Robert Cook, the defendant, committed the offense charged in this indictment, your verdict should be, "Guilty." If you should not believe this, your verdict should be, "Not guilty."

Verdict, "Guilty."

(4 Pen. 408)

CARSWELL v. PATZOWSKI.

(Superior Court of Delaware. New Castle. Oct. 3, 1903.)

MECHANIC'S LIEN—FILING OF STATEMENT.

1. Under the mechanic's lien law, providing that every person other than a contractor with the owner of the building, and a contractor who has furnished both labor and materials for the building, must, within 90 days "from the completion of the work performed," file a statement of his lien, in order to be entitled to a lien, a claimant for work and labor only must file his statement within 90 days from the completion of the work.

Mechanic's lien proceedings by Frank R. Carswell against Richard Patzowski. Dismissed.

See 53 Atl. 54, 55 Atl. 842.

Argued before LORE, C. J., and PENNEWILL and BOYCE, JJ.

Herbert H. Ward, for plaintiff. Robert H. Richards and William S. Hilles, for defendant.

LORE, C. J. The claim was for work and labor performed by the plaintiff, as an architect, in the erection of buildings in the city of Wilmington for the defendant as owner or reputed owner. The contract was made with the owner. The plaintiff's work and labor were finished on the 10th day of March, 1902. The statement of claim was filed on the 24th day of June, 1902. The exception relied on was that the statement was not filed within 90 days from the completion of the work and labor alleged to have been furnished by the plaintiff. Under the mechanic's lien law, a person who may file his statement of claim within 90 days after the expiration of 90

days from the completion of his work and labor must be: (1) A contractor who made his contract with the owner or reputed owner of the building. *Travis v. Meredith and Ruth*, 2 Marvel, 376, 43 Atl. 176. (2) A contractor who has furnished both work and labor, and material in and for the building. *Mulrine v. Washington Lodge*, 6 Houst. 350; *Curllett v. Aaron*, Id. 477. Every other person entitled to a lien must file a statement "within ninety days from the completion of the work and labor performed, or from the last delivery of materials furnished." This claim, being for work and labor only, should have been filed within 90 days from March 10, 1902, the date of completion of the work and labor. Not having been so filed, the claim is dismissed.

(4 Pen. 298)

SCHILANSKY et al. v. MERCHANTS' & MANUFACTURERS' FIRE INS. CO.

(Superior Court of Delaware. Kent. May 5, 1903.)

INSURANCE—PROOF OF LOSS—SUFFICIENCY—ACTION ON POLICY—EVIDENCE OF OWNERSHIP—INTEREST OF POLICY HOLDER—ASSIGNMENT OF POLICY.

1. The holder of a fire policy may sue thereon, though the policy has been marked by defendant for the use of a third person as his interest may appear.

2. Where the proofs of loss furnished an insurance company under a fire policy stated that the insurance on the property amounted to a certain sum, giving the sum for which the policy was written, and no more, there was a compliance with a provision of the policy requiring the proofs to state "whether any and all other insurance."

3. Where in an action on a fire policy on a saloon a witness for plaintiff testified that he was manager of the saloon, which belonged to the plaintiffs, a motion for a nonsuit on the ground that plaintiffs had not shown ownership of the property would be denied.

4. Provisions of insurance policies requiring acts to be done by insured subsequent to the loss, which do not alter the risk or increase the liability, are to be liberally construed in favor of insured.

5. It is the duty of the court to construe written papers which have been admitted in evidence, and to instruct the jury as to the meaning and effect of the same.

6. Where a fire policy provided that insured should furnish proofs of loss and make a complete inventory of the property, stating the quantity and cost of each article and the amount claimed thereon, and state the knowledge and belief of the insured as to the time and origin of the fire, proofs of loss which stated that at a certain time fire originated in a certain building, and which referred to a schedule which showed the amount claimed on the stock of wines, liquors, and articles usual to saloon stocks as a whole, and the amount claimed on furniture and fixtures as a whole, was sufficient, especially in view of the fact that there was a total destruction of the property, and all the books of account and papers were destroyed.

7. In an action on a fire policy the proofs of loss are not to be considered by the jury as proving or tending to prove the ownership of the property, or the fact of loss, or the amount of loss.

¶ 7. See Insurance, vol. 28, Cent. Dig. §§ 1701, 1728.

Action by Joseph Schilansky and another, for the use of the Bartholomay Brewing Company, against the Merchants' & Manufacturers' Fire Insurance Company. Judgment for plaintiffs.

Action of assumpsit on a policy of insurance for a loss sustained in the total destruction of a saloon belonging to the Schilanskys; also the fixtures of the said saloon and stock of liquors. The pleas were nonassumpsit and three special pleas: First, that the plaintiffs had an additional policy of insurance, without the knowledge of the defendant; second, that the assignment of the policy to the Bartholomay Brewing Company was without the knowledge or consent of the insurance company; and, third, that the plaintiffs furnished no proof of loss or notice within 30 days, such as required by the policy. It was in evidence that the property was destroyed on the 12th day of November, 1901, after midnight, and that the following proof of loss was received by the president of the company, at Dover, on December 11, 1901, and by him forwarded to the Chicago office of the company, viz.:

"Form No. 711.

"Policy No. 30,367.	Amount of Policy,
"Renewal No. ———.	\$1,500.00.

"Proof of Loss to

"Merchants' & Manufacturers' Fire Insurance Company of Dover, Delaware.

"By Your Policy Of Insurance No. 30,367, issued at your Chicago Agency, dated the 10 day of June 1901, and expiring the 10 day of June 1902, at 12 o'clock noon, you insured Sarah Schilansky and J. Schilansky against loss or damage by fire, to the amount of Fifteen hundred Dollars, according to the terms and conditions printed therein; the written portion and all indorsements, transfers and assignments being as follows:

"Loss if any payable to Bartholomay Brewing Company as their interest may appear.

"The Total Insurance on said property, or any part thereof, at the time of the fire, including the above mentioned policy, was, Fifteen hundred Dollars, and no more.

"(Full copies of the written portions of all other policies and endorsements, transfers and assignments are hereunto annexed or will be furnished on demand.)

"The Property described in said policy Belonged, at the time of the fire hereinafter mentioned, to Sarah Schilansky & J. Schilansky and no other person or persons had any interest therein, except as follows:

"The Building Described, or containing the property described in said policy, Was Occupied at the time of the fire as follows:

"First floor—Saloon and fixtures, Refrigerator.

"Second floor—Living rooms. Sarah Schilansky.

'Third floor--Living rooms. Sarah Schil-
ansky.

"Fourth floor—

"Fifth floor—

and for no other purpose whatever.

"A Fire Occurred on the 11th day of November, 1901, about the hour of 2.30 o'clock A. M., by which the property described by said policy and situate as therein named was destroyed or damaged, as hereinafter set forth in detail, said fire originating as follows: The fire started in Gelsberger Hotel Restaurant about 25 feet from Insured's saloon, two-thirds of the town was destroyed. The loss of insured was a total loss, nothing saved whatever.

"The Actual Cash Value of, each specific subject thus situated and described by the aforesaid policy at the time of loss, and the Actual Loss and Damage by said fire to the same, as shown by annexed schedule, and for which Claim Is Hereby Made, were as follows:

Item of Policy.	Sound Value.	Total Loss.	Total Ins.	Amount Named in This Policy.	Claimed Under This Policy.
1st Item of Policy. Stock	1600.00	1462.25	\$00.00	\$00.00	\$00.00
2nd " " Fixtures	1200.00	1200.00	\$00.00	\$00.00	\$00.00
3rd " " Refrigerator	\$00.00	\$00.00	\$00.00	\$00.00	\$00.00

Total Amount Claimed of this Company under above named Policy \$400.00.

“(For a detailed statement of value and loss, see schedule herewith, which is made a part of this Proof of Loss.)

"At the time said insurance was effected, the property described by said policy belonged to Sarah Schilansky and J. Schilansky; and the said fire did Not originate by any act, design or procurement on the part of

assured, or this affiant, or in consequence of any fraud or evil practice done or suffered by said assured, or this affiant; nothing has been done by or with the assured's, or this affiant's privity or consent to violate the conditions of the policy, or render it void; no articles are mentioned herein but such as were in the building damaged or destroyed, and belonging to, and in the possession of, the said assured at the time of fire; no property saved has been in any manner concealed, and no attempt to deceive the said Company, as to the extent of said loss, has in any manner been made.

"Any other information that may be required will be furnished on call, and considered a portion of these proofs.

"It is expressly understood and agreed, that the furnishing of this 'Proof of Loss' blank to the assured or making up of proofs by an adjuster, or any agent of the Company or Companies named herein, is not a waiver of any rights of said Company.

"Witness our hands at Davis, W. Va., this
9th day of December 1901.

"Sarah ^{her} X Schilansky.
mark.

"J. Schilansky, Assured.

"December 9th, 1901.

**"State of West Virginia, County of Tucker
--s.: Personally Appeared Sarah Schilansky
& J Schilansky signers of the foregoing
statement, who made solemn oath to the
truth of the same, and that no material fact
is withheld that the said Company should be
advised of.**

"Subscribed and sworn to before me, the
day and date above written.

"A. M. Cunningham, Notary Public. [Seal.]

"Witness to mark of Sarah Schilansky—A.
R. Stallings, Davis, W. Va."

“(Schedule.)”

"J. & Sarah Schilansky.

"\$500.00 On Stock, Wines, Liquors, Beers,
Cigars, Tobacco, and such other
articles as are usual to Saloon
Stocks.

"\$500.00 On Saloon Furniture and Fixtures, Bar, Back Bar, Mirrors, Screens, Glass Ware, and such other Articles as are used in furnishing and conducting a Saloon, all while contained in frame Building, situate on East side of East Ave., in Thomas, Tucker Co., W. Va.

"\$500.00 On Beer in storage in frame Building, situate adjoining building above described.

"Other Insurance permitted.

"It is understood the storage Building above described is in course of construction.

"Attached to and forms a part of Policy No. 30,397.

"C. A. Vananden & Co. Agents."

The above proof of loss was returned on January 22, 1902, by the adjuster of the defendant company to the attorney for the plaintiffs, at Dover, as "being incomplete, insufficient, and not in accordance with the conditions of said policy." On February 28, 1902, plaintiffs made further proofs, and forwarded same to defendant, which were received by the latter March 7, 1902. Plaintiffs, however, based their claim upon the proofs first sent, as set out above.

The parts of the policy relied upon by the parties as being material under the pleadings were as follows:

As to insured having other policies: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy. * * *

As to interest in favor of another: "Or if this policy be assigned before or after a loss. * * *

As to proof of loss, notice, etc. (lines 72 to 121 of policy): "If fire occur the insured shall give immediate notice in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the whole, stating the quantity and cost of each article and the amount claimed thereon; and, within thirty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and all others in the property; the cash value of each item thereof and the amount of loss thereon, whether any and all incumbrance thereon or upon any part thereof, setting out in full the nature, purposes and conditions thereof; whether any and all other insurance, whether valid or not, covering any of said property; and a copy of all policies pertaining to any property described in this policy; whether any and if so what change in the title; use, occupation, location, possession or exposures of said property, and of any property within one hundred feet thereof, and of all exposures of any row of buildings as defined in this policy, commencing within one hundred feet of the property herein described since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of the fire, and shall furnish, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged; and if such proofs of loss shall not be furnished within the time specified, or if any proofs of loss which may be furnished shall

not comply in every particular with the above requirements of this policy, this policy and such proofs of loss shall be void and of no effect; and this company shall not be required to return to the assured any defective proof of loss, nor shall this company be required to point out or specify to the assured any defects or objections to such proof of loss, nor shall the objection by this company to any defect in any such proof of loss be taken or deemed to be a waiver of any other defects therein or objections thereto, it being expressly understood and agreed, by the assured, by the acceptance of this policy, that any and all proofs of loss shall be made by the assured at his or her own risk as to any and all defects therein, and this company under no circumstances shall be deemed or held to have waived any objection to proofs of loss, unless such waiver is made in writing and signed by its President or Secretary.

"The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examination under oath, by any person named by this company, and subscribe to the same when reduced to writing, and a refusal to subscribe to the same shall cause a forfeiture of all right to recover under this policy; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made, and a representative of the company may examine the insured under oath or otherwise concerning any loss without having waived any condition or requirement of furnishing formal proofs by the insured.

"In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire, but the award shall not determine the liability of this company.

"The assured agreeing thereto by the acceptance hereof, this company shall not be held to have waived any provision or condition of this policy, or caused any forfeiture thereof by any requirement, act or proceeding on its part relating to the ap-

praised) or to any examination hereto provided for; and the loss shall not become payable until ninety days after the notice, ascertainment, estimate, and satisfactory proof of loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

"This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss may be provided for by agreement on condition written hereon or attached or appended hereto. Liability for reinsurance shall be as specifically agreed hereon.

"If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the assured on receiving such payment, the assured hereby agreeing to prosecute all claims for the benefit of this company at its expense.

"The assured agreeing thereto by the acceptance hereof, no suit or action on this policy, for the recovery of any claim, shall be sustained in any court of law or equity until after full compliance by the assured with all the foregoing requirements, nor unless commenced within six months after the date of fire and not afterwards; and provided also that execution upon any award or judgment of said court as against said company shall not issue until after the expiration of three months from the rendition thereof."

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

Robert H. Van Dyke and F. C. Gooden, for plaintiffs. George M. Jones and William M. Hope, for defendant.

Bernard Schilansky, being sworn on behalf of the plaintiffs, testified that he was the manager of the saloon belonging to the plaintiffs, and had entire charge of the business for the said owners, and that on the date in question the property above mentioned was totally destroyed by fire, the said fire communicating to the saloon from an adjoining hotel; that the defendant was notified through its resident agent; and that the above-stated proof of loss was made out and forwarded to the defendant company within the time specified in the policy of

insurance; that the proof of loss contained as full a statement as he could give from memory, all papers and books having been destroyed with the saloon, stock, and fixtures; and that no settlement had been received from the said defendant company.

Plaintiffs also proved by the treasurer of the brewing company that the insurance policy had been transferred to the said brewing company by the Schilanskys for an indebtedness due the said company for the stock and goods furnished to the said saloon, and that nothing had been paid to the brewing company on account of said policy.

The manager of the brewing company testified that at the time of the fire he was representing the brewing company as a traveling man, and knew of the insurance on the property of the plaintiffs at the time, and that it was for the benefit of the brewing company for the indebtedness due them from the Schilanskys, amounting to about \$1,500.

The plaintiffs rested, and the defendant moved for a nonsuit upon the following grounds: First, that the ownership of the property at the time of the taking out of the insurance had not been proved; second, that the ownership at the time of the fire had not been proved; and, third, that the plaintiffs have declared on an absolute assignment in these words: "And afterwards, to wit, on the tenth day of June, A. D. one thousand nine hundred and one, the said defendant marked the said policy so that any loss or damage that might accrue thereunder should be payable to Bartholomay Brewing Company, for whose use this suit is brought."

SPRUANCE, J. That is not a declaration of absolute assignment. It is, in substance, a declaration of use.

Mr. Hope: It says "should be payable"; does not say conditional.

SPRUANCE, J. Uses are not generally conditional. This suit was brought in the name of the insured for the use of another.

Mr. Hope: But this loss is payable to the Bartholomay Brewing Company upon one condition: if they have an interest. That is the language of the policy. We have no right to pay it to the brewing company unless they have an interest.

SPRUANCE, J. You will not be troubled about whom you are to pay if the plaintiffs recover. Your own company marked it to the use of the brewing company. Suppose it is conditional—suppose it is not worth anything—cannot this suit be maintained?

Mr. Hope: I think not.

SPRUANCE, J. Well, we think it can, if the person for whom the policy is made brings the suit. That point is disposed of.

Fourth. Because no proof of loss conforming to the requirements of the policy of insurance was filed with the company, as required by the terms of the said insurance

policy, within 30 days after the fire nor within 90 days before the commencement of the suit (lines 72 to 121 of the policy).

SPRUANCE, J. In what respect as required by the policy?

Mr. Hope: The proof of loss does not contain the proof of inventory of the quantity and cost of each article and the amount claimed thereon, the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of others in the property, whether any and all incumbrances thereon, whether any and all other insurance and a copy of all policies pertaining to said property.

SPRUANCE, J. Do you allege that there was any other insurance?

Mr. Hope: Their proof of loss must set out whether there is any other or not. We plead that there was other insurance.

SPRUANCE, J. We have not come to that yet. A man cannot show what does not exist. The plaintiffs say there was no other insurance. It seems that you are not hurt by it unless you can prove that there was other insurance. The proof, so far as it goes, is that there was no other policy.

Mr. Hope: I insist upon that point.

SPRUANCE, J. We will rule upon it, then, at once. We consider the proof sufficient with respect to other insurance.

Mr. Hope: I ask to note an exception.

SPRUANCE, J. You cannot note an exception on a motion for a nonsuit.

Mr. Hope: The only way to settle the first two contentions is by the court stenographer reading the evidence.

SPRUANCE, J. It is for the jury to recollect the testimony. Have you anything further to say upon the first two points—that there is no evidence as to the ownership at the time of the taking out of the policy, or as to ownership at the time of the fire?

Mr. Hope: Nothing; only that it is essential to the maintenance of the action. They must prove that there is a loss. This is a contract conditioned upon an actual loss.

SPRUANCE, J. The court are of the opinion that there is sufficient evidence to go to the jury as to ownership at the time the policy was taken out and at the time of the fire. If you look at the proof of loss, which has been admitted in evidence by your consent, you will find set forth that "at the time said insurance was effected the property described by said policy belonged to Sarah Schilansky and J. Schilansky, and that no other person or persons had any interest therein; * * * and the said fire did not originate by any act, design, or procurement on the part of the assured." We overrule your first two grounds. We have already passed upon No. 3—as to assignment. Part of No. 4 remains—failure of proof of loss to conform to requirement of policy. You may discuss such of the points relating to that as the court have not ruled upon.

After further discussion the court ruled as follows:

SPRUANCE, J. The court are unanimously of the opinion that you have not stated sufficient grounds to sustain a nonsuit, and we therefore decline to grant a nonsuit.

The defendant then offered in evidence the second proof of loss—above referred to as not being relied upon by the plaintiffs—and the same was admitted without objection, and the defendant rested.

The plaintiffs called Bernard Schilansky in rebuttal, and, after explaining the circumstances under which the second proof of loss was prepared, and also the ownership of the property alleged to have been destroyed, both sides closed their testimony.

Plaintiffs' Prayers.

The plaintiffs prayed the court to instruct the jury as follows:

(1) That the sufficiency of the preliminary notice and proofs is a question for the court, and is not to be considered by the jury.

(2) That, the proof of plaintiffs' claim before the jury being unimpeached, and no defense thereto being offered by the defendant, their verdict should be for the plaintiffs for the value of the property lost, not exceeding the amount specified under the policy, together with interest from the day that suit was brought.

(3) That where the loss is total, including all books and accounts, it is not necessary for the insured to guess at the items destroyed, but a general statement alleging the total loss is sufficient.

(4) That if the company received the proof of loss, and deemed it insufficient, they were bound to return it promptly, pointing out the defect therein; and upon their failure to do this the insured had a right to presume that such proof was sufficient.

(5) That the return of the said proof 42 days after it was filed with said company is not in time to permit it to take advantage of the insufficiency thereof.

Defendant's Prayers.

The defendant prayed the court, *inter alia*, to instruct the jury as follows:

(1) That it was necessary for the plaintiffs to prove the ownership of the property at the time of the issuance of the policy of insurance upon which the action is brought.

(2) That it is necessary for the plaintiffs to prove the ownership of the property destroyed at the time of the fire.

(3) That it is necessary for plaintiffs to prove that a proof of loss or statement conforming with all the terms contained in lines 72 to 121, inclusive, of said policy of insurance, was duly filed with the defendant company, within 30 days after the fire.

(4) That it is necessary for the plaintiffs to prove that a proof of loss or statement, conforming to all the requirements contained

in lines 72 to 121, inclusive, of said policy of insurance, was filed with the defendant company at least 90 days before the bringing of this suit.

(5) That it is necessary for the proof of loss or statement required by the terms of said policy of insurance to set out each of the following facts: (a) A complete inventory stating the quantity and cost of each article destroyed or damaged, and the amount claimed thereon. (b) The knowledge and belief of the insured as to the time and origin of the fire. (c) The interest of the insured and all others in the property. (d) Whether any and all incumbrance thereon. (e) Whether any and all other insurance, and a copy of all policies pertaining to any of said property. (f) Whether any, and, if so, what, change in the title, use, occupation, location, possession, or exposures of said property and of any property within a hundred feet thereof.

(6) That the proofs of loss admitted in evidence in this case cannot be taken as proofs of the ownership of the property described in said policy of insurance at the time of the issuance thereof or of the alleged loss, for the purposes of this trial.

(7) That it is necessary for the plaintiffs to prove an assignment (or use) indorsed upon said policy as absolute and complete, and of the same nature as that alleged in the declaration.

(8) That all the evidence as to ownership of the property destroyed either at the time of the fire or at the time of the issuance of the policy, which was introduced by the plaintiffs in rebuttal, was inadmissible, and should not be considered by the jury.

SPRUANCE, J. (charging the jury). This action is brought in the names of Joseph Schilansky and Sarah Schilansky for the use of Bartholomay Brewing Company, and is brought by the proper parties; the said Schilanskys being the persons with whom the contract of insurance was made, and they having the legal right to sue upon it, notwithstanding the fact that the defendant company marked the policy for the use of said brewing company. It is not controverted that the paper admitted in evidence, dated December 9, 1901, purporting to be the preliminary proof of the total loss by fire of the insured property, was made by the plaintiffs on the day of its date, and was received by the president of the defendant company on the 11th day of the same month; which was within 30 days from the date of the alleged loss, and more than 90 days before the commencement of this action. It is contended by the defendant company that this paper was not such a detailed proof of loss as was required by the policy of insurance to entitle the plaintiffs to maintain this action. In considering the provisions of policies of insurance relating to matters required to be done by the insured subsequent to the loss, which do not alter the risk of the insurer or increase the liability, it is the prevailing prac-

tice of the courts to give to such provisions a construction favorable to the insured so far as the same can be reasonably done. It is the duty of the court to construe written papers which have been admitted in evidence, and to instruct the jury as to the meaning and effect of the same. We have carefully examined and considered the provisions of the policy of insurance sued upon in respect to the proof of loss required to be made before suit, and also the said paper of December 9, 1901, purporting to be the preliminary proof of the loss, and we are of the opinion, and now instruct you, that the requirements of the policy as to preliminary proof of loss have been substantially and sufficiently complied with. This is especially so in view of the uncontroverted testimony in the case that there was a total destruction of the insured property, and that all of the books, accounts, and papers of the plaintiffs were also at the same time destroyed. This paper which we have determined to be a sufficient preliminary proof of loss to meet the requirements of the policy in that regard is not to be considered by you as proving or tending to prove the ownership of the property at the time of the execution of the policy or at the time of the loss, or the fact of the loss, or the amount of the loss, or any other material fact in issue in this case. These latter questions, viz., as to the ownership of the property, the loss, the amount thereof, and the other material facts, are to be determined by you from the testimony of the witnesses examined before you in this case. If you find a verdict for the plaintiffs, it should be for the value of the property destroyed, not exceeding \$500 for each of the three classes of property described in the policy, and not exceeding \$1,500 for the whole, with interest thereon from a date 90 days after the delivery of the proof of loss to the defendant company.

Verdict for plaintiff for \$1,602.75.

(76 Conn. 141)

DIME SAV. BANK v. McALENNEY et al.
(Supreme Court of Errors of Connecticut. Oct. 7, 1903.)

EXECUTOR—PRESENTATION OF CLAIMS—
BARRED CLAIM—REVIVAL—SUFFI-
CIENCY OF EVIDENCE.

1. In an action against an executor on a claim against the estate, facts showing that at an unknown time, and in an unknown manner, knowledge of the claim passed, either with or without purpose, from plaintiff to the executor, were not sufficient to support a finding that the claim was exhibited within the meaning and intent of the law.

2. A claim against an estate, based on a mortgage note, which was not presented within the prescribed time, was not revived by a payment of interest thereon by the executor some months after the time for presentation had expired.

Appeal from Superior Court, New Haven County; Milton A. Shumway, Judge.

Action by the Dime Savings Bank of Waterbury against Paul F. McAlenney and oth-

¶ 1. See Executors and Administrators, vol. 22, Cent. Dig. §§ 766, 822.

ers. Judgment for plaintiff, and defendants appeal. Reversed.

February 29, 1888, Joseph Cassidy, of Waterbury, owed the plaintiff \$1,800, as evidenced by his note therefor, payable on demand, with interest semiannually in advance. On that day, to secure said note, he executed to the plaintiff a mortgage deed of a certain piece of land in his possession, which mortgage contained the usual covenants of a warranty deed. Said note is still owned by the plaintiff, and unpaid. January 19, 1890, Cassidy died, still possessed of the land, and leaving an estate, consisting mostly of realty, which estate amounted to more than \$20,000 over and above all debts and liabilities. He left a will, in which he gave all his property to the defendant McAlenney. McAlenney was named executor, and qualified. He inventoried the mortgaged premises, entered into possession of them, and settled the estate. Six months from and after February 5, 1890, were limited for the presentation of claims. In March, 1891, McAlenney began to pay the interest upon said mortgage note as it accrued, and continued to do so until March, 1895. During all this time both McAlenney and the plaintiff believed that the latter's mortgage was a valid one. Shortly after March, 1895, McAlenney became aware of a defect in his title which he had theretofore believed to be a good one, and so notified the plaintiff. Litigation was soon begun, which, in March, 1897, terminated in the successful assertion by another of a title paramount to that of Cassidy at the date of the mortgage, the acquisition by that person of the possession of the land, and an adjudication that Cassidy had no interest therein at the time of his mortgage to the defendant, and that said mortgage was void and of no effect. November 22, 1898, and again later, the plaintiff exhibited to the defendant, as executor, his claim against the estate for the amount of its damages arising from said eviction and from the breach of the covenant of warranty contained in said mortgage. The executor refusing payment, the present action was begun on said day. The substituted complaint upon which the trial was had alleged not only the exhibitions of claim above recited, but also that the plaintiff had exhibited its claim upon the note to the executor within the six months limited for the presentation of claims. The other pertinent facts are sufficiently stated in the opinion.

Nathaniel R. Bronson and Cornelius J. Danaher, for appellants. Edward F. Cole, for appellee.

PRENTICE, J. (after stating the facts). This action was originally brought against the defendant in his individual capacity. After a demurrer to the complaint had been sustained in part, a substitute complaint was filed. This having been demurred to with the same result as before, the defendant, in his capacity as executor, was cited in as a party defendant, and another complaint substituted. Another demurrer followed, which was over-

ruled. After the pleadings had passed through sundry other vicissitudes, unimportant to notice, an answer was filed, and the case went to trial to the jury. After the evidence was closed, the case was taken from the jury and submitted to the court for decision. The last substituted complaint, in a single count, was apparently framed for the purpose of furnishing a basis for a judgment either for the amount due upon the note or for the damages arising from a breach of the covenant of warranty contained in the mortgage deed, as the proof might warrant. No exception was taken to its form, and we therefore need take none. The court, from the evidence, found that no exhibition of a claim for a breach of warranty had been seasonably made, and therefore adjudged that the plaintiff was not entitled to recover for such breach. It was, however, found that within the time limited for the presentation of claims against the estate the plaintiff exhibited its claim under the note to the defendant executor. Judgment was accordingly rendered against him in that capacity for the amount of said note and interest.

It is difficult to discover from the record and the transcript of the proceedings which is before us, in connection with the appeal, what right the court had to render a judgment such as was rendered. In its demurrer filed to the second special defense in the answer the plaintiff expressly declared that the cause of action sued upon was one based upon the eviction, and none other. This statement was more than once reiterated during the trial. When the case was taken from the jury and submitted to the court for decision, it was conceded by all concerned that the plaintiff could have judgment only in the event that there had been a proper and seasonable presentation of the claim for the breach of warranty, and the sole question submitted was, as we read the record, upon this point. Upon this question the court ruled adversely to the plaintiff, but proceeded to find what counsel had disclaimed his ability to prove, to wit, a due presentation of a claim upon the note, and to render a judgment therefor. As the appellant, however, has, in his appeal, failed to clearly take advantage of this aspect of the case, we pass to a consideration of other questions involved.

The subordinate facts from which the court's conclusion that there had been a due presentation of the claim under the note was drawn are stated in the finding as follows: "It did not appear from the evidence precisely at what time, nor in what manner, the existence of the note secured by the mortgage given by said Cassidy to the plaintiff bank was made known to the defendant, or when or in what manner said note was presented to him, as executor, as a claim against the estate. I find that soon after administration of the estate was granted to the defendant the existence of the note as a claim against the estate was made known to him by said plaintiff bank, and the defendant began in March, 1891, to pay the interest on said note, and continued to pay

(76 Conn. 125)

the same until March, 1895; and as a conclusion therefrom I find the allegation in paragraph 18 of the substituted complaint to be true." An examination of this statement, taken in connection with the facts disclosed by the record, shows that the fact of exhibition within the meaning and intent of the law was found upon the following subordinate facts alone: (1) Knowledge on the part of the executor of the existence of the claim; (2) the derivation of such knowledge from the plaintiff; and (3) payment of interest on the note for the four years named. With respect to the first two of these subordinate facts, it will be noticed that there is no finding of any act done or word spoken by the plaintiff, or by any one in its behalf, which was either actuated by a purpose to put this note in a position to claim payment out of the estate, or which evidenced, or was intended to evidence, any such purpose. The finding is barren of fact or incident transpiring prior to the expiration of the time limited for the presentation of claims indicative of an intention on the plaintiff's part to establish for its claim a status which should entitle it to share in the division of the assets of the estate. All that appears is that at some time unknown, and in some way unknown, and either with or without purpose, knowledge of the existence of the claim passed from the plaintiff to the executor. This we have heretofore held is not enough. *Brown & Bros. v. Brown*, 56 Conn. 249, 14 Atl. 718, 7 Am. St. Rep. 307; *Pike v. Thorp*, 44 Conn. 450. So far as the interest payments are concerned, neither these nor anything in connection with or attending them could by any possibility amount to a seasonable exhibition of a claim based upon the mortgage note, or the legal equivalent of such exhibition, since the first payment was not made until seven months after the time limited for the presentation of claims had expired and the plaintiff's claim become barred. Conduct which began in March, 1891, was too late to be effective in accomplishing a presentation prior to August 6, 1890. As evidence of a prior presentation, these interest payments—made, as they were, by one who was the equity owner, as well as the executor, and made apparently for the most part, if not wholly, after the settlement of the estate—could have no significance, since they were more in consonance with an intention on the part of the parties that the mortgage loan was to remain a continuing one than one that it was to be paid out of the estate in settlement. It follows that the court, in finding the essential fact of a seasonable exhibition by the plaintiff to the defendant executor of its claim under the note, must have either misconceived the legal requirements of such an exhibition or found the fact without evidence.

There is error, and the judgment is reversed. The other Judges concurred.

HART v. KNAPP.

(Supreme Court of Errors of Connecticut. Oct. 7, 1903.)

HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—DEFENSE—INSTRUCTIONS.

1. Where, in an action for the alienation of a husband's affections, the jury was charged, substantially in the language of a requested instruction, that plaintiff could not recover if she approved of her husband's visits to defendant, in order that she might bring an action for damages, and consented to the adulterous intercourse, defendant cannot complain of the court's refusal to give the requested instruction.

2. Defendant, in an action for the alienation of a husband's affections, cannot complain of a refusal to direct the jury to consider certain specific evidence in determining whether the plaintiff connived at her husband's misconduct, where the jury was instructed to take into account all proper evidence on disputed points, and there is no showing of a prejudice to defendant's rights.

3. Where, in an action for the alienation of a husband's affections, plaintiff's evidence tended to show that defendant, being of full age, had committed adultery with plaintiff's husband, and had thereafter continued to live in adultery with him, and thus won his affections from plaintiff, the fact that the husband was the seducer would constitute no bar to the action.

Appeal from Superior Court, Fairfield County; Ralph Wheeler, Judge.

Action by Celia Hart against Anna O. Knapp. Judgment for plaintiff, and defendant appeals. Affirmed.

Howard W. Taylor, for appellant. Henry A. Purdy, for appellee.

TORRANCE, C. J. The complaint, among other things, alleges, in substance, that prior to its date the defendant had alienated the affections of Hart, the plaintiff's husband, committed adultery with him, caused him to abandon the plaintiff, and had ever since lived in adultery with him. All this the defendant denied. The evidence for the plaintiff tended to prove all the allegations of her complaint, and especially that the defendant had done all the things charged against her, "by her acts, blandishments, and seductions." The defendant herself did not testify in the case, but the evidence offered in her behalf tended to prove that, shortly after the marriage of the plaintiff to Hart, he remained away from the plaintiff for some time by reason of some disagreement; that prior to his acquaintance with the defendant he was of intemperate habits, and had taken the Keely cure in 1896; that he had on occasions remained away from home till late in the night, and had become neglectful of his wife, and failed to provide adequate support for her; that any affection that might exist on the part of the defendant for Hart was begun and prolonged by his advances and addresses; that there had been no criminal in-

1. See *Husband and Wife*, vol. 24, Cent. Dig. § 1113.

tercourse between the defendant and him; and that, after the plaintiff had separated from her husband, "she had met him and made some proposition looking towards his helping her get some money from the defendant." No exceptions to the evidence on either side appear to have been taken.

The only errors assigned relate to the action of the court in refusing to charge four certain requests made by the defendant. One of these relates to the claim that the plaintiff consented to and connived at the conduct of the husband with the defendant for the purpose of bringing an action against the defendant for damages, and the defendant says the court did not charge that this, if true, barred a recovery. This contention is not borne out by the record. The jury are distinctly and emphatically told, substantially in the language of the request, that, if the plaintiff "acquiesced and approved of her husband visiting the defendant with the intended purpose" imputed in the request, she could not recover, and that, if she consented to the adulterous intercourse between the defendant and Hart, she could not recover. There is nothing in the charge upon the point of connivance of which the defendant can justly complain. Another of the requests asked the court to tell the jury that, "in considering whether the plaintiff connived at the alleged misconduct of her husband," they might take into account certain specific portions of the evidence upon that point. The court did not in terms so charge, but the jury were properly instructed to take into account all proper evidence bearing upon disputed points in the case; and this, under the circumstances, was enough. It was their duty to do so without being told, and they undoubtedly did so. There is nothing to show that the defendant was harmed by the failure of the court to call the attention of the jury to that portion of the evidence stated in the request.

The other two requests were, in substance, as follows: If the jury find "that the defendant did not seduce the plaintiff's husband, but, upon the contrary, that the plaintiff's husband seduced the defendant, then the plaintiff cannot recover." If the jury find that the defendant was not the "active or aggressive party who brought about the adulterous intercourse between herself and the plaintiff's husband," but that "the defendant was the victim of the wiles, blandishments, and intrigues of plaintiff's husband," the plaintiff cannot recover. These two requests cover substantially the same grounds, and may be considered together. The court did not charge these requests, but upon this point charged as follows: "The defendant, if she committed adultery with the husband of the plaintiff, is liable for damages in the action, whether the husband sought and solicited the defendant, or the defendant the husband of the plaintiff." The court further added that "if the defendant

was an active, persuading party in the alienation of affection," that fact might be considered on the question of punitive damages. This part of the charge, although the defendant complains of it in the brief, is not assigned for error. Indeed, no part of the charge as actually given is assigned for error. The only errors assigned on this part of the case relate to the action of the court in refusing to charge the two requests last above mentioned. It may, perhaps, be doubted whether there was sufficient evidence in the case to justify the defendant in making these requests. Certainly the record discloses very little evidence of that kind. The evidence for the plaintiff tended strongly to show that the defendant "was an active or aggressive party" in bringing about the state of things complained of by the plaintiff, while apparently the only evidence to the contrary was that of the husband to the effect "that any affection that might exist on the part of the defendant" for him "was begun and prolonged" by him. For the purposes of discussion, however, we will assume that there was evidence of the kind in question before the jury. The plaintiff claimed to have proved her case, and, if that claim was sustained by the jury, she was entitled to recover in this action. *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027, 6 L. R. A. 829, 18 Am. St. Rep. 258. Her case was based upon these facts: That the defendant had committed adultery with Hart, had thereafter continuously lived in adultery with him at her home, and had thereby won his affections from the plaintiff and caused him to abandon her. To meet this case the defendant in these requests asked the court to say to the jury that if the husband seduced her, and she was the victim of his wiles, that would be a complete bar to this action, and the question is whether this is so. The question is one of first impression in this state, and, so far as we are aware, it has not been passed upon elsewhere in a case just like the present, and must therefore be determined upon principle rather than precedent. The lack of precedent is not surprising. The right of the injured wife to bring an action of this kind was not recognized in any of the states until recently, and is still denied in many of them. Our own case of *Foot v. Card*, supra—one of the pioneer cases of this kind—was decided in 1889. We are of opinion that the facts assumed in the requests, even if true, constitute no bar to the plaintiff's action. The defense embodied in the requests is based upon the hypothesis that the defendant is guilty of the things charged against her. She thus hypothetically admits that she committed adultery with Hart, has long lived in adultery with him at her home, and that, as a result of this, Hart has abandoned his wife for her. She was a widow, of full age, with full knowledge that Hart was the husband of the plaintiff. She hypothetically admits that she engaged with him

in a great wrong to the plaintiff. She knew that her course of conduct with him probably would lead him to abandon his wife. "There can be no surer means adopted to estrange husband and wife, and stifle all affection that ever existed between them, than the existence of improper relations, especially of a criminal nature, between one of them and another party." *Shufeldt v. Shufeldt*, 86 Md. 525, 39 Atl. 416. She now claims, in effect, that, because the husband seduced her, she is absolved from liability for her own wrongs against the wife. The word "seduce," when used with reference to the conduct of a man towards a woman, is "universally understood to mean an enticement of her on his part to the surrender of her chastity, by means of some art, influence, promise, or deception calculated to accomplish that object, and to include the yielding of her person to him." *State v. Bierce*, 27 Conn. 319. When, therefore, the defendant says that the husband seduced her, that is merely saying that he first solicited, enticed, and persuaded her to adulterous intercourse with him, and that she yielded to his persuasion. She yielded to him first, and then continued to live in adultery with him at her home, although, for aught that appears, she might easily have gotten rid of him, had she chosen to do so. In what she did with the husband, she did with full knowledge that it was wrongful, and that it would, as the plaintiff claims it did, result in harm to the plaintiff. The gist of the defense set up in the requests is that the defendant did a great wrong by the persuasion of the husband. We know of no rule of law, civil or criminal, that absolves her from liability for such wrong because of such persuasion. Solicitation, persuasion, enticement, temptation, however urgent, powerful, or alluring, do not constitute duress. In law, so far as regards the plaintiff, what the defendant did with Hart, she did of her own free will; and she is responsible to the wife for the results of her conduct with the husband, even if it be true that he persuaded her to do what she did, and "was the active or aggressive party" in procuring her to do so. In actions for criminal conversation, at common law, the fact that the wife was, so to speak, the seductress, was of no avail as a defense (*Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260; *Bigaouette v. Paulet*, 134 Mass. 125, 45 Am. Rep. 307; *Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442; *Moore v. Hammons*, 119 Ind. 510, 21 N. E. 1111; *Kroessin v. Keller*, 60 Minn. 372, 62 N. W. 438, 27 L. R. A. 685, 51 Am. St. Rep. 533), although in some cases it has been admitted as bearing upon the quantum of damages (*Sieber v. Pettit*, 200 Pa. 58, 49 Atl. 763). Some of the reasons given for applying such a rule in such actions may not exist in actions brought by the wife to vindicate her right to the society and affections of her husband, but it is difficult to see why an analogous rule should not be applied in a

case like the present to the defense that the husband was the seducer. It may be that in cases like that of *Kroessin v. Keller*, supra—an action by a married woman against one of her own sex simply for an act of adultery with the husband, and alleging neither alienation of his affections, nor neglect nor abandonment of the plaintiff—the fact that the husband was the seducer should be held to be a defense, as is suggested in that case; but we have no occasion here and now to decide such a question, for the case at bar is not at all like the Minnesota case. Upon principle, we think the facts set up in the requests do not constitute a defense in the present case, and we know of no decision of any court of last resort to the contrary.

There is no error. The other Judges concurred.

(38 Md. 22)

SAFE DEPOSIT & TRUST CO. v. TURNER et al.

(Court of Appeals of Maryland. April 9, 1903.)

PARTNERSHIP—SHARING LOSSES—EVIDENCE—PRESUMPTIONS—ACCOUNTING—PRODUCTION OF BOOKS—SECONDARY EVIDENCE.

1. In an action by an executor for an accounting of the affairs of a partnership between defendants and testator, defendants claimed that the deceased had agreed that the profits of the firm's business should be equally divided, but that each of defendants should be entitled to draw \$2,500 a year, and that all losses which would reduce their shares below that sum should be borne by deceased. Evidence examined, and *held* not to substantiate defendant's claim.

2. Where there is no specific agreement between partners, the law presumes their interest to be equal.

3. Entries on the books of a firm as to the sharing of profits or losses, when acquiesced in, are as conclusive of the rights of the partners as if they had been prescribed in a regular contract.

4. In an action by an executor for an accounting of the affairs of a partnership between defendants and testator, it appeared that one of defendants had produced from his own possession balance sheets taken from the books of the firm, and that he had acknowledged the indebtedness with which they showed him chargeable, and that he had written letters relative to the business in which he admitted the indebtedness. *Held*, that he could not be heard to say that the balance sheets were erroneous.

5. The statements of a partner, when informed that a balance sheet taken from the firm's books showed him to be indebted in a certain sum, that, if they were in the handwriting of the bookkeeper, who, as a matter of fact, made them, they must be correct, could not of itself amount to an admission of a specific indebtedness appearing thereon, the sheets not being present at the time.

6. The failure of a partner to inspect the firm books and object to any charges against him amounts to such an acquiescence in the entries therein relating to himself or his relation to his partners as to bind him by them in an action for an accounting.

7. In an action against partners for an accounting, trial balances and balance sheets taken from the firm books, in connection with the testimony of the bookkeeper who made

¶ 2. See Partnership, vol. 33, Cent. Dig. § 124.

them, and who identified them, were admissible as secondary evidence to prove the contents of the books, which were shown to have been lost, and not found after a diligent search.

8. Where, in an action against partners for an accounting, they denied in their answers that they had the books in their possession, and stated that they did not know where they were, it was not necessary to serve them with notice to produce the books in order to warrant secondary evidence of entries therein.

9. Where a defendant relies on a certain contract in an unsworn answer, and, though put on the stand by the opposite party, does not attempt to support the allegations of his answer by his testimony, a strong presumption is raised to the effect that no such contract existed.

10. In an action by an executor to recover of defendants on an accounting of a partnership between them and testator, who was their father, it appearing that the father had been lenient in respect to enforcing the demands against them in his lifetime, interest would not be allowed on the sums due from the date of the ascertainment and entry on the books of the firm of the balances respectively due by them.

Appeal from Circuit Court of Baltimore City; George M. Sharp, Judge.

Action by the Safe Deposit & Trust Company, as executor of the will of Joshua J. Turner, against Joseph J. Turner and others. From a decree for defendants, complainant appeals. Reversed.

Argued before McSHERRY, O. J., and BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ.

W. Cabell Bruce and John Prentiss Poe, for appellant. Bernard Carter, Andrew C. Trippe, and A. Leo Knott, for appellees.

SCHMUCKER, J. The appellant corporation, as executor of the last will of the late Joshua J. Turner, filed the bill in this case against the appellees for an account of the affairs of a partnership which existed between them and the testator in his lifetime. The bill, after alleging the death of the testator leaving a last will, of which a copy is filed as an exhibit, and the qualification of the plaintiff as executor, avers that the testator and the defendants, who are his two sons, conducted the business of manufacturing and selling fertilizers as copartners from January, 1883, to February, 1888, and that at the dissolution of the firm both of the defendants were largely indebted to the testator; that the defendant Joseph J. Turner owed him on account of the partnership about \$2,600, and the defendant Louis I. Turner owed him on the same account about \$5,000, but there had been no ascertainment of the precise amount of such indebtedness, nor any final accounting of the affairs of the firm, although all debts due by it had been paid, and all debts due to it collected. It is further alleged in the bill: That after the dissolution of the firm its books and papers were left at its former place of business on Pratt street, in Baltimore, in the custody of the defendant Joseph J. Turner, who continued to conduct the fertilizer business at that place, with F.

A. Luchesi, the former bookkeeper of the firm, as his partner. That the plaintiff, after the grant to it of letters testamentary, made demand upon the defendants for the production of said books and papers, but they did not produce them; Joseph J. Turner, in whose possession they had been left, asserting that they had been lost and could not be found. That the defendant Louis I. Turner had produced out of his possession, and permitted the plaintiff to inspect and copy, original trial balances and balance sheets of the firm's business down to December 31, 1887, made by F. A. Luchesi, its bookkeeper, which showed that at that time Joseph J. Turner was indebted to the firm to the extent of \$23,900, or thereabout, and Louis I. Turner was indebted to it to the extent of \$4,900, or thereabout. The copies made by the plaintiff of the trial balances and balance sheets are filed as exhibits with the bill. The prayer of the bill is for an account, and for further relief, and certain interrogatories addressed to the defendants were appended to it. The bill was not verified, nor did it call for answers under oath to it or to the interrogatories.

The following clause appears in the will of the late Joshua J. Turner, the appellant's testator: "Such sums of money as my said sons or the husbands of my said daughters may owe to me are to constitute a part of the principal of my estate, and no payments are to be made to either of my sons, or to my daughters, or either of them, until my said sons and my said daughters' husbands shall have fully paid and satisfied the same."

Both of the defendants answered the bill and the interrogatories. In their answers they admit that the partnership existed between them and their father for the greater portion of the time mentioned in the bill, and that at its dissolution its books and papers were left in the Pratt street office, which thereafter remained in the possession and occupancy of the defendant Joseph J. Turner and his partner, F. A. Luchesi. Joseph J. Turner also admits that demand was made upon him by the plaintiff for the books, and that he failed to produce them, asserting that he had not seen them for more than a year, and did not know where they were. Both defendants deny that the trial balances and balance sheets made by Luchesi show the true state of the partnership accounts, and they assert in a general way that at the dissolution of the firm there was a full settlement of accounts between the partners, but do not state what were the nature and terms of the alleged settlement. They both deny that there was anything due from them to their father at the time of his death. Both of the answers further aver that, although no written articles of copartnership were ever executed between the defendants and their father, he agreed with them that the profits of the firm's business should be equally divided between the three partners, but that

each of the two sons should be entitled to draw from the business for the support of himself and his family, in weekly installments, the sum of \$2,500 per annum, and that all losses incurred in the business which would reduce the sons' shares of the profits below \$2,500 per annum, each, should be charged to and borne by their father. This arrangement the defendants, in their answers, say was consented to by him in order to compensate them for their services in connection with the business, and to continue under family control the enterprise with which his name had for many years been identified. The answer of Joseph J. Turner also avers that in 1885 his father agreed that he might draw out of the business such sums of money in addition to \$2,500 per annum as he found necessary for the support of his family, and that any excess thus drawn by him over his share of the profits should also be charged to and borne by the father.

Testimony was taken by the plaintiff in support of the allegations of the bill, but no witnesses were called on behalf of the defendants. B. F. Newcomer, the president, C. R. Barnett, the vice president, and J. W. Marshall, the secretary of the plaintiff, all testified that at an interview held after the death of Mr. Turner, Sr., with the defendant Louis I. Turner, the latter stated to them that he was indebted to his father's estate on the partnership account something over \$4,000, and that his brother, Joseph J. Turner, was indebted to it on the same account something over \$20,000. He further stated to them that he had trial balances and balance sheets of the firm in his possession, which would show how the partners stood, and at their request he produced those for the years 1886 and 1887, and permitted them to make the copies of them which are filed with the bill as exhibits. The last of these balance sheets shows an indebtedness to the firm as of December 30, 1887, from Joseph J. Turner, of \$23,906.26, and from Louis I. Turner of \$4,901.33. It does not appear that Louis I. Turner, when producing these trial balances and balance sheets, said or suggested that either of them was in any respect inaccurate or improper, but he, by his conduct and declarations, affirmed them, and, according to Barnett's testimony, he offered to settle his indebtedness as it appeared upon them. Barnett and Marshall further testified that Louis I. Turner told them that the books of the firm, which were at the old place of business on Pratt street, then occupied by Joseph J. Turner and F. A. Luchesi, would disclose the entire indebtedness, and that they thereupon went to the old office, and asked for the books, but failed to get them, as, after a diligent search of the building, with the permission and assistance of Joseph J. Turner and Luchesi, the books could not be found.

Two letters, written on February 15, 1888, by Louis I. Turner—the one to his sister

Mrs. Helen Kelley, and the other to his sister Mrs. Lillie Munson—were also put in evidence. The material portions of these letters are as follows:

"Baltimore, Md., February 15, 1888.

"My Dear Helen: I suppose you see by today's Sun and American, the Sun I know you take, the announcement of Pa's withdrawal from business, and the formation of a new firm by J. J. Turner, Jr., and Fred. A. Luchesi, under the old firm name as the successors, etc., of Pa. * * * I have not, as you probably know, been at the store for a year, but continued all the time a member of the firm ever since I discovered that the bookkeeper and Joe were desirous of getting together, with, of course, the intention of using Pa's capital, etc. * * * I deem it my duty to write to you, being my sister, and having both a legal and moral right to know of such matters, and inform you of exactly the state of affairs looked at from a financial standpoint, as you no doubt know the principal cause of all the trouble has been my protest against Joe's continued overdrawing at the store. My indebtedness to Pa, in consequence of losses, which we all had to bear is on January 1, 1888, \$4,901.33, which I hope some of these days to repay in full. J. J. T., Jr., total indebtedness is to January 1, 1888, \$23,906.26, together with \$2,700, which he realized upon 25 shares of German-American bank stock, about which you know I have no comments to make. * * * I am, yours as ever,

"L. I. Turner."

"Baltimore, Feb. 15th 88.

"My Dear Lillie You will see by enclosed slips from the Balto. Sun of today of Pa's withdrawal from business and the formation of a new firm as the successor of the old by J. J. T. Jr. & Fred. A. Luchesi. * * * I deem it my duty to acquaint you of matters as you have both a moral and legal right to know. * * *

"The financial facts as taken from our balance sheet of the business Jan 1st 1888, I give below. I am indebted to Pa, in consequence of losses which were made in '86 & '87 of which of course I had to bear my proportion is \$4,901.33 which I hope some day to repay. J. J. T. Jr.'s indebtedness is \$23,906.26 besides \$2,700 which he received from the sale of 25 shares of German American Bank Stock about which you know. His indebtedness to Pa from the former business with (Kelly & Co.) is about \$8,000. I make no comments I simply state facts which you can take as you please. I state them because I believe you should know them. * * *

"Yours as ever, L. I. Turner."

Marshall, the secretary of the plaintiff, also testified that he told the defendant Joseph J. Turner that he was shown to be indebted to his father by the balance sheets prepared by Luchesi, whereupon Turner replied

"that, if they were in the handwriting of Luchesi, they must be correct, because Luchesi always knew what he was doing."

The defendants were called by the plaintiff as witnesses, and interrogated as to the fact of the partnership, and the persons who composed it, and the whereabouts of its books and papers, and they both testified, in substance, that the books and papers had disappeared, and could not be found. Joseph J. Turner also testified that he had never seen a balance sheet of the business, and could not say whether or not it had been profitable, as he attended to the manufacturing branch of it.

A decree for an accounting was passed in the case on January 28, 1902, and the plaintiff called F. A. Luchesi as a witness before the auditor. He identified the trial balances and balance sheets as the original ones which he had prepared while bookkeeper of the firm, and testified that the trial balances had been taken by him on or about their several dates from the books of the firm, and that the balance sheets were made out from the trial balances, and that they correctly showed the state of accounts between the partners as they appeared upon the books of the firm. He also testified that Joseph J. Turner was charged on the ledger of the firm with an indebtedness of \$23,906.26, and Louis I. Turner was charged thereon with an indebtedness of \$4,901.83, being the same amounts which appeared to be due to the firm by them, respectively, on the balance sheet of December 31, 1887. Luchesi further testified that the books were kept upon the theory that the losses were to be borne in equal proportions by the three partners, and that, if an operative and binding partnership agreement existed providing for a different distribution of the losses, the books and balance sheets would not show the true state of the accounts. He also said that Mr. Turner, Sr., told him that he never expected his sons to pay him what they owed him, and that in 1885 or 1886 he exhibited to the witness an unexecuted paper, purporting to be an agreement between him and his two sons, providing that the sons should each receive \$2,500 per annum from the business without any liability on their part for its losses; that, after the witness was shown this paper, he asked Mr. Turner, Sr., in reference to the matter, and how he should thereafter make out the accounts, and that Mr. Turner directed him to let the books go on as they were, and they (the partners) would ultimately arrange matters between them; and that the witness therefore continued to keep the books in the same manner that they had been kept before, and that he was never directed to change the method of keeping them. This witness, in his testimony, at different times made allusion to what he designates as the agreement or arrangement between Mr. Turner and his sons, and said for that reason that

the accounts of the partners might be regarded simply as memoranda of what they had drawn out; but he admitted, when pressed in that respect, that he personally knew of no operative agreement between the partners as to the terms of their copartnership.

The auditor returned three accounts designated "A," "B," and "C." Account A adopted the balance sheets as correct, and found the defendants to be indebted to the plaintiff in the amounts of the debits appearing against them on the last balance sheet, with interest added thereto. Account B is stated upon the theory that the partnership existed during the years 1885 and 1886, and that by the partnership agreement the defendants were entitled to draw \$2,500 per annum, with no liability for any losses which might interfere with their right to draw that amount. Account C is stated upon the same theory as Account B, except that the partnership is treated as having continued until the end of 1887. The circuit court rejected Accounts A and B, and ratified Account C, and the plaintiff appealed.

We do not agree with the conclusion reached by the learned judge below. The evidence fails to convince us of the existence of any such agreement between the partners as that set up in the answers of the defendants, securing to each of them the right to draw out from the moneys of the firm, which had been entirely contributed by the father, the sum of \$2,500 per annum, in any event, with protection against the losses of the business. Where there is no specific agreement between partners as to their respective interests in the profits and losses of the firm, the law presumes them to be equal, unless, from the facts and circumstances of the case, it is apparent to the court that some other division was intended by the members of the firm. *Fleischmann v. Gottschalk*, 70 Md. 529, 17 Atl. 384. It is conceded that no articles of copartnership were ever executed in the present case, and the defendants assert, and the entries on the firm books as proven by Luchesi show, that the profits were equally divided between the three partners. Under these circumstances the presumption is strong that the losses also were to be borne equally by the partners, and the evidence relied on to establish a different rule of their distribution should be clear and convincing. To our minds, the preponderance of the evidence appearing in the record is the other way. The books of the firm, which were always so kept as to charge the losses as well as to credit the profits in equal portions to the three partners, were in charge of an experienced bookkeeper. When that bookkeeper, having been shown the unsigned draft of an agreement of the character set up in the answers, inquired of Mr. Turner, Sr., how the books should be kept in that respect, he was directed to go on and keep the books as he had theretofore done.

He continued to so keep the books and make out the balance sheets in such manner as to charge each partner with the money drawn out by him, and also one-third of the losses. The record furnishes no evidence of protest or objection by either of the sons to the entries upon the books of these charges against them, or to the theory upon which the books were kept. They must, therefore, be regarded as having acquiesced in the entries and the theory of distribution of profits and losses therein involved. It is well settled that entries upon the books of a firm as to shares of profits or losses, when acquiesced in, are as conclusive of the rights of the partners as if they had been prescribed in a regular contract. *Fleischmann v. Gottschalk*, 70 Md. 533, 534, 17 Atl. 384; *Wheatley & Dorsey v. Wheeler*, 34 Md. 65.

As to the defendant Louis Ignatius Turner, the record shows not only an acquiescence in the correctness of the balance sheets charging him with an indebtedness of \$4,901.33 to the firm as of December 30, 1887, but also a deliberate affirmance of the accuracy of the balance sheets, and an open acknowledgment of the indebtedness with which he was therein charged. After producing these sheets out of his own possession, and delivering them to the officers of the appellant as exhibiting the true state of accounts between the partners, and offering to settle his indebtedness on that basis, and after writing the letters appearing in the record to his sisters, whose interests are represented by the plaintiff in this litigation, he cannot, upon the evidence appearing in this case, be heard to say that the balance sheets were erroneous, and that he did not owe the debt with which he is therein charged.

The record does not contain evidence of any distinct admission by the other defendant, Joseph J. Turner, of the validity of the charges against him appearing upon balance sheets, or of the correctness of the theory upon which the books were kept from which the sheets were prepared. We would not regard the mere statement on his part that, if Luchesi prepared the sheets, they must be correct, as of itself amounting to an admission of a specific indebtedness appearing thereon, the sheets not being present at the time. We, however, regard him as concluded by his acquiescence in the state of the firm's books upon which he was regularly charged with his withdrawals of money, and also with one-third of the losses; those two classes of items composing, with interest thereon, the gross charge of \$23,906.26, with which he is debited upon the last balance sheet. It is true he says in his evidence that he never saw a balance sheet, and that he had no occasion to look at the books, but he does not say or intimate that he was ever denied access to the books, or in any manner prevented from examining them and informing himself as to their contents. Under those circumstances, the failure, if such there

were, on his part, to inspect the books, and to object to any charges therein against him, that were in his belief improper, amounted to such an acquiescence in the entries therein relating to himself or his relation to his partners as to bind him by them. Luchesi's testimony is positive that the entry of the debit against Joseph J. Turner of \$23,906.26 did appear upon the books of the firm.

The trial balances and balance sheets, taken in connection with Luchesi's testimony as to the entries upon the books of the firm, were admissible as secondary evidence to prove the contents of the books, which were proven to have been lost, and not found, although a diligent search for them was made at the place where they were last seen. Nor was it necessary for the plaintiff to give notice to produce the books in order to lay a foundation for the introduction of this testimony. Both defendants admitted in their answers that they had not the books in their possession, and did not know where they were. Under such circumstances it has been repeatedly decided that the notice to produce will not be required. *Union Banking Company v. Gittings*, 45 Md. 194; 1 Taylor on Evid. 449, § 425; *Rex v. Haworth*, 4 C. & P. 254; *Foster v. Pointer*, 9 C. & P. 718. It may be conceded that if the books themselves, as well as the balance sheets, were before us, the latter could not be relied upon to prove the contents of the former, which, being present, would afford the best evidence of their contents; but when the books have been lost or mislaid, and cannot be found, the trial balances taken from the books by the bookkeeper, and the balance sheets made up by him therefrom, accompanied by his testimony that the charges appearing thereon against the several partners appeared also upon the books, are admissible as secondary evidence of the contents of the books and the theory and plan upon which they were kept. This proposition is applicable with especial force in this case against the defendant Joseph J. Turner, because the books of the firm are shown to have been left, upon its dissolution, in his possession, and under his control, and he has failed to respond to the demand for their production.

The defendants are the only living parties to the alleged agreement with their father exempting them from liability for the losses of the firm, if such an agreement was in fact ever made; and yet they contented themselves with alleging its existence in rather general terms in their unsworn answers, and neither one of them, although they were put upon the stand by the opposite party, attempted to support the allegations of his answer in that respect by his testimony. Such conduct has been repeatedly held by this court to raise a strong presumption against the party who withholds the evidence which he has it in his power to produce, and has even been held to amount to a confession of the untruth of the allegations which he thus

fails to support. *Hiss v. Welk*, 78 Md. 452, 23 Atl. 490; *Zimmerman v. Bitner*, 79 Md. 128, 28 Atl. 820; *Berger v. Bullock*, 85 Md. 443, 37 Atl. 368; *Keller v. Gill*, 92 Md. 195, 48 Atl. 69.

The only testimony in the record tending to support the defendants' assertion that they had an agreement with their father restricting their liability as partners is that of Luchesi, who admits that his knowledge upon the subject was limited to what Mr. Turner, Sr., told him. His testimony, carefully examined, proves no more than that the elder Mr. Turner had in his mind an inchoate purpose to release his two sons from a certain portion of what he himself designated as "what they owed him," and that he went so far on one occasion as to have prepared an agreement, which, if it had been executed, would have effected such release. There is, however, no evidence that this agreement was ever signed by any of the parties named in it; and, as Mr. Turner, Sr., refused to permit the firm's method of bookkeeping to be so changed as to conform to the terms of the proposed agreement, it is evident that he must have abandoned any intention to relieve his sons from their partnership obligations to him. It is significant, in this connection, that while he, in his conversation with Luchesi, asserted that he did not expect his sons to pay to him their indebtedness, he, by his will, executed in October, 1886, and never afterwards changed, made the payment of that indebtedness a condition precedent to their participation in the distribution of his estate.

Upon the whole record we are of opinion that the appellant is entitled to a decree against the appellee Joseph J. Turner for \$23,906.28 and against the appellee Louis I. Turner for \$4,901.33, those being the sums with which they were charged on the firm's books as of December 31, 1887, there being neither allegation nor proof that the state of the accounts was changed by the remaining month during which the partnership may be regarded as having continued. In view of the whole situation out of which the indebtedness of the appellees to their late father arose, and of the lenient disposition manifested by him in respect to its enforcement against them in his lifetime, we have not allowed interest thereon since the date of the ascertainment and entry upon the books of the firm of the balances respectively due by them.

The appellees, in their argument, laid stress upon the apparent similarity between the present case and those of *Baker v. Safe Deposit Co.*, 90 Md. 744, 45 Atl. 1028, 78 Am. St. Rep. 463, and *Falconer v. Kirby*, 90 Md. 594, 45 Atl. 469, and claimed that these cases afforded precedents for the maintenance of their contention in the present one. It is sufficient to say in that connection that each of those cases was decided upon a special set of facts and circumstances established

by evidence which took them out of the operation of the rules of law applicable to ordinary copartnerships.

Decree appealed from reversed, with costs, and case remanded for decree in accordance with this opinion.

(206 Pa. 330)

KASE et al. v. BURNHAM et al.
(Supreme Court of Pennsylvania. May 25, 1903.)

APPEAL—ASSIGNMENTS OF ERROR—BILL IN EQUITY—EVIDENCE—LACHES.

1. An assignment of error, including the rulings on a large number of different requests for findings of law and fact, is in violation of the rules of the court, and will not be considered.

2. A bill to recover bonds of a corporation, where plaintiff merely shows that they were issued to him, as an officer of the corporation, to be used in making purchases for it, but fails to show ownership, cannot be sustained.

3. A bill filed by the owner of collaterals to recover them, on the ground that the debt has been paid, which is not brought until 26 years from the time the right of action accrued, cannot be sustained, though the delay was owing to plaintiff's difficulty in establishing the title to the collaterals as against a third party.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by J. Hervey Kase and others against George Burnham and others. Decree for defendants, and plaintiffs appeal. Affirmed.

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Carrie B. Kilgore and James Scarlet, for appellants. James Wilson Bayard and John G. Johnson, for appellees.

PER CURIAM. The first and third assignments of error are in total violation of the rules of court, as each of them includes the rulings of the judge below on a large number of different requests for findings of fact and law. The second assignment is to the rejection of the record of the suit between Kase and the Danville, Hazleton & Wilkesbarre Railroad Company, as an evidence of the title of Kase to the bonds now in controversy. This record was so plainly *res inter alios acta* that its exclusion does not require discussion, and we might well dismiss the appeal without further notice. But to put an end to this protracted and useless litigation, it may be well to add a few words on the general merits. This is a bill filed in 1899 to recover certain bonds pledged by plaintiff in 1870 as security for promissory notes due to the predecessors of defendants for locomotives furnished to the Danville, Hazleton & Wilkesbarre Railroad Company. The first step, of course, was for the plaintiff to prove his ownership of the bonds, and this there was an utter failure to do. So far as can be ascertained from this very defective and disorderly paper book, the bonds were issued to Kase as an officer of the railroad company, to be used in making pur-

* ¶ 1. See Appeal and Error, vol. 3, Cent. Dig. § 3012.

chases or raising funds for it, and in this particular instance they were pledged as security for a debt of the company. Prima facie, therefore, they were the bonds of the company, and not of the plaintiff. The transactions, however, between Kase and the railroad company were complicated, and led to a protracted litigation, finally resulting, in 1898, in a decree, which, however, was res inter alios acta as to the present case, and there was no other evidence of plaintiff's title. But plaintiff's case was equally defective in another respect. He sued as owner of collateral, to recover it on the ground that the debt secured by it had been paid in full. If the facts were so, he had a good cause of action at law. If he had brought suit at law, he would have been barred by the statute of limitations, and the lapse of 26 years was equally fatal in equity unless clearly excused. The excuse offered was the litigation over the title with the railroad company. This excuse was inoperative in any respect as against defendants. It amounted to no more than that during the long interval plaintiff's title was doubtful or difficult to prove. This was no fault of defendants, and no reason why they should be called upon to answer, after such lapse of time, with its changes in the partnership, death of parties and witnesses, and loss of documentary evidence. As already said, they took the bonds, prima facie belonging to the railroad company, as security for a debt admittedly owing by the company. When they sold the notes to the Pennsylvania Railroad Company as lessees of the debtor company, and transferred the collateral to the purchaser, there was nothing to give them notice that the transaction was not in every way regular and legal. Being without fault in that respect, there was nothing to prevent the operation of the statute of limitations in their favor, and in such cases equity follows the law.

Decree affirmed, with costs.

(206 Pa. 370)

McCONNELL v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. May 25, 1903.)

APPEAL—OBJECTIONS TO CHARGE.

1. Where the only errors assigned were to the charge, and no exceptions were taken below, the appeal will be quashed.

Appeal from Court of Common Pleas, Philadelphia County.

Action by one McConnell against the Pennsylvania Railroad Company. Judgment for defendant, and plaintiff appeals. Appeal quashed.

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Edwin Jaquett Sellers, for the motion. Francis G. Gallagher, opposed.

PER CURIAM. It appearing that no exception was taken to the charge of the court

below, and the only errors assigned here being to the charge, the appeal must be quashed. *Curtis v. Winston*, 186 Pa. 492, 40 Atl. 786.

Appeal quashed.

(206 Pa. 329)

BEHL v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. May 25, 1903.)

DEFECTIVE STREETS—LIABILITY OF CITY—QUESTION FOR JURY.

1. In an action against a city for the death of plaintiff's husband, her evidence tended to show that he was thrown from his wagon by the wheel slipping into a rut by a railroad track, while the evidence of defendant was that the wheel had caught in the frog of the track. *Held*, that the question of defendant's negligence was for the jury.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Annie Behl against the city of Philadelphia. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Chester N. Farr, Jr., and Samuel Chew, Asst. City Sols., and John L. Kinsey, City Sol., for appellant. John M. Vanderslice and Clarence Vanderslice, for appellee.

PER CURIAM. The jolt of the wagon by which plaintiff's husband was thrown off might have occurred either from the wheel slipping into the hole or rut beside the railway track, as testified to on the part of the plaintiff, or by its having caught in the frog of the railway track, and given the wagon a sudden twist, as claimed by the defendant. There was positive testimony both ways from witnesses who were present at the time. The case was therefore clearly for the jury, notwithstanding the fact that the witnesses for the defense were the most numerous.

Judgment affirmed.

(206 Pa. 323)

WILLEY v. BROWNE.

(Supreme Court of Pennsylvania. May 25, 1903.)

PLEDGE—NOTES AS SECURITIES—EFFECT OF DEFAULT.

1. Where a bankrupt executes composition notes with an agreement that if any note should be in default all should become due, and the claim of a creditor taking the notes is assigned to a third person, and such creditor takes in payment the notes of the third person and retains the composition notes as security, he cannot proceed on the composition notes until after default on the other notes.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Francis Willey, trading as Francis Willey & Co., against William Browne. From an order discharging a rule for judgment for want of a sufficient affidavit of defense in an action on promissory notes, plaintiff appeals. Affirmed.

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 1516.

Defendant filed an affidavit of defense as follows: "The promissory notes upon which suit is brought were executed in pursuance of a composition in bankruptcy offered by the firms of William Browne & Sons and the Phoenix Mills Company, of which the defendant was a member. The said Francis Willey & Company, who were creditors of said bankrupts, opposed the said composition, and upon its confirmation by the United States District Court for the Eastern District of Pennsylvania appealed to the Circuit Court of Appeals. The said Francis Willey & Company were represented in said proceedings in bankruptcy and in the appeal taken from the said confirmation by Messrs. Greenwald & Mayer, their counsel in the present proceedings. After the taking of the said appeal a settlement was had with the said plaintiff, through his attorneys, Messrs. Greenwald & Mayer, who were duly authorized to act in the premises, whereby, in consideration of the payment by one Charles F. Clarke of the sum of \$8,500 in cash, and the execution and delivery of five promissory notes executed by the said Charles F. Clarke and indorsed by the Schuylkill Worsted Mills Company, the said appeal was discontinued, and the plaintiff assigned to the said Clarke all claims and demands which he had or might have against the estate of William Browne & Sons or the Phoenix Mills Company or any of the partners composing said firms, including the said promissory notes now in suit. It was further agreed that the said Greenwald & Mayer should retain all the composition notes given to the appellants in said proceedings, in order to secure the payment of the said notes given by said Clarke, but by a supplemental agreement it was expressly stipulated that the notes now in suit should be held only to secure the payment to said Greenwald & Mayer of the sum of \$1,750, and that all other moneys received thereon should be the property of the said Charles F. Clarke. The said settlement and supplemental agreement are evidenced by two writings, copies of which are hereto annexed and made part hereof. Deponent avers that the said Charles F. Clarke by assignment dated April 1, 1902, a copy of which is hereto annexed and made part hereof, assigned and transferred to this deponent all his (the said Clarke's) interest, right, and title in the said promissory notes upon which this suit is brought. Deponent has been notified by Messrs. Greenwald & Mayer, and believes, and therefore avers, that the said sum of \$1,750, to secure the payment of which the said notes were held by them, is payable to them in their own right and for their own use, and that the said Francis Willey & Company have no interest therein, and have no title to or interest in the said notes for which this suit is brought. Deponent further avers that in addition to the sum of \$1,415.44, which the said Greenwald & Mayer have already received by way of dividend on said notes out of the proceeds of certain property conveyed

in trust to secure their payment, as set forth in the statement of claim, the said Greenwald & Mayer have received, or are now entitled to receive, a further dividend, which will be sufficient to make up the sum of \$1,750, for which said notes are held."

The agreements and assignments referred to in the affidavit of defense were as follows:

Copy of Agreement.

"This agreement entered into this twenty-eighth day of September, A. D. 1901, between Charles F. Clarke of the one part, and Francis Willey & Company, Hecht Liebeman & Company, Bach Becher & Company, Mawson Brothers, and Brown & Adams, of the other part (said Francis Willey & Co., Hecht Liebeman & Co., Bach Becher & Co., Mawson Bros. and Brown & Adams, being appellants in a certain appeal now pending and undetermined in the Circuit Court of Appeals for the Third Circuit, No. 16, September term, 1901), witnesseth:

"First. In consideration of the payment to Messrs. Greenwald & Mayer, attorneys for the said appellants, of the sum of eight thousand five hundred dollars, and of the execution and delivery of the notes hereinafter mentioned, the said appeal shall be discontinued of record without costs to either party.

"Second. The notes hereinafter mentioned are drawn by the said Charles F. Clarke to the order of the Schuylkill Worsted Mills Company and indorsed by the said company, in pursuance of a resolution of the directors thereof, duly passed and bear date September 26th, 1901. Said notes are for the following amounts and terms:

"One for \$3,217.51 payable three months after date.

"One for \$3,217.51 payable six months after date.

"One for \$1,066.44 payable four months after date.

"One for \$1,079.44 payable four months after date.

"One for \$2,748.00 payable three months after date.

"Third. The said parties of the second part in consideration of the premises hereby assign unto the said Clarke all claims and demands which they, or any of them have, or may have, against the bankrupt estate of William Browne & Sons and the Phoenix Mills Company, or against any of the partners composing said William Browne & Sons and the Phoenix Mills Company.

"Fourth. As collateral security for the payment of the notes above mentioned, Messrs. Greenwald & Mayer shall be entitled to receive and retain the several composition notes offered by William Browne to the said parties of the second part, and upon the payment of all the notes mentioned in the second clause, all of the said composition notes shall be delivered to said Clarke.

"Fifth. If default shall be made in the payment of any of the notes executed by

Clarke, the said composition notes shall be retained until the parties of the second part shall have received thirty-three and one-third per cent. of their respective claims except Francis Willey & Co., who are entitled to receive two thousand dollars (\$2,000) cash over and above the said thirty-three and one-third per cent.

"Sixth. As further collateral security for the payment of said notes, the said Clarke agrees upon the issue of certain bonds of the Schuylkill Worsted Mills Company, to which he is entitled for services rendered to deliver to said Greenwald & Mayer, as trustees for the parties, bonds covering twenty-five per cent. of the claims of the parties mentioned as appellants in the suit now pending, which bonds shall be returned to said Clarke upon the payment of the notes given by him."

Copy of Supplemental Agreement.

"Whereas a certain agreement was entered into on the 28th day of September, 1901, wherein Charles F. Clarke, Francis Willey & Co., Hecht, Lieberman & Co., Bach Becher & Co., Mawson Bros., and Brown & Adams are parties; and it is therein agreed by paragraph four (4) in said agreement, as follows: 'As collateral security for the payment of the notes above mentioned, Messrs. Greenwald & Mayer shall be entitled to receive and retain the several composition notes offered by William Browne to the said parties of the second part, and upon the payment of all the notes mentioned in the second clause, all of the said composition notes shall be delivered to said Clarke.'

"It is further agreed, that of the composition notes given by the said William Browne, there shall be retained by Greenwald & Mayer from the proceeds of such composition notes to which Francis Willey & Co. are entitled, the sum of seventeen hundred and fifty dollars (\$1,750), and when such sum is paid any other moneys realized upon said notes shall be paid to said Clarke.

"When the notes given by said Clarke to the order of the Schuylkill Worsted Mills Company shall have been entirely paid, all other composition notes given by William Browne shall be surrendered unto said Clarke."

Copy of Assignment.

"For value received I hereby assign and transfer unto William Browne all my right, title and interest in four certain promissory notes drawn by the said William Browne to the order of Francis Willey & Company, dated November 9, 1901, one of them for \$2,058.81, payable four months after date; another of them for \$2,573.51, payable eight months after date; one of them for \$2,573.51, payable twelve months after date; one of them for \$1,372.53, payable sixteen months after date; which said notes have been assigned and transferred to me by the said

Francis Willey & Company, under an agreement entered into with them dated September 28, 1901, and are now held to secure the payment to Messrs. Greenwald & Mayer of the sum of \$1,750, as provided in a certain supplemental agreement entered into on October 1, 1901.

"Witness my hand and seal this first day of April, A. D., 1902.

"Charles F. Clarke. [Seal.]"

Argued before MITCHELL, BROWN, FELL, MESTREZAT, and POTTER, JJ.

Clinton O. Mayer, for appellant. Edward P. Bliss, for appellee.

MITCHELL, J. The notes in suit were given by defendant to plaintiff as composition notes in a proceeding in bankruptcy, and the affidavits of defense aver that the notes were assigned by plaintiff to one Clarke, and by Clarke to defendant, with a saving of the right of Greenwald & Mayer to hold them as collateral security for the sum of \$1,750 due to them individually. The affidavits further aver that Greenwald & Mayer have already received from dividends in the bankruptcy proceeding, paid or now payable, full satisfaction of their claim. If the facts be so as we must assume on the rule for judgment, there is nothing due to plaintiff for which judgment can now be entered.

Whether plaintiff can recover on a trial will involve other considerations. The agreement between plaintiff and Clarke provides for the giving of certain notes by Clarke, in part payment for the assignment to him of the notes in suit, but also provides that the notes in suit shall be held by Greenwald & Mayer, attorneys for plaintiff, as collateral security for Clarke's notes, to be delivered to Clarke on payment of all his own notes. By the supplemental agreement between the same parties two days later it was further agreed that out of the proceeds of the composition notes (in suit) to which plaintiff would be entitled there should be retained by Greenwald & Mayer \$1,750, and "when such sum is paid any other moneys realized upon said notes shall be paid to said Clarke." This is the real point of controversy in the present case. The defendant claims that this provision is a substitute for the clause as to the collateral in the original agreement, and under it the right to hold the notes in suit is only to secure the money due Greenwald & Mayer, which defendant claims has already been paid. Plaintiff, on the other hand, claims that the only effect of the supplemental agreement is to entitle Greenwald & Mayer to the first payment out of the moneys realized on the composition notes, without disturbing the right to hold the rest of the notes as security for the payment of Clarke's notes. On the face of the writings the latter would seem to be the correct construction. Plaintiff under the composition received the notes of defendant. These he sold to Clarke, taking in payment, *inter alia*, Clarke's notes, but under the agreement con-

tinuing to hold defendant's notes as collateral security for Clarke's, with a stipulation that if default should be made on any of Clarke's notes "the composition notes shall be retained until the parties of the second part" (among whom was the plaintiff) shall have received a stipulated percentage of their claims. By the supplemental agreement, a preference in payment was given to the claim of Greenwald & Mayer, and when that was paid the subsequent moneys were to go to Clarke. Under the original agreement Clarke's right to receive the money on the composition notes as it was paid might have been open to question, but under the supplemental agreement it was made clear. But at the same time there is no evidence of intent on the part of plaintiff to release his hold on the composition notes as security for the payment of Clarke's, and the provision for default on the latter, already quoted, is clear to the contrary. The effect of the two instruments together is that Greenwald & Mayer, as attorneys for plaintiff, were to hold defendant's notes as security for Clarke's, and out of the first moneys received (whether as proceeds of these notes, or of Clarke's, or in some other manner from the bankrupt estate, is not clear) were to pay their own claim of \$1,750, then to pay over proceeds to Clarke, so long as he was not in default on any of his own notes; if he became in default, then to pay plaintiff and the other parties of the second part up to the stipulated percentage; and, finally, when Clarke's notes were all paid, to deliver up to him the collateral. While the meaning is not free from obscurity, this construction seems to be indicated on the face of the papers, though at the trial it may be changed by evidence of a different one by the parties at the time or subsequently.

Plaintiff, however, was not entitled to judgment. The notes sued on were not his property, but Clarke's, and his title to them was only to hold as collateral security for the payment of Clarke's notes. The latter, under the agreement, were the principal debt, and so long as there was no default on that there was no right of plaintiff to proceed on the collateral. The composition between defendant and his creditors provided that, if default was made on any of the composition notes, all of them should become due, and plaintiff declared on this basis. But that was not sufficient. Clarke might have done so as the owner of the notes, but plaintiff lost his right to do so when he parted with his ownership, and agreed to take Clarke's notes as the principal debt. Thereafter he could not proceed on the defendant's notes until a default occurred on Clarke's, and, while it is said in argument that there was such default, yet it is not averred in the statement, nor does it appear anywhere of record, and under the agreements set forth in the affidavits of defense it was a condition precedent to plaintiff's right of action against defendant.

Judgment affirmed.

(206 Pa. 338)

CITY OF PHILADELPHIA v. NEILL et al.
(Supreme Court of Pennsylvania. May 25, 1903.)

MUNICIPAL CORPORATIONS — CONTRACTORS' BOND—WAIVER OF BENEFITS—EVIDENCE.

1. In an action to recover on a bond given by defendants to the city of Philadelphia, under a city ordinance, for the benefit of subcontractors and persons furnishing materials to contractors for city work, evidence that an officer of the corporation, for whose benefit the suit was brought, stated that he did not think it was within the bond, as they had sold the material on the credit of the contractor, is insufficient to show a waiver of the benefit of the bond.

2. Where, in an action to recover on a bond given to the city for the benefit of the subcontractors under a contract for the paving of a street, evidence that plaintiff sold and furnished the bricks to the contractor, and that the latter used them under the paving contract, brings the claim within the terms of the bond.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the city of Philadelphia, to the use of McAvoy Vitrified Brick Company, against Aaron M. Neill and the Lincoln Savings & Trust Company on a bond given under a city ordinance. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

M. J. O'Callaghan, for appellants. Edward A. Anderson, for appellee.

PER CURIAM. This action is upon a bond given by the defendants to the city of Philadelphia, under the ordinance of March 30, 1896, for the protection of subcontractors and persons furnishing materials to contractors for city work. The question involved is not as appellant states it, whether the use plaintiffs, as materialmen, could waive the benefit of the ordinance, and sell on the sole personal credit of the contractor, but whether they did so in this case. Whether they could do so may be open to question, as the bond is exacted by the city as one of the terms of the contract, for the protection of the city's own interests (*Philadelphia v. Stewart*, 195 Pa. 309, 45 Atl. 1056), and the right of any other party to waive this protection without the city's consent is far from clear. But it will be time enough to determine that question when it arises. In the present case the proof of such waiver wholly failed. The evidence, at most, amounted only to the expression of an opinion by an officer of the use plaintiffs that they did not think themselves within the bond, as they had sold the bricks on the credit of the contractor. The case was tried by the defendants, and has been argued here as if it was a claim under the mechanic's lien law, and his points for charge being framed on the same view, the learned judge committed no error in disregarding them. The use plaintiffs proved the sale and furnishing of the bricks to the contractor, and the latter's use of them in paving under his contract with the city. This brought the claim within

the terms of the bond. The fact that the contractor, desiring to make his bid to the city for the work intelligently, agreed with the plaintiffs on the price of the bricks some time before his contract with the city was actually made, did not vary the case at all. Though the price was agreed upon in advance, the sale was not made until after the contract.

Judgment affirmed.

(206 Pa. 350)

QUAKERTOWN & E. R. CO. v. GUARANTORS' LIABILITY INDEMNITY CO. OF PHILADELPHIA et al.

(Supreme Court of Pennsylvania. May 25, 1908.)

ATTORNEY'S LIEN—FUND IN COURT.

1. An attorney in a common-law action has no lien on his client's money in the hands of a third person, or on funds brought into court in the action for distribution.

2. Where a suit is brought to recover certain bonds, and by an agreement the bonds are to be returned, the attorney for plaintiff has no lien thereon, and, if defendant deposits certain of them with the prothonotary, the court cannot appoint an auditor, and provide that the fee of the attorney, when ascertained, shall be paid out of the bonds so deposited.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Quakertown & Eastern Railroad Company against the Guarantors' Liability Indemnity Company of Philadelphia and others. From a decree dismissing exceptions to auditor's report, plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

John G. Johnson, Alfred N. Keim, and Carroll R. Williams, for appellant. George S. Graham, for appellees.

POTTER, J. On or about September 1, 1897, the officers of the Quakertown & Eastern Railroad Company deposited with the Guarantors' Liability Indemnity Company 214 of its first mortgage coupon bonds, of the par value of \$500 each, for the purpose of securing a proposed loan of \$80,000, which sum was to be used in the construction and equipment of its railroad. The loan was never consummated, and 20 of the bonds were returned to the appellant company, leaving 194 in the supposed custody of the Guarantors' Liability Indemnity Company, or its assignees, or others of the parties defendant, to whose use it was alleged that some of the bonds had been wrongfully appropriated. During the latter part of November, 1897, the Guarantors' Liability Indemnity Company transferred all of its business to, and was succeeded by, the Guarantors' Finance Company, and on March 24, 1898, this latter concern made an assignment for the benefit of creditors. Some time in April, 1898, Hen-

ry C. Terry, Esq., of the Philadelphia bar, was retained as attorney for the Quakertown & Eastern Railroad Company by John Jamison, its president, for the purpose of recovering the 194 bonds from the Guarantors' Liability Indemnity Company, its assigns, or other parties to whose use some of the bonds had been converted. Accordingly, on April 9, 1898, Mr. Terry filed a bill in equity in the court below against the Guarantors' Liability Indemnity Company, its assigns and others, praying that the defendants be ordered to surrender the said bonds to the plaintiff. Subsequently two short amendments to the bill were filed by Mr. Terry. Appearances were entered for all of the defendants, and answers filed by all excepting the receivers of the People's Bank. The case, however, was never heard in court, as it was settled by agreement, and the bonds were recovered without the necessity for a trial. Mr. Terry, and the president of the company, Mr. Jamison, and the contractor, Mr. Baker, and his attorney, Carroll R. Williams, Esq., were all active in the negotiations having in view the return of the 194 bonds. While these negotiations were pending, Mr. Terry requested his clients to arrange for the payment of his fees. This was not done to his satisfaction, and, in consequence, after arrangements had been made for the return of the bonds, and the matter amicably adjusted, Mr. Terry refused to mark the case settled of record until his fees were in some way secured to him. The appellant company then took a rule on the prothonotary to show cause why the case should not be discontinued by plaintiff, the appellant company, or its then counsel. This rule was discharged. Mr. Terry then notified the Guarantors' Finance Company not to deliver any bonds in their possession to the appellant company. The Guarantors' Finance Company, by its receivers, wishing to relieve itself of any liability to either the appellant company or Mr. Terry, filed a petition asking leave to deposit with the prothonotary of the court 18 bonds of the appellant company, and praying the court to order it and Mr. Terry to interplead, for the purpose of determining the ownership of the bonds and the amount of fees to which Mr. Terry is entitled, if any. The prayers of this petition were granted, and an auditor was appointed. The appellant company, through its then attorney, G. Harry Davis, Esq., filed a formal written protest against the appointment of the auditor, and denied wholly and entirely his jurisdiction in the premises. This protest was overruled, and the auditor heard testimony and prepared and presented a report, in which he found that the appellant company should pay Mr. Terry a fee of 10 per centum of \$89,500 of bonds, or \$8,950 in bonds, and \$50 for costs expended by Mr. Terry, subject to a deduction of \$500 already paid to him; and that it should also pay the costs of the audit, \$1,000. Upon exceptions taken to the auditor's report, the court of

¶1. See Attorney and Client, vol. 5, Cent. Dig. § 400.

common pleas sustained the auditor in assuming jurisdiction, but reduced Mr. Terry's fee to \$6,500 in bonds, together with interest coupons attached to said bonds from January 1, 1890, and also allowed \$50 in cash to Mr. Terry, and \$1,000 to the auditor, to be raised by the sale of sufficient bonds in the custody of the court.

From this action of the court, and the decree entered in pursuance thereof, this appeal is taken.

We are confronted at the outset with the question of jurisdiction in the court below, and of its right to thus adjudicate the claim of Mr. Terry for fees. In our judgment, no good reason can be given for sustaining the assumption of jurisdiction in this matter. Mr. Terry had no lien upon the bonds of the defendant company, either while they were in the custody of the guarantors' company or after they were deposited with the prothonotary. It is a well-recognized general rule of law that an attorney has a lien, or rather a right of defalcation, on money or papers of his client while they are in his hands; but in a common-law action he has no such right of lien on his client's money in the hands of third persons, or upon a fund brought into court for distribution. *Irwin v. Workman*, 3 Watts, 357; *Balsbaugh v. Frazer*, 19 Pa. 95; *Dubois' Appeal*, 38 Pa. 231, 80 Am. Dec. 478. While a chancellor has power to direct the payment of reasonable counsel fees out of a fund for distribution, when the fund is the product of the attorney's labors, and he has agreed to look to it solely for compensation, as was held in *McKelvy's Appeal*, 108 Pa. 615, yet that case distinctly recognized the doctrine of *Dubois' Appeal*, supra. The facts in *McKelvy's Appeal* are sufficiently distinctive to take it out of the general rule. It was there found that the fund was due in great measure to the services of the attorney, and that he was to look to that fund for his compensation. Neither of these facts appear in this case. While Mr. Terry no doubt rendered good service to his client in aiding it to recover bonds wrongfully converted or claimed by others, yet this does not justify a claim to the creation of the fund represented by the bonds. Nor does it appear that the appellant company was attempting to take the fund out of the control of the court, by the aid of their counsel, with any intention of defrauding Mr. Terry out of his fees. There is, therefore, no apparent reason why the court should be called upon to interfere in any extraordinary way for his protection. It is admitted that valuable services were rendered by Mr. Terry, and the dispute is only as to the amount of compensation to be made therefor. This is purely a question of fact. Mr. Terry having no right to a lien upon the bond in question, and there being no equitable consideration sufficient to move the conscience of a chancellor to interfere, we cannot justify the court below in assuming jurisdiction of

the matter in dispute. Its action in so doing against the formal protest of the appellant company was error. It cannot be contended that Mr. Terry has not an adequate and complete remedy at law, and, having that remedy, we see no reason why he should not be required to establish the amount of his claim before a jury, as other litigants whose claims are disputed are required to do.

It is unnecessary to consider the other points urged in the appeal, as the denial of the jurisdiction of the court disposes of the questions raised as to the reasonableness of the fee, as this may be passed upon by a jury.

The assignments of error which question the jurisdiction of the court are sustained, and the decree of the court below is reversed.

(306 Pa. 343)

PHILADELPHIA & T. R. CO. et al. v.
NESHAMINY EL. RY. CO.

(Supreme Court of Pennsylvania. May 25,
1903.)

ELEVATED ROAD—CONSTRUCTION—APPEAL—
REVIEW.

1. Where a passenger railway company is incorporated under Act June 7, 1901 (P. L. 523), giving a right of eminent domain to construct an elevated railway on a public highway for a distance of one mile, and has obtained the consent of the local authorities, and filed a bond to secure a nonconsenting landowner, it may build such road, though other street railway companies, at the instance of the landowner, have been restrained from building a surface street railway on the designated mile.

2. Questions which were not raised below, nor made the subject of any exceptions, nor set forth in any specifications of error, will not be considered on appeal.

Appeal from Court of Common Pleas,
Bucks County.

Bill by the Philadelphia & Trenton Railroad Company and the Pennsylvania Railroad Company against the Neshaminy Elevated Railway Company. Decree for defendant, and plaintiffs appeal. Affirmed.

From the findings of fact of the trial court it appeared that the plaintiff was the owner in fee of the land underlying the public road set forth in its articles of association as the route of the defendant's railroad, described as follows: "Commencing in the road leading from Bridgewater to the town of Bristol at a point about two hundred (200) feet northerly from Neshaminy creek, and running along said road northerly the distance of about one mile, and to the place of beginning; all being in the township of Bristol and in the county of Bucks." Under the street railway act of May 14, 1889 (P. L. 211), a charter had been granted in 1896 for the building of a street railway over a route including that as above described, and at the suit of the plaintiff its construction has been perpetually enjoined. Injunctions also issued at the instance of Henry L. Gaw, Jr., and other property own-

ers along the route. By reason of these injunctions the line of street railway was incomplete, and the construction of the proposed elevated line will make it possible to form a continuous line of railway between the borough of Bristol and the city of Philadelphia.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

George Stuart Patterson and Henry Lear, for appellants. Richard C. Dale, B. F. Gilkeson, George Quintard Horwitz, and W. F. Sadler, for appellee.

POTTER, J. The act of June 7, 1901 (P. L. 523), authorized the incorporation of companies "for the purpose of construction and operation of passenger railways either elevated or underground, or partly elevated and partly underground, for the transportation of passengers." The first section of the act provides that permission to erect or construct such a railway must be obtained from the local authorities of the city, borough, or township in which the same is to operate. The eighth section of the act confers upon corporations created under it the right of eminent domain. The act was a general one, authorizing the formation of companies to operate in all parts of the state, whether in cities, boroughs, or townships. On June 13, 1901, the articles of association of the Neshaminy Elevated Railway Company, under this act of assembly, were filed in the office of the Secretary of the Commonwealth, and on June 18, 1901, letters patent were granted by the Governor to the said company. The articles provided that the route of the railway to be constructed was as follows: Commencing in the road leading from Bridgewater to the town of Bristol at a point about 200 feet from Neshaminy creek, and running along said road northerly the distance of about 1 mile, to the place of beginning; all being in the township of Bristol and county of Bucks. On April 10, 1901, the supervisors of Bristol township gave permission for the construction of an elevated railway by the appellee company over the route named in the articles of association. On February 24, 1902, the company, by leave of court, filed its bond in the sum of \$20,000, with approved surety, for the use of all parties interested, as required by section 8 of the act of June 7, 1901, and shortly afterwards began the construction of an elevated railway over the route designated in its articles of association. On April 10, 1902, the appellants, who are owners of certain land abutting upon the route of the proposed elevated railway, and also of the fee underlying the public road over which the elevated railway was to be constructed, filed the present bill, complaining that certain railway and railroad companies had been previously incorporated under the street railway act of 1889 (P. L. 211), and the general railroad act of 1868 (P. L. 62), for the purpose of constructing a street passenger railway over the same route, and that they

had been enjoined by the courts from so doing; that the officers, stockholders, and persons interested in the defendant company were substantially the same as those of the enjoined companies; that there was no reason or necessity for an elevated railway at the point in question; that it was the intention of the defendant to construct a railway partly on the surface, and that the charter was not obtained for the purpose of constructing a bona fide elevated railway, but for the fraudulent purpose of evading the injunction of the court by a use of the power of eminent domain to complete the railway of a preceding corporation. An injunction was, therefore, prayed for to restrain the construction of the proposed road. The appellee company filed an answer denying any fraudulent intention, averring the regularity of its charter, and asserting its purpose of building a bona fide elevated railway. The court below granted a preliminary injunction, which, after hearing, was dissolved. By agreement of the parties, the hearing on the motion to dissolve was to be treated as a final hearing of the case on bill, answer, and proofs, and this appeal is to be treated as an appeal from the final decree in the cause.

The duty which devolved upon the court below was to ascertain whether the appellee company has the power, under its charter, to do what it proposes to do. In discharging this duty the trial judge found that the proposed construction is within the terms of the act of June 7, 1901, above quoted, and that "the grant is within the well-defined powers of the Legislature." He sets forth also that the injunctions mentioned in the bill were granted upon the ground that the companies which were defendants in those cases were not possessed of the right of eminent domain, and had, therefore, no power to construct their roads along the highway, except with the consent of the owners of abutting land, in whom were vested the underlying fee. But in the present case the appellee company is proceeding under its right of eminent domain, and has provided for compensation to the abutting owners. The situation is, therefore, entirely different from that which prevailed when the former injunction was granted. The appellee is a new corporation, claiming to exercise the right of eminent domain under legislation since enacted. It cannot, therefore, with any propriety be charged with attempting to evade the former decision of the court. The conclusion reached by the court below as to this point is as follows: "Neither has there been established an illegal conspiracy to use the act of 1901 to fraudulently evade said decrees. Had the allegation been sustained of a lease or ownership by the road to the others in the line of railways extending from Red Lion to Bristol with the intent and for the purpose of filling out the gap existing in a continuous line, as the result of the injunction of the court, the act of 1901 expressly permits the same to be done." As is suggested in the argument of counsel for appellee, it

would have been entirely competent for the Legislature to have conferred upon existing street railway companies the power of eminent domain, in which case the reason for the continuance of the injunction formerly granted would have ceased. The Legislature did not, however, see fit to adopt this simple and obvious remedy for a condition of affairs which has grown burdensome to the people of many localities in the state. It did, however, confer the right of eminent domain upon corporations organized, as is the appellee, under the act of June 7, 1901. As that act confers upon the appellee the right to construct its road above the highway, and, while endowing it with the right of eminent domain, it also fixes its liability for damages to the abutting property owners, we are unable to see that the appellants have anything of which to complain. As was said by our Brother Brown in *Gaw v. Railroad Co.*, 196 Pa. 451, 46 Atl. 372: "The company sought to do nothing that it was not specifically authorized to do by the act which gave it life, and it is a novel doctrine that a court of equity can be appealed to for its decree to restrain the doing of that which, by the express terms of the statute, is declared to be lawful."

The second proposition in the argument of appellants is based upon an alleged defect in the statement of the appellee in its articles of association as to its route. The language criticised is, perhaps, not appropriate, but its use evidently came from familiarity with a similar clause commonly used in applications for charters for street railways, where, by the use of a double track, a circuit is made upon the line. But it does not appear that this question was raised in the court below. It does not seem to be included or alluded to in any finding of fact or of law. It was not made the subject of any exception, nor is it set forth in any specification of error. For these reasons, we give it no consideration here. The findings of fact by the learned judge of the court below fully justify, and his opinion amply vindicates, the conclusion that the appellee company possesses the right to build its railway in the manner proposed.

The decree is affirmed, and this appeal is dismissed, at the cost of the appellants.

(206 Pa. 338)

BOROUGH OF MONTTOOTH v. BROWNSVILLE AVE. ST. RY. CO. et al.

(Supreme Court of Pennsylvania. May 25, 1903.)

STREET RAILROADS—CONTRACT TO BUILD—BREACH—IMPOSSIBILITY AS A DEFENSE.

1. It is no defense to an action for breach of contract to build a street railway on a certain street that for a distance of 75 feet the highway was only 11 feet in width, the evidence not being conclusive that such width was insufficient for the purposes of the road.

2. Where a street railway company contracted to build a road on a certain street, the fact that, because of the narrowness of the street, it was impossible to build such railway, is no

defense to an action for breach of the contract. 3. Evidence in an action against a railway company for failure to build its line on a certain street in accordance with its contract held insufficient to show that the contract was impossible of performance.

Appeal from Court of Common Pleas, Allegheny County.

Action by the borough of Montooth against the Brownsville Avenue Street Railway Company and the Mercantile Trust Company of Pittsburgh. Judgment for defendants, and plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

H. I. Riley, for appellant. William A. Challener, Homer L. Castle, and Clarence Burleigh, for appellees.

POTTER, J. This is an action to recover upon a bond given by the Brownsville Avenue Street Railway Company to the borough of Montooth to secure the construction of a street railway upon West street in the said borough. The consent of the borough had been given by an ordinance dated September 21, 1900, which was formally accepted by the street railway company upon September 28th following. Its provisions required the filing of a bond conditioned for the faithful performance of all the terms of the ordinance, and stipulated that the bond was to be forfeited, and the sum of \$2,000 paid as liquidated damages to the borough, if the street railway was not completely built and in operation on or before the 1st day of October, 1901. The bond thus required was given, and upon it the present action was brought. The trial judge found that the ordinance and its acceptance created an agreement between the borough and the railway company, and that by the terms of this agreement the company received a valuable right, for which, as a consideration, it was to construct the line, and grade and fill in with broken stone and pave the portions of West street referred to. He further found that the entire failure of the railway company to perform its agreement had occasioned a loss to the borough, which was not to be measured by any ordinary standard, and that the damages as agreed upon and liquidated by the parties should be considered as the proper measure of compensation. But the learned judge was of opinion that the railway company had a good defense upon the ground of the insufficiency of the width of the highway. It appeared from the testimony that for a distance of about 750 feet the width of the portion of West street in the borough was not more than 11½ feet, and the court held, as a matter of mathematical certainty, and therefore of law, that this was not sufficient to admit of the safe construction and operation upon it of a line of street railway. Being thus of the opinion that it was impossible for the company to perform its contract, he directed a verdict for the defendant. But, "impossi-

bility of performance is, in general, no answer to an action for damages for nonperformance." 3 Addison on Contracts, *1195. "If one, for a valid consideration, promises another to do that which is in fact impossible, but the promise is not obtained by actual or constructive fraud, or is not on its face obviously impossible, there seems no reason why the promisor should not be held to pay damages for the breach of the contract—not, in fact, for not doing what cannot be done, but for undertaking and promising to do it." 2 Parsons on Contracts, *673. The general rule is thus stated in a discussion upon the subject of "Impossibility of Performance as a Defense," in 12 Cent. Law J. 4: "Impossibility of performance, whether such impossibility arises through the fault of the promisor or not, will not constitute a valid defense to an action for a breach of the contract. If the promisor makes the promise conditional upon its continued possibility, then the risk is assumed by the promisee, and he loses his right of action if the contingency arises. But if the promisor makes the promise unconditionally, then he assumes the risk, and, as a general rule, he cannot set up the impossibility of performance as a defense to an action by the promisee."

It is the duty of the party making the promise to ascertain at the time whether or not performance is possible. If he neglects to inform himself, it is at his peril. But it is by no means clear that the evidence in this case justifies the conclusion that the construction and proper operation of the street railway upon West street, within the borough limits, was an impossibility. The narrow portion in which the difficulty lay, extended for a short distance only; and it does not seem to us that the problem which it presented was one to baffle the resources of the builders of modern street railways, even if for a distance of 750 feet they were confined to the use of about 11 feet in width of the highway. The borough engineer testifies positively that it is feasible to build and operate a line of railway over the street in question, and he bases his statement upon the fact that he had actually constructed another line of street railway, which in one place had only a 10-foot right of way. The argument against the sufficiency of the width for the purpose is based upon the supposed necessity for cutting off a portion of each side of the street for a sidewalk. But it does not follow that any such exclusive use of the street at that point will be required. As the borough authorities have granted the use of that street to the company, to build its street railway upon, it is to be presumed that other provisions, by means of widening the street or otherwise, will be made for a sidewalk, if it be needed. At the present time the street does not seem to be built upon, and is but little more than a country

road; but, if the public needs require it, the street can be widened, either by the borough in the usual way, or the railway company can secure additional space by the purchase of ground from the abutting owners. The mere matter of additional expense to the company is no sufficient excuse for failure to comply with its contract. The argument for the appellee proceeds entirely upon the assumption that the company was not bound to make any effort to secure additional space which might be made available, if needful to enable it to build the road upon the right of way granted by the borough. We do not regard this position as tenable. The company knew the situations and the conditions existing upon the ground, or at least it certainly might have known them, when it made the agreement. It is fair to presume that at that time the company had in view a plan which would enable it to use to good advantage the privileges granted to it by the borough over the portion of West street within its limits. The testimony shows that West street was 40 feet in width, and while, at the narrow part, the portion of it within the borough was only 10 or 11 feet in width, yet the remainder of the highway was in existence at that point, and was open for the use of the public. Nothing appears in the evidence to show that the railway company could not have obtained the right from the proper authorities to make such auxiliary use of the remaining portion of the highway as would permit of the safe and comfortable operation of such an instrument of public convenience as a street railway. An inspection of the testimony makes it apparent that various other expedients might have been effective. For instance, if a double line of poles were thought necessary upon the 750-foot portion, permission might have been obtained to set them outside the line of the street, and upon either side. But even if confined to the limit of space which was clearly available, it seems that other methods were open to adoption, which would have made compliance possible. It does not appear from the evidence that double lines of poles are absolutely necessary, as instances were cited in which single lines of poles to support overhead wires are in practical use. It seems also, that, by means of an underground conduit, the power can be conveyed and the system successfully operated without the use of any poles at all.

As we read the evidence, we cannot avoid the conclusion that there was sufficient in it to justify a finding that it was possible for the railway company to have complied with its agreement to build its line in accordance with the terms of the ordinance. The third specification of error is therefore sustained.

The judgment is reversed, and a venire facias de novo is awarded.

(206 Pa. 338)

ASPINALL et al. v. VINEY.

(Supreme Court of Pennsylvania. May 25, 1903.)

ORDER—PRESENTATION—REASONABLE TIME.

1. Where, in an action by the holder of an order against the drawer, it appeared that plaintiff had not presented the order for some weeks, and that the drawee accepted it with the provision that it should not be paid until after the completion of a certain contract, and the drawer suggested that plaintiff should take notes of the drawee, which he did, and they were never paid, and there was evidence that the drawee was in failing circumstances, but none that plaintiff knew it, and also evidence that the drawer was insane when he wrote the letter to the plaintiff, whether plaintiff presented the order in a reasonable time was a question for the jury.

Appeal from Court of Common Pleas, Philadelphia County.

Action by William Aspinall and others, trading as Aspinall & Hayes, to use of Thomas McCullough, against Emily W. Viney, administratrix of William Viney. Judgment for plaintiffs, and defendant appeals. Affirmed.

At the trial it appeared that William Viney gave to Thomas McCullough an order for \$3,000, as follows: "Bryn Mawr, Pa., June 30, 1898. J. W. Mercur & Company: Please pay to the order of Thomas McCullough the sum of \$3,000 and charge the same to my account for stone and brick work, etc., at the Broadway M. E. Church, Camden, New Jersey. [Signed] William Viney." Mercur & Company accepted the order, but stipulated that it should not be paid "until after the completion of the contract." On July 29, 1898, Viney wrote to McCullough the following letter: "Mr. Thomas McCullough—Dear Sir: I write a line to you in regard to the order you hold from me on Mercur & Co. I have been thinking that it might be better if you took a note from them for the amount of the order and deposit it in your bank for collection when it becomes due, and if they did not pay the note, it seems to me it would be better to sue them on the note than the order. I heard yesterday that some of the people doing the work on the asylum are stopping the work on account of not getting paid. Yours truly, William Viney." The order was accepted some time before the above letter was written, but the evidence as to the exact date was not definite. The work on the contract was completed July 25th, and, in a settlement made about that time between Mercur & Co. and Viney, Mercur & Co. claimed credit for \$3,000, not because they paid the money, but because they had accepted the order. McCullough subsequently accepted notes from Mercur & Co. These notes were never paid. There was evidence that, at the time the letter from Viney to McCullough was written, Viney was insane. There was no evidence, however, that McCullough knew of this.

The court charged in part as follows: "I do not know that it could properly be said that a man who received an order of that sort, when he knows nothing to put him on guard—when he knows nothing to indicate that the man on whom the order is given is in precarious financial circumstances—is bound to present it at once. He should present it in what a prudent business man—a man of reasonable intelligence—would say was a reasonable time."

Argued before MITCHELL, DEAN, FELL, MESTREZAT, and POTTER, JJ.

W. Henry Sutton, for appellant. Avery D. Harrington, for appellees.

PER CURIAM. The turning point in the case was whether McCullough's delay in presenting the order for payment, and his acceptance of notes instead of the money when he did present it, amounted to such negligence as should discharge the drawer of the order. This, however, was not a simple question of law, as the appellant presents it. The order was not accepted by Mercur & Co. for immediate payment, but, as Mercur testified, not to be paid "until after the completion of the contract." That involved the question of indefinite time. In regard to taking notes instead of insisting on money, the defendant Viney himself suggested that course in the letter of July 29th. The case is still further complicated at this point by the claim that Viney was insane when he wrote that letter. The result of all the evidence was practically to eliminate the application of any general rules of law, and reduce the whole controversy to one of fact, which was correctly submitted in the instruction that McCullough was bound to present the order "in what a prudent business man, of reasonable intelligence, would say was a reasonable time," and the direction to the jury to determine the question of his negligence by that standard.

Judgment affirmed.

(206 Pa. 374)

CROWE v. NANTICOKE LIGHT CO.

(Supreme Court of Pennsylvania. May 25, 1903.)

ELECTRIC LIGHT COMPANY—NEGLIGENCE.

1. In action against electric light company for death of plaintiff's husband by an electric shock, evidence held to require the giving of binding instructions for the defendant.

Appeal from Court of Common Pleas, Luzerne County.

Action by Annie Crowe against the Nanticoke Light Company. Judgment for defendant, and plaintiff appeals. Affirmed.

At the trial it appeared that the deceased, Henry Crowe, became a customer of the defendant company on November 1, 1896, under a contract which was to continue for one year, and, unless notice was given to the contrary, from year to year thereafter. On

June 23, 1898, the defendant company leased and transferred its property and contracts to the People's Electric Heat & Power Company of Nanticoke. On the evening of August 19, 1898, the deceased, while in his bar-room, reached up to turn on an incandescent electric light which was suspended from the ceiling. He immediately received a severe shock, which knocked him down. In falling, he carried with him the glass bulb. He immediately sprang up, saying, "What is that?" and attempted to insert the bulb in the socket, when he received a second shock which killed him. There was evidence that at the house of one Alexander, which was on the same circuit, about 200 feet away from the house of the deceased, a person had received a shock at about the same time. There was also evidence that at Alexander's house some arc wire was stripped of insulation, and had come in contact with the incandescent wire. There was no evidence, however, that a contact of a naked arc wire with an incandescent wire would produce dangerous results at the house of the deceased.

Plaintiff presented the following points:

"(1) There is no statutory provision enabling an electric light company to lease to an electric light, heat, and power company. Answer. That may be so; but both these companies were heat, light, and power companies, and I believe, under the law, in companies of this character, there exists a power to lease.

"(2) If there is such statutory authority, it is for the jury to say, under all the evidence, whether the electric light, heat, and power company were actually in possession of and operating the plant under the lease from the Nanticoke Light Company. Answer. That would be so if there were any evidence to warrant the submission of the matter to you. But there is no evidence of possession in the Nanticoke Light Company after June 29, 1898, and this accident did not happen until August 19th, nearly two months after the People's Company had gone into possession and were running this plant.

"(4) The plaintiff having shown continuous disturbances for a considerable time prior to and the same evening of the accident, and that the insulation on this circuit was frayed and hung in strips from the wires in places, and further that Cooper, the company's electrician, was at Crowe's place immediately after the accident, repairing the circuit, and that E. N. Alexander, whose store lights were on the same circuit, was severely injured by receiving a shock at between eight and nine o'clock of the same evening, and that Cooper aforesaid was present at Alexander's within a few minutes after Alexander was hurt, and that other persons on same circuit received shocks the same night, raises a question which is for the jury to determine, as to whether or not the company had notice of the condition existing, and the defective working of the system. Answer. That point I decline

to affirm, for the reason stated in my general charge, because, even if the company did have notice that wires were out of order up at Alexander's, and even if the company was negligent in having the wires out of order up at Alexander's, and even it had not been true that the wrong company had been sued in the lawsuit, instead of the right company, then I say it would not make any difference what happened up at Alexander's, unless the plaintiff had gone on and showed that what happened up at Alexander's was the cause of Harry Crowe's death. It would not be material, in other words, what happened up at Alexander's, unless there was proof that whatever did happen there was what caused Harry Crowe's death.

"(5) An electric light company furnishing electricity to a contract user for pay is *prima facie* liable for injuries to the user, if received by him while using the lights in the usual and ordinary manner. Answer. I decline to affirm that point, if by '*prima facie*' is meant that by reason of the happening of the accident a presumption of negligence arises. That may be the law in some states, but I do not believe it to be the law in Pennsylvania. I do not think that the relation which exists between the company which furnishes a man an electric light on a contract and the consumer of that light is of such a character as warrants the assertion that the law, as between them, would be that, if he gets hurt in using that electric light, the presumption immediately arises that they have been guilty of negligence. I believe that the law remains with them as with reference to other parties as a rule, and that, where it is alleged that he is hurt by reason of the negligence of the company, it is his duty to prove that he was so hurt."

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

Edmund G. Butler and Harris B. Hamlin, for appellant. James L. Morris, for appellee.

PER CURIAM. The majority of the court are of opinion that the judgment should be affirmed, but are not agreed upon the grounds of affirmance. No reasons, therefore, will be presented.

Judgment affirmed.

(206 Pa. 348)

FLESCHHUT v. LEHIGH VALLEY R. CO.
(Supreme Court of Pennsylvania. May 25, 1903.)

RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

1. Evidence in an action for injuries at a railroad crossing held to justify order of nonsuit because of plaintiff's contributory negligence.

Appeal from Court of Common Pleas, Bradford County.

Action by William M. Fleschhut against the Lehigh Valley Railroad Company. From

an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

D. O. DeWitt, for appellant. Henry Street-er and William T. Davies, for appellee.

POTTER, J. The plaintiff was at the defendant's depot for baggage. He loaded two trunks upon his wagon, which had a covered seat, and started away. He drove along the highway for a distance of about 200 feet, parallel with the railroad, being separated from it by a platform about 11 feet wide and 3 feet high. The highway crossed the track at a point about 50 feet from the end of the platform. After driving this distance, of about 200 feet in all, parallel with the railroad, the plaintiff turned his horse to the left and drove towards the track, intending to cross. Just then a fast train passed, and the horse was struck either by reason of having been driven too close to the track, or because in its fright it moved close enough to be struck by the passing train. The horse was killed, and plaintiff was thrown from the wagon and injured. Beyond all question, this accident was caused by the heedless manner in which the plaintiff drove up to the crossing. When he untied his horse at the depot, he could see down the track towards the east, from which direction the train came, for nearly a mile. Not seeing the train then, he got in his wagon, under the cover, and drove parallel with the track, until he came to the crossing, and up to it, without again looking to the east, and, as he testifies, did not see the train until just before the horse was struck. He was in no danger from the train so long as he was driving in the highway; which was parallel with, and some 15 feet away from, the track. But when he turned his horse towards the track at the crossing, he came almost instantly within the reach of the passing train, and it was the sheerest neglect of duty to make this near approach, without noting the proximity of the train, which a glance toward the east must have shown him. The undisputed testimony in this case left the learned trial judge no alternative but to enter a judgment of compulsory nonsuit.

The assignment of error is overruled, and the judgment is affirmed.

(206 Pa. 366)

In re McANDREW'S ESTATE.

Appeal of MOUGHAN.

(Supreme Court of Pennsylvania. May 25, 1903.)

WILLS—PROBATE—REVOCATION—EVIDENCE OF EXECUTION.

1. After a will has been probated by the register of wills, he has no power to revoke the probate.

2. A paper signed with a mark, and dated three years prior to the death of the testatrix, prepared by a justice of the peace, and executed before him by a woman whom he did not know, will not be admitted to probate where one witness did not know the testatrix, and the other, who probably did know her, was dead at the time of the probate, and another woman present at the execution of the will was also dead, where the paper was discovered in the effects of this woman three years afterwards, and the paper made a stranger to the blood of the testatrix the principal beneficiary of the estate.

Appeal from Court of Common Pleas, Luzerne County.

In the matter of the estate of Catharine McAndrew. From a decree refusing to admit the will to probate, Michael Moughan appeals. Affirmed.

The following is the opinion of the lower court, filed by Freas, P. J.:

"Catharine McAndrew died October 17, 1901, and her will, dated March 29, 1884, was probated October 26, 1901. On January 31, 1902, the petition of Michael Moughan was presented to the register, asking that the probate of the aforesaid will be vacated and annulled, and that an alleged will dated May 14, 1898, be probated. Testimony was taken before the register, and the case proceeded in, and the register filed an opinion on March 10, 1902, refusing to strike off the decree of probate of the will dated March 29, 1884. An appeal from this decree was taken March 29, 1902, and was submitted to the court upon argument of counsel and the testimony taken before the register. The register's powers ceased with the probate of the first will, and he had no authority to entertain a petition for revocation. Beatty's Estate, 193 Pa. 304, 45 Atl. 1057. But as the case is now before us by consent of all the parties in interest, we will proceed to dispose of it as though the appeal had been regularly entered.

"The only question before us is whether the paper dated May 14, 1898, is the last will and testament of Catharine McAndrew, late of Pringle Hill, Kingston township, Luzerne county, deceased. At the date of the last will a woman giving her name as Catharine McAndrew, accompanied by Mary Queeney and William J. Lyons, appeared before P. H. Sheridan, an alderman of the city of Pittston, and at the request of the testatrix the alderman drew the paper in question. It was witnessed by Lyons and J. H. McLane; the latter being called in for that purpose, and to whom the decedent was unknown. Lyons is dead, but his signature was identified. After execution the paper was given by the testatrix to Mary Queeney, who died January 20, 1899. After Mary Queeney's death all her few belongings were taken possession of by Bridget Tighe, and among them was a bureau, one drawer of which was filled with bed sheets. For over three years the contents of this drawer were allowed to remain undisturbed, when finally its contents were taken out and examined. The alleged will dropped out, and was subsequently offered for probate. Of those present

at the signing of the supposed will, only Mary Queeney and Lyons knew the testatrix, and both are dead, and there is no one living who can testify to the identity of the testatrix. Although Mary Queeney died eight months after the making of the will, and delivery to her for safe-keeping, and thirty-three months before Catharine McAndrew died, who attended the funeral of the former, yet there is no testimony showing that the testatrix ever caused any search to be made for the alleged will. It seems natural to suppose that if she had given her friend, for safe-keeping, so important a document as a will disposing of her entire estate, she would have instituted a search among her dead friend's effects, or made inquiries for its recovery. Had she done so, Bridget Tighe, above all persons in the world, would have known it, yet this witness denies any knowledge of the will previous to its accidental discovery three years later. The husband of the testatrix, Thomas McAndrew, died December 14, 1901, before the last will was produced. Many wills are witnessed by persons not acquainted with the maker, and that sometimes when the testator signs by mark as in this case; but the attending circumstances must be such as to preclude possibility, or at least probability, of fraud. The subsequent custody of the instrument, the relations of the testator and beneficiaries, truthfulness of the witnesses, and inherent probability of the instrument itself, are circumstances from which its genuineness must be considered. It taxes our credulity very strongly to believe the testimony offered as to the whereabouts of the alleged will. It does not bear the impress of truth, or seem probable, under the circumstances. The chief beneficiary claims to be a cousin of testatrix, while her own sister denies it, and states emphatically that they had never known Moughan in Ireland at the time he said he knew them, and that his testimony in many respects is false. The sister should know the facts, and undoubtedly told the truth. The alleged will cuts off the natural heirs of the testatrix with small bequests, and leaves nearly all the estate to a stranger to her blood, who seldom visited her, and, so far as the testimony shows, had done nothing for her. There is no living witness to show that the maker of the will offered was Catharine McAndrew, of Pringle Hill, but it is plain from the instrument itself that she is the person intended. Either Catharine McAndrew, from Pringle Hill, signed the paper offered, or it is a forgery. It does not seem possible that any other person could fulfill the conditions. That some one purporting to be this Catharine McAndrew did appear before Alderman Sheridan, and signed the paper in question, seems true, from the testimony; but we are of the opinion, from all the circumstances in the case, that she was an impostor. To admit a will to probate, resting on such testimony as this one, would be to invite fraud and forgery in every case where an illiterate person died leaving only collateral

heirs. Assumed kinship, the testimony of a few obliging neighbors as to declarations by testatrix of her intentions, an impostor to make her mark to the will in the presence of possibly honest witnesses to whom the testatrix is unknown, and the production of the will, with a more or less plausible explanation of its disappearance, after all are dead who could know the facts, and the trick is done. The identity of the testator is of prime importance, and that has not been satisfactorily established in this case. The appeal is dismissed."

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

T. R. Martin and M. N. Donnelly, for appellant. David B. Gildea and John T. Lennahan, for appellee.

PER CURIAM. The decree is affirmed on the opinion of the court below. Costs to be paid by the appellant.

LUTZ v. ALKAZIN et al.

(Court of Chancery of New Jersey. Oct. 5, 1908.)

OPENING DECREE—SURPRISE.

1. In a suit to reform a contract for sale of land so as to include 10 feet not in the description, and for specific performance, defendants, other than the person who made the contract, will be allowed to have the decree for complainant opened, they having title to the 10 feet by deed prior to the contract, and having submitted to their counsel the bill indorsed "On bill for specific performance," under the belief that all it sought was enforcement of the contract as written, and their counsel having overlooked the prayer for reformation and the few lines of the bill in regard thereto.

Suit by Charles S. Lutz against Milhim P. Alkazin and others. Defendants Alkazin petition to have the decree for complainant opened. Granted.

Geo. A. Bourgeois, for complainant. E. A. Higbee, for defendants Alkazin.

GREY, V. C. (orally.) The bill in this cause asked for the reformation of a contract for the sale of a lot of land in Atlantic City, by extending the description of the lot to include 10 feet at the rear end, and for the specific performance of the contract (when so amended) by the defendants. A final decree in favor of the complainant on both prayers has been entered against the defendants. Milhim P. Alkazin and Ameen P. Alkazin are two of the defendants. They now file their petition asking to have the decree opened, and that they be let in to defend as to the 10-foot extension, on the ground that to that part they held a title which was antecedent and superior to the contract of sale; that they and their counsel understood and believed that the bill of complaint in the cause only sought performance of the contract as originally expressed, and through inadvertence did not know the reformation of the

contract to include the 10 feet was asked for, and for this reason no defense was made. In cases of this character the party seeking to open a decree must show that he has a meritorious defense, and that the order which he seeks to have opened was obtained by what is called "surprise." In the present case the proof is undisputed that the Alkazin defendants did hold an interest in the 10 feet by deed made and recorded antecedently to the making of the contract of sale sought to be enforced. This is a showing that they had a meritorious defense. On the element of surprise, it appears that the Alkazins submitted the papers in the cause to the examination of counsel under the belief that all that was sought in the suit was the enforcement of the contract for sale of the lot as described in that contract, which did not include the 10 feet at the rear; that they did not know or notice that the bill sought to reform the contract. Their counsel also overlooked the special relief sought. The Alkazins had no defense to the enforcement of the contract as it was expressed on its face. They were not themselves parties to it, as it was an option contained in a lease made to the complainant by an antecedent owner, under which the complainant entered. No defense was made, because of the mistaken understanding and belief of the Alkazins and their counsel that the decree sought was only the enforcement of the contract as it was expressed on its face. The Alkazins now ask that if the complainant is not willing to amend the decree, so that they shall not be required to convey the 10 feet, which they claim to hold by a title superior to the complainant's contract, the decree may, as to them, be opened, and they be let in to defend as to this 10 feet. The showing is that the Alkazin defendants gave attention to the suit, and had their counsel examine the bill of complaint. By mistake, he overlooked the special prayer. This certainly was not an error of judgment, for, as the counsel did not see the special prayer, he did not consider and pass on the questions it suggested. Both counsel and client believed the relief sought to be limited to the lot as it was described in the complainant's contract. The bill of complaint is indorsed, "On bill for specific performance," not indicating that it sought, as part of the relief, the reformation of the contract. The premises of the bill stating the ground on which reformation is sought are very meager, consisting of but five lines. Furthermore, the bill of complaint prays that the Alkazins may be decreed to convey, but does not in any way recite or refer to their deed by which they held a title superior to the complainant's contract, so that the bill gave little warning that a decree was asked, the effect of which would be to compel them to convey the title acquired by that deed. The Alkazin defendants have, I think, under these circumstances, exhibited such a case of surprise, as well as merits, that they should

have the decree opened as to them, and they be let in to defend as to the conveyance of the 10 feet in the rear of the lot described in the contract for sale, unless the complainant prefers to amend the decree so that they be released from its obligation as to that 10 feet.

If the decree be opened, and the Alkazin defendants be let in to defend, it should be upon terms that they pay the costs of the complainant from the entry of the decree pro confesso, and that no costs be allowed them on their petition to open the decree.

COOK v. ANDERSON FOOD CO.

(Court of Chancery of New Jersey. Oct. 5, 1903.)

EQUITY—APPEAL—PERMISSION TO APPEAL—RECEIVERS—APPEAL BY RECEIVER—COSTS.

1. Where the effect of a decree retains certain property within the lien of a mortgage, and so keeps it from the general assets of an insolvent corporation which is in the hands of a receiver, it is not necessary for creditors to obtain permission from the court to appeal, inasmuch as any person aggrieved may appeal.

2. Where the largest unsecured creditor of a corporation which is in the hands of a receiver is also the holder of a mortgage on certain property, which property other creditors claim should be brought within the general assets of the corporation, an appeal may not be taken in the name of the receiver from a decree, the effect of which is to retain the property within the lien of the mortgage, since the effect thereof would be to compel the mortgagee to contribute to litigation against himself.

Application by John Cook, as receiver of the Anderson Food Company, for leave to take, in the name of the receiver, an appeal from a decree in the suit of Anderson v. Anderson Food Company. Order entered that the receiver might take the appeal when certain unsecured creditors shall secure the costs thereof.

Lewis Starr and John G. Horner, for receiver. E. G. C. Bleakly and Schuyler C. Woodhull, for general creditors. John F. Harned and Joseph H. Gaskill, for Abraham Anderson.

GREY, V. C. (orally). This is an application by the receiver, at the instance of a large majority of the proving creditors against this insolvent estate, both in number and value, for leave to take, in the name of the receiver, an appeal from a decree made in the previous suit of Anderson v. Anderson Food Co., refusing the prayer of the cross-bill of the defendant to reform a mortgage so that a large value in personal property included within that mortgage might be removed from its lien. The effect of the decree, as made, retains this disputed personal property within the lien of the mortgage which is held by Mr. Anderson, and thus keeps it from the general assets of the Anderson Food Company. The unsecured credit-

ors of that company support the application of the receiver that he be permitted to take the appeal. So far as leave is asked to take an appeal from the decree in question, the application of the general creditors is superfluous. This court has no control over the taking of appeals from its decrees, and ought not to have. The law prescribes that any person aggrieved may appeal. Any unsecured creditor who will get a less dividend because of this court's order is aggrieved if that order is erroneous. Any of them may, therefore, without any leave from this court, appeal from the order in question. What is asked, however, is that the appeal may be taken not only in the name of the receiver, but at the expense of the insolvent estate. The effect of the decree which is questioned is to retain within Mr. Anderson's mortgage several thousand dollars worth of property of the insolvent company. This property the unsecured creditors seek to recover from the lien of that mortgage. The struggle is therefore between the unsecured creditors and Mr. Anderson. It happens that Mr. Anderson is not only the holder of the mortgage which is attacked, but he is also the largest unsecured creditor of the company. The present application that the appeal be taken at the expense of the insolvent estate is therefore an effort to compel Mr. Anderson to contribute to the expense of litigation against himself. This course appears to me to be inequitable. It is argued that, as one of the unsecured creditors, Mr. Anderson will participate in the advantages of the recovery of the assets sought to be relieved from the lien of his mortgage if the decree is reversed. This may, in a limited sense, be true; but it is certain that, if the decree be reversed, he will have to lose, as a secured creditor, all that is recovered, and, as an unsecured creditor, will have to pay his share of the costs of the litigation against himself.

The receiver suggests that if the limitation on the appeal be successful, and the decree be reversed, the expenses be paid out of the general assets of the insolvent estate, and, if it be affirmed, the expenses be paid out of the dividends of those creditors who seek, through the receiver, to take the appeal. This plan would, in case of a reversal, compel Mr. Anderson, as an unsecured creditor, to pay a share of the expenses of a litigation against himself. This, in my opinion, is inequitable, as I have above stated. The taking of an appeal by the receiver is, under the law and the circumstances of this case, not a necessity. Those unsecured creditors who are aggrieved may in their own names prosecute the appeal upon any arrangements as to expenses which they may choose to make. The name of the receiver as appellant has some conveniences which would not attend upon an appeal in the name of the creditors. Those for whom the receiver would act in taking an appeal are antagonistic. While

the majority in number and value ask the use of his name, they should not be permitted to use it to compel the minority in number and value to pay the expenses of litigation to be brought against the minority. No man ought directly or indirectly to be forced in advance into a position where he will have to pay the expenses of litigation against himself. That is a matter which ought to be reserved for determination by the judgment in the litigating suit.

I will advise an order that the receiver may take the appeal in his name when those unsecured creditors who have solicited him to do so shall have secured him the costs and expenses of the appeal.

(55 N. J. B. 106)

MANNING v. LINDSLEY.

(Court of Chancery of New Jersey. Sept. 29, 1903.)

WILLS—BEQUEST—RESIDUARY CLAUSE.

1. The remainder interest in money bequeathed to testator's wife for life, not otherwise being disposed of, passes to her under a clause giving to her the residue and remainder of his estate.

Suit by John P. Manning, administrator of Philander S. Pierson, deceased, against Walter P. Lindsley, executor of Mary E. Pierson, deceased. Defendant demurs to the bill. Demurrer sustained.

J. D. Gallagher, for demurrant. Malcolm MacLear, for complainant.

EMERY, V. C. This bill, which involves the construction of a will, discloses the following material facts: Philander S. Pierson, by his will, directed (1) the payment of his debts; (2) bequeathed to his wife, Mary S. Pierson, his household furniture, horses, wagons, and riding equipments, with a direction that no inventory or accounting of these should be made; (3) devised his homestead property, with certain other lands, to his wife for life, with remainder over to other persons. The fourth item (one of the items now in question) is as follows: "Fourth. I give and bequeath to my wife aforesaid the sum of fifteen thousand dollars during her natural life, with the privilege of selecting that amount from any securities held by me at my decease, at the par value of the same." By the fifth item he bequeathed to Emma L. Harrison \$5,000, and gave to her the second choice of selection from any securities held at his decease. Four other legacies, three of \$1,000 each and one of \$2,000, are given by the sixth, seventh, and eighth clauses, and by the ninth clause the wife was made residuary legatee, as follows: "Ninth. The residue and remainder of my estate I give and bequeath to my wife aforesaid, but if at my decease there shall not be sufficient property, together with the proceeds of sale of any and all real estate not otherwise disposed of by this my last will, to pay all the

foregoing bequests, then and in that case I order the bequests to my wife and Emma L. Harrison to be paid first and the residue and remainder to be divided pro rata according to the several bequests made." Testator's wife was appointed sole executor of the will, with the power to sell real estate. She received the securities left by the testator, selected the \$15,000 from them, retained these during her life, and afterwards died, having made a will of which the defendant is executor. By this will she disposed of all her real and personal estate. The bill alleges that the defendant, as executor of Mary E. Pierson, has taken possession of the \$15,000 in securities, and now claims them as part of her estate for distribution under her will. After Mary E. Pierson's death, complainant was appointed substituted administrator of Philander S. Pierson, and files this bill for an account of this fund, and payment of it to him, as a part of the husband's estate. Complainant's claim is that the remainder interest in this fund of \$15,000, after the bequest to testator's wife for life, did not pass to her under the residuary clause, and therefore not being disposed of, testator died intestate as to this sum. This contention cannot be sustained. The bequest of \$15,000 to the wife for life left the sum undisposed of after her death. The ninth item disposed of "residue and remainder" of testator's estate, and these words, in their ordinary and natural import, include the interest in the \$15,000 undisposed of by the fourth clause. Had this "residue and remainder" been given to any person other than the wife, no possible question could have been raised as to the residuary legatee being entitled to the sum after the wife's death. The mere fact that the residuary legatee is also the legatee for life is not of itself sufficient to restrict this ordinary operation of the words. Nor in the form of the bequest to the wife for life is there anything to exclude the operation of the residuary bequest. In *Clark's Ex'rs v. Richards* (Err. & App. 1899) 21 N. J. Eq. 361, it was held that a gift of the interest of a bond and mortgage and of the dividends of stock to testator's daughter, by bequests which were construed to be bequests for life, with a provision for using the principal for her support if necessary, did not have the effect of restricting the operation of a general residuary clause, which divided the principal between the life tenant and another as residuary legatee. Both the life estate and residuary legacies were held to be operative. This is also the rule of construction applied where there is a devise for life of real estate, and a subsequent residuary devise in fee to the tenant for life, either alone or in connection with others; and in such case the mere fact that there is prior devise to the tenant for life does not, by implication or construction, restrict the full operation of the residuary devise. 2 Jarm.

Wills (R. & T. Ed.) *649; *Williams v. Goodtitle*, 10 B. & C. (21 E. C. L.) 895 (1830); *Ridout v. Pain*, 3 Atk. 486, 493 (Ld. Hardwicke, 1747). A fortiori this must be the rule in bequests of personalty, and this is the conclusion reached in other courts in such bequests. *Read v. Payne*, 3 Call, 225, 2 Am. Dec. 550 (1802). Even had the bequest for life been made in such terms as to show a clear intention that the tenant for life should not herself have the corpus, or have anything but the interest, then, as Chief Justice Beasley points out in *Clark's Ex'rs v. Richards*, 21 N. J. Eq. 363, the residuary gift to the tenant for life must be held to take effect by giving to the life tenant the power to dispose of the corpus by will. That has been done in this case, and the defendant claims under the will of the tenant for life.

Complainant has no claim to this fund in question, and the demurrer must be sustained.

SCHOENFELD v. AMERICAN CAN CO. et al.

(Court of Chancery of New Jersey. Oct. 5, 1903.)

EQUITY—INJUNCTION—CORPORATIONS—BILL BY STOCKHOLDERS—PAYMENT OF DIVIDENDS—FRAUDULENT ORGANIZATION—SUFFICIENCY OF ALLEGATIONS—REMEDY AT LAW.

1. A bill by a stockholder against the corporation sought a reduction of the capital stock on the ground that the company was fraudulently organized, because the property transferred for its stock had been overvalued, and sought an injunction restraining the payment of a dividend on the preferred stock. In support of a preliminary injunction, plaintiff filed an affidavit by himself and one by his counsel; his affidavit not showing any circumstances tending to show that he stood in any such relation to the alleged wrongdoings that he could speak thereof from personal knowledge, and the counsel's affidavit concerning itself principally with admissions made by defendant's president in a conversation. *Held*, that the affidavits were not sufficient to warrant the issuance of the preliminary injunction.

2. P. L. 1896, p. 287, § 30, provides that, if a corporation pay dividends which have not been earned in net profits, the directors shall be liable to the corporation and its creditors for the dividends so paid. *Held*, that an injunction restraining the payment of a dividend on the ground that it had not been earned will be denied where there is no showing that the directors are insolvent, there being an adequate remedy at law under the statute.

3. A bill by a stockholder of a corporation to restrain the payment of a dividend on the ground that it had not been earned in net profits might be amended, after application for a preliminary injunction, so as to invoke on final hearing the remedies given under Corporation Act (P. L. 1896, p. 287) § 30, making the directors liable for the amount of a dividend paid when not earned.

4. Where public notice was given September 1st that a corporation would pay dividends on the preferred stock on September 30th, a bill by a stockholder, filed September 25th, seeking to restrain the payment of the dividend, was too late.

Suit by Frank Schoenfeld against the American Can Company and others for an injunction.

tion to restrain the payment of a dividend on defendant's preferred stock, etc. Order to show cause dismissed.

Jacob Erb, S. H. Richards, and Thomas E. French, for complainant. R. V. Lindabury, for defendants.

GREY, V. O. (orally). This matter can and ought to be settled without delay, and, as it is presented to me, may be disposed of upon the proofs and argument submitted on the part of the complainant. The bill of complaint is filed by the owner of 300 shares of the common stock of the American Can Company, and asks a reduction of the capital stock of the company on the ground that the company was fraudulently organized; that the property which was transferred to the company in exchange for the issue of its capital stock was fraudulently overvalued, and for an accounting incidental thereto; and that the individual defendants, who were promoters of the company, may be decreed to deliver up all such capital stock held by them as has been fraudulently received, without value paid to the company, and to pay for all such stock as they may have transferred; that the books of the company may be brought into this state, and the defendant afforded an opportunity to examine them; and, lastly, that a preliminary injunction be issued, restraining the company from the payment of a dividend on the preferred stock which it has announced its purpose to pay on the 30th of September, 1903. The bill also contains a prayer for general relief. The bill was filed on September 25, 1903. It is supported by two affidavits—one made by the complainant, and the other by his counsel, Mr. Erb. An order was issued, returnable to-day, September 28th, calling upon the defendant company to show cause why a preliminary injunction should not issue to restrain the payment of the dividend announced to be paid on September 30, 1903, upon the preferred stock of the company. The company responds by filing counter affidavits. The single question here to be considered is whether such a preliminary injunction should be granted. It is entirely settled that, in order to be entitled to a preliminary injunction, the complainant must establish his equity by legal evidence, and must also show that he will suffer irreparable injury unless the defendant is restrained from doing the act regarding which the preliminary injunction is sought. In the present case the defendant company gave notice on September 1, 1903, that on September 30, 1903, it would pay a dividend upon its preferred stock. The pertinent allegations of the bill touching this matter are that the capital stock of the company was fraudulently overissued; that it has since been seriously impaired; that the money about to be used for the proposed dividend to the preferred stockholders is not in any proper sense profits earned in the company's

business; that, if it is, it should be used to restore losses which have vitally lessened the company's capital. The proof submitted in support of this claim is the complainant's own affidavit in formal verification of the bill. Nothing in the bill of complaint itself, or in the complainant's affidavit annexed thereto, shows that he was a participant in, or actually acquainted with, any of the various incidents by which the alleged lessening of capital or failure to earn profits came to happen. Not a single circumstance is narrated which shows that he ever stood in any such relation to any of the alleged wrongdoings of the company's officers that he can speak touching those matters from his personal knowledge. The other affidavit is that of the complainant's counsel, and addresses itself to alleged admissions made by the president of the defendant company within the last few days in a conversation had in New York. None of these are of sufficient weight to justify the issuing of a preliminary injunction, and, so far as they attempt to show that the proposed dividend has not been earned, they are fully met and contradicted by the affidavits of the president and the accounting officers of the defendant company. The order to show cause is therefore not sufficiently sustained by the proofs submitted by the complainant, and I am quite satisfied upon this more careful examination that I ought not to have allowed it. The application should fail because the complainant has not supported it with sufficient evidence. When the defendant's affidavits in reply are read, they meet all the complainant's proofs, so far as they set up any matter which can be considered on this preliminary application, and refute them.

There is also an entire failure on the part of the complainant to show that he will suffer irreparable damage if the preliminary writ asked for is not allowed. The wrong alleged is that the directors of the defendant company are about to pay a dividend which has not been earned in net profits. If this be true, a full and adequate remedy is afforded by section 30 of the general corporation act (P. L. 1896, p. 287), which provides that in such case the directors shall be jointly and severally liable to the corporation and its creditors for the full amount of any dividend so paid. There is no showing that the directors of the defendant company are insolvent or financially irresponsible, nor is there in this bill of complaint any showing that the statutory remedy is inadequate to correct the alleged wrong.

It is argued that the statutory remedy is reserved to the corporation and to creditors, and that the complainant is neither the corporation nor a creditor, but only a stockholder. It is, however, the law that if those officers of a corporation who may control the use of its name in a litigation act in fraud of the company, so that it has a right of suit against them, their action in consenting to

or directing the use of the corporation name is in such a case not necessary. Any stockholder may exhibit his claim for relief. Such a course of procedure, based on section 30 of the general corporation act, was sustained by the Court of Appeals in the case of *Appleton v. Am. Malting Co. et al.*, 54 Atl. 454. This bill of complaint might be readily amended to invoke on final hearing the application of the remedies proffered in section 30 of the corporation act.

It should, I think, be noticed, that extended public notice was given on September 1, 1903, that the dividend on the preferred stock of the defendant company, the payment of which the complainant now asks to have enjoined, would be paid on September 30, 1903. It is hardly possible that the complainant, though a holder of common stock in the company, escaped notice of this publication. Yet his bill of complaint seeking to restrain payment of this dividend was not filed until September 25, 1903—a period so shortly before the day fixed for payment of the dividend that it would be very difficult for the defendant company, if called upon to respond to a bill properly supported by proof, to answer it in time to have a hearing and decision before the day of payment would have arrived. A preliminary restraint ought not to be allowed where the complainant delays application to a time when, if granted, it would be an unreasonable hardship to the defendant.

The order to show cause should be dismissed.

(72 N. H. 235)

HURLBUTT v. BROWN.

(Supreme Court of New Hampshire. Grafton. June 30, 1903.)

BANKRUPTCY—LIEN—JUDGMENT ENFORCING LIEN—VALIDITY.

1. A creditor who sued the debtor and secured an attachment more than four months before the petition in bankruptcy against the debtor was filed acquired a lien on the debtor's property which was not destroyed by Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], providing that all levies, judgments, attachments, or other liens obtained against a person who is insolvent within four months prior to the filing of a petition in bankruptcy against him shall be void, though the judgment enforcing the lien was obtained less than four months prior to the filing of such petition.

2. Bankr. Act July 1, 1898, c. 541, §§ 60a, 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], providing that a person shall be deemed to have given a preference, if, being insolvent, he has suffered a judgment to be entered against himself in favor of any person the effect of which will be to enable a creditor to obtain a greater percentage of his debt than other creditors of the same class, and if a bankrupt shall have given a preference within four months before the filing of a petition in bankruptcy, and the person receiving it shall have had reasonable cause to believe that it was intended to give a preference it shall be voidable by the trustee, does not destroy the lien of an

attachment obtained more than four months before filing petition in bankruptcy, though the creditor and debtor both knew at the time of the attachment that the debtor was insolvent.

3. Bankr. Act July 1, 1898, c. 541, § 3a, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], providing that acts of bankruptcy of a person shall consist of his having suffered or permitted, while insolvent, any creditor to obtain a preference, and not having at least five days before a sale of any property affected by such preference vacated or discharged such preference, does not destroy the lien of an attachment procured more than four months before filing petition in bankruptcy.

Transferred from Superior Court; Pike, Judge.

Action by Charles O. Hurlbutt, trustee in bankruptcy of one Wilder, against C. F. Brown. Facts found, and case transferred from the superior court. Case discharged.

Wilder is the son-in-law of the defendant, and prior to September 25, 1899, owned and conducted a drug business at Lebanon. On that date the defendant brought suit against Wilder, and caused his stock in trade to be attached to secure the payment of certain promissory notes which Wilder owed him. The writ was entered at the October term, 1899. There was no appearance by Wilder. The action was defaulted, and judgment entered for the plaintiff, Brown, January 26, 1900. Execution was issued upon the judgment January 30, 1900. February 9, 1900, a petition in bankruptcy was filed against Wilder. February 10, 1900, the property attached was sold on the execution for \$2,064.77, of which \$1,995.64 was applied in satisfaction of the execution and \$69.13 was subsequently paid to the plaintiff, as trustee in bankruptcy. Wilder was adjudged bankrupt March 8, 1900, and the plaintiff was appointed and qualified April 10, 1900. Wilder was insolvent before September 25, 1899, and so continued down to the filing of his petition in bankruptcy. During all of this time both Brown and Wilder knew that the latter was insolvent. Wilder intentionally suffered the judgment to be entered against himself in the defendant's suit, and levy to be made thereon. The effect of this judgment and levy was to enable the defendant to obtain a greater percentage of his debts than any other creditors of the same class. The defendant "had a reasonable cause to believe," and in fact knew, that "it was intended thereby" to give him a preference.

Sargent, Niles & Morrill, for plaintiff. Jewett & Plummer, for defendant.

WALKER, J. The plaintiff claims that he is entitled to recover under Bankruptcy Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], which, so far as it is material to the plaintiff's contention, provides "that all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior

¶ 1. See Bankruptcy, vol. 6, Cent. Dig. § 297.

to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt." In *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, it was held that judgment creditors of a bankrupt, by commencing a judgment creditors' action more than four months before the petition in bankruptcy is filed, acquire a lien on the property of the bankrupt, which is not rendered void by section 67f of the bankruptcy act, though the judgment enforcing the lien was recovered less than four months prior to the filing of the petition, since this provision relates to judgments creating liens, and not to judgments which enforce otherwise valid pre-existing liens. The court say (page 174, 187 U. S., page 71, 23 Sup. Ct., 47 L. Ed. 122): "In our opinion, the conclusion to be drawn from this language [section 67f] is that it is the lien created by the levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that, where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months, the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens." As the defendant's attachment of the debtor's property was regularly made more than four months before the petition in bankruptcy, and as it created a valid lien thereon (*Kittredge v. Warren*, 14 N. H. 509; *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841; *Metcalf v. Barker*, supra), the authoritative decision in the latter case upon the point raised renders extended discussion of it unnecessary.

But the plaintiff takes the additional position that he has made out a case under section 60 (30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), where it is provided (a) that "a person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class"; and (b) that, "if any bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." In answer to the argument based upon these provisions, it is sufficient to say that the preference consists

in the debtor's suffering a judgment to be entered against him, the enforcement of which would result in the appropriation for the benefit of the judgment creditor of specific property of the debtor, which would otherwise be held for all the common creditors. But in this case, before the entry of the judgment which it is claimed constituted the preference, the defendant's attachment lien had become a valid security as against the subsequent proceedings in bankruptcy. The defendant had become a secured creditor, and when the petition in bankruptcy was filed he was not a creditor "of the same class" he was in when he brought his suit. Then he was an unsecured creditor as against proceedings in bankruptcy which might have been instituted within four months. After the expiration of that period, and in the absence of action against the debtor's estate under the bankruptcy law, the defendant became a secured creditor. The provisions of the statute last above quoted, thus construed, are in accord with the controlling construction given section 67f in *Metcalf v. Barker*, supra. Nor does section 3a (3) of the bankrupt act (30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]) change this result. It is there enacted that "acts of bankruptcy by a person shall consist of his having * * * suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference." To construe this section, in connection with section 60, in accordance with the plaintiff's contention, would be in effect to hold that, although a creditor has acquired an attachment lien on his debtor's property more than four months before the filing of a petition in bankruptcy, and has in fact become a secured creditor, the trustee in bankruptcy is entitled to the property or its proceeds, if the debtor suffers the property to be sold upon execution. The inconsistency of such a result is apparent. As said by the court in *In re Blair* (D. C.) 108 Fed. 529: "It is not easy to reconcile all the language concerning preferences and liens in the bankrupt act, but the argument thus drawn from sections 3 and 60 does not appear to me strong enough to meet the language and plain implication of section 67f."

Case discharged. All concurred.

(72 N. H. 302)

DEMERITT et al. v. YOUNG et al.

(Supreme Court of New Hampshire. Strafford. June 30, 1903.)

WILLS—CONSTRUCTION—LIFE ESTATE—INTEREST OF REMAINDERMEN—POWER OF TRUSTEES.

1. A testator bequeathed to his wife for life a third part of all his property, and at her death to trustees for the support of his two children, and at their death to the nieces and nephews of the wife. He gave the rest of his

estate to the trustees, with directions to pay from the net income all money needed for the support of his two children, and provided that on the death of either of the children the longest liver should take all, and further provided that, should the wife survive either or both of the children, the estate should be the estate of the wife during life, and then to be equally divided between the nieces and nephews of the testator. *Held*, that all the property should be held for the benefit of the last surviving member of the testator's family, but that on the death of the last survivor the remainder of the one third passed to the nephews and nieces of the widow, and the other two thirds to the nephews and nieces of the testator.

2. Where trustees of property for the support of the testator's children for life and on their death to designated beneficiaries are vested with a discretion as to the expenditure of the income for the support of the children, they cannot give the children the immediate benefit of it, or pay it to them, except when the necessities and comfort of the children require it; and whatever is not required for such purposes and the expenses of the trust must be paid over on the death of the children to the respective remaindermen as part of the principal.

Transferred from Superior Court; Young, Judge.

Bill in equity by Joseph L. Demeritt and another, trustees of the will of Emerson Furber, deceased, against one Young and another for the construction of the will. Facts agreed, and case transferred from the superior court. Case discharged.

The plaintiffs are the trustees named in the will, who now hold the estate in that capacity. Mary Furber, the widow of the testator, died in November, 1901, and Ann Leighton, his daughter, died in March, 1901. Frank, his son, is now living, but is, and has been since a long time before the testator's death, non compos mentis. His mental incapacity is permanent and incurable, and was known by the testator to be so when he made his will. The defendant Leighton, at the death of the testator, was the sole survivor of his nephews and nieces. The will provides as follows:

"Second. I give, bequeath, and devise unto my beloved wife, for and during only the term of her natural life, the one-third part of all my estate, both personal and real, wherever found or however situated; at the decease of my beloved wife, the aforesaid estate is hereby bequeathed and devised to Joseph L. Demeritt and Eli Meader, in trust for the support and all necessary expenses in sickness and health, at all times and under all circumstances, for the welfare and comfort of my two children, Ann Leighton and Frank Furber, during their natural life; at the decease of the aforesaid children, Ann Leighton and Frank Furber, the aforesaid estate remaining in the hands of the trustees to be equally divided between the nieces and nephews of Mary Furber.

"Third. I give, devise, and bequeath all the rest and residue and remainder of my estate, real, personal, or mixed, of every name, nature, and description, wherever found and wherever situated, to Joseph L.

Demeritt of Farmington and Eli Meader of Rochester, and their successors, in trust for the following purposes: To carry on, manage, and improve all my said estate to the best advantage, and take care of my personal estate, and invest the proceed of all my said estate, with power to sell at private or public sale a part or all of my real estate, whenever the best judgment of the trustee it is most expedient and for the interest of my estate so to do, make the money so received from such sale or sales a part of said investment.

"Fourth. To pay out of and from the net income, to my daughter, Ann Leighton, all the money said Ann Leighton, to make good and ample provisions in sickness and health, care, comfort, or support at any boarding place said Ann Leighton may elect, and two hundred dollars per annum in cash, if she so elects, or any part thereof.

"Fifth. To pay out of and from said net income of my estate to my son, Frank Furber, during his natural life, all the money that may be actually necessary for his comfort and support in sickness or health, at such times and such places as may be expedient, under all circumstances, relative to justice; look after said Frank, with a diligent exercise of your best powers relative to good care and no abuse.

"Sixth. In case of the death of either of my children, Frank Furber or Ann Leighton, the interest of the one deceased, the interest of the one survives the other. The longest liver takes all.

"Seventh. Should Mary Furber survive Ann Leighton or Frank Furber, either or both of them, the estate of the deceased shall be the estate of Mary Furber during her natural life, and no longer, and then to be equally divided between the nieces and nephews of Emerson Furber."

The trustees submit the following questions:

"First. Whether or not the said trustees shall pay to said Frank Furber the whole income of said estate, including the one-third part of the income given to said Mary Furber, widow, now deceased; or, if not, what disposition shall be made of income not paid to said Frank.

"Second. If the income of said estate is not sufficient for the support of said Frank Furber, whether or not said trustees may pay for his said support any sum or sums out of the principal of said estate.

"Third. Whether or not, under the seventh section of said will, any portion of the principal of the estate should be at once paid to said William S. Leighton, as only surviving nephew of said Emerson Furber, him surviving; and, if so, what portion.

"Fourth. Whether or not at the death of said Frank Furber one-third of the residue shall be equally divided between said nieces and nephews of said Mary Furber, and two-thirds of said residue be paid to said Wil-

Ham S. Leighton, only surviving nephew of Emerson Furber.

"Fifth. Whether or not said William S. Leighton, only surviving nephew of said Emerson Furber, shall at the death of said Frank Furber receive all the remainder of said estate."

George E. Cochrane, for plaintiffs. Arthur G. Whittemore and Gardner Greene, for defendants.

WALKER, J. It is apparent that the testator's purpose was (1) to provide for the comfortable support of his widow and children, and (2) to devise the remainder to others more remotely related to him. To carry out the first one—and, in his view, the more urgent or important purpose—he arranged for the enjoyment of his estate by his widow and children while they all lived by giving his widow the use and income of one-third of his property, and by giving to trustees the remaining two-thirds to hold for the support of his children. Desiring that all his property should be devoted to the benefit of his immediate family before it, or any part thereof, should become the absolute property of the remaindermen, he attempted to create devises to operate (1) if the widow should die first, (2) if one of the children should die first, and (3) if both of the children should die before their mother. Upon her decease before the decease of either of the children, it is clear that the property devised to her would have passed to the trustees to hold for the benefit of the children. In other words, it would be a devise in addition to what had already been given to them, and the entire estate would be held by the trustees for their benefit. It is equally clear that, in case the widow survived both of the children, two-thirds of the testator's property which he gave to the trustees for the children would be held for her benefit during her life. His general intention as thus indicated was to withhold all the property from the remaindermen so long as his widow or either child survived. In accordance with this intention, which the inexact and ungrammatical language of the sixth and seventh clauses of the will does not necessarily contradict, the right which Ann had to the net income of the trust property upon her decease became the right of the widow; and upon the decease of the widow it passed to Frank, the sole surviving member of the testator's family. Any conflict there may be between the sixth and seventh clauses, when regarded as distinct and independent provisions, disappears when they are read together in the light of the testator's general purpose. "The longest liver" of the children "takes all" the interest the other had in the trust property, unless the widow is living; in which case it goes to her, and ultimately to the last survivor. Ann's right to receive a portion of the income during her life was deemed by the tes-

tator to be a right which might exist in favor of another after her decease. It is as though he had said: "I give to my daughter Ann the right to receive the benefit of so much of the income of said two-thirds of my property annually as will suitably support her during her life, and upon her decease I give to Frank the right to receive what she would receive if living,—in other words, to receive the whole net income if his needs require it,—provided his mother is not then alive. If she is living, I give Ann's said right to her to enjoy during her life, and upon her decease Frank shall enjoy the right until his decease; when the right shall then become the property of my nieces and nephews." It is not probable that the testator intended that that part of the trust property which produced the income used by Ann should be turned over to his nieces and nephews upon the death of his widow after her use of it, but that it should continue trust property until the decease of Frank. The interpretation of his intention above indicated is the only one consistent with his general purpose, and must prevail over the obscure and doubtful language in the will, which, standing alone, might be susceptible of some other meaning. If, by the language of the seventh clause, the testator meant that the property producing the children's income upon the death of both should, after the widow's life estate therein, be divided between his nieces and nephews, an intention that upon the widow's death after the death of one of the children a proportional part of the property should be divided among his collateral relatives while the other child survived would be inconsistent with the provision of the sixth clause that "the longest liver takes all." No reason is apparent why he should desire that the entire trust property should be held for the benefit of a surviving child if the death of the other child occurred after the death of the widow, and that only a part of it should be so held if the child's decease occurred before that of the widow. In the absence of a reason for such a distinction, and in view of his evident purpose to devote his entire estate in the first instance to the support of the members of his immediate family, it is more probable than otherwise that he intended that all his property should be held in any event for the benefit of the last surviving member of his family; and that after this purpose was fulfilled, the remainder of the one third of his estate given to the widow should become the property of her nephews and nieces, and that the other two thirds held in trust should be divided among his nephews and nieces.

As the trustees, under the second and fifth clauses of the will, are vested with a discretion as to the expenditure of the income for Frank, they cannot give him the immediate benefit of it, or pay it to him, except when his necessities and comfort, as indicated in the will, require it. Whatever is

not required for this purpose and for the expenses of the trust, upon his decease must be paid over to the respective remaindermen as a part of the principal.

The question whether, if the income is not sufficient for the support of Frank, any part of the principal may be used for that purpose, is not answered at this time, since it does not appear that the condition of the estate and the needs of Frank make its solution necessary in the due administration of the trust. Application to the court may be made for advice upon this subject whenever there is occasion for it.

Case discharged. All concurred.

(206 Pa. 335)

FITZPATRICK v. UNION TRACTION CO.

(Supreme Court of Pennsylvania. May 25, 1903.)

INSTRUCTIONS—ASSIGNMENT OF ERROR—HARMLESS ERROR.

1. Error in an instruction is no ground for reversal where the court subsequently gave full, ample, and proper instructions, so that the jury could not have been misled.

2. An assignment that the entire charge of the court was erroneous, without pointing out specific errors, is insufficient.

3. Exclusion of certain evidence is harmless error where plaintiff is subsequently permitted to testify to substantially the same facts as those contained in the testimony rejected.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Thomas H. Fitzpatrick against the Union Traction Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

G. W. Pepper and W. B. Bodine, Jr., for appellant. Thomas Leaming and Thad. L. Vanderslice, for appellee.

POTTER, J. The first assignment of error is based upon the following extract from the charge of the learned trial judge: "In order that he [the plaintiff] should be entitled to damages, he must prove two things to you: First, that he was in no wise guilty of any negligence that contributed to the injury." Taken by itself, this was clearly an erroneous statement of the law, for it would impose upon the plaintiff the burden of showing affirmatively that he was not guilty of contributory negligence. This is more than he is required to do. It is sufficient that his own evidence does not disclose any contributory negligence. The court below evidently made the statement complained of inadvertently, as his intention, as gathered from other portions of the charge, was merely to instruct the jury that, before a recovery could be had by the plaintiff, they must find two things: First, that he was not guilty of contributory negligence; and, secondly, that the defendant was negligent. The

court gave substantially that instruction to the jury at the conclusion of the charge in the following language: "The facts are for you. The value of the testimony is for you. If the plaintiff, without any fault of his own, was injured by the fault of the defendant's motorman, then he can recover, and if he can recover, he can recover according to the measure of the damages I have given you. If, however, he in the smallest degree contributed himself to the injury, he cannot recover. Moreover, he cannot recover if, however innocent the plaintiff was, the motorman did nothing wrong. If the motorman did his duty simply, and in consequence of some other set of circumstances, not known to us, the accident happened, then the plaintiff cannot recover. It requires negligence in the defendant and freedom from negligence in the plaintiff, both, to enable the plaintiff to recover." We think these instructions fully corrected the inaccuracy of the expression used in the former part of the charge, and gave to the jury a plain and accurate statement of the law. The general effect of the charge of the court, rather than a casual expression in it, must govern the interpretation or construction of it. *Kyle v. Southern Elec. Light & Power Co.*, 174 Pa. 570, 34 Atl. 323; *McCloskey v. Bell Gap R. R. Co.*, 156 Pa. 254, 27 Atl. 246. The first assignment of error is therefore not sustained.

The second specification is practically, as was the case in *Drenning v. Wesley*, 189 Pa. 160, 42 Atl. 13, "to the entire charge of the court. No specific error is pointed out to us by the assignment, and therefore no discussion of it is called for." We have, however, carefully examined the charge in the light of this assignment. The appellant admits that the charge, with the exception of the portion covered by the first assignment, does not contain any misstatement of law. But it is contended that "it amounted to an argument in favor of the defendant, and is replete with comments on the testimony, which are unwarranted, and which prejudiced the plaintiff's case before the jury." Our reading of the charge does not so impress us. We find no misstatements of the evidence, and no unwarrantable conclusions. As this court said in *Newhard v. Yundt*, 132 Pa. 324, 19 Atl. 288, in answer to a somewhat similar criticism of a charge: "Nor were there any such expressions of opinion upon the facts as would amount to error, under the authority of *Ditmars v. Com.*, 47 Pa. 335, where it was held that it is often proper for the court to express an opinion upon the facts, provided care is taken not to infringe the province of the jury. In referring to the testimony and to the names of the witnesses by whom it is given, much latitude must necessarily be allowed in a charge; and where there is nothing in it that is unfair or misleading, or that withdraws the facts from the jury,

¶ 2. See Appeal and Error, vol. 3, Cent. Dig. § 8013.

we cannot reverse. We are not prepared to say that either of these defects appears in this charge. If it can be said to lean somewhat toward the plaintiffs, it may be due to the strength of their case." In *Fredericks v. Northern Central R. R. Co.*, 157 Pa., 103, 27 Atl. 689, 22 L. R. A. 306, Mr. Justice Green said (on page 128, 157 Pa., page 696, 27 Atl., 22 L. R. A. 306): "The complaint that the judge expressed an opinion on the facts * * * is without merit. In the case of *Leibig v. Steiner*, 94 Pa. 466, we said: 'A judge may give his opinion freely on the weight and value of evidence, for he is the best and safest adviser of the jury; but he has no authority to decide any question of fact, when the party affirming it has sustained his averment by any reasonable proof. Very strong expressions of opinion on the facts are tolerated; indeed, sometimes, may be necessary. * * * Exceptional cases arise where it is the duty of the judge to express his opinion of the facts and guide the mind of the jury to a correct view of the evidence; and, therefore, it has been settled that when he does so without misleading or controlling them in the disposition of the facts, there is no ground for reversing.'" In *Price v. Hamscher*, 174 Pa. 73, 34 Atl. 546, our Brother Fell says (on page 78, 174 Pa., and page 547, 34 Atl.): "While a judge may not decide a disputed question of fact when the averments of the parties in its support or denial are sustained by reasonable proof, he may express his opinion respecting the evidence, and at times it is his duty to do so." It may be admitted that in the present case there was a rather strong intimation of the opinion of the court upon certain facts, but, as the case was left fully and clearly to the jury, we see nothing which calls for reversal in this respect.

In the remaining assignments of error the appellants complain of the exclusion of certain offers of testimony. Even if this were shown to be error, it would be harmless; for the plaintiff was permitted to testify to substantially the same allegations as those contained in the rejected offers, and the testimony was thus before the jury for whatever it was worth.

The assignments of error are all overruled, and the judgment is affirmed.

(206 Pa. 386)

SARGENT et al. v. JOHNS et al.

(Supreme Court of Pennsylvania. June 2, 1903.)

ASSUMPTION OF DEBTS—CONSIDERATION—NOVATION—EVIDENCE.

1. Where a person takes over the entire stock of another, and publishes a notice that he has assumed the debts for goods purchased by the previous owner, the creditors of such owner are entitled to sue such person in their own names.
2. Where a person takes over the entire stock of another, and agrees to pay the debts for the

price of the goods purchased by the previous owner, the taking of the entire stock is a sufficient consideration for such promise, though the creditors were not parties to the consideration.

3. An attorney at law may testify as to matters affecting his client, except as to privileged communications.

Appeal from Court of Common Pleas, Adams County.

Action by J. B. Sargent and others against S. L. Johns and others, trading as the L. M. Alleman Hardware Company. Verdict for plaintiffs, and defendants appeal. Affirmed.

At the trial it appeared that the defendants in 1900 purchased from L. M. Alleman the latter's entire stock of goods. Shortly thereafter the following advertisement prepared by G. J. Benner, Esq., an attorney at law, was published in the *Gettysburg Compiler*: "Public notice is hereby given that the undersigned have purchased the entire stock in trade of the general hardware store on Baltimore street, in the borough of Gettysburg, recently owned by L. M. Alleman, consisting of hardware, paints, wall paper, wagons, buggies, carriage repair goods, etc., and that the business of said store will, from this date, be conducted by the two undersigned as joint owners under the name and title of the L. M. Alleman Hardware Company. The undersigned, in pursuance of the contract of sale, have assumed the payment of all bills for goods purchased in the conduct of said store by L. M. Alleman, the retiring owner, and creditors are notified to promptly present their claims to them, or either of them. All bills for goods to be purchased in further continuance of said business must, before the delivery of the goods, be approved by one of the undersigned, by whom said bills will be paid at maturity, or upon the usual terms of credit. The books of account of said L. M. Alleman have been transferred to the undersigned, with whom settlement must be made. S. L. Johns. H. N. Gitt." Defendants claimed that when they made the purchase from Alleman it was understood that the plaintiffs' claim had been paid. Under objection and exception, the court admitted in evidence the newspaper notice above quoted.

When G. J. Benner was on the stand, he was asked this question: "Mr. Hersh: Q. Did you prepare a notice for the L. M. Alleman Hardware Company? Mr. Sheely: Objected to. Mr. Hersh: We propose to show by the witness on the stand, at the request of L. M. Alleman, of the defendant company, he prepared a business notice, and, after preparing it, telephoned the contents of the notice, as prepared, to the defendant company; that they were perfectly satisfied with it, and instructed him to have it published in the *Gettysburg Compiler* and *Lit-tlestown Independent*. Mr. Sheely: Objected to as being a confidential communication to an attorney by people he represented at

¶ 1. See *Contracts*, vol. 11, Cent. Dig. § 800.

the time, and unless the clients waive it—Mr. Hersh: We will supplement that by saying this was a gratuitous piece of work by the witness on the stand, and not as an attorney. Mr. Sheely: That will not help the matter at all. The Witness: I may be able to simplify the matter— Q. (The Court): Were you his attorney at the time? A. Not at that time; and my sole conversations in relation to the preparation of that notice were with Mr. Alleman personally, and Mr. Johns, and, I think, possibly Mr. Brady, who is his confidential agent. I had no personal conversation with Mr. Johns and Gitt. Mr. Alleman came to me and instructed me to do certain work. At that time Mr. Sheely was not in town, and, I presumed at that time, if Mr. Sheely had been here Mr. Alleman would not have been in the office, and I had intended to ask these gentlemen how far they regarded this as a privileged communication. I had no conversation with either Johns, Gitt or Alleman about the preparation of this notice until some months after that, long after it had appeared in the papers, when I was consulted by one of them with reference to this suit. The Court: It seems from the cross-examination that the defendants were acquainted with this notice. We think we will allow this testimony to be admitted, under the circumstances. Q. (The Court): Did you consider yourself acting at the time for them? A. I did not. I regarded myself as acting in a purely clerical capacity for Mr. Alleman. And I conferred with the principal parties and went on with the preparation purely and solely, as I regarded it, on account of the absence of Mr. Sheely from town. Mr. McSherry: This offer is objected to, first, for the reason that Mr. Benner, the witness, was a stranger to this transaction, and that Gitt and Johns cannot be bound by his act; second, for the reason that if he was not a stranger, but was acting as counsel for Mr. Alleman, for Mr. Johns, or Mr. Gitt, he cannot testify, it being in the nature of a professional engagement. The Court: Just restate your offer. Mr. Hersh: We propose to show by the witness on the stand that at the request of L. M. Alleman, the original owner of the store, he prepared the business notice, a copy of which is now in evidence, and after its preparation conferred or spoke to the defendant company, and that they O. K'd it. The Court: Who is the defendant? Mr. Hersh: S. L. Johns and H. N. Gitt, the L. M. Alleman Hardware Company—and that they asked him to have it put in the papers. Mr. McSherry: Objected to, that the employment of Mr. Benner by L. M. Alleman cannot be binding upon the defendants in this suit, and that the testimony is illegal and incompetent. Mr. Sheely: The testimony is further objected to for the reason that Mr. Benner, the witness on the stand, is an attorney at law practicing at this court,

and that he ought not to be allowed to testify to anything which he did in this matter, whether he acted for Mr. Alleman or Mr. Gitt or Mr. Johns, whatever was said to him having been privileged. The Court: The court taking the employment of Mr. Benner to be largely in the capacity of a scrivener, and at the instance of L. M. Alleman, the grantor in the sale of this store, we think the offer is admissible. (Exception for the defendant, and bill sealed.)

The court charged in part as follows: "The plaintiff seeks to recover the amount of their claim from the defendant firm because, as they allege, the defendant firm in July or August, 1900, bought all the goods, wares, and merchandise of the L. M. Alleman store, and assumed to pay all his indebtedness; that L. M. Alleman was then indebted to them for goods sold him, the said Alleman, in the sum of \$3,035, with interest from April 4, 1900; and that none of this claim has ever been paid them, the plaintiff company. Gentlemen, if there were nothing more in this case than these allegations, and they were sustained by proof, the plaintiff company would not only be properly in this court suing the defendant firm in their own name, but they would be entitled at your hands to a verdict for the full amount of their claim." "The plaintiffs also claim, gentlemen, that they have shown by proof that they relied and acted on the truth of the advertised notice of sale by Alleman to the defendant company, and the assumption by the defendant company of the debts of Alleman in the purchase of the goods bought by him, and thus changed their relation as a creditor of Alleman to their injury. Now, gentlemen, if you believe the above allegation to be established by proof in this case, then we instruct you that, independent of what the contract of sale was, the defendants would be estopped from showing a different contract in the purchase of the Alleman store than what they gave public notice that it was. Estoppels, gentlemen, signify that a man, for the sake of good faith and fair dealing, should be prevented from saying that to be false which by his means has once been accredited as the truth, and by his representations has led others to act. When one by his words or conduct causes a reasonable man to believe in the existence of a certain state of things, and induces him to act on that belief to his injury, or to alter his own previous position for the worse, the former is estopped from averring against the latter a different state of things as existing at the same time. A man is not permitted to charge the consequences of his own fault on others, and to complain of that which he himself has brought about. The defendants, gentlemen, we understand, are not denying that, at the time of purchase by them of the Alleman store, Mr. Alleman was indebted to the plaintiff firm in the sum of \$3,035, with interest

from April 4, 1900, and that this claim is unpaid. But the defendants claim they have shown by the proof in this case that they did not assume or agree to pay the plaintiff's claim in the purchase of the store of Mr. Alleman; that they refused to buy the store until Mr. Alleman produced a receipt showing that certain claims, including the plaintiff's claim, were provided for; also that they did not authorize the printed notice of the sale as it appeared in the Gettysburg Compiler; that it did not represent the contract of sale truly; that the plaintiff company did not rely on the truth of said advertised notice to their injury, or change their previous relations to Mr. Alleman as their debtor by reason of it. Now, gentlemen, if you believe all the above allegations of the defendants to be established by proof in this case, then your verdict should be for the defendants. You will, therefore, determine, gentlemen, from all the evidence in the case: (1) What the contract for the purchase of the Alleman store by the defendant company was. Did the defendant company assume the payment of the plaintiff's claim, or did they not? (2) Was the advertised notice of this sale published with the approval or assent of the defendant company—with the approval or assent of either Mr. Johns or Mr. Gitt, of the defendant company? (3) Did the plaintiff company, relying on the truth of the advertised notice, change their relation as a creditor of Mr. Alleman to their injury, or for the worse? If you find the contract of purchase of the Alleman store by the defendant company included an assumption of the plaintiff's claim against Alleman by the defendant company, then your verdict should be for the plaintiffs for the full amount of their claim. If you find the purchase of said store by the defendant company did not include the assumption or payment by the defendant company of the plaintiff's claim against Alleman, then your verdict should still be for the plaintiffs, provided you also find that the advertised notice of the sale was published, or remained in the paper, with the assent or approval of either Mr. Johns or Mr. Gitt, of the defendant company, and that the plaintiff company, relying on the truth of said notice, changed their relation as a creditor of Mr. Alleman to their injury. If you find the contract of sale of the Alleman store to the defendant company did not include the assumption or payment of the plaintiff's claim against said Alleman, then your verdict should be for the defendants, unless you find that the advertised notice of sale was published with the approval or assent of either Mr. Johns or Mr. Gitt, of the defendant company, and the plaintiff company, relying on the truth of said notice, changed their relation as a creditor of Alleman to their injury."

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Robert Snodgrass, William McSherry, and W. C. Sheely, for appellants. Wm. Arch McClean, Wm. McClean, and Wm. Hersh, for appellees.

MITCHELL, J. There were two general grounds on which the defendants were claimed to be liable—first, the actual assumption by them of the plaintiff's claim against Alleman; and, secondly, an estoppel to deny such assumption by the published notice to Alleman's creditors. The first claim raised a question of fact, which was properly left to the jury. Under the testimony, it could not have been withdrawn from them. The second question depends chiefly on the published advertisement in the names of the defendants of their purchase of the Alleman store, their taking possession of the entire stock, and their assumption of Alleman's liabilities for goods purchased in that business. No question of the statute of frauds arises, for by the taking of the entire stock a consideration passed to defendants, and Alleman's creditors, though not parties to the contract, were parties to the consideration, within the principles of *Delp v. Bartholomay Brewing Co.*, 123 Pa. 42, 15 Atl. 871, and *Adams v. Kuehn*, 119 Pa. 76, 13 Atl. 184. Plaintiffs therefore as such creditors were entitled to sue in their own names, if their claims were in fact within the consideration, or on the principle of estoppel if they were led to believe so, and to act upon such belief, to their prejudice, in reliance on a notice authorized or adopted by the defendants. There was evidence sufficient to go to the jury that the advertisement was authorized by the defendants. The testimony of Mr. Benner was direct and positive that, although he drafted the notice on the request of Alleman, yet, in view of the circumstances, he thought it best to communicate with the defendants, and did so over the telephone twice with Johns, read the notice to him, and received his approval of it. Other evidence was to the same effect, in the circumstances of the sending of the bill of sale to him by Johns, so that he might get the notice in proper form, the payment for the advertisement by the firm, the failure of Gitt to disclaim when it was shown to him subsequently, and demand for payment made by a representative of plaintiffs.

The contention of appellants that Benner's testimony was not admissible cannot be sustained. The fact that he was an attorney at law does not render him incompetent to testify, except as to a confidential communication, and here there was nothing of the kind shown. Mr. Benner himself testified positively that he was not employed by defendants at all, but by Alleman, and not even by him in his professional capacity, but acted clerically, and entirely as matter of friendliness, because Alleman's regular counsel was away. There was no relation of client and attorney shown between the defendants and Benner. But

even if such relation had been directly and expressly shown, Benner's testimony would not have been incompetent. The mere fact of employment of an attorney is not a confidential or privileged communication. Seip's Estate, 163 Pa. 423, 432, 30 Atl. 226, 43 Am. St. Rep. 803. There being a difference in the testimony of Alleman and Benner as to the circumstances of the latter's connection with the notice, the court left the question of the relation of client and attorney to the jury, instructing them that, if they found such relation existed, they should disregard Benner's testimony. This was more favorable to defendants than they were entitled to.

The only remaining question was whether plaintiffs had altered their position in any way to their disadvantage in reliance on the published notice. This was also a question for the jury, and was left to them with careful and correct instructions, including the express affirmation of defendants' points that "if the jury believe that the defendants at the time of the purchase of the store from L. M. Alleman purchased the same with the understanding and the belief that the Sargent claim had been settled or arranged in some other way, and with no intention on their part to assume the same, then the defendants are not liable in this action, unless for some reason the defendants are estopped from alleging the actual contract of purchase," and "if the jury believe that on December 10, 1900, as soon as the notice published in the Gettysburg Compiler was seen by the plaintiffs' agent, or brought to the notice of plaintiffs or their agent, and an agent of the plaintiffs called upon the defendants, or either of them, and was at once informed that the notice did not include, and was not intended to include, the payment of the Sargent claim, then the defendants are not estopped from alleging that said claim was excluded in the contract of purchase."

The whole case, in all its aspects, was submitted to the jury carefully, and we find no error of which appellants can complain. Judgment affirmed.

(206 Pa. 362)

FINK et al. v. VAN FOSSEN.

(Supreme Court of Pennsylvania. May 25, 1903.)

CANCELLATION OF DEED—EVIDENCE.

1. In a bill to cancel a deed, both parties to which were dead, where there was no evidence of what took place at the time of its execution other than that afforded by the deed, nor any evidence that the purchase money was not paid in cash or some agreed upon equivalent therefor, nor that the execution of the deed was induced by fraud or undue influence, nor any evidence from which those facts, or either of them, could be fairly inferred, a decree refusing to cancel the deed was proper.

Appeal from Court of Common Pleas, Luzerne County.

Bill by Frank Fink and others against Franklin E. Van Fossen, guardian of Lucy

May Kicherer. From decree dismissing the bill, plaintiffs appeal. Affirmed.

The following is the opinion of the court below, filed by Ferris, J.:

"(1) On and before September 18, 1883, Thomas Fink was the owner in fee of the land described in the plaintiff's bill. On that date he, with his wife, executed and delivered to Frank Kicherer a deed in fee simple therefor, which was duly recorded October 25th of the same year. A money consideration of \$2,000 was mentioned in the deed, and a separate receipt for the same was indorsed upon and recorded with that instrument.

"(2) That said Frank Kicherer died on April 3, 1890, intestate, leaving to survive him a widow, now Nora Van Fossen, and one child, Lucy Kicherer, a minor, who now has as her guardian Franklin E. Van Fossen, who is the defendant in this suit.

"(3) There is no evidence of what took place at the time of the execution of the deed in question, other than that afforded by the document itself; nor is there any evidence that the purchase money was not paid in cash or some agreed upon equivalent therefor, nor that the execution of the deed was induced by fraud or undue influence, nor any from which those facts or either of them could be fairly inferred.

"(4) The grantee Kicherer, at the date of the deed and prior thereto, resided with the grantor, Fink, who was his uncle, and they continued to reside together on the farm in question, each of them doing work thereon, until Kicherer's death, in 1890. After his death, Fink and his wife continued to occupy the premises until they died, in 1900. There is no evidence that the relations between Kicherer and Fink and his wife during the seven years that elapsed from the date of the deed to that of the former's death were otherwise than harmonious and affectionate, or that any complaints were made by either Fink or his wife that Kicherer failed in any way in the performance of any duty toward them, whether such duty arose from contract or otherwise.

"(5) After the date of the deed both Fink and Kicherer treated the property as belonging to the latter. Kicherer made improvements upon it, and it was assessed in his name from 1884 to 1890, inclusive, and in the name of his 'estate' from 1891 to 1897, both inclusive, and from 1889 to 1900, both inclusive, it was assessed in the individual name of Thomas Fink, who was at that time guardian of the estate of Lucy M. Kicherer, the child and heir of Frank Kicherer. There is no evidence as to how or why the assessment was so changed.

"(6) Thomas Fink admitted at several times to certain witnesses who testified at the trial that the ownership of said farm was in Frank Kicherer during his lifetime, and was in his only child and heir at law,

Lucy M. Kicherer, after the death of her said father.

"(7) Thomas Fink, in his lifetime, took no legal steps to annul the said deed; nor was any written evidence produced at the trial tending to show that Kicherer took, or at any time held, this farm in trust from Thomas Fink or any other person; nor was there any written evidence tending to vary or modify in any way the effect of the deed as an absolute conveyance in fee simple upon a good and sufficient consideration; nor is any such trust relation or such variance or modification of the deed shown by the clear, precise, and indubitable testimony of two witnesses, or of one with proof of corroborating circumstances equivalent to the testimony of a second witness. On the contrary, the weight of the oral evidence sustains the deed as an absolute conveyance according to its terms.

"Testimony was given tending to show that Kicherer, shortly before his death, and while in the extremity of his last illness, said, in effect, that the farm should revert to Fink, because he (Kicherer) could not live to fulfill his contract. What that contract was does not appear. The plaintiffs, however, contend that it was an understanding on the part of Kicherer to provide for the support of Fink and his wife during their joint lives and the life of the survivor, and for their suitable burial after death. It is not shown, or even alleged, that this agreement, if there was one, was ever reduced to writing. Some evidence has been given, though of a vague and unsatisfactory character, of declarations tending to show the existence of some such understanding, and upon this evidence it is sought to build up a theory that a trust *ex maleficio* arose in favor of Fink and his wife. The evidence is wholly insufficient to establish this claim."

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

W. H. Hines, for appellants. Samuel L. Fedder and James M. Fritz, for appellee.

PER CURIAM. The learned judge below found as a fact that "there is no evidence of what took place at the time of the execution of the deed in question, other than that afforded by the document itself; nor is there any evidence that the purchase money was not paid in cash or some agreed upon equivalent therefor; nor that the execution of the deed was induced by fraud or undue influence; nor any from which those facts, or either of them, could be fairly inferred." It is objected to this finding by the appellant that it is incorrect, because there was evidence as to conversations between Fink and his grantee, Kicherer, as to the terms on which the conveyance was to be made. The witness stated that the conversation to which he testified was "just before" the execution of the deed, but on

cross-examination he said it was "along through the summer, towards fall; I don't remember the date." The deed was made on September 18th, and the conversation testified to was not connected closely enough with the execution to make it part of the *res gestæ*, or sufficient to vary the terms of the writing.

Appellant further calls attention to the declarations of Kicherer in his last sickness to Fink: "I cannot live to fulfill my contract. You will have to take your property into your own hands," etc. The utmost that these declarations amount to is that Kicherer thought Fink had a right to rescind the conveyance. Whether, in view of the act of 1856, and the absence of any evidence of fraud, Fink had any such right or not, we need not consider. Conceding, for argument sake, that he had, he chose not to enforce it. The judge found on this point that, "after the date of the deed both Fink and Kicherer treated the property as belonging to the latter. Kicherer made improvements upon it, and it was assessed in his name from 1884 to 1890, inclusive, and in the name of his 'estate' from 1891 to 1897, both inclusive, and from 1889 to 1900, both inclusive, it was assessed in the individual name of Thomas Fink, who was at that time guardian of the estate of Lucy M. Kicherer, the child and heir of Frank Kicherer. There is no evidence as to how or why the assessment was so changed." This finding disposes of any claim the appellants, as heirs of Fink, might have to do in his right what he clearly refused to do for himself.

Decree affirmed, with costs.

(206 Pa. 356)

HOLT v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. May 25, 1903.)

RAILROADS—OCCUPATION OF STREETS—DUTIES—INJURIES TO PERSON ON TRACK.

1. Where the tracks of a steam railroad company are laid in a street, though a wagon on the track is required to get out of the way of an approaching train, the railroad company is required to give full warning of its approach, and is bound to keep the train under such control as not to injure a traveler in a wagon going in the same direction with the train.

2. Evidence in an action for injuries to a person on wagon by a train on the track of a steam railroad company occupying a public street reviewed, and held that the question of plaintiff's contributory negligence and defendant's negligence was for the jury.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Thomas E. Holt against the Pennsylvania Railroad Company. From an order refusing to take off a nonsuit, plaintiff appeals. Reversed.

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

William G. Keir, for appellant. John Hampton Barnes and George Tucker Bls-
ham, for appellee.

POTTER, J.: It appears from the evidence in this case that, upon a portion of Richmond street in Philadelphia, two tracks for a street railway and one track for a steam railroad are laid. The street railway tracks are in the center, and the railroad track is at one side. All the tracks are so laid with respect to the paving as not to impede the use of the street by vehicles and the general public. The railroad track is used for the movement of freight trains only. The plaintiff was familiar with the locality, having driven over it frequently. Upon the afternoon of January 9, 1901, he was driving a horse and wagon loaded with iron, going north upon the easterly track of the trolley road. When near Huntingdon street a trolley car behind him rang its bell for him to clear its track. A south-bound trolley car was approaching him upon the other trolley track, and several wagons were in the space between the trolley tracks and the west side of the street. He therefore turned to the right, and over upon that portion of the street where the railroad track of the defendant company was laid. He continued to drive along the street, with one wheel of his wagon between the rails of the railroad track, until the trolley cars behind him had passed. In this way he consumed about four minutes of time, and traveled about 120 feet. He was beginning to turn again to the left, in order to get back into the trolley track, as the way was then open for him to do, when his wagon was struck in the rear by a locomotive engine of the defendant company. The shock was not very severe, but it was sufficient to drive an iron shaft which lay in the wagon with considerable force against the plaintiff's back. To recover for resulting injuries, this action was brought.

Upon the trial, the learned judge of the court below was of the opinion that the plaintiff was guilty of contributory negligence in driving upon the part of the street where the railroad track was laid, and in continuing there until his wagon was struck in the rear by the approaching engine. He therefore entered judgment of compulsory nonsuit, and his subsequent refusal to take it off is here assigned as error. This is not a case of one turning into the track in front of an approaching train, and being immediately struck. If it were, the court below would unquestionably have been right in pronouncing it contributory negligence. The plaintiff was occupying the portion of the street included between the rails for several moments before the accident, and was driving slowly along, and was in the act of turning back into the trolley track when his wagon was struck by the engine. The case was tried in the court below, evidently, upon the theory that the rights of the defendant to the use of the railroad track at the place of the accident were precisely the same as, and no less, than they are where laid upon its own right of way, purchased or condemned

by it, and appropriated to its exclusive use. If the place in question was the exclusive roadway of the company, in which the public had no right of passage, then the defendant would not be liable to one who drove upon it, unless the injury were willfully or intentionally inflicted. But if it was a street which the public had a right to use, then, even if it were occupied in part by the track of the railroad, no one driving upon it, and making such use of the street as it is ordinarily and manifestly intended for, could be considered as a trespasser. It is true that such a one might be guilty of contributory negligence in the manner in which he made use of the street and drove upon the track, but he could not, from the mere fact of being upon the track as laid in the street, be considered a trespasser, and held to forfeit his right to exact from the railroad company a reasonable degree of care in the running of its trains.

In the present case it is admitted that the accident occurred upon a public street, and nothing appears in the evidence to show that the defendant company had anything more than a right to lay down a railroad track therein, and run cars thereon. The track was not raised above the level of the street, but was laid in the same manner as the street car tracks, and was paved in with Belgian blocks. All this indicated that the street retained its character as a public highway for the use of all kinds of vehicles. Under these circumstances, it could not be considered negligence, in itself, for a citizen to drive over or along the track.

At this particular point the street was occupied with two tracks of a street railway, and one track of a steam railroad, and it is not apparent that the rights of the latter to the use of the street differed in any degree from those of the street railway. In fact, the argument of the appellee is in part directed to the application to this case of the decisions in street railway cases upon contributory negligence. And if the facts justified their application here, such authorities would certainly be appropriate and controlling. But in none of the cases cited do we find sufficient similarity in the facts to those now under consideration to make them available to sustain the action of the court below. In *Winter v. Federal St., etc., Pass. Ry. Co.*, 153 Pa. 26, 25 Atl. 1028, 19 L. R. A. 232, the doctrine was carried to the extreme, but there the plaintiff turned his wagon squarely across the track, and left it there while he was unloading, and depended upon the defendant company to avoid a collision by stopping its car in time while approaching upon a down grade. In *Gilmore v. Federal St., etc., Pass. Ry. Co.*, 153 Pa. 81, 25 Atl. 651, 34 Am. St. Rep. 682, there was like gross negligence upon the part of the plaintiff. The cases of *Gilmartin v. Lackawanna Valley Transit Co.*, 186 Pa. 193, 40 Atl. 322, and *Penman v. McKeesport, etc., Ry. Co.*, 201 Pa. 247, 50 Atl. 978, were those

in which the plaintiffs were struck while walking at night longitudinally on the tracks. There is a manifest difference in the rule which should properly be applied to pedestrians who make an unfitting use of the streetway in converting it into a footway, and that which is appropriate to drivers of teams, who have a right to use, with due care, any portion of a public driveway. Each has its appropriate purpose—the street for the use of the horse and vehicle; the sidewalk, for the pedestrian. When either is found in the place set apart for the other, it is manifestly out of the ordinary. In the present case the plaintiff was making a proper and legitimate use of the street. The conditions under which the railroad company laid and used its tracks at that point made it incumbent upon it to operate its trains with due regard to the safety of other people who were also rightfully using the street, at the same time.

The testimony shows that, when it became necessary for the plaintiff to turn out of the trolley track and to pass over to the railroad track, he did not drive immediately in front of the approaching train. On the contrary, he drove steadily along the street for a distance of perhaps 140 feet; occupying, as was estimated, about four minutes of time before his wagon was reached and struck by the engine. The latter in the same time had run only about 840 feet, so that it is difficult to see why the engine, running so very slowly, might not have been stopped before striking the wagon of the plaintiff. However, that was a matter of defense, which might have been satisfactorily explained to the jury. But it was for them, rather than for the court. If the plaintiff was lawfully using the track in front of the approaching train, while it was his duty to give way to it and not obstruct its progress, yet he was entitled to reasonable warning and reasonable time to get out of the way. The employees of the railroad were bound to keep the train under proper control, and they had no right to run into plaintiff, either upon the track, or while in the act of leaving it. They were bound to use every reasonable effort to avoid a collision. Whether or not they did so, was a question of fact; and this, as well as the question of any contributory negligence upon the part of the plaintiff, should, under proper instructions, have been left to the jury. It was certainly not so clear as to justify the court in pronouncing upon it as a matter of law.

The assignments of error are sustained, and the judgment is reversed, and a venire facias de novo is awarded.

(206 Pa. 415)

IN RE HOGG'S ESTATE.

(Supreme Court of Pennsylvania. June 2, 1903.)

PARTITION—RETURN—SUFFICIENCY.

1. A return of an order of inquest in partition of equal undivided interests in land devised by different ancestors is fatally defective where

the entire real estate is valued as that of one ancestor, when his interest was only in two-thirds of the land, and when the proceedings were had as if it were but one estate.

Appeal from Orphans' Court, Lancaster County.

In the matter of the partition of the estate of Robert Hogg, deceased. From a decree sustaining exceptions to alias inquest, Edna E. Hogg appeals. Affirmed.

The following is the opinion of the court below (Smith, P. J.):

"Robert Hogg devised to his son, William H. Hogg, and his granddaughter, Edna E. Hogg, each an undivided one-third interest in a farm in Colerain township. Rachel Hogg devised to each of them the undivided one-half of the other undivided one-third of the same farm. Thus William and Edna each owned an undivided one-half interest in a farm, the title to which came to them from different ancestors. It will serve no purpose to recite the various steps in this somewhat protracted partition proceeding. Our attention is now directed to the alias inquest and return. While the petition for the inquest recites the wills of Robert and Rachel Hogg, and traces the devisees' titles, it seems to contemplate a partition only of the undivided interests devised by Robert Hogg. The docket entries, as well as the indorsements on the various papers filed, so indicate. The order reads: 'It is ordered by the court that the high sheriff of Lancaster county do again summon a jury to view the said premises and make partition thereof between the heirs and legal representatives of said deceased,' etc. What deceased? Robert Hogg. Return of the inquest in these words: 'Appraised and valued 188 acres, more or less (as within described), at \$39.00 per acre, amounting to \$7,332.' This return certainly did not imply the parting of or the appraising of several undivided interests in premises devised by different ancestors. The whole was appraised as having come from one. If the two-thirds interest devised by Robert Hogg had been specifically appraised, and return thereto made, the exception might have been overruled; and partition allowed as to the two-thirds interest; or if the respective interests which came from the several ancestors had been separately appraised and properly distinguished in the return, an amendment might have cured the other defects. Irreconcilable inconsistencies bar the way to a confirmation of this return. If it was the intention to partition the interests devised by both Robert and Rachel Hogg, it ought to have been made to so appear with particularity, and the appraisalment ought to have been clear and distinguishing. 'The return of the inquest should be free of uncertainty or ambiguity. * * * This inquest ought to have been set aside for manifest defects even had no exceptions been filed.' Often the sheriff and jurors are unfamiliar with practice in the orphans' court, and with

the statutes relative to partitions. The statute provides that a reasonable allowance to the attorney for the petitioners may be made and taxed as if costs, and in many districts such attorneys furnish the inquest with proper instructions and forms—a practice to be commended.' Christy's Appeal, 110 Pa. 538, 5 Atl. 205. The confirmation of the inquest and return is refused. The same is set aside at the costs of the petitioner."

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

B. F. Davis, for appellant. W. U. Hensel and B. Frank Kready, for appellee.

PER CURIAM. This decree is affirmed on the opinion of the learned judge of the orphans' court.

(206 Pa. 379)

COMMONWEALTH ex rel. MERCANTILE TRUST CO. v. CITY OF PITTSBURG et al.

(Supreme Court of Pennsylvania. May 25, 1903.)

MUNICIPAL CONTRACTS—APPROVAL OF ESTIMATE—PAYMENT—DUTIES OF CONTROLLER.

1. A contract for the building of a reservoir provided that the decision of the director of the department of public works should be binding upon all the parties. The director approved an estimate for the work. *Held*, that the estimate was conclusive upon the controller of the city, and he had no discretion to refuse to pay it.

2. In mandamus to compel a city controller to pay a warrant issued to a contractor for a public improvement, under which contract the decision of the director of the department of public works was to be conclusive, the controller cannot allege, as a ground for refusal to pay, that the work was not done according to contract, but was done in an improper manner intentionally, of which fact the director had notice before he approved the estimate.

Mestrezat, J., dissenting.

Appeal from Court of Common Pleas, Allegheny County.

Mandamus by the commonwealth, on relation of the Mercantile Trust Company, against the city of Pittsburg and John B. Larkin, city controller. From the judgment, defendants appeal. Affirmed.

It appeared that on November 29, 1903, the court granted a writ of peremptory mandamus. 53 Atl. 769. Subsequently a motion was made to quash the writ on the ground that no notice had been given to the controller of the application for the writ. The court held that no notice was necessary to a public officer in a proceeding which concerned only the performance of public duties. He accordingly discharged the rule to quash. Subsequently, on its being made to appear that the controller had other reasons which he desired to present to the court as grounds for not countersigning the warrant, the court permitted the peremptory writ to be super-

seded, and allowed an alternative writ. Demurrers were filed to the returns of the several writs. The court sustained the demurrers, and the following is the opinion of the court below, filed by Shafer, J.:

"These five demurrers to the return of several writs of alternative mandamus were argued together, and may be considered together; the writs being to enforce a countersigning of warrants for monthly estimates for as many amounts claimed to be due the relator, the first being for the month of May, 1902. A similar proceeding was had as to the warrant for April, 1902, on which a peremptory writ was issued, and the judgment confirmed by the Supreme Court. Unless the present cases shall appear to be materially different from that case, they will be governed by it. Without repeating what has been said in the opinions heretofore filed in these cases, it is sufficient to say that the question really is whether or not any substantially new matter has been set up in these cases, additional to that which was before the Supreme Court in the case heard by it, and, if so, what is its effect. So far as the relators' case is concerned, it is practically identical with that presented in the case already determined, except that each proceeding is for a different month and a different amount. If there is any difference, therefore, it must be found in the returns.

"The first matter set up, not contained in the former return, is that the respondent, as controller, is not bound to countersign a warrant not already signed by the recorder, and that the warrants presented to him were not so signed. It may be that the controller might insist that a warrant duly signed by the recorder should be presented to him before he were called upon to countersign it; but where the refusal to sign was not based upon the absence of the recorder's signature, but for other reasons the respondent refused to sign any warrant, as in this case, it does not seem that the lack of the recorder's signature upon a warrant presented to the controller, or even the lack of the presentation of any warrant to the controller, would, under the circumstances, make any difference. The case seems to be analogous to that of a tender of money, where the refusal to receive any money excuses the production of legal tender.

"In the former return it was alleged that the relators owed the city \$100 a day, under the contract, for delay in finishing the work, and that the amount so owing was greater than the sum demanded in that proceeding. This is repeated in the present return, with the addition that the amount is now \$146,000, and that a resolution was pending in council, directing that these damages should be retained and enforced. We cannot see any real difference between the two allegations of the returns. If the existence of the penal clause in the contract, and the fact that the amount incurred under

¶ 1. See *Municipal Corporations*, vol. 26, Cent. Dig. § 890.

it exceeded the amount claimed, was not an answer to the former writ, it is none to this. Nor can we see that the resolution in question can alter the relators' rights.

"In the return in the former case it was alleged that the work was not done according to the contract, although it was not pointed out in what respects it was not so done. In the present return various particulars are pointed out in which the work done is said to be different from, and inferior to, that required by the contract. This, we conceive, however, makes no difference, for, if the director of public works is the arbiter, his decision cannot be impeached by declaring him to have made a mistaken or untrue certificate, whether the allegations are general or specific. It is further alleged that the reservoir is now completed, or supposed to be so, and that water has been turned into it, and that it leaks very badly. This also appears to us to be beside the question, as it does not appear by the contract that the relators guarantied to make a reservoir that should not leak, but only one that should be built according to the plans and specifications. The returns also contain a number of other allegations as to the injury that will be done to the city if the payments demanded are made, but all of them rest upon the allegations as to imperfect work, which, in the face of the contract as to the powers of the director, the city and its accounting officer cannot allege against the relator.

"The only additional allegations are those which relate to the knowledge of the director of public works that the work done was done in an inferior manner, upon a corrupt bargain between the relator and the former incumbent of the office, and other allegations of like import, which together were claimed by the respondent's counsel upon the argument to amount to a charge of fraudulent conduct on the part of the director of public works, such as to render his certificate invalid. In the opinion filed on January 26, 1903, allowing the respondent time to correct and amend his return in this respect, it was pointed out that in the original return no such fraud was charged, and we need not repeat what was then said. The respondent has since, under the leave so given, filed a correction or amendment to his return, the substance of which is that the director who is alleged to have made a corrupt bargain with the relator is not the same director who issued the estimate, but was one of his predecessors, but that the present director had notice of the corrupt bargain, and that he had notice that the work was done according to it; that a former director had condemned certain work and ordered its removal, but that it has not been removed; and that the present director, before making the estimates, had notice that the work was not done according to plans and specifications, and that the failure so to do it was intentional on the part of the relator; and that the director either

knew of the specific defects set out in the return, or was willfully blind to them. Taking the allegation of the correction or amendment as additional to, and not a substitute for, the original return, and looking at them together, they amount substantially to the allegation that the work was improperly done in certain respects; that the doing of the work in this improper manner by the relator was intentional; that the director had notice of this before he approved the work, but approved it notwithstanding. In other words, they say that the decision of the director was erroneous and unjust. As was decided in the case of Hostetter v. The City of Pittsburgh, 107 Pa. 419, the fraud for which the decisions of an arbitrator may be attacked must be actual and intentional, and not constructive, or such as flows from an erroneous or unjust judgment, and, further, that such decisions cannot be 'voided, unless by proof of fraud practiced on him, or by proof of accident or mistake, by which he was deceived or misled so that in fact the award is not the result of his own judgment.' If this were not the law, it would be of little avail to refer questions of any sort to arbitrators, as the losing party commonly believes the award against him to be erroneous and unjust, and the arbitrator to have willfully disregarded what he believes to be established facts.

"We are therefore of opinion that nothing has been set up in return to these writs, additional to what was set up in the case already decided, which furnishes a reason why the peremptory writs should not be issued. The demurrers in each of the cases above named are therefore sustained, and it is ordered that judgment be entered for plaintiff and against the defendants in each of the said cases, with costs, and that a peremptory mandamus issue in each of said cases as provided by law."

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

George W. Guthrie and W. B. Rodgers, for appellant. William A. Stone, H. L. Castle, and J. A. Langfitt, for appellee.

MITCHELL, J. These judgments are affirmed on the opinion of the court below.

MESTREZAT, J., dissenting.

(206 Pa. 370)

ANDREWS et al. v. BLUE RIDGE PACKING CO.

(Supreme Court of Pennsylvania. May 25, 1903.)

AFFIDAVIT OF DEFENSE—ACTION ON NOTE—SUFFICIENCY—AMENDMENT.

1. Where an affidavit of defense in an action against a corporation is sworn to by the business manager, it is unnecessary for him to set forth his information and belief.

2. An affidavit of defense executed by a corporation in an action on a note averred that

the claim was for money due for advances to defendant under contract under which plaintiff was to sell on commission the product of defendant's fruit-packing business; that plaintiff refused to take all of the product, whereby part of it was left over the season, to the loss of defendant; that plaintiff had failed to give due credit for the goods actually taken, and had overcharged commissions on the part sold, and was indebted to defendant in a greater sum than the amount of the notes. *Held* to state a good defense.

3. Where the defense set up in an affidavit of defense is probably good, but is insufficiently stated, a supplemental affidavit is properly allowed.

Appeal from Court of Common Pleas, Luzerne County.

Action by B. W. Andrews and George M. Randall, trading as B. W. Andrews & Co., against the Blue Ridge Packing Company. From a decree discharging rule for judgment for want of a sufficient affidavit of defense, plaintiffs appeal. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

Felix Ansart and John G. Johnson, for appellants. John T. Lenahan and T. J. Chase, for appellee.

MITCHELL, J. An affidavit of defense should set forth fully and fairly facts sufficient to show prima facie a good defense, and, if it fails to do so, either from omission of essential facts or manifest evasiveness in the mode of statement, it will be insufficient to prevent judgment. But if not deficient in either of these respects, and on its face fairly setting forth a prima facie defense, it is not to be subjected to close technical examination as if it was a special plea demurred to. Its office is to prevent a summary judgment, and for that purpose a showing of a defense, with certainty to a common intent, is sufficient. Tested by this standard, the first affidavit of defense was sufficient. It was made by the business manager of the defendant in positive terms. As such officer he must be presumed to be acquainted with the facts, and, as he took the responsibility of swearing positively as of his own knowledge, it was unnecessary for him to set forth his information and belief. *Newbold v. Pennock*, 154 Pa. 591, 26 Atl. 606; *Wolf v. Jacobs*, 187 Pa. 260, 41 Atl. 27. The affidavit set up a defense to the whole of plaintiff's claim, arising from a set-off in the same transaction. The defense, in substance, is that plaintiff's claim is for money due on certain promissory notes given as memoranda for advancements by plaintiff to defendant on a contract under which the plaintiff was to take and sell on commission the entire product of defendant's fruit-packing operations; that plaintiff had refused to take the whole product, whereby part of it was left over the season, to defendant's loss; that plaintiff had not accounted and given credit for the whole of

the goods actually taken, had overcharged commissions on the part sold and accounted for; and that the plaintiff, upon these transactions, was indebted to the defendant in a greater sum than the amount of the notes sued upon. If made out as to the facts, this was a good defense to the whole claim. So far as it rested on the contract, the court, having the latter before it, could look into the respective obligations of the parties; but as to the failure to account for goods sold, and the overcharge in regard to commissions, the result could only be shown by testimony as to facts, and a critical examination of the accounts, which can only be had at a trial. The supplemental affidavits, though they complicate the statement of facts somewhat, do not materially vary the defense, and, as the original was sufficient, they were unnecessary. If the insufficiency of an affidavit is manifestly in the substance of a defense, or if evasiveness is patent in the manner of statement, it is usual and proper to give judgment; but otherwise a supplemental affidavit is allowable, and is usually allowed.

The origin of the affidavit of defense law was in an agreement of the Philadelphia bar in 1795 (see note by Mr. W. W. Carr to *Detmold v. Gate Vein Coal Co.*, 3 Wkly. Notes Cas. 567, Fed. Cas. No. 3,830), subsequently enforced by rule of court, the validity of which was sustained in *Vanatta v. Anderson*, 3 Bin. 417. The affidavit under this rule, however, was only that to the best of defendant's knowledge and belief there was a just and good defense. But under the act of 1835 (P. L. 88) in relation to the district court of Philadelphia it was required that the affidavit should state "the nature and character" of the defense. Under this act the district court held that, to enable the court to judge of the nature and character of the defense, the affidavit must set forth the facts. The question then at once arose as to the sufficiency of the facts stated to constitute a good defense, and the practice of granting judgments for want of a sufficient affidavit rested for half a century on "the uncontrovertible judicial deduction that an insufficient affidavit was legally no affidavit at all." *Stedman v. Poterle*, 139 Pa. 100, 21 Atl. 219. In *Walker v. Morgan*, 2 Wkly. Notes Cas. 173, Williams, J., refers to the fact that no act of assembly had given the courts of Allegheny county authority to enter judgment for want of a sufficient affidavit of defense, and there was no general statute giving express sanction to such judgments until the procedure act of May 25, 1887 (P. L. 271). Long before that, however, the practice had become general, and was established beyond question. As a corollary, the practice was equally well established to allow a supplemental affidavit "if the court deem the defense to be probably good, but defectively stated." 1 *Troubat & Haly*, § 423. This was done in the interest of justice, and the same reasons that move the

¶ 3. See Pleading, vol. 39, Cent. Dig. § 809.

court to allow a supplemental affidavit may move it to allow a second or third supplemental, if it still appears probable that the defense is good, and the defect merely in the mode of statement. The extent of the indulgence is largely in the discretion of the court.

Order affirmed.

(206 Pa. 300)

SEIFRED v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, June 2, 1903.)

APPEAL — ASSIGNMENTS OF ERROR — RAILROADS — INJURIES AT CROSSING — NEGLIGENCE — INSTRUCTIONS — EVIDENCE.

1. It is not proper on appeal to raise the same question by different assignments of error.

2. In an action against a railroad company for injuries at a grade crossing, where the evidence shows the nature thereof, opinion evidence that the crossing was dangerous was erroneously admitted.

3. It is not negligence per se for a railroad company not to guard a crossing with a flagman, but it is a fact to be considered in determining whether due care was exercised by the railroad.

4. Where the Carlike Tables are admitted in an action to recover for personal injuries, it is insufficient for the court to state in its charge that the tables were some aid, but not conclusive, in determining the probable life of plaintiff, but all the circumstances affecting the probable duration of his life, as disclosed by the evidence, should be called to the attention of the jury.

5. Evidence in an action for injuries at a grade crossing reviewed, and held that the question of plaintiff's contributory negligence was for the jury.

6. A request for an instruction is properly refused where it contains several propositions of law, some of which are bad.

Appeal from Court of Common Pleas, Snyder County.

Action by William P. Seifred against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, and MESTREZAT, JJ.

Andrew A. Lelser, for appellant. C. P. Ulrich and A. W. Potter, for appellee.

MESTREZAT, J. It is not the number of exceptions taken during the trial nor the number of assignments of error filed in this court that determines the importance of the cause or the merits of the appeal when the case reaches the appellate court. This suggestion has been made so often by this court that its repetition would seem useless were it not that occasionally counsel still seem to think it necessary to raise the same question by several different assignments of error. Here we have seven assignments, which raise but the single question of the competency of a witness to express an opinion as to the dangerous character of the crossing where the accident occurred. A like obser-

vation may be made as to the other assignments, and it is safe to say that of the 30 assignments of error filed in this case one-fifth of the number would have been adequate to raise all the questions presented by this record for our consideration. We make these suggestions with the hope that we may be relieved from an examination of an unnecessarily voluminous record, such as we have before us, should the next trial of this cause be followed by an appeal.

We think it was error to admit the opinion of witnesses to show that the crossing where the collision occurred was dangerous. The competency of such testimony is based upon necessity. Where facts disclosed by the evidence give an adequate and intelligent description of the situation, opinion evidence is not admissible. Here there can be no difficulty in placing before the jury by proper evidence the exact situation of the crossing and its approaches, so that the jury will be enabled to determine with equal correctness as the witness the character of the crossing. The testimony produced on the trial shows the number of tracks, the manner in which they cross the highway, the frequency with which and the purpose for which they were used by the railroad, the cars standing on the track at the time of the accident, the buildings, trees, etc., along the approaches which obstruct the view of an approaching train; in a word, every fact which a juror could know by personal inspection of the premises, and which would qualify him to testify as a witness. The jury, therefore, would have the same information and knowledge of the situation, and be as competent and capable of forming an opinion as to the dangerous character of the crossing, as any witness who might be called to the stand. No special knowledge or training was necessary to qualify a witness or juror to determine whether the crossing was dangerous or not, and, a full and adequate description of the circumstances and situation having been given by the witnesses, there was no necessity for opinion evidence on the subject, and its admission was error.

The learned trial judge charged, *inter alia*, as follows: "If this crossing was not a more than ordinarily dangerous crossing, then the sounding of the bell and blowing of the whistle was sufficient notice, and the company would not be to blame for not having a watchman or flagman at that point; and, if the whistle was blown and the bell was rung as the engine approached the crossing, they have done their full duty at this point, if you find in addition that it was not a dangerous crossing." This was clearly misleading and erroneous, and was not cured by any other part of the charge. In effect, the court said to the jury, if the crossing was dangerous, it was negligence per se for the company not to guard it with a flagman or watchman. As suggested by counsel, all railroad crossings are more or less danger-

¶ 2. See *Railroads*, vol. 41, Cent. Dig. § 975.

ous, and are so regarded. The jury therefore was told by the court that the failure to furnish a flagman or watchman at the place of the accident was negligence. The learned judge may not have intended to say this to the jury, but such was clearly the effect of that part of the charge just quoted. On running its trains over a crossing, a railroad company must exercise the care required by all the circumstances, and the failure to perform this duty is negligence. It must adopt and use some means for the protection of those who may be crossing its tracks at their intersection with a public highway. But what particular means shall be used to protect the public when using the crossing with due care is left to the railroad company which operates the road, the law merely demanding and requiring reasonable care in view of all the circumstances. Says Clark, J., in *Lehigh Valley Railroad Company v. Brandtmaier*, 113 Pa. 610, 6 Atl. 238: "The law does not designate the mode in which these precautions against injury on part of the company (at crossings) are to be exercised. There is, it may be conceded, no common-law duty on part of the company to station flagmen or to maintain gates at public grade crossings, unless, indeed, under the particular circumstances, the public safety cannot otherwise be reasonably secured. But the fact that flagmen are not stationed at such a crossing and that gates are not there maintained are matters proper to be considered, with other facts, in a given case, in determining the rate of speed which is reasonably consistent with the public safety." The twelfth and thirteenth assignments of error must be sustained.

From the charge and his answer to points we are satisfied that the learned trial judge intended to instruct the jury that compensation was the measure of damages. Some of the language used in the charge on the subject may be open to criticism, but, if so, on another trial this fault may be avoided. The rule as to the measure of damages in cases of this character is so well established by a long line of decisions that it need not be repeated here.

Having admitted the Carlisle Tables to show the expectancy of life of the plaintiff, the learned trial judge should have more carefully guarded the effect of the evidence by directing the attention of the jury to the circumstances affecting the duration of the life in question. As said in *Steinbrunner v. Pittsburg, etc., Railway Company*, 146 Pa. 504, 23 Atl. 239, 28 Am. St. Rep. 806: "Their value, where applied to a particular case, will depend very much upon other matters, such as the state of health of the person, his habits of life, his social surroundings, and other circumstances which might be mentioned." It is not sufficient to say, as the court did, that the tables were some aid, but not conclusive, in determining the probable life of the plaintiff. All the circumstances af-

fecting the probable duration of the plaintiff's life as disclosed by the evidence, or concerning which there was testimony, should have been called to the attention of the jury. Unless this is done, and in a very pointed and direct way, by the court, mortality tables are very likely to have more weight with the jury than should be given evidence of that character.

Under the evidence, the plaintiff's negligence, like that of the defendant's, was a question for the jury. He did not drive recklessly nor carelessly in front of a moving locomotive, if his evidence is believed. *Carroll v. Penna. R. R. Co.*, 12 Wkly. Notes Cas. 348, and kindred cases, therefore, are not applicable to the facts disclosed by the evidence in this case. The jury would have been justified in finding that the plaintiff did what the law exacted of him, and stopped, looked, and listened for an approaching train before he attempted to cross the defendant company's tracks. He testified that the point at which he stopped was between 60 and 70 feet from the track, and "was the best place I could get to look through." The view eastward, from which the train approached, was somewhat obstructed; but he says that at that point there was an open space of 60 feet, through which he could see in an easterly direction the railroad tracks. "I looked out through there," he says, "and there was nothing to be seen ahead of me, and I thought I could drive across." He had passed safely over two tracks, and his horse was beyond the third track when his vehicle was struck and he was injured. The facts thus disclosed were sufficient to send the case to the jury on the question of the plaintiff's negligence. It was argued by counsel for the appellant that it "is conclusively shown by the fact of the collision itself and by the testimony of disinterested eyewitnesses that Selfred did not, in truth, stop at all," and the appellant's testimony to sustain the argument is quoted at length in the printed brief. But this argument, like the testimony, was for the jury, and not for this court. There was testimony introduced by the plaintiff, if believed, to warrant a finding that he did stop, look, and listen at a place where he could see an approaching train. The fact that the view in the direction in which he looked was not entirely unobstructed does not convict him of stopping in the wrong place. There he could see, and it was his duty to stop at that point, and to use the opportunity thus given him to prevent a collision by looking and listening for an approaching train. This he did.

The defendant's counsel embodied in some of his requests for instruction several propositions of law, some good and others clearly not. The learned trial judge was therefore right in refusing them. A point should contain but a single legal proposition, and be so constructed that the trial court can answer it by a simple affirmation or negation.

Such matters as inadvertently crept into

the case during the trial, and are complained of here, will doubtless not appear in the next trial, and need not receive any special attention at this time.

The judgment of the court below is reversed, and a venire facias de novo is awarded.

(206 Pa. 411)

GEIST et al. v. RAPP.

(Supreme Court of Pennsylvania. June 2, 1903.)

INJURY TO EMPLOYE—EVIDENCE—QUALIFICATION OF JUROR—REVIEW.

1. Evidence in an action to recover damages for the death of an employé by the fall of a scaffolding on which he worked reviewed, and held sufficient to take the case to the jury on the question of defendant's negligence.

2. In an action to recover for injuries received by the fall of a scaffolding, a model of the scaffolding may be used by a witness for the purpose of illustration, though the model is not in evidence.

3. A judgment of the trial court on apparently sufficient evidence that no relationship exists between a party and a juror on a motion for a new trial will not be reviewed.

Appeal from Court of Common Pleas, Lancaster County.

Action by Mollie Geist and others against Dionysius H. Rapp. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

John A. Coyle and William R. Brinton, for appellant. W. U. Hensel and E. D. Reilly, for appellees.

PER CURIAM. There was testimony that the scaffold was erected in an unusual manner, with insufficient planks and insufficient nails, and that for that reason it was not capable of bearing safely the weight that would be put upon it. If the jury believed this evidence, the cause of the accident was shown, and it was clearly a question for the jury.

So, also, whether the defective construction was so manifest that the plaintiff's decedent should have seen it, and his not doing so, or his use of the scaffold in disregard of its faulty construction, was contributory negligence on his part, was for the jury. Where witnesses who were experienced carpenters differed on that question, the court certainly could not determine it as a matter of law.

The defendant's third point—that, if an employé is injured by the negligence of a fellow employé, the employer is not responsible—was affirmed by the judge with the addition that the employer is responsible for the acts of a vice principal, but that Asper, the workman who built the scaffold in this case, was not a vice principal. Taken by itself, this addition seems somewhat irrelevant, and is assigned for error on that account. But, even if so, it could not have done any harm

to appellant, and its relevancy is clearly shown by the learned judge in his opinion refusing a new trial: "It had been suggested by counsel for the plaintiff that Asper was a vice principal, and so, that the jury might thoroughly understand the law of the case, we not only told them that the proposition contained in the point was correct, but also that, while an employer was responsible for the acts of the vice principal, Asper was not a vice principal, but a fellow workman with Geist, and that his negligence, as such, if the building of the scaffold was entirely intrusted to him, would not render Rapp liable." So explained, the answer was not only relevant, but more favorable to appellant than the bare affirmation of his point would have been.

The assignment of error to the use of the model cannot be sustained. The model was not put in evidence, nor treated as such, but merely used for illustration of the description by the witness of the mode of building the scaffold. The witness might have put the boards together in the presence of the jury by way of illustration as part of his testimony, or counsel might have done the same thing as part of his argument. Hagan v. Carr, 198 Pa. 606, 48 Atl. 688. The appellant had and exercised the same privilege as part of his side of the case.

The assignment of error that "the court erred in refusing to grant the defendant a new trial for the following reasons: B. F. Brenner, one of the jurors sworn in the case, was a brother-in-law of Ezra Geist, the latter being a brother of Abram Geist, the injured deceased, and the person who was looking after the plaintiff's case, gathering evidence, sitting with plaintiff's counsel during the entire trial, and one of the witnesses of the plaintiff, and the witness who contradicted some of defendant's witnesses in most important particulars," is not a correct statement of the facts. In the argument this is modified into the statement that the juror and Ezra Geist had married foster sisters; but even this is not correct. The facts were, as stated by the judge in his opinion refusing a new trial, that "the juror was neither a relative of the plaintiff nor was he a relative of her brother-in-law, Ezra Geist. He had no acquaintance at all with the plaintiff, so far as we are informed. His wife's mother worked as a servant in the family of Ezra Geist's wife's father, and the child, who afterwards became Mrs. Brenner, was there at the time." The judge at the trial, with the parties and jurors before him, is in far better position to determine the weight to be attached to circumstances of apparent favor or otherwise than we can possibly be, and it would require proof of a much closer connection between party and juror than was here shown to justify us in interfering with his discretion.

Judgment affirmed.

(204 Pa. 395)

EBERT v. JOHNS et al.

(Supreme Court of Pennsylvania. June 2, 1903.)

ESTOPPEL—ASSUMPTION OF DEBT—ACCORD AND SATISFACTION.

1. Where a creditor gives a debtor a receipt in full of the amount of his claim, when in fact only a portion thereof was paid, and the debtor sells his entire stock to another, who, on the strength of the receipt, assumes in a notice all the debts of the vendor, the creditor is estopped by reason of the receipt from making any claim for the balance against the purchaser of the goods.

2. A payment of less than the entire sum due is a valid accord and satisfaction as to third parties.

Appeal from Court of Common Pleas, Adams County.

Action by Augustus H. Ebert, trading as B. Ebert & Sons, against S. L. Johns and Harry N. Gitt. Judgment for defendants, and plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Robert Snodgrass, William McSherry, and W. O. Sheely, for appellants. William Hersh, William & William Arch McClean, and F. J. Nelson, for appellees.

MITCHELL, J. This case grows out of the same transaction as that of Sargent et al. v. Johns (opinion filed herewith) 55 Atl. 1051, and most of the questions involved have been discussed and determined in that case. But there is one important feature in which there is a wide difference. In the former case there were two grounds on which the jury were entitled to find the liability of defendants: First, that they had in fact assumed the payment of Sargent's claim; and, secondly, that they had legally assumed it by estoppel after the publication of notice to Alleman's creditors, and the latter's change of position in reliance upon it. Neither of these grounds exists in the present case. There is no evidence on which the jury could find that the defendants assumed in fact, or intended to assume, the payment of Ebert's claim as a part of the consideration in the purchase of Alleman's stock. The whole body of the evidence is to the contrary.

Nor does the publication of the notice in the Gettysburg Compiler to the creditors of Alleman, even conceding, as the jury have found, that it was by authority of defendants, raise any estoppel in favor of the plaintiff, as a review of the facts will show. Alleman was indebted to many parties, including Ebert, and the latter was pressing for his money. Alleman, being unable to pay, proposed to sell out to Ebert, but after some negotiation this plan fell through, and Alleman then endeavored to obtain a loan from defendants. The latter required a statement of his financial condition, and finally agreed to buy his stock if the bulk of his debts, as shown by a prepared list, could be

paid or settled. To facilitate this arrangement, Ebert signed a paper containing a list of Alleman's creditors, with the amount of their claims, on which Ebert receipted for \$5,000, "in full satisfaction and payment of all sums of money due us by said Alleman on book account, for money loaned, notes, or in any other way or matter whatsoever."

* * * I also acknowledge that the aforesaid payment to us made includes the payment of the following bills of goods purchased by said Alleman, or by me for said Alleman, and I hereby expressly agree to assume said bills, and to pay the same to the holders thereof. * * * I also acknowledge that the aforesaid payment includes the payment by said Alleman of all notes given by said Alleman to us, whether the same have been discounted by us or not, and I hereby expressly agree to take up all of said notes, and to deliver the same to said Alleman." In explanation of the inclusion of other creditors, it was shown that Ebert was not only a creditor of Alleman for goods sold to him directly, but was also liable to other dealers, from whom he had purchased goods for Alleman on the pledge of his own credit. Armed with this paper, Alleman procured the defendants to purchase his stock, and paid over to Ebert \$5,000 of the purchase money. This money he got from defendants on the faith of that paper, by which they were led to believe that Ebert's debt was settled, and the other claims on the list assumed by him. When, therefore, defendants published the notice to Alleman's creditors, they had a right to rely on Ebert's representation that he was no longer a creditor, and he was estopped from setting up any claim against defendants. Sargent & Co. and the other creditors who were in ignorance of this arrangement, and no parties to it, even if they had known of it, were entitled, as already discussed in that case, to rely on the notice, and as to them defendants were estopped from denying their liability. But no such estoppel arose in favor of Ebert, for he had previously estopped himself by the receipt, signed for the purpose of inducing defendants to advance money either as loan or purchase, and the purchase by defendants on the faith of that receipt.

The learned judge below, in a general way, took this view, but left it to the jury, always with the qualification, "provided the jury find that in the purchase of the store, by agreement between defendant company and Alleman, the defendant company did not assume the payment of the plaintiff's claim." But there was no evidence on which the jury could be permitted to so find. The execution of the paper by plaintiff, and the use of it by Alleman as the basis of the sale to defendants, were not denied, and the estoppel of the plaintiff should have been ruled by the court, as a matter of law, on the undisputed facts.

All the plaintiff's points on the estoppel

of defendants by the published notice were, for the foregoing reasons, entirely irrelevant, and should have been refused.

All the points in regard to accord and satisfaction were also irrelevant, and should have been refused. Whether the receipt of \$5,000 by Ebert as in full for an indebtedness said to have been four times that amount was a good accord and satisfaction between him and Alleman was immaterial. It was said that it was a payment of part of the debt before it was due, and therefore valid. But, however the facts may be as to that, the point had no relevancy to this case. The rule that payment of a smaller sum is not a good accord and satisfaction for a larger one applies only between debtor and creditor. It was a deduction of strict scholastic logic in the days when money was regarded as having a fixed and unchangeable value. Hence, a part payment of money due could never logically be treated, even by agreement, as equivalent to a payment of the whole. In the business methods of the present, it has come to be recognized that money, like other commodities, has fluctuations of value, not only in the general market, but also and more especially to the individual. To a merchant with a note coming due \$5,000 before 3 o'clock to-day, which will save his commercial credit, may well be worth more than \$20,000 to-morrow, after his note has gone to protest. The recognition of this business condition has led to a statutory change of the rule in some states. 1 Am. & Eng. Ency. of Law, tit. "Accord" (2d Ed.), p. 414. But the rule was always regarded as more logical than just, and as coming very close to a contradiction of the general rule that the law will not measure the amount or value of the consideration if parties have agreed upon it. Hence, any circumstance of variation, such as payment at a different place or before the debt is due, has been held sufficient to take a case out of the rule. But the rule itself never had any application to a payment by a third party, and that was the case here. The \$5,000 paid by Alleman to plaintiff was furnished by defendants in consideration of the receipt which plaintiff signed for that purpose. As between these parties, it was a valid consideration, and raised the estoppel already discussed.

Judgment reversed.

(206 Pa. 428)

WHEELER v. EQUITABLE TRUST CO.
(Supreme Court of Pennsylvania. July 9, 1908.)

TITLE INSURANCE—CONSTRUCTION OF POLICY—ACTION.

1. A policy of title insurance indemnified the insured against loss from defects or unmarketability of title and contained in a note to the schedule a guaranty to complete certain buildings according to plans mentioned therein. *Held*, that plaintiff in an action thereon could not show that the houses were not built in accord-

ance with plans without prior proof of actual loss.

2. In an action on a policy of title insurance indemnifying against loss from defects of title, and containing a note with a guaranty to complete certain buildings according to plans, the contract is an entire one under the indemnification covenant, and cannot be divided into one to indemnify against loss from defects of title and another to guaranty that the buildings shall be finished in accordance with plans.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Susan Farnum Wheeler, executrix of Charles Wheeler, against the Equitable Trust Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

When Frank Loughran was on the stand the following offer was made: "I offer to show that the seventeen houses on Douglas street, between Foster and Arch streets, west of Thirty-Second, were not built in accordance with the plans and specifications filed with the Equitable Trust Company, in accordance with the policy, by John D. Pharoah, and the cost necessary to make those houses conform to those plans and specifications. Mr. Brown: You offer to prove that by this witness? Mr. Taylor: Yea. Mr. Brown: I object, because it is irrelevant, and because the witness is not qualified to testify as of or about February 25, 1899, when completion was claimed to have been guaranteed. (Objection sustained. Exception for plaintiff.)"

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

C. Berkeley Taylor, for appellant. Ira Jewell Williams and Simpson & Brown, for appellee.

DEAN, J. The Equitable Trust Company on May 15, 1898, delivered to plaintiff, executrix of Charles Wheeler, deceased, a policy of title insurance in the amount of \$50,000. The subject insured was a mortgage for \$61,500, made by John D. Pharoah, on 17 ground rents issuing out of 17 lots and buildings thereon, situate on Douglas street in Philadelphia. This mortgage was taken by plaintiff as collateral security for a loan. It is not alleged that there is any defect in the title to the ground rents which has rendered them unmarketable. The policy stipulates that defendant "will indemnify, keep harmless, and insure the said Susan Farnum Wheeler, executrix, * * * against all loss or damage not exceeding fifty thousand dollars," arising from defects or unmarketableness of title or loss as described in Schedules A and B, which are set out in and form part of the policy. In a note to Schedule B occurs this statement: "Note.—The completion of seventeen buildings on said lots of ground in accordance with the plans and specifications filed with this company by John D. Pharoah within nine months of the date hereof (unless destroyed by fire) together

with all municipal—John H. Connellan—improvements free of municipal liens is hereby guaranteed." Pharoah, who had mortgaged the ground rents to plaintiff for a loan to him, having defaulted in payment of the rents, the mortgage was foreclosed, and the ground rents purchased at sheriff's sale by Richard M. Elliot for Mrs. Wheeler, the price at which they were knocked down being only \$500. The plaintiff then brought suit against the trust company for damages sustained by her by breach of the conditions of the policy of insurance. The breach averred by her was of the stipulation in the note to Schedule B as heretofore quoted, in that the houses, as she averred in her statement, were not completed according to the plans and specifications filed with the trust company by John D. Pharoah.

At the trial, plaintiff, after showing that she purchased the ground rents at sheriff's sale on the mortgage, and reading in evidence her policy of insurance, called to the witness stand Frank Loughran, a builder of experience, and made the following offer: "I offer to show that the seventeen houses on Douglas street, between Foster and Arch streets, west of Thirty-Second, were not built in accordance with the plans and specifications filed with the Equitable Trust Company in accordance with the policy, by John D. Pharoah, and the cost necessary to make those houses conform to those plans and specifications." This was objected to by defendant on the ground that the evidence was irrelevant, and on the further ground that witness had made no examination of the houses until some time after the policy was issued. The court sustained the objection. Plaintiff declined to offer further evidence, and thereupon the court directed a nonsuit, which it afterwards refused to take off, and we have this appeal by plaintiff assigning for error the rejection of the testimony of Loughran.

Whether this testimony was relevant depends upon a proper construction of the policy. Was it an indemnity against loss or damage by a failure of the mortgage as security? Or was it a guaranty for completion of the buildings as specified in the note to Schedule B? If the latter, the testimony was relevant; if the whole instrument was merely a covenant to indemnify against loss or damage, then the testimony, when offered, was irrelevant, and properly rejected. The policy, in its general terms, is one of indemnity. In the commencement clause it says: "The Equitable Trust Company in consideration of the sum of \$1,125 to them paid by Susan Farnum Wheeler, etc., do hereby covenant that they will indemnify, keep harmless," her against all loss and damage, not exceeding \$50,000, which the insured shall sustain by reason of any defects in or unmarketability of the title to the property which is the subject of the mortgage. Excepting, however, defects, liens,

and incumbrances specified in Schedule B. These are listed thus: Accuracy of description, taxes of 1898, water rent, building restrictions, mechanics' liens not of record. Then follows the note which guaranties the completion of the 17 buildings within 9 months from the date of the policy, free from liens for municipal improvements. It seems to us the policy was one of indemnity alone. The word "guaranty" is used in the note, but its use in that connection does not change or split into two parts the general intent of the contract, which is one of indemnity. The plainly expressed intent is to indemnify against loss from defects or unmarketability of title. Then come certain exceptions in Schedule B; but these do not fully express the intent of the parties, so the note is added, making an exception to the exceptions—that is, John D. Pharoah will within nine months complete the building according to the plans and specifications, and free from municipal liens and improvements. That is, notwithstanding the exceptions, the general indemnity contract shall extend to and cover any loss from failure in these particulars. The note, although inaptly worded, is intended to signify that, if the buildings should not be completed in accordance with the specifications, then, if any loss be sustained thereby by plaintiff, such loss should come under the indemnification covenant of the policy. But the contract is not intended by its terms to be severed into two—one to indemnify against loss from defects of title, and one to guaranty that the buildings shall be finished in accordance with certain plans and specifications. If the contract were one of guaranty, then the plaintiff, although she may have lost nothing on her collateral, instead may really have largely profited by the sale of it, would have a right to recover; on the other hand, if the contract were one of indemnity alone, she could not recover unless she proved a loss on the mortgage. This is the substance of the decisions in *Wheeler v. Real Estate Title Ins. & Trust Co.*, 160 Pa. 408, 28 Atl. 849, and *Seymour v. Tradesmen's Trust, etc. Co.*, 203 Pa. 151, 52 Atl. 125. We hold that this policy, taking it as a whole, is a contract of indemnity, and recovery can be had on it only as such.

The plaintiff avers that the houses were not completed according to the plans and specifications, and that their value in consequence has depreciated in the sum of \$15,174; but she does not aver any loss on the mortgage which she took as collateral for her loan. She bought in all the ground-rents, and now owns them. For anything that appears, they may be worth far more than the mortgage, and she may be largely the gainer, notwithstanding the failure to complete the houses according to the specifications. As preliminary to a recovery on the stipulation of the note to Schedule B, plaintiff must show that she has not been indemnified and saved

harmless on her collateral mortgage; that defendant has failed in that particular. Then she can go further, and show that the failure to complete the building caused, or tended to cause, the loss. This was, in effect, the ruling of the learned trial judge when he says: "If any loss is shown, the plaintiff will be entitled to show the condition of the buildings in accordance with the German-American Company Case, 190 Pa. 247, 42 Atl. 682, and show the difference in their value as they were and as they would have been had they been completed according to the specifications."

In view of what we have said, we think the court below properly held that at that stage of the trial Loughran's evidence was irrelevant, and therefore rejected it. This being the only assignment of error, it is overruled, and the judgment is affirmed.

(206 Pa. 405)

In re MINNICH'S ESTATE.

(Supreme Court of Pennsylvania, June 2, 1903.)

WILL—CONSTRUCTION—SPENDTHRIFT TRUST.

1. Where testatrix leaves her estate to a trustee to invest, and, if it is invested in real estate, to allow her son to occupy it, and to pay taxes and make repairs if the son fails to do so, and pay any balance of the income to the son, with directions that the income was not to be in any wise liable for any debts of the son, or for any debts thereafter contracted, it creates a valid spendthrift trust, although there is no devise over after the son's death.

Appeal from Orphans' Court, Lancaster County.

In the matter of the estate of Anna Minnich. From a decree dismissing exceptions to the adjudication, Jacob O. Minnich appeals. Affirmed.

At the audit Jacob O. Minnich claimed his share of his mother's estate, divested of any trust. The material portion of the will of the testatrix was as follows: "The part or share coming to my son Jacob O. Minnich, I give and bequeath to my brother Abraham B. Oberholtzer, of Lebanon County, Pa., in trust for the use and benefit of my said son Jacob O. Minnich, said trustee to invest the funds at interest at his discretion, either in real estate or otherwise and pay to my said son the interest thereof as often as it may accrue, and if invested in real estate to give him the income or occupation of same, providing he pays all taxes upon it and keeps the same in reasonable repair from time to time during the term of his life, and in case of neglect said trustee shall pay the taxes and make the necessary repairs, and deduct from his annual income the amount so expended, and pay annually to him the balance; and if invested at interest, said trustee shall pay the annual state tax on the same, and deduct it from the income, and the same is not to be in any wise liable for any

debts owing by my said son, nor for any debts that may be hereafter contracted by him." The court awarded the fund to the trustee. Exceptions to the adjudication were dismissed by the court. Error assigned was in dismissing exceptions to auditor's report.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

I. C. Arnold and J. H. Light, for appellant.
O. P. Bricker, for appellee.

PER CURIAM. The testatrix, it is true, as appellant claims, left him the entire net income of his share of her estate, without any devise over of the corpus after his death. But she put it in the hands of a trustee, with active duties to perform in the payment of taxes and repairs if the devisee failed to do so, and with the express direction that "the same is not to be in any wise liable for any debts owing by my said son, nor for any debts that may be hereafter contracted by him." This was a valid spendthrift trust, which could not be allowed to be defeated by handing over the corpus of the estate to the control of the cestui que trust.

Decree affirmed at costs of appellant.

(206 Pa. 433)

WATERHOUSE v. WATERHOUSE

(Supreme Court of Pennsylvania. July 9, 1903.)

JUDGMENT—OPENING—ISSUES.

1. Where a husband confessed judgment to his brother in a large amount, under which the house in which his wife lived was seized and advertised for sale, and the husband had become hostile to the wife, and had threatened that, if she did not leave his home, he would get rid of his property, and the wife filed a petition for rule to open judgment so as to protect her dower rights, and the testimony of the brothers as to the consideration of the judgment note was not free from contradiction, the wife was entitled to have the judgment opened, and to have an issue to determine whether there was good consideration for the judgment, and whether it had been collusively confessed to defraud her.

Appeal from Court of Common Pleas, Philadelphia County.

Action by William H. Waterhouse against Edward L. Waterhouse. Judgment for plaintiff. From an order discharging a rule to open judgment on petition of Georgena K. Waterhouse, she appeals. Reversed.

From the record it appeared that on January 31, 1902, Edward L. Waterhouse confessed judgment in the sum of \$12,000 to William H. Waterhouse, and on February 4, 1902, the judgment note was entered up and execution issued against Edward L. Waterhouse. On February 28, 1902, Georgena K. Waterhouse filed a petition setting forth that said judgment note was without consideration, and was given collusively to defraud her of her dower rights. The court granted a rule to show cause why the judgment

should not be opened and Georgena K. Waterhouse allowed to intervene and defend. An answer was filed, and subsequently amended, denying the fraud and want of consideration alleged in the petition. After argument the court discharged the rule.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Francis Shunk Brown, Alex. Simpson, Jr., and Henry K. Fries, for appellant. Albert M. Paterson and S. Walter Foulkrod, for appellee.

DEAN, J. The petition of Georgena K. Waterhouse set out that she is the wife of defendant; that the judgment is for \$12,000, entered on judgment bill dated January 31, 1902; that judgment was entered on the bill three days after its date, and execution immediately issued, and the real estate of her husband levied upon and advertised for sale; that plaintiff, William H. Waterhouse, is a brother of her husband, the defendant; that the judgment bill was given without consideration by her husband, and fraudulently in collusion with his brother, for purpose of depriving her of dower in the land levied upon under color of a judicial sale; that the property seized is the home of herself and her husband; and that he has notified her she must leave the property and leave him, otherwise he will put the property out of his name and leave the commonwealth. She therefore prayed the court for leave to intervene so as to protect her dower rights, and that a rule be granted on plaintiff to show cause why the judgment should not be opened, and she be allowed to defend. The rule was granted as prayed for. On hearing the court below discharged the rule, and the wife brings this appeal.

The court filed no opinion, and gave no reasons for the decree, so we are left to practically pass upon the evidence as if this were a first hearing of it. Leaving her inference and conclusions in her petition altogether out of it, the facts set out are not disputed. The husband and his brother became hostile to the wife. The husband did not want to risk the penalty of deserting her, so he sought to drive her away from their home. If she did not leave, he threatened that he would get rid of all his property and leave the state. Of course, to aid him in his purpose, she would not relinquish her dower. This would at least hamper, if not effectually prevent, a sale. Just at this juncture this large judgment is confessed to the brother, execution issued, and seizure of the home made. The undisputed facts thus far raise at least a grave suspicion of a collusion to deprive her of her lawful right of dower, for a lawful judicial sale on a bona fide debt of the husband would forever discharge the property from her claim. Under these facts the burden was on the plaintiff to establish

by the preponderance of testimony that the judgment was honestly confessed for a bona fide debt due him from the defendant. The power and duty of the court to aid the wife sought to be defrauded is well settled. In the very late case of *Wells v. Bunnell*, 160 Pa. 460, 28 Atl. 851, we said: "The law will lay its hands upon a fraudulent scheme to deprive the wife of her dower, and will open or stay proceedings upon a judgment confessed without a full bona fide consideration." There are many other authorities to the same effect. Of course, if the judgment was fraudulent, and without consideration, the brothers would not openly proclaim their agreement as to its purpose. When the wife was to be cheated they would not call witnesses to their agreement. As in most cases of this character, circumstances which afford a fair inference of the purpose are alone capable of proof. Here is a threat of the husband. Then the confession of judgment for a large amount to his brother, and the immediate seizure on execution of the home in which the wife lived. The plaintiff testified that the debt was the accumulation of small loans made by him to his brother running for years. We can conceive that, if the husband had become indebted to the brother, the latter might desire the security of a judgment lien; but just why this fraternal affection, which had prompted small loans and indulgence for 12 years without any security, should all at once impel him to exact a judgment, followed by immediate sale of the brother's property, is not clear, and certainly is not made clear by the conduct and testimony of the two brothers. They were both called by the wife to testify as if under cross-examination. Notice first the conduct of plaintiff, William H. Waterhouse, on the witness stand. This is a sample of his examination: "Q. State where, when, and under what circumstances a judgment note for \$12,000, dated January 31, 1902, was given by Edward L. Waterhouse to you. (Witness refuses to answer.) Q. Was Edward L. Waterhouse indebted to you January 31, 1902, in the sum of \$12,000, or any other sum? (Witness refuses to answer.)" A number of other questions were then put to witness, all of which he refused to answer, when this one, involving the very subject of dispute, was asked: "Is it not a fact that said judgment was confessed by your brother to you without any consideration whatever, and that he is not indebted to you in any sum whatever, and that said judgment note was given by him as a result of and in pursuance of a conspiracy between you and him to transfer the title of the Arrat street property in fraud of the dower rights of Georgena K. Waterhouse, his wife, so that the brother might avoid the proper support and maintenance of his wife?" The witness refused to answer. Many other questions tending to elicit material facts were asked, and to all he refused

to answer. It is wholly immaterial if their refusal was based on the advice of counsel. If the judgment was an honest one, given for a good consideration, these two witnesses perhaps alone knew the fact; yet in face of the suspicion raised by the circumstances and the direct, express accusation of the wife, they refused to disclose the truth, if such were the truth, which would effectually have answered the accusation. From that moment a court might well doubt the candor of the two men and the honesty of the transaction. As is said in *Kaine v. Weigley*, 22 Pa. 179: "It is no hardship upon an honest man to require a reasonable explanation of every suspicious circumstance, and rogues are not entitled to a veto upon the means employed for their detection." But the witnesses did not answer, and the hearing went over from March 8, 1902, to May 5, 1902. In the meantime the court directed the witnesses to answer. When called again, they answered, and undertook in quite long statements to show the consideration for the judgment note. To our minds the testimony is not free from contradictions. But it would be out of place, in view of the decree which we feel we must make, to carefully compare and analyze it, because plaintiff has a right to go before a jury without unnecessary adverse comment on the testimony by this court. We think, taking the undisputed facts with the testimony, that the wife has a right to ask that it be passed upon by a jury.

The decree of the court below discharging the rule is reversed, and it is directed that it be made absolute. Further, it is ordered that she be allowed to intervene as a party defendant, and that an issue be framed in the court below to determine: (1) Whether there was a good consideration for the judgment bill; (2) whether it was executed and delivered by Edward L. Waterhouse to William H. Waterhouse collusively, for the purpose of defrauding the wife of her dower in the land.

(206 Pa. 417)

SHUMAN v. JUNIATA FARMERS' MUT. FIRE INS. CO.

(Supreme Court of Pennsylvania. June 2, 1903.)

MUTUAL INSURANCE COMPANY.—NOTICE OF ASSESSMENT.

1. Under the by-law of a mutual fire insurance company, providing that assessments must be paid within 30 days of notice thereof, where the company sent a notice, in the form of a bill, to a member, which notice stated that the company's treasurer would be at certain dates named at certain places to receive the assessments, the 30 days began to run from the date of the notice, and not from the date when the treasurer was to be in the member's neighborhood.

2. In an action to recover on a mutual fire insurance policy, where the defense was failure to pay an assessment after notice, plaintiff cannot prove the insufficiency of the notice by

evidence of a subsequent notice received, different in form from the prior one.

Appeal from Court of Common Pleas, Juniata County; Shull, Judge.

Action by Uriah Shuman against the Juniata Farmers' Mutual Life Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

Louis E. Atkinson, for appellant. J. N. Keller and J. Howard Neely, for appellee.

PER CURIAM. In mutual insurance companies the prompt payment of assessments by the policy holders is essential to the life of the company. The amounts are relatively small, and delay in payment means either larger assessments than are really required, or danger of lack of funds for prompt settlement of losses. In the present case the limit of time for payment was expressly fixed in by-law 21: "When an assessment shall have been made on any premium note and the same is not paid within thirty days from date of notice to pay, protection against loss or damage by fire shall cease, until such assessment has been fully paid," etc. By the only reasonable construction of this by-law, notice to the policy holder of an assessment on his policy was a notice to pay it. Everybody understands that sending a bill for goods bought or money due the sender on any account is a notice to pay. The notice sent by the company in this case to the plaintiff was in form a bill: "Mr. Uriah Shuman to Juniata Farmers' Mutual Fire Insurance Co., Dr. To assessment No. 17 on policy 2023," etc. This was a clear call for payment, and admits of no other reasonable understanding. Had it stopped there, the plaintiff would have been bound to know that under by-law 21 he must pay within 30 days of the receipt of the notice, or his protection under the policy would be suspended. The notice contained, in addition to the statement of the assessment, a notice that the treasurer of the company would be at certain places at dates named, to receive the assessments. This, however, was plainly for the convenience of the policy holders, and could not reasonably be taken as in any way modifying the requirement that the payment must be within 30 days. Plaintiff claimed to have understood that the notice gave him 30 days from December 7th, when the treasurer was to be at Thomsons town, apparently a convenient place for plaintiff to make his payment. But such a claim has no reasonable basis. If he chose, for his convenience, to wait until the treasurer came to Thomsons town on December 7th, he should have paid there and then; otherwise what did it matter to him that the treasurer came there on that day or at all? If he found he did not want to take advantage of the presence of the treasurer in his neighborhood, he still had 2

weeks left of his 30 days in which to pay. But he neither paid on December 7th, nor in the next 2 weeks, but allowed his full 30 days to run out, without any intention to pay, so far as appears, until his interest was sharpened by the happening of his fire. This was a total disregard of his obligation, and he was bound to know that under by-law 21 the penalty would be suspension of his protection by the policy.

The notice of the subsequent assessment, No. 18, was properly excluded. The company had a right to change its form of notice, and its doing so had no bearing on the sufficiency of the form previously used. Even if it was suggested by this plaintiff's perverse misconstruction of the first form, it would not on that account have been competent evidence that the latter was insufficient.

Judgment affirmed.

(206 Pa. 407)

SVENSON v. ROHRER.

(Supreme Court of Pennsylvania. June 2, 1903.)

DEED—BILL FOR RECONVEYANCE.

1. Where a conveyance of real property was as security for a debt, and the time for reconveyance was specified therein, and thereafter, by agreement, a later date was fixed upon, such date becomes the essence of an agreement, and on failure to tender the amount due at such date a bill filed four months thereafter to compel such reconveyance will be dismissed.

Appeal from Court of Common Pleas, Lancaster County.

Bill by Mary C. Svenson against Howard Rohrer. Decree for defendant, and plaintiff appeals. Affirmed.

The following is the opinion of the court below, filed by Landis, P. J.:

"Findings of Fact.

"The plaintiff resides in the county of Lancaster and the defendant in the city of Lancaster, and both of them have there resided for a number of years. The plaintiff was the owner of a tract of land situated in Providence township, containing thirty-four acres and ninety-seven perches, and upon it is erected a tavern property, which is licensed to sell liquor by the court of quarter sessions. She obtained her title through a purchase at sheriff's sale held on January 18, 1902, and her deed is dated January 31, 1902. The consideration named therein is \$1,400. The said property belonged to the estate of Frederick Schmook, deceased, and it was sold under a judgment to October term, 1901, No. 51, in which Mary C. Markley was the plaintiff, and Frederick W. Schmook, Gertrude Schmook, Mary Svenson, George A. Schmook, and Henry Schmook were the defendants. Simultaneously with her deed being executed and delivered, she conveyed the property to Howard Rohrer, and he then immediately executed the following paper:

"January 31, 1902.

"I, Howard Rohrer, hereby agree to convey to Mary C. Svenson the property this day conveyed by her to me. I am to convey the same to her on April 1, 1902, on payment to me of the sum of fifteen hundred and three dollars by said Mary C. Svenson.

"Howard Rohrer.

"Witness: A. B. Hassler."

"Mrs. Svenson, at the same time, paid \$14.00 as interest on the money to April 1, 1902. When this paper was executed Mrs. Svenson admits it was read to her, and she fully knew its contents; but she now relies upon another agreement, whereby Rohrer agreed to wait another year if she did not have the money on April 1, 1902. This latter agreement, she says, was first made in the morning before the signing of the written agreement. There is no testimony on the part of any one but herself concerning it. It was also mentioned and agreed upon, according to the testimony of herself and that of B. F. Rowe, in the afternoon after the deed and written agreement were executed and delivered. As Rohrer denies that any agreement except the written one was ever entered into, it is oath against oath, so far as the alleged morning agreement is concerned, and therefore the writing must govern; and as to the alleged agreement made in the afternoon, after the deed and written agreement were signed and delivered, it is wholly without consideration, and therefore unsupportable. We therefore find as a fact that the written agreement signed by Howard Rohrer, and delivered to Mrs. Svenson, was the true agreement of the parties, and by it they must each stand or fall. *Sidney School-Furniture Co. v. Warsaw School District*, 130 Pa. 76, 18 Atl. 604. Mrs. Svenson had purchased this property at sheriff's sale for \$1,400, and had difficulty in raising the money to pay for it. Rohrer therefore agreed that, if she would allow him \$100 for his trouble, he would raise the money for her. This he did, and the \$1,503 mentioned in the writing was made up of \$1,400, the amount of her bid at the sheriff's sale, \$3 for the sheriff's deed, and \$100 compensation for Rohrer. Possession was never given by Rohrer to Mrs. Svenson, but about March 17th he agreed with Rowe that he might go into the premises temporarily—no definite time being fixed—the license having been granted to Rowe. Rohrer furnished the money necessary to lift it. Mrs. Svenson was either living on the property at the time, or moved into it about April 1st. She now says she leased to Rowe on February 17th; but, as she at that time had no deed, and not even the right of possession to the property, she could not lawfully make a lease for it. When April 1st arrived she did not pay or offer to pay the amount stipulated in the agreement, and on April 10th Rohrer went down to see what she proposed to do about it. She asked him to hold off until the following Monday, and

he agreed to do so. He waited until the next Wednesday, and then placed his deed on record. On May 9th she came to town, and, in company with Louis N. Spencer, Esq., called upon him. She had been endeavoring to negotiate a loan for the amount, and Mr. Spencer had a client, who had the money, if the security was satisfactory. She had promised to give him a mortgage on this property, and other security besides, and from his inquiries Mr. Spencer had concluded that it, if as represented, would be a good loan; but he made no investigations, and never definitely promised her the money. He came across, or was told of, the Rohrer deed, and it was because of this they made their call upon Mr. Rohrer on that day. They made no tender of the money at that time, nor did they even offer to pay it, but Mr. Rohrer did not state to them that the property was his, and he was going to keep it. In the month of June, however, Rohrer offered to convey the property to her if she would pay the expenses, but this she would not agree to do. In order to run a hotel, it was, of course, necessary to have stock. Rowe and Mrs. Svenson, therefore, came together to the liquor store kept by Mr. Rohrer and his father, and purchased liquors to the amount of about \$149. He paid \$15 on account, leaving \$134 due. On August 4th another attempt was made to effect a settlement, the parties both having counsel acting for them at that time. It was agreed that, if Mrs. Svenson would pay the amount of the claim, the balance of the liquor bill, and all costs incident to it, and Mr. Rohrer's attorney, so that he might not be at any expense through the transaction, he would make a deed to Mrs. Svenson. She was to have until the following Friday to pay the money; but she never saw Rohrer afterwards, and he had no communication with her up to the time of the filing of this bill. There is no evidence before us that the defendant endeavored to sell the property to any one else before this bill was filed, except Mrs. Svenson's statement that he told her 'there was a couple of fellows dickering at it, and in a couple of days' he 'would get word whether they will buy it or not.'

The court entered a decree dismissing the bill. Plaintiff appealed.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

B. F. Davis, for appellant. A. B. Hassler, for appellee.

PER CURIAM. The agreement between the parties, as appears from its face, is for a reconveyance of property conveyed by plaintiff to defendant as security for the payment of money. Under such contracts time, though specified, is not regarded in equity as of the essence. We pass by as unnecessary to consider in the present case the effect of the act of 1881. But even in equity the pledgee is not bound to wait indefinitely, and may call

upon the pledgor to redeem in a reasonable time. What is a reasonable time may be fixed by the parties or by a court of equity. In the present case the parties agreed upon an extension of the time to a given date, and, whatever their respective rights may have been previously, the date fixed then became of the essence of the agreement, and plaintiff was bound by it. She did not tender the money on the date, and her bill was not filed until more than four months later. The court held that it was too late, and we are not convinced that he erred in so doing.

Decree affirmed.

(306 Pa. 414)

EBERLY v. SHIRK.

(Supreme Court of Pennsylvania. June 2, 1903.)

EXECUTION SALE—DISTRIBUTION OF PROCEEDS—EQUITY IN LAND.

1. An owner of land conveyed it to a bank to secure a note. No defeasance was executed at the time, and thereafter the bank conveyed it to a guarantor of the notes, who had paid them. The guarantor also had a judgment and levied execution on the land, and sold it as the land of the maker of the notes, and bought it in. *Held* that, where the proceeds were sufficient to pay not only the judgment of the guarantor, but other judgments against the maker of the note, they could not be retained by the guarantor, but must be divided among the judgment creditors.

2. Where a debtor conveys land to secure a debt without taking back any defeasance, he has an equity in the land, though he cannot enforce it, which equity any creditor may sell for whatever any purchaser may choose to give for it.

Appeal from Court of Common Pleas, Lancaster County.

Action by Mary E. Eberly, administratrix of Adam J. Eberly, against Aaron R. Shirk. Judgment for defendant, and plaintiff appeals. Affirmed.

A. J. Eberly, Esq., had indorsed for A. R. Shirk in the People's National Bank of Lancaster. To protect the bank and Eberly, his indorser, Shirk conveyed his real estate to the bank. The bank soon after executed a defeasance to Shirk, to the effect that it held the deed as security for the notes, and would reconvey on their payment. This defeasance never was recorded. Eberly's administratrix paid the notes made by Shirk and indorsed by her decedent, and the bank conveyed the property to her. Having another judgment against Shirk, she then issued execution against him, levied on the identical real estate conveyed to her as his property, and exposed at sheriff's sale all his right, title, and interest in it. He had several other judgment creditors, who attended the sale to protect their interests, but, as her first bid of \$2,500 was ample to cover their liens, the property was knocked down to her. The administratrix claimed the whole fund, on the ground (1) that she was the owner of the

¶ 2. See Execution, vol. 21, Cent. Dig. § 101.

property she had caused to be sold at Shirk's; and (2) that, as she had title to the property before the creditors' judgments were entered, they had no liens on Shirk's interest in it. The court awarded the fund among all the lien creditors of Shirk.

Argued before MITCHELL, DEAN, FELL, BROWN, and POTTER, JJ.

William B. Eberly and J. W. Denlinger, for appellant. W. U. Hensel, for appellee.

PER CURIAM. The questions upon the defeasance and its effect as to the plaintiff's title to the land, raised and argued by appellant, are not in the case. The execution was against the land as the property of the defendant, Shirk, and what the sheriff sold under it was Shirk's title and interest, good or bad, large or small. At the time of the entry of the judgments, Shirk had an equity in the land, which was recognized by the People's National Bank, though it was not enforceable by Shirk as mortgagor, because of the bar of the act of 1881 (P. L. 84). But it was an interest which any creditor might sell on execution, for whatever any purchaser might choose to give for it. The fund produced by the sale, therefore, represents Shirk's interest in the land sold, and was properly distributed to the creditors having a lien on it.

Judgment affirmed.

(306 Pa. 479)

STAUFFER v. CITY OF READING.

(Supreme Court of Pennsylvania. July 9, 1903.)

NEW TRIAL—CONDITIONS—DISCRETION OF COURT.

1. The trial court may impose terms on either of the parties as conditions of the grant or refusal of a new trial.

2. In proceedings to assess damages against the city for land taken for a highway, on motion for new trial by plaintiff, the court cannot compel him, as an alternative, to convey to the city three acres of land, cut off from the main body of his land for park purposes by the road in question, where neither of the parties had asked for such a conveyance.

Appeal from Court of Common Pleas, Berks County.

Action by A. K. Stauffer against the city of Reading. From an order making absolute a rule for a new trial, plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, MES-TREZAT, BROWN, and POTTER, JJ.

C. H. Ruhl and Cyrus G. Derr, for appellant. Walter S. Young, City Sol., for appellee.

MITCHELL, J. The granting or refusing of a new trial, except for causes like errors of law by the judge or misconduct of the jury, where it may be matter of right, is

an exercise of judicial discretion by the court in furtherance of right and justice, according to the circumstances of the case. Hence, it is well settled that the court may impose terms upon either or both of the parties as conditions of the grant or refusal, and the latitude allowed to the discretion of the court to this end is very great. As each case must be determined on its own circumstances, the causes cannot all be specified or enumerated beforehand, but in general, as is said by the most prominent writer on the subject. "It may be safely asserted that no case can occur presenting circumstances timely addressed to the discretion of the court, in which the rights of the parties may not be fully protected by the imposition of conditions meeting the exigency." *Graham on New Trials*, 610. Large as the discretion is, however, it is a judicial discretion, and must be used with reference to the rights involved in the controversy. The conditions imposed, therefore, must have some direct relation to the issue between the parties in the case. The condition complained of in the present proceeding transgresses this limit. The conveyance of the three acres was not asked for by the city, nor offered by the appellant. Whatever its merits as a just or wise settlement between the parties, it was not apparently desired by either, and was certainly no part of the issue which they brought into court to have decided. In imposing it as a condition of the refusal of a new trial, therefore, the court exceeded its discretionary authority.

The condition was erroneous, also, from another point of view, as tending to deprive appellant of his property in violation of his right to have a jury pass upon its value. In this respect the case goes further than *Lehr v. Brodbeck*, 192 Pa. 535, 43 Atl. 1006, 73 Am. St. Rep. 828, where the jury having found a verdict for defendant contrary to the instructions of the judge as to part of the goods sued for, the court directed the acceptance of an offer by the defendant to pay a sum less than plaintiff claimed, and, on refusal of plaintiff to accept, refused a new trial. It was held that this was error. In the opinion our Brother Dean said: "The plaintiff claimed that the value of her goods wrongfully seized and sold was \$335, and whether this was the value or not, she had offered evidence tending to establish it as the value. As a suitor under the law, she had a right to the opinion of the jury on the evidence; and the court at the trial thought so too. It, however, now directs her arbitrarily to strike from her claim \$85, and, as a penalty for refusal, in effect says she shall have nothing." See, also, *Bradwell v. Pittsburg*, etc., Ry. Co., 139 Pa. 404, 20 Atl. 1046.

Judgment reversed, and record remitted, with directions to reinstate the rule for new trial, and proceed to dispose of it according to law.

¶ 1. See *New Trial*, vol. 27, Cent. Dig. § 321.

(55 N. J. E. 633)

McKENSEY v. McKENSEY.

(Court of Chancery of New Jersey. Oct. 14, 1903.)

DIVORCE—ALIMONY—RIGHT TO AFTER DECREE.

1. Under Sess. Laws 1902, p. 507, § 19, which provides that "pending a suit for divorce or nullity or after decree for divorce" it shall be lawful for the court of chancery to make orders for alimony, alimony may be awarded to a wife after a decree for divorce, though the petition and decree for divorce are silent on the subject.

Application by Nellie McKensy against Arthur McKensy to amend decree for divorce so as to insert allowance for alimony. Additional notice of hearing required to be served on defendant.

John I. Weller, for petitioner. Arthur McKensy, pro se.

STEVENSON, V. C. The petition presented now to the court shows that the petitioner obtained a decree of divorce from the defendant on the ground of desertion in September, 1902. The petition for divorce "prayed for counsel fees and alimony pendente lite and such further and other relief as might seem equitable and just." No application for alimony or counsel fees seems to have been made. The decree was silent on the subject of alimony, and the petitioner alleges that she first learned of that fact in August, 1903, when she went to the office of her solicitors for the purpose of having them procure alimony for her from her former husband. The husband is alleged to have recently come into the possession of considerable property from his father's estate. The prayer of the petition is that the decree of divorce may be amended "by inserting therein a direction to the said defendant to pay" the petitioner alimony and counsel fees. The petition also prays for such further and other relief in the premises as may be agreeable to equity and good conscience. If the divorce act now stood as it was revised in 1874 (2 Gen. St. p. 1269, § 19), there would be serious difficulties in dealing with the petitioner's case, all of which will appear by an examination of the opinion of Chancellor McGill in *Lynde v. Lynde*, 54 N. J. Eq. 473, 35 Atl. 641, which was adopted by the Court of Errors and Appeals (55 N. J. Eq. 591, 39 Atl. 1114). Without looking, however, into the power of the court to amend a petition for a divorce and decree thereon in a case like this under the facts disclosed on this present application, in my opinion there is no reason why such a power should be exercised in order to give the petitioner all the relief to which she is entitled. By a slight change in the phraseology of section 19 of the divorce act as revised in 1902 (Sess. Laws 1902, p. 507), an important change of practice was made in cases like *Lynde v. Lynde* and the one now

before this court. The former law, as expressed in the original divorce act of 1794, and re-enacted in the subsequent revisions of 1818, 1846, and 1874, provided (2 Gen. St. p. 1269, § 19) "that when a divorce shall be decreed" it should be lawful for the Court of Chancery to order alimony, etc. The present statute (Sess. Laws 1902, p. 507, § 19) provides that "pending a suit for divorce or nullity, or after decree for divorce," it shall be lawful for the Court of Chancery to make orders for alimony, etc. In my opinion, the phraseology of this section of our divorce act was changed for the purpose of affecting cases like *Lynde v. Lynde*. The wife who sues a husband for divorce is not obliged to pray for alimony, or reserve her right to alimony in the decree for divorce. In large numbers of cases it is impossible for the wife to obtain any practical benefit by praying for alimony while she is suing for a divorce. If, after the divorce has been obtained, it becomes worth while to endeavor to compel the divorced husband to support his former wife, or his former wife and his children, whom he has wronged, there is no reason why the petition of the former wife should not then properly be presented in order to obtain the practical relief which has just come within her reach. In some cases when the wife obtains a divorce a prayer for alimony would be denied on account of the poverty of the husband or the wealth of the wife. Subsequently these conditions might be reversed. There is no reason why a wife, when suing for a divorce, should be obliged to go through the form of praying for alimony to which she is not entitled, or which she cannot in fact obtain, merely for the purpose of saving her right to demand alimony at some future time when a change of conditions may establish her right to alimony, or make an allowance of it a practical benefit to her. The effect of the change of phraseology in our statute has been to reserve the right of the wife who obtains a divorce from her husband to alimony, even though the petition for divorce and the decree itself are silent on that subject.

A divorce suit is practically kept open by our new statute after final decree and after enrollment of the decree for applications for orders for alimony and the maintenance of children, even though these matters have not been originally brought into the suit by the petition or bill or by the final decree. The construction which I put upon our revised statute, it seems to me establishes a practice which accords with common sense, and makes for simplicity and convenience in our divorce procedure. If technical rules of equity pleading must be considered in interpreting the changed phraseology of the act, it should be borne in mind that the allowance of alimony is not a distinct and independent form of relief administered in a suit brought for the purpose. It is a mere incident to a divorce suit, which may or may

not accompany a decree for divorce. My conclusion is that this is not a case in which the record of the divorce suit should be in any way amended. If the petitioner is at the present time entitled to alimony or counsel fees, she can enforce her rights by a direct application to the court, inasmuch as such application will be made after she has obtained her decree for divorce, and the petition now presented is an ample basis for such application. In view, however, of the narrow language of the notice of this motion served upon the defendant, before any investigation is made of the petitioner's claim for alimony further notice to the defendant must be given.

(65 N. J. E. 658)

ATKINS et al. v. W. & A. FLETCHER CO.
et al.

(Court of Chancery of New Jersey. Oct. 2,
1903.)

**EMPLOYERS AND EMPLOYEES—COMBINATIONS—
RIGHT TO EMPLOY—RIGHT TO STRIKE
—INJUNCTION.**

1. A bill alleged that the complainants, 46 in number, were machinists, recently employed by defendant company, but were on strike; that the complainants, with other machinists, had formed a voluntary association to better the condition of machinists in general; that defendant company and others, individuals and corporations, had formed a voluntary association for the purpose of dealing with labor troubles affecting the metal trades in New York Harbor; that, in order to carry out the design of the machinists' association, the complainants had endeavored to obtain machinists to join them, and had maintained a system of quiet picketing in the streets near the machine shops of the defendant company; and averred that defendants, in combination, were interfering by intimidation, threats, violence, arrests, etc., with the pickets of complainants. *Held*, that the complainants were before the court as employers, and not as employés, though the bill also averred that defendants had conspired to compel complainants to work for defendant company.

2. Employers have the right to combine to refuse employment to any kind or class of workmen just as fully as employés have the right to combine to refuse to be employed by any employer employing men of whom they disapprove or conducting his business contrary to their views.

3. A bill presenting the complaint of a voluntary association composed of machinists, and organized for various purposes, including benevolent purposes, and alleging that the association had employed persons to perform the service of "picketing," that complainants had been so employed, but that most of them had been compelled to give up the work because of the insults, violence, unlawful arrests, etc., to which they were subjected by defendants, could not be deemed as averring grievances of the "pickets" themselves, but merely regarded as grievances of the association itself.

4. The mere fact that defendants, in combination, by means of intimidation or criminal violence, interfere with the free flow of labor to an employer, does not give the employer the right to equitable relief, in the absence of his showing that his remedy at law is inadequate.

5. Equity does not undertake to grant injunction in strike or boycott cases unless complainant has shown substantial pecuniary loss in respect to his property and business for which an action at law was an inadequate remedy, or

where he has shown that he had been deprived of his right to make a living.

6. The right of a voluntary association, engaged in supporting a strike, to freedom in the labor market, so that the association can readily employ pickets and other agents in carrying on its industrial warfare, is not a proper subject of protection by means of an injunction.

Suit by Benjamin Atkins and others against the W. & A. Fletcher Company and others. On motion on bill and affidavits for preliminary injunction. Motion denied.

William Hughes and James G. Blauvelt, for complainants. Edward Russ and Francis Scott, for defendants.

STEVENSON, V. C. (orally). My conclusion is that no proper case is presented for an injunction, certainly not for a preliminary injunction.

I indicated to counsel during the argument, or at its close, several of the principal objections which seemed to me to lie in the way of granting to the complainants the preliminary injunctive relief for which they apply. The case is a somewhat novel one. It may be that a little later I shall file a written opinion. I certainly shall do so in case of an appeal. At present I shall not undertake to discuss at great length all the reasons, some of which I cannot now recall, which led me, after going over the case very carefully, to the conclusion that a preliminary injunction would not be justified by the case now before this court.

It seems to me, however, in view of the wide scope of the argument and the various aspects in which the complainants' bill was viewed and exhibited by counsel, and the various kinds of grievances of all or some of the complainants which have been the subject of discussion, that it is important to explain what I regard as the correct analysis of the case now presented for judicial determination.

The complainants, 46 in number, are machinists recently employed by the defendant corporation W. & A. Fletcher Company, but now on a strike. The complainants, "with certain other machinists, have formed a voluntary association for the purpose of bettering the condition of machinists in general and the members of such association in particular," which voluntary association is known as the International Association of Machinists. The bill sets forth that the defendant the W. & A. Fletcher Company, and some 30 or 40 individuals, partners and corporations, who are named, "have formed a voluntary association known as the New York Metal Trades Association," which is organized for the purpose of dealing with labor difficulties affecting the metal trades in New York Harbor. It further appears from the bill and accompanying affidavits that, "in order to carry out the design" of the International Association of Machinists, the complainants "have endeavored to obtain as many machinists as possible to join them,"

and have maintained a system of quiet, peaceable picketing in the streets near the machine shops of the W. & A. Fletcher Company. All unlawful practices in connection with this picketing are denied, and the bill sets forth in detail various reasons why, for the accomplishment of the objects of the complainants in their voluntary association, the maintenance of pickets is lawful and proper, if not necessary. The grievance of which the complainants complain is that the defendants, acting in combination, are interfering by intimidation, threats, violence, arrests, and other unlawful practices with the pickets of the complainants.

The complainants do not stand before the court as employes or persons seeking employment, whose natural expectation of obtaining work in machine shops is defeated because the defendants, by intimidation and molestation practiced upon the proprietors of the machine shops, constantly thwart them in their effort to get employment. In brief, the complainants stand before the court as employers, and not as employes.

It is true that the bill alleges that the "members of the New York Metal Trades Association have entered into a conspiracy to force and compel the complainants to work for the W. & A. Fletcher Company upon such terms as the W. & A. Fletcher Company may demand, and have conspired together for the purpose of preventing the complainants from earning a living at their trade as machinists, and that they are carrying out and effectuating the said conspiracy, and that they have discharged such of the complainants as have received employment from any of the members of such association as soon as they ascertained that the complainants were former employes of the Fletcher shops, and the only reason assigned was that the complainants are former employes at Fletcher's, on strike." This allegation of the bill seems to be based upon the erroneous idea that employers have not the right to combine freely to refuse employment to any kind or class of workmen precisely as employes have a right to combine freely to refuse to be employed by any employer who sees fit to employ workmen of whom they disapprove, or sees fit in any respect to conduct his business contrary to their views. But, apart from this consideration, the bill is not filed by the particular machinists who thus have been discharged to restrain defendants, acting in combination, from unlawful conduct which has secured their discharge, and now stands in the way of their being employed by persons who, if left free, would be willing to give them work. The discharge of some of the complainants, whether procured lawfully or unlawfully, is not to be regarded, under the allegations of this bill, as a grievance of the particular workmen who have been so discharged. It must be regarded solely as a grievance on the part of the 46 complainants, as constituting the International Association

of Machinists, and in their capacity as employers of labor, if such discharge can constitute a grievance of said association.

It also appears from the bill and affidavits that the International Association of Machinists have employed some of the complainants at a daily wage to do certain services which evidently may be all deemed embraced in the word "picketing," and that "many of the complainants have been so employed during said strike, and that they or most of them have been compelled to give up such employment by reason of the annoyance, insults, violence, force, intimidation, threats, unlawful arrests, and malicious prosecutions to which they were subjected by the Fletcher Company and the New York Metal Trades Association and their employes," etc. Here again we have a charge of unlawful conduct on the part of the defendants which has caused some of the complainants to be deprived of what is claimed to be a lawful employment, by which they may be said to be earning their living at a daily wage. But this bill is not filed by the complainants as pickets, as persons employed in a certain business whose opportunities for employment are cut off by the alleged unlawful conspiracy of the defendants. The interference with the work of the pickets must be regarded in this case as an alleged grievance of the International Association of Machinists.

This bill presents the complaint of this voluntary association, as a partnership, engaged in the accomplishment of certain objects, many of which are benevolent. Any intimidation or other interference with the pickets employed by the association may be regarded as a possible grievance of the association, but cannot be regarded in this suit as a grievance of the pickets themselves. It will be time enough to consider any such grievance of the pickets when the pickets file their bill or bills for relief.

No question has been raised as to the capacity of the 46 machinists to file this bill on behalf of the entire voluntary association known as the International Association of Machinists, although the argument on both sides assumed that this international association embraces large numbers of machinists throughout various states of the Union. Confusion no doubt has resulted in the argument of this motion from the fact that 46 of a large number of partners or voluntary associates file a bill apparently for the protection of the right of the entire partnership or association to employ labor and to enjoy a free labor market, while the same bill sets up what might be deemed as separate causes of action in equity on the part of different sets of these 46 complainants seeking employment in their trade as machinists, or seeking employment in the business of picketing for a daily wage. All the allegations of this bill, although they may contain a large number of separate causes of action in equity on behalf of employes of one kind or another, whose right to make a living has been

interfered with, must be considered solely with reference to the capacity in which the 46 complainants stand before the court, and the complaint which they make in such capacity. As I have said, the complainants stand before the court as employers of labor, and their grievance is that the defendants, acting in combination, are unlawfully interfering with the right of the complainants as such employers of labor to have labor flow freely to them. *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230.

The mere statement of the nature of the complainants' case—the only case, as this bill is framed, which I think the court can now take cognizance of—indicates the fatal objection to granting in such case the remedy of injunction.

The mere fact that defendants, in combination, by molestation and intimidation, or by criminal violence, interfere with the free flow of labor to an employer, does not necessarily give such employer the right to come into a court of equity and procure an injunction for his protection. The employer, complainant, must show not only that the conduct of the defendants in combination unlawfully obstructs him, the complainant, in enjoying his natural expectancy in respect of the labor market, but that the natural and proximate result of the unlawful conduct complained of will be to inflict upon him, the employer, substantial money damages, for which the remedy at law is inadequate. The injunction, at the instance of an employer, in these strike cases was forced out of courts of equity because the situation presented was one where, without injunctive relief, ruinous losses to the complainant would be inevitable. Railroads and large plants of machinery were paralyzed, aggregations of capital lay idle, while the persons acting in combination, who by their interference with the free labor market had caused and were continuing this great pecuniary loss, were themselves irresponsible pecuniarily. It is to this class of cases, in my judgment, that the strike injunction should under present social and business conditions, as far as possible, be confined. Courts of equity should be cautious in undertaking to regulate by injunction the annoying conduct of a combination of individuals at the instance of complainants, whose only complaint is that their political, social, or religious activities are interfered with, or their amusements curtailed. The elemental right of the employer of labor which the courts recognize today no doubt is the right to employ, while the corresponding right of the workman is the right to be employed. In other words, the right to buy labor and the right to sell labor are recognized by the law, and their enjoyment is greatly impaired or destroyed unless freedom in the labor market—freedom on both sides of the labor market—is maintained. Each party to a contract for the sale of labor has an interest in the freedom of the other party with respect to making the contract. But I know of no case where a court

of equity has recognized this right and protected it by means of an injunction where the violation, or the continued violation, of the right would not result in irreparable damage of a substantial character for which the remedy at law by an action for damages would be inadequate.

It is not every person who wishes to hire a servant or engage an agent for any one of the innumerable purposes for which servants and agents are employed who can come into a court of equity and obtain an injunction for the protection of his right to employ, and for the removal of obstacles in the way of its exercise. At the present stage of the development of strike and boycott law there are innumerable situations in which one desiring to enjoy the right to employ or the right to be employed would not be allowed an injunction for his protection, because, while his social, moral, or even legal right may have been violated, the damage is not of a kind or nature to justify interference on his behalf by a court of equity. I do not know that courts of equity have as yet undertaken to grant injunctions in strike or boycott cases unless the complainant has shown substantial pecuniary loss in respect of his property, including his business, for which an action at law was an inadequate remedy, or where he has shown that the conduct complained of deprived him of his right to make a living—deprived him of the means of a livelihood.

In the present case the complainants composing, or at least representing, the International Association of Machinists, do not claim that they are suffering any substantial money loss from the alleged unlawful interference of the defendants with the complainants' pickets. This association apparently has little, if any, capital invested in any way, and it does not appear to be conducting any trade or business of any kind. Its objects are not to make gain for its members as partners in business, using and seeking to acquire property. Its objects are largely benevolent. It is true that among its objects as set forth in the bill of complaint, and therein declared to be the business of the association, is to "provide financial assistance to members attaining the age of sixty-five years and upwards, and to provide death benefits to all members in good standing for more than six months"; but it does not appear that the association has actually established such a pension and death benefit system, nor does it appear that any conduct of the defendants complained of has interfered with the operation and maintenance of such a system. The business of the association which is alleged to have been interfered with is rendering assistance to workmen in the successful maintenance of a strike.

If benevolent operations are entitled to the same protection by injunctions against combinations with a view to the preservation of a free labor market for their benefit, it might be argued with some force that before an injunction should issue in this case the proofs

ought to show that the cause of the employes is just—the merits of the strike ought to be passed upon and determined. This would be strange work, indeed, for the court of chancery to undertake to do.

The right of partners or voluntary associates who are engaged in supporting a strike to freedom in the labor market, so that they can readily employ pickets and other agents in carrying on their side of the industrial war, has certainly never been recognized by a court of equity as a proper subject of protection by means of an injunction. No such right on the other hand has been recognized and protected for the benefit of persons engaged in resisting a strike. If the New York Metal Trades Association, with its large and powerful combination of employing partners, corporations, and individuals, should file a bill against the complainants to secure an injunction, protecting them, the Metal Trades Association, in employing detectives, agents, and pickets to assist the W. & A. Fletcher Company in this contest with its employes on strike, it seems to me the case would present the same fatal defect which is exhibited in this present case. What a court of equity will protect by an injunction in a proper case are the rights of the two parties directly interested in this conflict, W. & A. Fletcher Company and their employes—the right of the one to employ and the right of the other to be employed; the right of both to have a free labor market upon which the opportunity to make money and make a living depends. If the New York Metal Trades Association—this powerful combination of employers—should undertake to deprive the complainants, as machinists, as workmen seeking to sell their labor, of all opportunities for employment other than by the Fletcher Company, and in carrying out this purpose should molest and intimidate, or in various ways annoy or injure, the proprietors of machine shops who otherwise would be willing to employ the complainants, then it seems to me the complainants would be entitled to an injunction from a court of equity under principles which are now well settled, unless the more or less definite amount of the damages suffered by the complainants and the pecuniary responsibility of the defendants would relegate the complainants to a court of law for their remedy. On this point, however, it is not necessary to express any opinion in this case.

In connection with the consideration of the principle that an injunction is issued in strike cases only where the remedy at law is inadequate, it is important to note that the complainants present no proof whatever that the defendants, or at least the principal defendants, are insolvent. On the contrary, the affidavits on behalf of the W. & A. Fletcher Company stand uncontradicted to the effect that that company is entirely solvent, and able to discharge all pecuniary obligations which may be placed upon it.

I do not want either party to this case to understand that I have undertaken to lay down with accuracy the entire strike law applicable to this present case or suggested by it. The primary rights which are violated by strikes and boycotts, and the remedial rights which thereby arise, are far from a condition of complete development or accurate definition. The law of this whole subject is to a large extent unsettled, and involved in dispute and difference of opinion among judges and text-writers. In this condition of the law it is certainly safe to hold that in a novel case like this a preliminary injunction, at least, ought not to be issued, where the complainants do not show any substantial pecuniary damage, and it appears that the defendants, or some of them, are amply responsible for any money damages which may be recovered against them in an action at law.

It must be borne in mind that the damages to the pickets which have been caused by their wrongful exclusion from employment are to be sharply distinguished from any damages which the complainants may have suffered on that account. It does not satisfactorily appear in this case that any department of benevolent effort, or any lawful business of the complainants in which these pickets were employed, has been impaired in efficiency or suffered actual pecuniary loss by reason of the alleged outrages to which the pickets have been subjected, or by reason of the driving of the pickets from their posts.

If an injunction should issue in this case, it seems to me it would have to be based upon a principle far broader than any which has yet been laid down in any reported case—a principle as broad as this: that a court of equity will protect by an injunction the right of every man to enjoy a free labor market, the right of every employer to have labor flow freely to him, and the right of every employe to have employers left free to give him work—without reference to whether the invasion of the right complained of causes great damages or trifling damages; damages readily measured in money, or damages difficult of exact ascertainment; damages for which a judgment could be collected, or damages for which a judgment would be wholly uncollectible.

I shall advise that the motion for a preliminary injunction be denied, with costs.

W. & A. FLETCHER CO. v. INTERNATIONAL ASS'N OF MACHINISTS et al.

(Court of Chancery of New Jersey. Oct. 2, 1903.)

EQUITY—INJUNCTION—STRIKES—PICKETING.

1. Where the practice of picketing by striking employes is to intimidate and interfere with the liberty of other workmen in seeking employment it is unlawful, and will be prohibited

¶ 1. See *Injunction*, vol. 27, Cent. Dig. §§ 174, 175.

by injunction; but picketing carried on for the mere purpose of obtaining information, or for the purpose of conveying information or bringing orderly and peaceable persuasions to bear on the minds of those seeking employment, the object of which does not include the disruption of any existing contract, will not be restrained.

Suit by the W. & A. Fletcher Company against the International Association of Machinists and others for an injunction to restrain picketing by strikers. Injunction granted as to some defendants, and denied as to others.

Edward Russ and Francis Scott, for complainant. James G. Blauvelt and William Hughes, for defendants.

STEVENS, V. C. (orally). In the injunction suit brought by the Fletcher Machine Company against the International Association of Machinists and others the conclusion which I have reached is that the complainant is not entitled to any further preliminary restraint than that which is now embodied in the restraining orders. The motion was argued on both sides, practically with the admission that there was nothing objectionable in the restraining orders as they now stand; that those orders were proper, and should remain binding upon such of the defendants as stand fairly charged under oath with conduct which brings them within their reach.

The counsel for complainant practically confined his argument to the proposition that a preliminary injunction should go in the case to restrain picketing, without reference to the object of the picketing or its effect. If this view is correct, it follows that workmen maintaining a strike have no right to station pickets merely for the purpose of giving them such information in regard to their late employers' operations as may be discovered by ordinary observation. It seems to me that this claim is not well founded; that it is contrary to the great weight of reason as well as authority.

Picketing may be lawful; picketing may be unlawful. Whether picketing is lawful or unlawful depends wholly upon the purpose with which it is carried on, or perhaps, it would be more accurate to say, the effect which is produced by it. If the purpose and effect are to intimidate, to interfere with the liberty of workmen in seeking employment, to interfere with what in another case I called the employer's right to have labor flow freely to him, so that a reasonably courageous person would be restrained from offering his labor to such employer, then picketing is unlawful, and, where the other necessary conditions for the interference of a court of equity exist, will be prohibited by an injunction.

If, however, the picketing is carried on for the mere purpose of obtaining information, or for the purpose of conveying information to persons seeking or willing to receive the

same, or even, in some cases, for the purpose of bringing orderly and peaceable persuasions to bear upon the minds of men who desire to listen to the same, the object of such persuasions not including in any way the disruption of an existing contract for labor, then there may be no unlawful element in the picketing, and carrying it on may found no action even at law, and certainly may not call for any interference on the part of a court of equity.

The insistence of counsel for the complainants would seem to include the proposition that workmen on strike cannot maintain pickets (although merely for the purpose of obtaining such information as can be procured by the use of the eyes and ears) without violating the employer's right to the enjoyment of a free labor market, and thereby causing him substantial and irreparable damage. This proposition seems to me to be utterly untenable. The restraining orders, therefore, will stand in their present form against those defendants, as I stated, who are charged under oath with such conduct as brings them within their operation.

It is admitted that there are a number of defendants who are not connected in any way with the practices of which the complainant complains, and as to them the order will be vacated. If counsel cannot agree upon the names of the defendants who are to be held subject to restraint, I will go over the list myself, and determine who are to be included and who are to be excluded.

(39 N. J. L. 495)

WALLACE v. MAYOR, ETC., OF CITY OF NEWARK et al.

(Supreme Court of New Jersey. Oct. 19, 1903.)
MUNICIPAL CORPORATIONS—ACTION FOR ASSAULT—DECLARATION—DEMURRER—AUTHORITY OF AGENT.

1. Where a declaration charged that a municipal corporation, by its agents duly authorized, empowered, and directed so to do, committed upon the plaintiff a tort, consisting of assaults, batteries, and false imprisonment, it was *held* on demurrer that this was a sufficient allegation of the tortious act by the corporation; that the details of the authorization were a matter for proof at the trial, rather than a necessary allegation in the pleading.

2. The demurrer to such a declaration admits that the acts complained of were not *ultra vires*, but that the agents of the corporation had competent authority to commit the assaults. Whether they actually had such authority is a question of fact, to be determined at the trial.

(Syllabus by the Court.)

Action by Edward L. Wallace against the mayor and common council of the city of Newark and others. Demurrer to declaration. Overruled.

Argued June term, 1903, before GUMMERE, C. J., and FORT, PITNEY, and HENDRICKSON, JJ.

Edward F. Merrey, for plaintiff. Malcolm MacLear, for defendants.

HENDRICKSON, J. The action is in tort, and the declaration demurred to consists of three counts. The first count sets out, as a cause of action, certain acts of assault, battery, and false imprisonment alleged to have been committed upon the plaintiff by the defendant municipality by its agents, G. B. and F. J. S., who had been by it placed in charge of its water reservoir and premises at Oak Ridge, N. J., from which it supplied with water the citizens of Newark. The count further alleges that said agents of the municipality, before the time of the committing of these outrages, had been by it placed in charge of the said reservoir and premises, with orders to protect the same, and prevent trespassing thereon or fishing in said reservoir from the roadway crossing the premises, and were at the time of the commission thereof acting under the power, authority, and direction of said municipality as aforesaid, for the purpose of preventing said plaintiff's fishing in the reservoir from said roadway. The said G. B. and F. J. S. were also charged as jointly liable with the defendant municipality as individuals. The second count charges that the defendant municipality, by its agents, G. B. and F. J. S., duly authorized, empowered, and directed by the said municipality as aforesaid, and the said G. B. and F. J. S., assaulted the said plaintiff, to wit, at the township of West Milford, in the county of Passaic, aforesaid, and then and there imprisoned him and kept and detained him in prison there, without any reasonable or probable cause whatever, for a long time, to wit, for 10 hours then next following, contrary, etc., wherefore, etc. The third count is similar to the second.

The demurrer is general to the whole declaration. It follows that, if any of the counts be good, the demurrer must be overruled. We have looked at the second and third counts of the declaration in the light of the specifications of demurrer, and we think the counts should be sustained.

The first objection raised by the specifications is that a municipality cannot be held for an assault or false imprisonment by its agents or servants, without clear proof of the express authorization or direction of the act complained of by its duly constituted authorities, in solemn form to bind the corporation, and that the counts in question fail to show that the alleged assault and imprisonment were so expressly authorized or directed. The necessity of clear proof being required as here stated we may perhaps concede. *Tomlin v. Hildreth*, 65 N. J. Law, 438, 47 Atl. 649. But that the authorization by the municipality is not sufficiently pleaded, we cannot concede. We are not referred to any case or precedent to sustain the latter contention. It is a well-recognized rule of pleading that, in the allegation of an essential fact, it is unnecessary to state such circumstances as merely tend to prove the truth of it. 1 Chitty, Pl. 228. The point seems to

have been raised in *Jeffersonville v. Myers*, 2 Ind. App. 532, 28 N. E. 999. There was a demurrer to a declaration, which charged a tort against a municipality and others. The pleader, in describing the tortious act of the corporation, alleged that the defendants wrongfully and unlawfully constructed the embankment, etc. It was contended that it should have been alleged that the wrongful act of the city was authorized by the common council. The court held that the pleading was sufficient. See, also, *La France Fire Engine Co. v. Mt. Vernon*, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. Rep. 827.

The other ground of demurrer is that the acts complained of were ultra vires, and without the scope of the employment of the said G. B. and F. J. S., and unauthorized, and that the declaration discloses no authorization or ratification. But this cannot avail the demurrant so far as the second and third counts are concerned. In each of these the allegation is that the municipality, by its agents duly authorized, empowered, and directed by it as aforesaid, committed the torts complained of. It cannot be said that the words "as aforesaid" should limit the declared authority by reference to the first count. Each count is separate, and, since no reference is made to the first count in the other counts, the rules of pleading exclude the right to import any borrowed force therefrom. 1 Chitty, Pl. 413. If this specification properly raises the question of ultra vires as regards the powers of the municipality, it may be said that the counts are still sufficient. The charge that the municipality, by its agents duly authorized, empowered, and directed so to do, committed the torts complained of, carries with it the assertion that it was acting within the scope of its authority in so doing. It is also a general rule of pleading that matters which should come from the other side need not be stated. 1 Chitty, Pl. 222. Upon a like principle it has been held by this court, in a suit against a school district to recover upon its note, that it was unnecessary for the holder to aver that in its creation the corporate body which gave it acted within its power. *Montague v. Church School District*, 34 N. J. Law, 218; *Ridgefield v. Cliffside Park*, 63 N. J. Law, 371, 43 Atl. 722. See, also, *Brown v. Board of Education*, 103 Cal. 531, 37 Pac. 503. In *Brokaw v. N. J. R. & Tr. Co.*, 32 N. J. Law, 328, 90 Am. Dec. 659, the declaration charged that the defendant company, by their servants, etc., assaulted the plaintiff, etc. In disposing of the demurrer, Justice Depue, speaking for the Supreme Court, said: "The demurrer admits that the servants of the corporate defendant had competent authority to commit the assault and battery," etc. "Whether, in point of fact, the servants of the company had such authority, and the corporation is liable for their acts, is a question of fact to be determined at the trial." Having reached the result stated as to the

second and third counts, we need not consider the question of the validity of the first count of the declaration. The demurrer must be overruled, with costs.

(69 N. J. L. 435)

BROWN v. STREET LIGHTING DIST. NO. 1 OF WOODBRIDGE TP. et al.

(Supreme Court of New Jersey. Oct. 9, 1903.)

CERTIORARI—PRACTICE—ESTOPPEL—LIGHTING DISTRICT—ELECTION.

1. The Legislature may confer upon a single justice of the Supreme Court power to hear and determine, after return and upon notice, any proceedings in certiorari, and direct that the order and determination of such justice therein shall be entered as the judgment of the Supreme Court.

2. Where the prosecutor was present at, and participated in, an election in a street lighting district, and without objection or protest voted upon the question of the sum to be raised for street lighting purposes in the district for the ensuing year, he will be held to be estopped from questioning the regularity of the election because of an allegation that the requisite 10 days' notice thereof was not given by the township clerk.

(Syllabus by the Court.)

Certiorari by David H. Brown against the Street Lighting District No. 1 of the township of Woodbridge and others to review proceedings of the meeting thereof. Heard before a single justice upon notice, under Revision 1903, § 5 (P. L. 1903, p. 344). Writ dismissed.

Nelson Abeel, for prosecutor. Malcolm MacLear and J. H. Thayer Martin, for defendants.

FORT, J. In this case the court has reached the following conclusions:

First. The Legislature may confer upon a single justice of the Supreme Court the power to hear and determine proceedings in certiorari, and authorize the entry of his order and direction therein as the judgment of the Supreme Court. *Motts' Practice Act*, p. 135, § 5. By the act relative to supreme and circuit courts, the Supreme Court may be held by the Chief Justice or any one of the Justices. P. L. 1900, p. 350, § 7. The same provision is found in the Revision of 1874, and was carried into that Revision from existing statutes. 1 Gen. St. p. 1023, § 19. *Wood v. Fithian*, 24 N. J. Law, 838.

Second. Certiorari is the proper remedy to review the legality of the passage of a resolution fixing the sum of money to be raised and expended in the lighting district for the ensuing year, under the authority conferred by the street lighting district act. 3 Gen. St. p. 8669, § 450.

Third. Under the proof taken in this case, it appears that less than 10 days' notice of the election held for the purpose of fixing said sum, as required by the statute, was given by the township clerk, and for this reason the prosecutor asks that the action of the meeting in voting the sum directed to be

expended in the district for the ensuing year be set aside. The statute fixes the first Tuesday in June of each year for the legal voters of each district to meet, after the district is set up, to elect the lighting commissioners, and to determine by ballot, by a majority of those present, the sum to be raised and expended for street lighting. The polls are required to be open at — o'clock in the afternoon and to close at 7 o'clock at night. The township clerk is required to give 10 days' notice of the time and place of the meeting. Under the proof in this case, it is clear that the requisite notices were not set up for the required 10 days. I think this would be fatal, under the decisions in this state, if no other fact appeared in the case. *Canda Manufacturing Co. v. Woodbridge*, 53 N. J. Law, 134, 32 Atl. 66; *Davis v. Rapp*, 48 N. J. Law, 594. But it appears in this case that the prosecutor attended, and participated in, and voted at, the election without protest or objection. There was a very full vote at the election—a greater number than usual; 208 voted. If the resolution be set aside, there would be no method for a reconsideration of the action of the lighting district. The prosecutor comes before the court upon the merest technicality, without showing that a single person who wished to vote did not do so, or that any voter in the district did not in fact have notice of the election. He admits that he did, and that he voted. I think he should be held to be estopped from raising the question of the irregularity of the notice.

The writ of certiorari will therefore be dismissed, with costs.

(69 N. J. L. 256)

MECHANICS' BANK v. CHARDAVOYNE
(Court of Errors and Appeals of New Jersey. Oct. 12, 1903.)

NOTE—BONA FIDE HOLDER—INDORSEMENT.

1. The M. Bank, of the city of Brooklyn, N. Y., received at its banking house, from C., in the regular course of business, in good faith, without notice of any infirmity in it, and in payment of an indebtedness then due to the bank from C., a promissory note, which the wife of C. had indorsed in blank, and intrusted to him for the purpose of having it discounted for her benefit. *Held* that, by the *lex loci contractus*, the bank was a bona fide holder thereof for value.

2. One who indorses a promissory note in blank, and intrusts it to another to fill it up and have it discounted for his (the indorser's) benefit, is liable upon it to a bona fide holder for value, who receives it before maturity, in the usual course of business, from the person to whom it was intrusted, notwithstanding that the latter has filled it up for, and fraudulently converted it to, a purpose entirely different from that for which he was authorized to use it.

Dixon, Garrison, Fort, and Green, JJ., dissenting.

(Syllabus by the Court.)

Error to Circuit Court, Essex County.

Action by the Mechanics' Bank against Annie N. Chardavoyne and William S. Chardavoyne. Judgment for plaintiff, and de-

pendant Annie N. Chardavoyne brings error. Affirmed.

Lambert & Stewart, for plaintiff in error.
Albert C. Wall, for defendant in error.

GUMMERE, C. J. This suit was brought against William S. Chardavoyne and Annie N., his wife, upon a promissory note made by William to the order of Annie, and indorsed by her. The note is dated Newark, July 28, 1899, and is payable at the Mechanics' Bank, Brooklyn, N. Y. The case was tried by the court without a jury, by consent of the parties. The following are the pertinent facts found by the trial court: Mrs. Chardavoyne, about ten days or two weeks before July 28, 1899, intrusted her husband with a blank form of promissory note, indorsed by her, to be filled up and signed by him, and used at the German National Bank of Newark to obtain a loan for Mrs. Chardavoyne. The German National Bank refused to discount the note, and its refusal was reported to her. She never authorized her husband to use the note for any other purpose. Notwithstanding this fact, he, on the 28th day of July, took the blank note to the banking house of the plaintiff company, in Brooklyn, New York; and the body of the instrument was then filled up by the plaintiff's president, at the request of Mr. Chardavoyne, for a sum equal to the amount of an indebtedness due from Mr. Chardavoyne to the plaintiff. The next day the note was discounted by the plaintiff, and the proceeds placed to Mr. Chardavoyne's credit. The president of the bank, when he filled up the note, was ignorant of the fact that it had been indorsed in blank by Mrs. Chardavoyne; and the plaintiff took it in the regular course of business, in good faith, without notice of any infirmity in it, and in payment of the indebtedness then due to it from Mr. Chardavoyne. On this finding of facts, judgment was entered for the plaintiff against both the maker and indorser of the note. The writ of error is sued out by the indorser, Mrs. Chardavoyne, alone.

The principal ground upon which we are asked to reverse this judgment is that, upon the facts found, no liability on the part of Mrs. Chardavoyne can be predicated. The contention is that her husband had no authority to fill up the note, except for the purpose of having it discounted at the German National Bank for her benefit; that, when this purpose failed, her husband's agency ceased, and her indorsement became a nullity, and that his subsequent fraudulent act in having the blanks in the note filled up, and then appropriating it to the payment of his own indebtedness, did not render her responsible thereon as indorser. An examination of the authorities, however, will disclose that this contention is untenable. The question to be determined in a case like the present is not what is the actual limit of authority con-

ferred by the indorser of a blank note upon the person into whose hands she delivers it, but, rather, what authority such an indorser, by her conduct, holds out that person as possessing, to one who takes the note in good faith, for value, and without notice that the actual authority conferred is a limited one only, and therefore, as is stated by Mr. Parsons in his treatise on Notes and Bills (volume 1, p. 110), "it is no defense against a bona fide holder for value to prove either that the person to whom the instrument was intrusted in blank had no authority at all to fill the blank, or that his authority was limited to a certain sum, which he had exceeded, or that he was only authorized to use the paper for a particular purpose, and had fraudulently converted it to a different purpose, or that he was only authorized to fill the blank upon a certain condition, which had not happened, or that the authority was limited in point of time, and that the time had expired." Practically the same statement appears in 1 Daniel on Neg. Instr. § 143, where it is said that "the authority implied by a signature in blank, and the credit granted, are so extensive that the party so signing will be bound, though the holder was only authorized to use it for one purpose, and has perverted it to another, and though the authority was limited to a time which has expired, or was only to be exercised upon a condition which has not happened." The decided cases fully support the rule laid down by these authors. As early as 1780, Lord Mansfield, in *Russell v. Langstaffe*, Doug. 514, declared that "the indorsement on a blank note is a letter of credit for an indefinite amount. By it the indorser says, 'Trust G.' (the person who received the note from the indorser) 'to any amount, and I will be his security.' It does not lie in his mouth to say that the indorsement is not regular." In *Gerrard v. Lewis*, L. R. 10 Q. B. Div. 30, it was held that "a man who gives his acceptance [to a bill of exchange] in blank holds out the person to whom it is intrusted as clothed with ostensible authority to fill in the bill as he pleases." In *Bank of Pittsburg v. Neal*, 22 How. 96, 16 L. Ed. 323, it was held that "where a party to a negotiable instrument intrusts it to the custody of another, with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument," and that "a bona fide holder of such an instrument, for valuable consideration, without notice of the facts which impeach its validity between the antecedent parties, if he takes it before the same becomes due, holds the title unaffected by these facts, and may recover thereon." In *Michigan Bank v. Eldred*, 9 Wall. 544, 19 L. Ed. 763, it is declared to be "well-settled law that where a party to a negotiable bill of exchange or promissory

note containing blanks intrusts it to the custody of another, whether it be for the purpose of accommodating the person to whom it was intrusted, or to be used to raise money for his own benefit, such bill or note, especially if it be indorsed in blank, carries on its face an implied authority in the person to whom it is so intrusted to fill up the blanks in his discretion; and as between such party to the bill or note, and innocent third parties holding the bill or note as transferees for value, in the usual course of business, the person to whom it is so intrusted must be deemed to be the agent of the party who committed such bill or note to his custody, and the legal conclusion is that he acted under the authority of that party, and with his approbation and consent." In *Van Duzer v. Howe*, 21 N. Y. 531, it was decided that "a party who intrusts another with his acceptance in blank is responsible to a bona fide holder, although the blank is filled with a sum exceeding that fixed as a limit by the acceptor." In *Redlich v. Doll*, 54 N. Y. 235, 13 Am. Rep. 573, the rule is stated to be that "if a note be obtained from a maker by fraud; if it be made for one purpose, and used by the holder for another; if it be delivered in blank, with an agreement that the blank shall be filled in one way, and it be filled in another—in all these cases the maker is liable to a bona fide holder for value. The maker, rather than the innocent holder, must suffer for his negligence or misplaced confidence." In *Putnam v. Sullivan*, 4 Mass. 45, 3 Am. Dec. 206, it was held that "where a merchant intrusts his clerk with his blank indorsements, and one by false pretense obtains and uses them [by writing and signing promissory notes upon the face of the blanks], such fraudulent use of them will not discharge the indorser, against an innocent indorsee." In *Greenfield Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67, the rule is laid down that "if a man indorses a blank form of note, and delivers it with the intention that the blank should be filled, he thereby makes the person to whom he delivers it his agent, and is responsible for whatever date, sum, or time of payment he may insert, to a bona fide indorsee." In *Breckenridge v. Lewis*, 84 Me. 349, 24 Atl. 864, 30 Am. St. Rep. 353, it was decided that "one who intrusts his signature to another for commercial use (that is, to have some business obligation written over it) becomes holden upon a negotiable promissory note fraudulently so written by the person so intrusted with it, and negotiated to an innocent holder."

It is unnecessary to multiply authorities. Enough have been cited to make it clear that one who indorses a promissory note in blank, and intrusts it to another to fill it up, and have it discounted for his (the indorser's) benefit, is liable upon it to a bona fide holder for value, who receives it before maturity, in the usual course of business, from the person to whom it was intrusted, notwithstanding

that the latter has filled it up for, and fraudulently converted it to, a purpose entirely different from that for which he was authorized to use it. Commercial paper is a part of the mercantile currency of the country, and, in order that its free circulation may not be impeded, it is the settled policy of the law that innocent holders thereof for value should have a right to enforce payment of such paper against those who, by signing or indorsing it, either in blank or otherwise, have caused it to become a part of such currency.

It is further contended on behalf of the plaintiff in error that, if it be considered that the indorser of a blank promissory note is liable to a bona fide holder for value under the circumstances existing in the present case, still the plaintiff bank is not entitled to recover against her, because it does not occupy that position. The fact is established by the finding of the trial court, as has been already stated, that the plaintiff bank took the note "in the regular course of business, in good faith, without notice of any infirmity in it." It is therefore a bona fide holder. The trial court further found that the bank took the note "in payment of an indebtedness then due" to it. So far as this state is concerned, the rule is entirely settled that a party taking a promissory note in payment of an antecedent debt is a holder of such note for a valuable consideration, and entitled to protection as such. *Allaire v. Hartshorne*, 21 N. J. Law, 673, 47 Am. Dec. 175; *Duncan Sherman & Co. v. Gilbert*, 29 N. J. Law, 527. But as the transaction out of which the plaintiff's right sprang took place in New York, the question to be determined is whether, by the law of that jurisdiction, one who so takes a promissory note is a holder for value. The plaintiff in error insists that the rule established in that state is that, where the holder has received the paper as payment for an antecedent debt, he is not such a holder, and refers us to a declaration to that effect contained in the opinion of this court in *Duncan Sherman & Co. v. Gilbert*, 29 N. J. Law, 528. No authority for this statement is cited in the opinion referred to, and an examination of the New York cases does not justify it. On the contrary, the New York decisions on this subject, so far as we have been able to ascertain by an examination of the published reports of such decisions, are in entire harmony with our own. In 1840, more than 20 years prior to the decision in *Duncan Sherman & Co. v. Gilbert*, the Supreme Court of New York, in the case of *Bank of St. Albans v. Gilliland*, 23 Wend. 311, 35 Am. Dec. 566, held that "receiving a note for a precedent debt is receiving it for value, within the law merchant, if it be taken in satisfaction of such precedent debt, and the indebtedness be canceled." To the same effect is the decision of the Court of Appeals in *Brown, Ex'r, v. Leavitt*, 31 N. Y. 113, and in the later cases of *Phoenix Ins. Co. v. Church*, 81 N. Y. 218, 37 Am. Rep. 494, and

Mayer v. Heidelbach, 123 N. Y. 332, 25 N. E. 416, 9 L. R. A. 850.

It is further urged on behalf of the plaintiff in error that, as she received nothing for her indorsement, she is, at most, an accommodation indorser, and that section 5 of our married women's act (2 Gen. St. p. 2017, § 26) exempts her from liability on such a contract. In disposing of this contention, it is enough to say that it has already been decided by this court that where a note upon which a married woman puts her name, in this state, first comes into legal existence in the state of New York, as was the present case, the statutory provision appealed to affords her no protection. *Thompson v. Taylor*, 66 N. J. Law, 253, 49 Atl. 544, 54 L. R. A. 585, 88 Am. Rep. 485.

The only other ground upon which the validity of the judgment below is attacked is based upon the claim set up by the plaintiff in error at the trial of the cause that, at the time of the transaction between her husband and the bank, the former was insane, the contention being that the court erred in its holding with regard to the measure of liability upon contracts made by insane persons. It is quite immaterial, however, whether such error occurred or not. The trial court found as a fact that the husband of the plaintiff in error was not insane at the time when he delivered the note in suit to the plaintiff, and, as the testimony produced on the subject of Chardavoyne's sanity was amply sufficient to support this finding, it must be accepted by this court. Consequently the question of the measure of liability, under the conditions mentioned, is not involved in the decision of the case.

The judgment under review should be affirmed.

DIXON, GARRISON, FORT, and GREEN, JJ., dissent.

(99 N. J. L. 596)

GREEN v. BARNES MFG. CO.

(Supreme Court of New Jersey. Oct. 1, 1903.)

MASTER AND SERVANT—INJURIES TO SERVANT—WARNING—EVIDENCE—VERDICT.

1. Where, in an action for injuries to a servant by wood flying from a circular saw, the proof was plenary that plaintiff had been warned of the danger of the saw, and forbidden to pass through the room where it was working, and that another way had been expressly provided, and the only evidence to the contrary was plaintiff's evidence, which was practically uncorroborated, a verdict finding that plaintiff was not warned, and therefore did not assume the risk of injury, was contrary to the evidence.

Action by Michael Green against the Barnes Manufacturing Company. On rule to show cause why a new trial should be granted after verdict in favor of plaintiff. Rule absolute.

Argued February term, 1903, before the CHIEF JUSTICE and FORT, HENDRICKSON, and PITNEY, JJ.

Joseph Anderson, Charles L. Black, and Charles L. Corbin, for the rule. Lewis, Bes-son & Stevens, opposed.

PER CURIAM. The plaintiff was injured by the flying of a piece of wood thrown by a circular saw. The proof seems to us to have been almost plenary that the plaintiff in this case was warned of the danger of the circular saw, and forbidden to pass through the room where it was working because of such danger; another way being expressly provided for the plaintiff and others to do their work. The jury have found that the plaintiff was not warned, accepting practically his own uncorroborated evidence against the whole range of the unimpeached testimony of the defendant. If the plaintiff was warned, and with full knowledge of the danger went the way he did, and was injured, he assumed the risk. The verdict was against the clear weight of evidence. The verdict in this case was also grossly excessive.

The rule to show cause must be made absolute, and a new trial granted.

(95 N. J. E. 237)

MILLER v. GOURLEY.

(Court of Chancery of New Jersey. Oct. 6, 1903.)

CORPORATIONS—MORTGAGE—VALIDITY—AUTHORITY OF EXECUTIVE OFFICERS—CHATTEL MORTGAGE—CONSIDERATION.

1. A corporation was unable to pay its debts in the usual conduct of its business. Its board of directors passed a resolution directing the creation of a mortgage for \$20,000 upon the real and personal property, and authorizing the payment of a commission of 10 per cent. for the placing of the mortgage. No intended mortgagee was named in the resolution. The circumstances of the case indicated that the mortgage was intended to raise money to be at the disposal of the company for the payment of its debts. The executive officers of the company made and delivered a mortgage for \$20,000 to a person (claiming to be a creditor of the company) selected by them. What items went to make up the \$20,000 are, upon the evidence, uncertain. It is shown that at least \$14,000 of it consisted of pre-existing debts owing by the company to the selected mortgagee, and that but a small portion cash was paid by the mortgagee for the company's benefit at the time of the delivery of the mortgage. *Held*, the mortgage was made to the mortgagee creditor of the company without authorization from the board of directors, and in contemplation of its insolvency, and is invalid to secure any part of the mortgage money, except that which was paid to or for the mortgagor company at the time of its delivery, induced by reliance upon its security.

2. The affidavit of the mortgagee annexed to the mortgage stated the true consideration of the mortgage to be "twenty thousand dollars; two thousand dollars thereof in cash loaned by the mortgagee to the mortgagor, and the balance thereof in work and labor performed by the mortgagee for the mortgagor at its request." The evidence showed that this was not the true consideration of the mortgage. *Held*, the mortgage is wholly invalid as a chattel mortgage, under the provisions of section 4 of the chattel mortgage act (Gen. St. p. 2113).

(Syllabus by the Court.)

¶ 2. See Chattel Mortgages, vol. 9, Cent. Dig. § 17

Bill by Richard T. Miller, receiver, against Samuel Gourley. Decree for complainant.

This bill is filed by the complainant, as receiver, by appointment of this court, of Robert S. Hobbs & Co., a corporation of this state, against one Samuel Gourley, the holder of a real estate and chattel mortgage made on the 18th day of December, 1901, by that company to the defendant to secure the payment of \$20,000, covering substantially the entire property of the company. The affidavit of consideration specifies that the true consideration of the mortgage was \$20,000, of which \$2,000 was for cash loaned to the mortgagor, and the balance for work and labor performed by the mortgagee for the mortgagor at its request. The mortgage was recorded on December 14, 1901, in Burlington county clerk's office, where the real and personal property of the mortgagor company were situated. On January 15, 1902, Samuel Gourley, Jr., the son of the mortgagee, filed his bill in this court, alleging that the R. S. Hobbs Company was insolvent, and praying the appointment of a receiver. On the same day the defendant company filed its answer admitting its insolvency, and on the same day Richard T. Miller was appointed receiver. Under that appointment, the receiver has brought the present suit, challenging the legality of the mortgage held by Samuel Gourley, the father.

The R. S. Hobbs Company was organized on the 1st day of May, 1901, for the manufacture of wall paper. It needed buildings for its business, and in the spring of 1901 entered into contracts for the erection with either Samuel Gourley, Jr., the son of the mortgagee, or with Samuel Gourley, the mortgagee himself; it being one of the points in dispute which of these two parties contracted to erect the buildings. The complainant charges that the buildings were contracted for and were in fact built by Samuel Gourley, Jr.; that, at the time the mortgage was given, the mortgagor company was insolvent; that both Samuel Gourley, Jr., and Samuel Gourley were aware of this condition of affairs; that the mortgage was made by the officers of the company without any vote of the board of directors of the company that it should be made; that in fact no cash sum of money was paid on the making of the mortgage; that it was given to secure for Samuel Gourley, Jr., whatever was due him from the company, as a preferred debt, in expectation of the financial failure of the company; and that the mortgage was made for an amount in excess of all that was due from the company to Samuel Gourley, Jr. The bill charges that the mortgage is fraudulent as against the receiver, representing the creditors of the insolvent company, and prays that it may be decreed to be null and void, and no lien on the property described therein, and that it and the bond of the company accompanying it may be delivered up to be canceled. The defendant, Samuel

Gourley, by his answer, denies that the bond and mortgage were not executed in accordance with the direction of the by-laws of the company, and without the approval or direction of its officers. He avers that the defendant did advance the sum of \$2,000 to the mortgagor company, and that the company was indebted to the defendant at or prior to the making of the bond and mortgage in the sum of \$18,000 for work and labor done for the company by the defendant, and that there is due on the bond and mortgage the sum of \$20,000, less a small amount for adjustment of accounts between the parties. He denies that Samuel Gourley, Jr., was the creditor of the corporation; denies that the corporation was insolvent when the mortgage was made, and that he had any knowledge when the bond and mortgage were executed that the corporation was either insolvent, or about to become so; denies that the bond and mortgage were taken to prefer any indebtedness owing to Samuel Gourley, Jr., and that when it was given it was in any way fraudulent or without consideration; and further denies that either the officers of the corporation who executed it, or the defendant, had at the time of its execution any knowledge that the corporation was insolvent or in contemplation of insolvency. The answer further states in detail: That the defendant contracted for the erection of the mortgagor company's buildings, and did the work and furnished the material required therefor, and considerable extra work, amounting in all to \$6,417.66. That, after he had nearly completed his contract, he learned that the money subscribed for the capital stock of the company had not been paid in, and that the company was without ready funds to pay him. He proposed that the company should give him a mortgage to secure this indebtedness. That a resolution of the board of directors directed the officers to execute to defendant the bond and mortgage here in controversy. That, when the mortgage came to be executed, the officers of the company told the defendant they were without sufficient means to begin work on the contracts for the manufacture which they then had, and requested the defendant to advance them some money with which to get the business started. That on the 13th day of December, 1901, the defendant advanced to the company in cash \$1,637; on the same day, the further sum of \$113; on the same day, the further sum of \$250; making due to him on the contract, for extra work and money advanced, the sum of \$20,917.66. That on the 1st of November, 1901, the company had paid him \$1,500, making the total amount due on the mortgage at the present time the sum of \$19,417.66, together with interest thereon from the date of the mortgage. The defendant filed an amendment to his answer, repeating in detail the contract between him and the Hobbs Company for the erection of its build-

ing, and his performance thereof, and also extra work done by him for that company. He also again stated that he learned that the company's subscription for its capital stock had not been paid in, and that the company was without funds to pay him, and mentions the 15th day of November, 1901, as the date on which he received this information. He states that he refused to go on with his contract, but finally completed it, and also a large amount of extra work, under the promise that he should have a mortgage for his debt. He repeats his averment that a meeting of the board of directors adopted a resolution directing the company's officers to execute to the defendant the bond and mortgage now in controversy. He also repeats his claim that, when the bond and mortgage were executed, the officers stated to the defendant that they were without sufficient means to begin work upon contracts which they then had, requesting him to advance them some money to start their business. He states in his amendment that he advanced to the company in cash on the same day the several sums of \$1,687, \$113, and \$250, and that when he was about to accept the mortgage he learned that one David M. Hess held a mortgage of \$2,000 on the premises. He states that the defendant agreed with the Hobbs Company to pay off that mortgage, and actually did pay the same, and that said \$2,000 was added to the amount then due by the company to the defendant, and formed part of the consideration of the mortgage, making the total sum due to the complainant to be the sum of \$20,000. Issue has been joined on the defendant's answer, and the cause has come to hearing on these pleadings. All the property of the insolvent company which is covered by the defendant's mortgage has been sold by the receiver, under an order of this court, clear of the mortgage lien, on petition, etc., under section 81 of the general corporation act (Sess. Laws 1890, p. 303). The real estate produced \$6,600, and the personal property which is included in defendant's mortgage produced about \$450. These sums are held by the receiver subject to the decree of the court in this cause as to the validity of the defendant's mortgage upon the properties sold.

Howard Flanders and S. W. Beldon, for complainant. John F. Harned, for defendant.

GREY, V. O. (after stating the facts). The bill of complaint in this case challenges the validity of the mortgage for \$20,000 held by the defendant upon several grounds: First. That though given in the name and under the seal of the mortgagor company, and proven by the annexed oath of the secretary to have been made "pursuant to resolution of the directors" of that company, there was not, in point of fact, any vote of the board of di-

rectors that the mortgage should be given. Second. The complainant insists that, when the mortgage was made, the mortgagor company was either insolvent or certainly in contemplation of its insolvency, and that it is therefore invalid, under the section of the corporation act which prohibits the officers of a corporation from disposing of its property under such circumstances. Sess. Laws 1896, p. 298, § 64. Third. That the mortgage, so far as it undertakes to be a chattel mortgage, is invalid, because the affidavit of the mortgagee annexed does not truly state the consideration of the chattel mortgage, as required by the chattel mortgage act (Gen. St. p. 2113, § 4), which was in effect when the mortgage was made, and has been re-enacted in the act concerning chattel mortgages (Sess. Laws 1902, p. 487).

On the first point, that the defendant's mortgage was not authorized to be made by any action of the board of directors of the Robert S. Hobbs Company, a short summary of the evidence will show the status of the company previous to and at the time when that mortgage was given. It was organized in May, 1901, and began preparations for business upon an extended scale shortly after, by the erection of buildings, and making of blocks, patterns, and purchase of machinery. It had almost no money with which to pay the debts incurred in these preparations for business. Its cash subscriptions to the capital stock were not paid into the company's treasury to any substantial extent, so that from the very start it was continually in debt, for both large and small sums of money, owing for matters which in the usual course are paid for in cash. Its business was conducted by borrowing from whosoever would lend money to it—sometimes in petty sums for necessary implements, sometimes in larger sums to pay for wages and other cash items. Samuel Gourley, Jr., who personally conducted the erection of buildings under the contract with the company, either for himself, or for his father, Samuel Gourley, Sr., made a number of advances of small sums to pay cash items which were necessary to keep the company going. This condition of affairs continued from bad to worse, and culminated in November, 1901, about six months after the company was organized, when it became plainly apparent that, unless a large sum of ready cash was obtained for the company's use, it would be unable to complete its works and manufacture wall paper in the usual course of the trade. By the first week in December, 1901, a large number of orders for such goods had been obtained, and a small portion of completely manufactured goods had been made and delivered, although the works had not yet been completely finished. The executive committee of the board of directors then passed a resolution authorizing the creating of a \$20,000 mortgage upon the company's property, to place which a

commission of 10 per cent. was to be allowed. This resolution was afterwards, on December 5, 1901, as appears by the minutes, ratified by the board of directors. This resolution, while it authorizes the making of a mortgage for \$20,000, does not in any way refer to the defendant as the intended mortgagee. One of the directors, who is recorded as voting for the resolution, and whose vote was necessary to its passage, declares that there never was any authorization of the making of the mortgage to Samuel Gourley, Sr. The terms of the resolution, when considered in connection with the defendant's affidavit annexed to his mortgage, make it most improbable that it was passed to authorize the making of that mortgage which it is now invoked to support. After authorizing the creation of a mortgage for \$20,000 upon all the company's property, without stating to whom it should be made, the resolution directs the payment of a commission of 10 per cent. for the placing of the mortgage. The defendant's own affidavit annexed to the mortgage declares that "the true consideration of the said mortgage is as follows, to wit: Twenty thousand dollars; two thousand dollars thereof in cash loaned by the mortgagee to the mortgagor, and the balance thereof in work and labor performed by the mortgagees for the mortgagor at its request," etc. If it be true that the resolution in the minutes refer to the mortgage now in dispute, then it authorized the officers of the company to secure the debt of \$18,000, which the company owed the defendant for work and labor done, by a mortgage upon all the company's property, and to pay him \$2,000 in commissions for taking the mortgage to secure his own debt. I find it impossible to believe that the resolution referred to was intended to give any such authority. The company at that time had no money. It was overwhelmingly in debt. It wanted cash to pay its various creditors, and was willing to submit to the payment of a 10 per cent. premium to get it. No particular mortgage was in contemplation when the resolution was passed, and for this reason no mortgagee was named in the resolution. Any mortgagee who would raise the \$20,000 in cash would have been acceptable. None could be had. The company's financial situation was desperate. The defendant, Samuel Gourley, Sr., was the largest creditor. His son Samuel Gourley, Jr., was in frequent conference with the company's officers, and knew of its embarrassments, and of the peril to the Gourley claim for erecting the company's buildings. The defendant, in his answer, admits that he solicited the making of the mortgage now in dispute. Under these circumstances, the officers of the company, without any authority from the board of directors to make a mortgage to the defendant, Samuel Gourley, Sr., executed to him, for \$20,000, the mortgage now challenged. It contains no reference to or recital of any res-

olution of the board of directors of the company authorizing it to be made. As above shown, no resolution of the board did in fact authorize it to be made, but the secretary of the company, who favored the securing of Mr. Gourley's claim, and Mr. Gourley himself, now appeal to the resolution which directed the making of a mortgage for \$20,000, obviously intended to raise cash, as authority to make a mortgage for \$20,000 to secure (as to \$18,000 of it) an antecedent debt of the company, and which in fact raised but the small sum of \$1,637 in cash.

The affidavit of the secretary annexed to the defendant's mortgage is upon a printed form, which recites that the mortgage was made "pursuant to resolution of the board of directors," but no resolution has been proven which authorized the giving of that mortgage, and I am satisfied that the board of directors never ordered that mortgage to be made. It was the voluntary act of those officers of the company who desired to secure for Mr. Gourley the payment of his claim against the company. This view is supported by the phrasing of the resolution, by the testimony of the directors who voted for it, and by the varying and contradictory statements made by the defendant and his son in their endeavor to state how the \$20,000 was made up, for which the mortgage is on its face expressed to be given.

The defendant, Samuel Gourley, Sr., in his affidavit annexed to the mortgage, and taken on December 13, 1901, the date of the mortgage, says the consideration of the mortgage was:

Cash loaned	\$ 2,000 00
Work and labor performed.....	18,000 00

Total amount of mortgage..... \$20,000 00

—"Besides lawful interest thereon from the 13th day of December, 1901."

In his sworn answer in this cause, filed June 21, 1902, the defendant says the consideration of the mortgage was ascertained as follows:

Contract price	\$12,500 00
Extra work	6,417 66
Cash advanced.....	1,637 00
" "	113 00
" "	250 00

\$20,917 66

Cr. by payment on account made	
November 1, 1901.....	1,500 00

\$19,417 66

—Making, he alleges in his sworn answer, "the total amount now due to this defendant upon said mortgage the sum of \$19,417.66." That is, on December 13, 1901, he swore that \$20,000 principal was due on the mortgage, which was to draw 6 per cent. interest. On June 21, 1902, with no pretense that any payment of either principal or interest had been paid since the mortgage was given, he swore that the mortgage debt was, with varying items, but \$19,417.66. By an amendment to his answer filed January 5, 1906 (not

sworn to), he restates the items of the mortgage money as last above given, making it \$19,417.66, and then adds this clause: "That, when this defendant was about to accept said mortgage, he learned that one David M. Hess held a mortgage of two thousand dollars on said premises, the lien of which was prior to that of this defendant; that this defendant agreed with said company to pay off said mortgage of two thousand dollars, and did actually pay the same; and that said two thousand dollars was added to the amount then due by said company to this defendant, and formed part of the consideration of said mortgage, making the total amount now due to this defendant upon said mortgage the sum of twenty thousand dollars." By any calculation I can make, the total amount due on the mortgage, if the \$2,000 for the Hess mortgage were added to the \$19,417.66, would be \$21,417.66. This new sum of \$2,000 is not referred to in the affidavit annexed to the mortgage.

At the hearing, the son, Samuel Gourley, Jr., who had conducted all the business with the Hobbs Company, was examined as to the specific items going to make up the amount for which the mortgage was given. He was quite unable to show specific sum which approximated reasonably near \$20,000, and he varied the items substantially from those given by his father. On cross-examination the son was obliged to admit that he had given a receipt, dated the 13th day of December, 1901, the date of the mortgage, which stated the—

Balance due on contract.....	\$9,500 00
On extra work.....	4,500 00
Fee in placing mortgage.....	2,000 00

The father had, by his affidavit annexed to the mortgage, dated December 13, 1901, stated the consideration to be \$2,000 cash, and the balance, \$18,000, to be for work and labor. The son on the same day, by his receipt, states the work and labor to have been \$14,000, omits all cash, and puts in a commission for \$2,000. The testimony given by the son was entirely unsatisfactory, when he attempted to explain how the mortgage to his father came to be taken for \$20,000.

Mr. Thron, the secretary of the company, and for a time its assistant treasurer, and the active business man in securing the company to give the defendant's mortgage, made the entries in the cashbook of the company on December 13, 1901, which explain what he desired to be understood to be the items going to make up the mortgage in question. Mr. Thron's statement varies substantially both from the affidavit of the defendant, Samuel Gourley, Sr., annexed to the mortgage, bearing the same date as Mr. Thron's entries in the books of the company, and also from the testimony in this cause given by Mr. Samuel Gourley, Jr., and also from memoranda purporting to be explanatory of the items of this mortgage, also made by Samuel Gourley, Jr. Mr. Thron's entries in the cash-

book, showing both sides of the account, are as follows:

Dr. to cash:

1901—Dec. 13. To mortgage acct. from S. Gourley as per resolution of board 12/5/01.....	\$20,000 00
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The corresponding entries are:

Cr. by cash:

1901—Dec. 13. S. Gourley Jr. Bal. due on contract	\$ 9,500 00
1901—Dec. 13. S. Gourley Jr. Bal. on acct. of extras (bill to be rend.)	4,500 00
Expense acct. com. of 10% on placing mortg.	2,000 00
Mortgage acct. to pay off Hess mortg.	2,000 00
Expense acct. W. J. T. Co. for Title ins. etc.	113 00
Bills payable—note due S. Gourley Jr.	250 00
Bills payable—note due F. J. Thron	450 00
Expense acct. incidentals in settlement	2 35
Expense acct. J. V. Ripperger, Daniels & Co. case.....	100 00

The total of these items amounts to	\$18,915 35
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It may be noted that Mr. Thron, by this settlement, appears to have secured the payment of his own note for \$450 as part of the cash items satisfied by the mortgage money. It is also noteworthy that, by Mr. Thron's entries, Mr. Gourley's debt for contract work and extras is shown to be \$14,000, though on the same day Mr. Gourley, Sr., swore it was \$18,000, in his affidavit annexed to his mortgage. Mr. Thron's entries also show that the mortgagee was allowed a commission of \$2,000 for taking a mortgage securing his own debt of \$14,000, on which the cash payments (\$915.35) were less than the commission.

In argument, the defendant contends that the defendant's mortgage should be sustained as a valid lien upon the company's real estate, because it is claimed the defendant had, under the mechanic's lien statute, a lien upon the building which he erected, and the curtilage whereon it was built, and that the giving of the mortgage in the place and stead of the mechanic's lien was a good and valid consideration. There is no proof that the contract under which the company's buildings were erected was filed in the county clerk's office, securing the defendant the extensive right to a mechanic's lien. If the defendant, Samuel Gourley, Sr., had a right of lien because of the debt owing for the erecting of the building, the statute gave the same right to all other creditors who furnished work or material for the erection of those buildings. If Mr. Gourley was entitled, under the mechanic's lien act, to be paid out of the proceeds of the sale of the property, he must have shared pro rata with other creditors having a lien. Sess. Laws 1898, p. 550, § 29. There is no such proof in this cause as enables this court to know what was the value of Mr. Gourley's interest in the lien, if he had any, for which he might have taken his mortgage. There

is no evidence that on taking his mortgage the defendant released or discharged his lien, or agreed to do so, in consideration of the giving of his mortgage. His affidavit annexed to the mortgage does not mention any release of lien as consideration. The suggestion of the defendant's right to a lien, as furnishing any consideration for the giving of his mortgage, is a matter which plainly was not dealt with by the parties at the time the mortgage was given.

The defendant also contends that part of the consideration of his mortgage was his undertaking to pay off a preceding mortgage upon the company's property, known as the "Hess mortgage," for \$2,000. The defendant's own affidavit annexed to his mortgage does not mention this undertaking as part of the consideration of that mortgage. Mr. Hess is not claimed to have been a party to the undertaking. It was not a novation whereby the company's estate was exonerated from the payment of the Hess mortgage, and the defendant substituted in the company's place. At most, it was a mere promise to pay. The defendant never did in fact relieve the company's estate from the obligation of that mortgage. The Hess mortgage was a charge upon the company's property on December 13, 1901, when the defendant's mortgage was made. It remained a charge at the time the receiver was appointed, on January 15, 1902. It still remained a charge in June, 1902, when the receiver sold the mortgaged premises. He announced publicly to persons present that his sale of that property would be subject to the lien of the Hess mortgage. The defendant heard that announcement, and said nothing about his being under contract to pay that mortgage. The defendant stood by while bids were made under the receiver's proclamation that the property would have to pay the Hess mortgage, and was himself a bidder, and finally became the purchaser of the mortgaged premises from the receiver, under that proclamation. After the defendant had thus obtained, as bidder and purchaser, the benefit of the reduced price paid for the property because of the proclamation, and had himself become the owner of the mortgaged premises, he paid off the Hess mortgage. If the undertaking of the payment of the Hess mortgage was part of the consideration of the defendant's mortgage, contrary to the defendant's own affidavit annexed thereto, then that undertaking was never performed, for its obvious purpose and intent were that the payment should be so made as to inure to the benefit of the company, but in fact the defendant did not pay the Hess mortgage until the mortgaged premises had been sold from the company still subject to that mortgage, and the defendant had become the purchaser. The payment was for his own benefit, and not for the benefit of the company.

I have now gone over all the variant and

contradictory statements which attempt to explain what was the true consideration of the defendant's mortgage. The witnesses who claim to have made or obtained that mortgage are all of them interested in maintaining its validity. They are, as is above shown, unable to state with any reasonable agreement between themselves how it came to be made to Samuel Gourley, Sr., for \$20,000. No two of them stand together in testifying that the mortgage was made for the same items, for the same amounts. This variance and the uncertainties in their statements confirm me in the belief that the mortgage was not in fact made under the authority of the resolution of the board of directors which appears in the minutes, naming no mortgagee, but that it was the outcome of an effort on the part of the officers of the company to use that resolution to protect and favor the defendant as a preferred creditor of the company. The complainant's contention that the defendant's mortgage was not authorized to be made by the board of directors of the company is therefore sustained.

It does not, however, follow that the mortgage, though not authorized to be made, previously to its execution and delivery, is therefore utterly invalid for all purposes. The mortgage was duly executed by the officers of the company, with the seal of the company annexed. It was formally proven by the deposition of the secretary of the company, annexed to the mortgage, that it was executed pursuant to resolution of the directors. It was by the company's officers delivered to the mortgagee, completed with all the formalities on its face necessary to charge the company with its obligation. The proofs show that some money, at least, was passed by the mortgagee to the company's officers, or paid by him to its order, coincidentally with their delivery of this mortgage to the mortgagee, induced by the security it tendered. If a corporation mortgage shows on its face a compliance with all requirements necessary to make it a lien on the corporation's property, and, by the indorsed deposition of the company's secretary, appears to have been made pursuant to a resolution of the board of directors, and is delivered by the company's officers to the mortgagee, who coincidentally advances to the company part or the whole of the money, the mortgage ought not to be held to be invalid to secure such advances, even if in fact it was made without any previous resolution of the board. The acceptance of the defendant's money, paid on the giving of its mortgage, estops, to the extent of the money so paid, the company from denying the validity of the mortgage used to obtain that money. The defendant's mortgage should, I think, be held to be valid to the extent that, relying upon its security, he actually advanced or paid money or values to or for the Robert S. Hobbs Company.

Secondly, was the mortgage made when the company was insolvent, or in contemplation of its insolvency, so that it is invalid against creditors of the company, under the provisions of sections 64 of the general corporation act? It will be noted that, under section 64 of the corporation act, if the company is insolvent or has suspended its ordinary business, or if its officers attempt any of the acts of transfer prohibited by that section, in contemplation of its insolvency, they are by the statute incapacitated to accomplish any of those acts, save only that under the proviso in that section a bona fide purchase for a valuable consideration, under the circumstances detailed in the proviso, will not be invalidated. The object of section 64 of the statute can be ascertained by reading the title of the original act, which was "An act to prevent frauds by incorporated companies." Sess. Laws 1828-29, p. 58. It is not the purpose of the act to deprive the officers of an incorporated company of the power to conduct the business of the company, by so disposing of its property that its insolvency may be avoided or remedied, if such action is taken in good faith, and secured to the company a full and fair consideration, passing coincidentally with the transfer of its property in the conduct of its business. Such dealings are in no sense frauds. The company's assets, after such a transaction, though changed in their nature, are still intact as to value and ability to respond to creditors. If a mortgage be so made, it stands for the property sold or transferred in good faith. But the act is intended to prevent the officers from disposing of the company's assets to those of its creditors who are favored by the officers. Such preferential transactions by officers of corporations have always been held to be prohibited while this statute was in operation, and to have been permissible while it was off the statute books. *Wilkinson v. Bauerle*, 41 N. J. Eq. 635-641, 7 Atl. 514 (Court of Appeals), and the list of cases cited in *Savage v. Miller*, 56 N. J. Eq. 438, 38 Atl. 578, 39 Atl. 665, in the opinion of Mr. Justice Garrison, also in the Court of Appeals. This subject is discussed in the case of *Reed v. Helios Carbide Co.*, 64 N. J. Eq. 242, 53 Atl. 1057. In the present case the defendant, Samuel Gourley, Sr., claims that the Robert S. Hobbs Company was not insolvent at the time the mortgage was made to him, on December 13, 1901; that at that time the insolvency of that company was not in contemplation in the giving of that mortgage; and that he, in accepting the mortgage, occupied the position of a bona fide purchaser without notice, referred to in the proviso. The statute applies to the financial situation of the corporation existing at the time the challenged transfer of the company's property is actually made. *Wells v. Rahway White Rubber Co.*, 19 N. J. Eq. 405. The proofs submitted on this point are quite voluminous. They

have been directed, to a great extent, to showing that the company, at the time the mortgage was made, was possessed of property sufficient in value to pay its debts. This property consisted of patterns, designs, and blocks for making wall paper (which cost a large sum of money, but which were practically not salable), of contracts for future manufacture and sale of wall paper, and of its buildings and plant, all of which, it is insisted, were worth at least what they cost. So far as cost is ascertained by payment made, the company's property had cost it very little. The company never had any substantial sum of money of its own in the treasury.

The defendant contends that the only test of insolvency which, under the statute, can be applied to such a corporation as the Robert S. Hobbs Company, is whether it has, at the time the challenged act is done, actually suspended its business. The defendant's counsel refers to the language of Chancellor Green in *Bedford v. Newark Machine Company*, 16 N. J. Eq. 120, that the suspension of its ordinary business is the only criterion which the statute gives to ascertain the insolvency of companies other than banks. A reading of the terms of section 64 will show that the prohibition it contains becomes applicable whenever the corporation become insolvent or suspends its ordinary business for want of funds to carry on the same, or when the prohibited act is done in contemplation of the company's insolvency. Here are three contingencies, any of which existing, the company's officers are precluded from transferring its property. What is meant by "insolvency" has been defined by this court and the Court of Appeals so clearly that there ought not to be any further question about it. A review of the cases may be found in the opinion of Reed, V. C., in the case of *Skirm v. Eastern Rubber Mfg. Co.*, 57 N. J. Eq. 184, 40 Atl. 769. The Court of Appeals, in *Nat. Bank v. Sprague*, 21 N. J. Eq. 558, declared that "insolvency means a general inability of a debtor to answer pecuniary engagements, and it does not follow that he is not insolvent because he may ultimately have a surplus after winding up his affairs." It seems but a fair construction of the words "suspend its ordinary business for want of funds," etc., to hold that they include the suspension of payment of the company's debts in the usual conduct of trade. The Robert S. Hobbs Company, from its very inception, was in such a condition of insolvency, for the sufficient reason (stated by the defendant in his answer to have been known by him before he took his mortgage) that its subscriptions to its capital stock had not been paid to the company. It never had the money to pay its debts. Its salary contracts alone, beginning on May 1, 1901, at the organization of the company, amounted to \$9,500 per year, payable in semi-monthly installments, for which it was at all times

in arrears. Its only sources of funds (except borrowing) were its capital stock and its earnings. The company's answer in the insolvent suit in which the receiver was appointed declares that but \$600 was paid on its subscriptions to stock into the company's treasury in cash. The receiver was appointed before the company had perfected and completed its plant so as to engage in profitable business. In substance, it had no earnings. Without cash capital or earned profits, it was necessarily in a condition of general inability to meet its pecuniary engagements. This situation of affairs was within the constant knowledge of the officers of the company, was openly recognized before they gave the defendant his mortgage, and was admitted by the defendant himself, by the acts and conduct of his son and agent, Samuel Gourley, Jr., and by the circumstances which attended the taking of the mortgage.

The attitude of the defendant, Samuel Gourley, Sr., to this mortgage, is somewhat peculiar. The greater part of the money secured by the mortgage is claimed to have been earned by Samuel Gourley, Sr., under his contract to erect the company's buildings. He did not bid for that contract, is not named in making it, and did not appear during its performance. All these matters were entered upon and carried on by the son, Samuel Gourley, Jr. The receiver's counsel insists that the building contract was in fact made between the company and Samuel Gourley, Jr., the son, and that the father was, by the assent of the company's officers, substituted as the creditor to whom the mortgage should be given on December 13, 1901, leaving the son free to file the insolvency bill of complaint against the company, which he did, as stockholder and creditor, on January 15, 1902. Nothing had happened between December 13, 1901, when the defendant's mortgage was given, and January 15, 1902, when the insolvent bill was filed, which changed the financial situation of the company. It was insolvent at both those dates, and for a long while before. This suggestion of collusive substitution of the creditor is sustained to a considerable extent by the proofs, and by the fact that the insolvency bill filed by Samuel Gourley, Jr., states and recognizes the validity of the \$20,000 mortgage held in the name of his father as a lien on all the company's property; and the answer of the company, filed by its officers in its name, to the insolvency bill, also recognizes the validity of that mortgage. Both Samuel Gourley, Jr., and the officers of the company, were, when these proceedings took place, well acquainted with all the above-recited incidents touching the consideration of that mortgage. The company's answer in the insolvency suit admitted its insolvency, and that only \$600 of the subscriptions of its capital stock had been paid in cash. The insolvency bill by Samuel Gourley, Jr., and the answer thereto

by the company, were both filed on the same day; and on the day of filing, January 15, 1902, a receiver was by this method obtained to be instantly appointed. In all probability, there was a prearrangement between Samuel Gourley, Jr., and the officers of the company, in order to accomplish such instantaneous and coincident results. The bill and the answer are apparently indorsed in the same handwriting. The challenge of the defendant's mortgage presently under consideration was raised by the receiver, and has received little aid from those who had been active in the management of the company. It has not been necessary to examine and pass upon the detailed proofs submitted regarding the collusive substitution of Samuel Gourley, Sr., as the creditor of the company in the place of Samuel Gourley, Jr., for the reason that assuming that Samuel Gourley, Sr., the defendant, was in fact the creditor of the company to whom it owed the debt for erecting its buildings, it is clearly shown that in the conduct of all the business pertaining to the making and performing of the contract for that work, and the securing of the payment therefor by the defendant's mortgage, Samuel Gourley, Jr., the son, must have been the active agent of his father. The son was during the whole period from June to December, 1901, in frequent attendance at the company's place of business, superintending the building work and in conference with its officers, seeking and failing to collect the moneys coming due on that contract. He several times loaned petty sums of cash to the company to supply urgent needs. He certainly knew long before the mortgage was made that the company's financial situation was hopeless. The father, Samuel Gourley, Sr., first came to the front as an actor in the business in the early part of December, 1901, at which time it was obvious the company could not pay its debts. Samuel Gourley, Sr., then took an interest apparently solely to obtain the mortgage now in dispute. All the knowledge touching the company's financial embarrassments which came to the son is clearly imputable to the father, for whom he acted, if in fact the father was the contractor. In addition to this, the father's own knowledge and his statements touching this mortgage show that it was taken because the company was known to be unable to meet its pecuniary liabilities. His answer in this cause shows that he knew in November, 1901, a month before he took the mortgage, that the company could not pay him what was due on the contract, because its subscriptions had not been paid into its treasury. He certainly must have known that the company had then no other source from which to get money, for as yet the buildings on which he was working had not been entirely completed, so as to be used in any productive way, to manufacture goods, the sales of which were the only other source whence the company might get money. The

testimony satisfies me that, at the time the defendant's mortgage was given, the Robert S. Hobbs Company was insolvent; that the officers of the company made that mortgage in contemplation of the impending failure of the company, intending, as to the greater part of the mortgage money, to give to the defendant the position of a preferred and secured creditor of the company. So far as these acts of the officers of the company attempted to secure to the defendant a pre-existing debt, the mortgage must be held to be invalid, under the statute.

The third contention of the complainant is that the defendant's mortgage, so far as it is claimed to be a chattel mortgage, is invalid, because the defendant mortgagee's affidavit annexed to it does not state the true consideration of the mortgage, as required by section 4 of the chattel mortgage act.

The affidavit of consideration is in the words and figures following:

"State of Pa., County of Phila., ss.: Samuel Gourley, the mortgagee in the foregoing mortgage named, being duly sworn on his oath says that the true consideration of said mortgage is as follows, to wit:—Twenty thousand dollars, *two thousand dollars thereof in cash loaned by the mortgagee to the mortgagor, and the balance thereof in work and labor performed by the mortgagee for the mortgagor at its request*, and that the amount owing upon said mortgage and payable according to the provisions thereof is Twenty thousand dollars besides lawful interest thereon from the Thirteenth day of December, 1901. S. Gourley.

"Sworn and subscribed this Thirteenth day of December, 1901, before me at Phila. Pa. Bella D. Berkhelser, Notary Public. [Notarial Seal.] Com. Exp. Feb. 27th, 1905."

The portion of the above copy which is in typewriting [printed here in roman] shows the affidavit as it was originally drawn. It was all in one handwriting, and was complete in itself, and stated the consideration to be "Twenty thousand dollars in cash loaned by the mortgagee to the mortgagor." The interlineations above copied in manuscript [printed here in italic] are inserted in the original in a different handwriting, precisely as above shown, and appear to have been made at the time the mortgage was executed, thus changing the mortgage from what it was intended to be—a cash mortgage—to one securing in great part a pre-existing debt owing to the defendant. This change supports the conclusion that the original purpose of the making of a \$20,000 mortgage was to raise cash, and that this was perverted to the securing of defendant's debt. The above comparison of the statements of the defendant, Samuel Gourley, Sr., of his son, Samuel Gourley, Jr., and of Mr. Thron, the company's secretary, and the documentary proofs touching what constituted the true consideration of the defendant's mortgage, show that, whatever that true consideration

may have been, it certainly was not \$2,000 in cash loaned by the mortgagee, and the balance (\$18,000) work and labor performed by him for the mortgagor, as the defendant mortgagee states in his affidavit annexed to his mortgage. Nobody testifies that it was—not even the mortgagee himself. The contention that the affidavit does not state the true consideration of the mortgage, and that it is therefore void as a chattel mortgage, under section 4 of the chattel mortgage act (Gen. St. p. 2118), must therefore be sustained.

The result is that the defendant's mortgage should be held to be a valid lien only upon the real estate, and not upon the personal property, therein described; that it should be held to be good only to the extent of the money actually paid out by the defendant as new consideration, induced thereto by the security of his mortgage.

Some of the defendant's claims under his mortgage have been disposed of in this opinion. The testimony as to the cash payments made by the defendant on the strength of his mortgage is not sufficiently clear to enable me to state the account. If the parties can agree upon the sums which properly come within the class herein declared to be secured by the defendant's mortgage, there will be no need of a reference. Otherwise a master may state the account, considering the testimony herein presented, and taking such additional proofs as may be necessary. I will advise such a decree, with costs against the defendant.

(65 N. J. E 721)

STEVENSON v. EARL.

(Court of Errors and Appeals of New Jersey.
Oct. 3, 1903.)

TESTAMENTARY DISPOSITION—VALIDITY.

1. *El.*, a depositor in the savings fund of the Pennsylvania Railroad Company, at the time of opening his account therein directed the company to pay to his wife, in the event of his death, all deposits which should then be standing to his credit in the fund. This the company agreed to do. *Held*, that the disposition thus made of the moneys remaining to *El.*'s credit at his death was testamentary in its character, and was invalid, because not made in the manner prescribed by the statute of wills.

(Syllabus by the Court.)

Appeal from Court of Chancery.

Bill of interpleader by the Pennsylvania Railroad Company against Charles R. Stevenson, executor, and Ellen V. Earl. From a judgment for Earl, Stevenson appeals. Reversed.

Thomas E. French, for appellant. William T. Boyle and John W. Wescott, for respondent.

GUMMERE, C. J. The Pennsylvania Railroad Company has established for its employés a depository known as the "Pennsyl-

vanla Railroad Employees' Savings Fund," in which any person in the employ of the company, or of certain other subsidiary companies controlled by it, may deposit his savings, subject to certain rules and regulations which have been formulated by the company for the management and control of this "fund." Only such employes may become depositors, and no employe may remain a depositor more than 30 days after his employment with the company is terminated, but must close his account within that period. One of the rules requires that an employe who desires to become a depositor must make application in writing, and must state therein, among other things, "the name and residence of the person to whom, in the event of death, his deposits and the accrued interest thereon shall be paid." Another rule provides that upon the presentation of satisfactory proof of the death of a depositor "the money belonging to him shall be paid over to the person designated in his application to receive the same." Still another rule authorizes any depositor to withdraw, at his pleasure, all or any portion of his deposits, with the accrued interest thereon, upon 10 days' notice to the superintendent of the fund. In March, 1888, one Walter Earl, Jr., a locomotive engineer in the employ of the company, made written application for permission to become a depositor in the company's savings fund, and in and by his application agreed to be bound by the rules and regulations under which it was managed, and particularly "that in the event of my death all deposits standing to my credit in said savings fund, and all interest due thereon, shall be paid to my wife." His application having been favorably acted upon, he opened an account with the fund by a deposit of \$500. The passbook delivered to him by the company as his voucher for the amounts deposited by him he gave to his wife, stating to her that here was the money, and that if he died it should go to her, and that she could get it in 10 days by giving notice to the company. Subsequent to the opening of the account he increased the amount of his credit, from time to time, by additional deposits, so that on the 1st of January, 1896, it amounted to \$2,056. By the 12th of June of that year, however, he had drawn against it to such an extent that there remained to his credit only \$56. By the 1st of November, 1900, the amount of his deposits, with interest, had so increased that there stood to his credit the sum of \$2,286. By the 1st of February, 1901, he had drawn it down to \$1,578. On the 21st of that month he died, leaving the last-named amount standing to his credit in the fund. About two months prior to his death he had made and executed a last will and testament, in and by which he gave all of his estate, except a small legacy, to his executor, upon certain trusts, which were set forth in the instrument. Demand having been made upon the Pennsylvania

Railroad Company both by the wife and by the executor of the deceased to be paid the balance standing to his credit on the books of the savings fund, that company filed its bill of interpleader against them, and deposited the fund in the Court of Chancery. The parties having interpleaded in that court, it was adjudged and decreed upon final hearing that the legal title to the fund was in the widow. The appeal now before us is taken by the executor from that decree.

The learned vice chancellor, who heard the cause in the court below, concluded, from the facts which have been recited, that there was a distinct donative purpose on the part of the husband towards the wife covering this fund, and that, as a matter of law, the effect of his agreement with the company was to impress the subject-matter of this donative purpose with a trust whose terms were defined by the printed regulations that constituted the agreement between the donor and the company, including both the withdrawal of sums by the settler of the trust during his lifetime and the payment to his widow of any balance that might at his death stand to the credit of his account. Although we concur in the view that, on the facts set forth, a clear donative purpose appears on the part of the deceased towards his wife, we cannot agree that it covered the whole amount of the deposits made by him. On the contrary, it seems to us to be so plain as to be beyond the shadow of a doubt that he intended to retain the absolute control and ownership of all moneys which were deposited by him, and to deal with them on that basis, during his life; and that his donative purpose toward his wife was confined solely to such balance, if any, as should remain to his credit at his death. Nor can we accede to the proposition that the agreement between the husband and the company is, in effect, a declaration of trust by the former in favor of his wife. As was said by Bacon, V. C., in *Warriner v. Rogers*, L. R. 16 Eq. Cas. 348, and repeated by Sir George Jessel, M. R., in *Richards v. Delbridge*, L. R. 18 Eq. Cas. 18: "The one thing necessary to give validity to a declaration of trust—the indispensable thing—I take to be that the donor, or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration; should have effectively changed his right in that respect, and put the property out of his power, at least in the way of interest." Instead of the agreement showing that by force of it the husband had parted with his interest in the funds then deposited and thereafter to be deposited by him—that he had put them out of his power, so far as any interest of his own was concerned—it in terms preserves to him the absolute right of dealing with and disposing of them solely for his own benefit. And that he exercised this right to its fullest extent is shown by his dealings with the deposits, as

set forth in the statement of facts above recited. If the right of the wife to the fund in dispute is to be sustained at all, it must be because the donative purpose of the deceased toward her, with relation to such balance of his deposits as should remain to his credit at his death, was rendered effective by the agreement entered into between himself and the company, coupled with the delivery by him to her of the passbook which he had received from the company as a voucher; in other words, because that agreement and the delivery of the passbook constituted a valid gift *inter vivos*. But, in order to legalize such a gift, there must be not only a donative intention, but also, in conjunction with it, a complete stripping of the donor of all dominion or control over the thing given. *Cook v. Lum*, 55 N. J. Law, 375, 378, 28 Atl. 803. As was said in the case cited, this is the crucial test; and if it be applied to the present case the gift is not to be sustained, for neither by force of his contract with the company nor by the delivery of the passbook did he intend to, nor did he in fact, part with his complete dominion over any part of the moneys deposited by him. The expressed intention of the deceased was only to bestow upon his wife so much of his deposit as should remain undrawn by him at his death. Such a gift, it seems to us, is purely testamentary in its character. If it is not, then it is a perfectly easy thing for a person to retain the absolute control and dominion over his moneys and personal securities during his life, and transfer that dominion to another at his death, with total disregard of the requirements contained in the statute of wills, by the simple device of depositing such moneys and securities under an agreement with the depository that he shall have the right to use them or deal with them as he pleases during his life, and that at his death so much of them as may remain shall be delivered to such person as is named in the agreement, who shall then become the owner thereof, and then delivering the agreement to the beneficiary with a statement of the same purport as that made by the deceased to his wife when he gave the passbook to her. To hold that such a method of disposing of property by the owner at his death is valid would be to practically repeal the statute of wills in its operation upon personal property, so far as its mandatory provisions are concerned.

Our conclusion is that the moneys remaining to the credit of Earl, at his death, in the savings fund of the Pennsylvania Railroad Company, did not become the property of his wife, notwithstanding the provisions in the agreement between him and the company that such moneys should be paid to her at his death; our reason for so concluding being that such agreement constituted a testamentary disposition of his property, which was invalid because not made in the manner prescribed by the statute of wills. The necessary result of this conclusion is that such

moneys passed to his executor on his death as part of his estate.

The decree appealed from should be reversed.

(55 N. J. E. 106)

LISTER v. LISTER.

(Court of Chancery of New Jersey. Oct. 15, 1908.)

DIVORCE—CRUELTY—CONSTRUCTIVE DESERTION—EVIDENCE—TESTIMONY OF PARTY—CORROBORATION—SEPARATION—OFFER TO RETURN—GOOD FAITH.

1. Where a wife is justified in leaving her husband on account of his cruelty, the separation is legally chargeable to the husband, and constitutes a legal abandonment or desertion upon his part.

2. Where a wife leaves her husband, and seeks to establish constructive desertion by him on account of cruelty, her testimony must be corroborated.

3. After a separation caused by cruel conduct of a husband, it is his duty to reform his habits, and within two years seek out his wife, and apply to restore the marital relations, giving her reasonable assurance of the sincerity of his reformation and of her probable safety in resuming the marital relations.

4. If at the time of offering to return to live with his wife the husband was in fact living in adultery, or if he willingly permitted the wife to remain under the impression that he was guilty of adultery, the offer to return cannot be considered as one made in good faith, or to be an offer which the wife was bound to accept for the purpose of terminating the desertion.

Petition by Emma K. Lister against Robert Lister for divorce, in which defendant files cross-bill. Judgment for petitioner.

Elvin W. Crane, for petitioner. Samuel Kalisch, for defendant.

EMERY, V. C. In this case there are cross-petitions by wife and husband, each charging desertion by the other. The actual separation of the parties took place about October 15, 1899, when the wife left the hotel in Newark where the husband, herself, and the children had been boarding since January, 1899. She left the husband and took the children with her, and her claim is that she was obliged to do this on account of her husband's cruelty. Where a wife is justified in leaving her husband on account of his cruelty, the separation is legally chargeable to the husband, and constitutes a legal abandonment or desertion upon his part. This is the settled rule in this state. *Weigand v. Weigand*, 41 N. J. Eq. 202, 209, 3 Atl. 699 (*Van Fleet, V. C.*, 1886), affirmed on appeal for the reasons stated below, 42 N. J. Eq. 699, 11 Atl. 113, subsequently approved in *Dummar v. Dummar* (Err. & App. 1898) 41 Atl. 149, 150; *McVickar v. McVickar*, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. Rep. 422 (*Pitney, V. C.*, 1890). The husband alleges that the separation was without justification, and was a desertion by the wife, which has been continued obstinately and against his efforts to terminate it. The ques-

¶ 1. See *Divorce*, vol. 17, Cent. Dig. §§ 131, 132.

tions involved are altogether questions of fact, and the first one is whether the petitioner has satisfactorily established that the cruelty of her husband was such as to justify her separation from him as necessary for the protection of her life or health. If her own evidence is true, she has certainly established a case of extreme cruelty; but, as the case is one of constructive desertion, her evidence alone is not sufficient, and it must be satisfactorily corroborated, and the real question, therefore, on this branch of the case, is whether she has produced such corroborative evidence. In my judgment, she has. The defendant's vindictive feelings toward his wife, and his abusive language to and about her, while under the influence of liquor, is established by the evidence of the proprietor of the hotel and his wife and employes of the hotel, and by the evidence of former servants of the parties; and the evidence also shows that when defendant was in this condition his wife, in one instance at least, felt obliged to leave the family rooms with the children, and stay elsewhere in the hotel for safety. This condition of intoxication and his abuse of his wife occurred from time to time after 1894, and while living at the hotel the proprietor felt called on to remonstrate with him about his conduct and treatment of his wife. Once before the petitioner left the defendant on account of his cruelty, as she says, going in this instance to the defendant's mother's, but she returned within a day or two upon his promise to reform. The act of cruelty which led to the final separation on Sunday, October 15, 1899, was her husband's choking her while in bed, abusing her, and threatening to kill her. The wife is the only witness to this occurrence, and the husband denies that he either struck, choked, or threatened her. Two witnesses, however, swear that on that day they saw on the wife's neck marks or bruises, and one of them—the bell boy—says that in her husband's presence the petitioner said defendant had done this. The other witness saw the marks on the neck and arm on the same day in New York, where petitioner had brought her children to stay. The husband, as to striking his wife then or at any other time, says: "She would get in some dispute. She was just as apt, and more apt many a time, to have the dispute out as I would; and she would come up and make a strike at me as quick as she would look for one from anybody else; and if I would shove her, 'Now, you have hit me; you have struck me; I have got a black and blue mark;' the first thing every time after her helping every quarrel on." And again, in reference to ever striking her at the hotel, says: "I pushed her away from me when she has come up that way—pushed her away from me. She has been looking— She was always, up to the Continental Hotel, looking for me to make black and blue marks on her; and I notice she could show up black

and blue marks if I looked at her—manipulate herself." Notwithstanding the husband's denial of striking his wife on his direct answer to the questions, I am inclined to think that the above evidence, taken in connection with the evident lack of self-control and his disposition toward his wife, shown by his evidence and bearing on the stand, is also corroborative of the wife's evidence as to his treatment of her. His claim that the "black and blue marks are due to manipulation" would seem to amount to an admission that the marks were there, and, if so, the only question is, is there any sufficient reason to support the conclusion that they were self-inflicted?

Upon the entire evidence in the case, my conclusion is that the wife has satisfactorily made out a case of cruelty on the part of the defendant, justifying her in separating from him, and that the separation is therefore legally chargeable to the husband. As to the duty of the husband, after a separation thus occasioned by his conduct, the rule applied is that it is the duty of the husband to reform his habits, and after such reformation, and within two years, seek out his wife, and apply to restore the marital relations, giving her reasonable assurances of the sincerity of his reformation and of her probable safety in resuming marital relations. *McVickar v. McVickar*, 46 N. J. Eq. 490, 501, 19 Atl. 249, 19 Am. St. Rep. 422 (Pitney, V. C., 1890). This is a special application of the general rule, settled by our decisions, that where the husband has, by his conduct toward his wife, contributed to the desertion, he must make such advances and concessions as a just man would make, and might reasonably be expected to make, in order to induce her to return. *Cornish v. Cornish*, 23 N. J. Eq. 208 (Zabriskie, Ch., 1872); *Hall v. Hall* (Err. & App. 1900) 60 N. J. Eq. 469, 470, 48 Atl. 866. What the assurances should be depends upon the circumstances of each case. The husband did in this case apply to his wife to return to him, but his wife was unwilling to return, because she did not trust him, or believe he was living a proper life. She thought he was still continuing his habits of drinking, and also that he had been living unfaithfully after the separation. If at the time of offering to return to live with his wife the husband was in fact living in adultery, the offer to return cannot be considered as one made in good faith, or to be an offer which the wife was bound to accept for the purpose of terminating the desertion. In *Mallinson v. Mallinson*, L. R. 1 Pr. & Div. 93 (1886), Lord Penzance, Judge Ordinary, says upon this point that the mode of life of the respondent at the time the alleged offer to return is made is material as showing whether or not the offer was sincere. Shortly after their separation, and in February, 1900, the petitioner, under the advice and arrangement of counsel, employed detectives to watch her husband's move-

ments, and the detectives reported to her counsel that the husband had been followed by them to a hotel in New York, and had been seen to go into a room with a woman in whose company he had previously dined at the hotel. Defendant and his counsel, Mr. Frank M. McDermit, had both seen petitioner's detective immediately after this occurrence, and defendant then had a conversation with the detective. Within two or three days defendant's counsel, Mr. McDermit, with defendant's consent, entered into negotiations with petitioner's chief detective, and in defendant's presence offered the detective money not to report what had been seen. The present explanation of defendant and his counsel is that this woman whom defendant met was herself a detective, and that she was there in company with other detectives, and met defendant by arrangement for the purpose of leading petitioner's detectives into a trap, and ascertaining whether petitioner was employing detectives to watch her husband, she having denied that she was employing them. McDermit, who was sworn in this case, admits that an offer of money (\$3,000) was made in defendant's presence to the petitioner's detective to suppress his report to petitioner's counsel, but he now swears that this was a ruse for the purpose of ascertaining whether the detective really had the petitioner's notes for \$2,000, as he claimed. The remarkable feature about this explanation, and the bearing which the explanation has upon the present inquiry, is that, until this explanation was given under oath on this hearing, it does not appear that the husband or his counsel ever made any effort to disabuse the mind of his wife or of her counsel of the correctness of the impression given them by their detective that defendant had been seen with a woman under suspicious circumstances in New York by the detectives, and that defendant had offered money to suppress the report. And, not only this, but defendant seems to have allowed his wife to pay, or to have been willing that she should pay, the detective she had employed, a large sum of money (\$1,000) for information which, as he now claims, gave her a wrong view of his conduct. After receiving this information from the detective, the petitioner, as she swears, spoke to her husband about it, and told him "he had been caught with a woman," to which his reply was, "What are you going to do about it?" The husband did not at any time previous to this hearing correct or attempt to correct in any way the impression received by his wife from the reports of the detectives as to the occurrence at the hotel in New York. Mrs. Lister says that before this conversation, when he asked her to come back, and she refused, he had said to her that if she would not come back she had better sue for an absolute divorce.

Upon the evidence offered by defendant it is difficult to resist the conclusion that the

defendant, in this incident of the hotel, intentionally supplied to petitioner's detectives, who seem to have been acting in entire good faith, evidence that would to some degree tend to support a charge of adultery, and that he made no effort to correct the effect of this evidence. A request to return made by the husband to the wife while she was allowed to remain under this impression as to his conduct cannot be considered as a bona fide offer, or as one which changed the character of the separation. The defendant also seems to have been willing to allow his wife's state of mind as to his unfaithfulness to her in other instances to continue after the separation. For six months, and up to within four or five weeks of the hearing, he has made, as he says, his headquarters in New York a flat or apartment in Eighty-Third street, where a woman lives with her two daughters. He goes there when he is in New York, spends two or three days either alone or with a friend, and pays board (a fair amount—\$4 or \$5 a week), and defendant goes out with these women. Petitioner was informed by her counsel that defendant was at this place, and when he spoke to his wife in the summer of 1900 about coming back to live with her she said to him, "I don't see how you can ask me to do that when you have got this woman in New York." Defendant had previously denied having a woman there, but on this occasion he said, "Well, she is a Jewess, but she has a white heart." The husband denies any improper relations with these women, but does not deny this conversation, and, if it occurred, the husband was not unwilling that the wife's impression as to his unfaithfulness should continue. She was not bound, in my judgment, to consider this request to return as made in good faith.

Whether the husband's habits as to drinking have been reformed has not been shown, and under all the evidence in the case I reach the conclusion that the husband has not shown in this case any such change in his habits or such a mode of living after the separation as was calculated to give to his wife the reasonable assurance of his reformation and of her probable safety in resuming marital relations to which she was entitled. The continuance of the separation, therefore, must be held to be due to his continued, willful, and obstinate conduct, and the wife is entitled to a divorce for desertion.

The cross-bill of the husband will be dismissed.

KRAUSE v. KRAUSE et al.

(Court of Chancery of New Jersey. Oct. 14, 1903.)

DEEDS—CAPACITY OF GRANTOR—UNDUE INFLUENCE—BURDEN OF PROOF.

1. In a suit to set aside a deed of a grantor who was advanced in years and afflicted with incipient senile dementia at the time of its ex-

execution, evidence held to require a finding that the deed was the result of undue influence exerted by the grantee.

2. Where a grantor, previous to a conveyance of his realty, had made a will equally dividing his property among his children, and the deed to one of them would operate, if sustained, to give the grantee a much larger share than the grantor's other children, the burden of proof was on such grantee to show that the grantor understood and wished the deed to operate in addition to the share given by the will.

Bill by George A. Krause against William B. Krause and others to set aside a deed. Decree setting aside deed unless the grantee will accept the same as his share of the grantor's estate.

M. T. Rosenberg, for complainant. Samuel A. Besson, for defendant William B. Krause.

PITNEY, V. C. The complainant and the defendant William B. Krause are executors and trustees named in the will of their father, Gustave Bernard Krause. The bill is filed by the complainant both in his individual capacity and in his capacity as executor and trustee against the defendant William B. Krause in the same capacities. The other defendants are interested as beneficiaries under the will, and are made parties for that reason. The object of the bill is to set aside a deed of conveyance of a house and lot situate in Jersey City, N. J., made by the decedent to William B. Krause on the 2d of May, 1900. The decedent by his will devised all his property to the complainant and the defendant William B. Krause in trust, with power of sale; and, if the deed be set aside, the house and lot will pass under and be subjected to the trusts of the will. The complainant and all the defendants are beneficiaries under it. Hence the bill is avowedly filed by the complainant in his individual capacity, and also as executor of and trustee under the will; and the prayer is not only that the deed may be set aside, but that the defendant William B. Krause may be decreed to account for the rents and profits which accrued and were received by him, if any, since the date of the conveyance. Three grounds are relied upon for this relief: First, that the decedent for a considerable period before the execution of the deed had been under the influence of his son William, and was at the time advanced in years, and, by reason of his age and of incipient senile dementia, weakened in mind to such an extent as to render the influence of William undue and effective in the execution of the deed; second, that the deed was testamentary in its character, and intended to take effect only after the death of the testator, and that no life estate was reserved, either in the conveyance itself, or by any collateral instrument; and, third, that the effect of the conveyance upon the disposition of the testator's estate was and is to seriously disturb his clear intention as to the distribution thereof among his descendants. Evidence was given in sup-

port of these several grounds, and, in order to properly consider its weight, a somewhat minute and detailed history of the testator and his family, and their relations to each other, is necessary:

The will of the testator was made on the 16th of October, 1886. At that time he was about 65 years old, and had a wife and five children, whom he named in his will, viz., William; Rose Anna, wife of John Martin; Charles Gustave, since deceased without leaving children; Mary Lina, wife of Charles Knodel, who died in her father's lifetime, leaving several infant children, defendants herein; and George Andrew, the complainant herein. He was the owner of three houses and lots adjoining each other, being Nos. 60, 62, and 64 Sherman avenue. No. 62 is the subject of the present controversy. By his will he gave and devised all his real estate and personal property to his executors in trust, first, to pay the rents and profits to his wife during her lifetime, and after her death to divide the same among his children, naming them. And it further provides: "If any such child shall have died before such distribution, then they shall divide the share of such deceased equally among such deceased child's heirs at law." The infant children of Mrs. Knodel take under this clause. The will contains no direction to sell and divide the proceeds, except what may be inferred from the power of sale and the use of the language "upon her death to pay over the principal to my children [naming them] in equal shares." At some period after the making of his will he handed to his son-in-law Knodel \$2,250 in cash, which was invested by his son-in-law in a house and lot, the title to which was placed in the name of Mrs. Knodel, and at her death (which occurred in January, 1900) it descended to her infant heirs at law, defendants herein. The decedent, on the occasion of making the deed here in question, stated to Mr. Besson, in whose office it was prepared and executed, that this gift of money to his son-in-law was intended as an advance on account of Mrs. Knodel's share in his estate. On the other hand, Knodel swears that it was a gift out and out to him (Knodel), and the defendant William B. Krause swears that it was a gift to Mrs. Knodel. This evidence came out incidentally, and not in support of any issue in the cause. Of the two married daughters, one (Mrs. Martin) lived in one of the floors of one (No. 60) of the three houses. The other (Mrs. Knodel) lived in the neighborhood, in the house erected with the \$2,250 before mentioned. The son Charles was a ne'er-do-well, and during his lifetime was the source of much grief to his father. The son William, the defendant, learned his father's trade, viz., that of a carpenter, did not marry, and always lived at home. The son Gustave, the complainant, left home to seek his fortune elsewhere, and seems to have been reasonably successful. The testator worked for

many years at his trade with Messrs. John and George Runtun, brothers and master carpenters, who superintended the building operations of the Hoboken Land & Improvement Company, and who are the witnesses to his will, or, rather, George Runtun is one of the witnesses to his will (and to the deed in question), and George and John Runtun are witnesses to a codicil which provides simply that his executors need not give security. The testator stopped working about the year 1896, and lived with his wife and his son William in the first floor and basement of No. 62 Sherman avenue. His wife seemed to be afflicted with mental disorder, and died in May, 1898. From that time on until his death, which occurred on the 8th of September, 1901, the testator continued to live as before with his son William. For a little more than a year after his wife's death he had a woman, a Mrs. Klose, either staying or living in the house to take care of him. She moved away in the fall of 1899, and from that time on he had only his daughter Mrs. Martin and her children, who lived in No. 60, to minister to his wants. It is proven clearly by a respectable physician, Dr. Gilman, who attended him in January, March, May, and July in 1901, that he was then afflicted with senile dementia. His attention to it was called particularly in July, 1900, when he had recently suffered a slight apoplectic seizure. He then observed a marked difference in his mental condition from what it was when he visited him the previous January. At that time, January, however, his attention was not at all directed to his mental condition. And Dr. Ferris, an acknowledged expert in such matters, upon having the symptoms which were attempted to be established by the evidence detailed to him, gave it as his opinion that he had been afflicted with that disease during a period which covered the date of the conveyance in question, May 2, 1900. Conduct and behavior on his part covering more or less of the period between the death of his wife and his own death were testified to by several witnesses which tended to show that his mind was failing; that he became childish and more or less helpless, that he failed to recognize people, and thought that all his children were dead, except William, and that he was unable to sit out the funeral of his daughter Mrs. Knodel, which occurred in January, 1900, and was obliged to be taken home in a carriage before the services were over; and that he acted on many occasions like a child. These circumstances were narrated by his daughter Mrs. Martin, and her daughter, a girl 12 or 14 years old, and two or three other witnesses, and also by the complainant, who testified that at the death of his mother in 1898 it was a recognized fact in the family, including William, that his father was becoming incapable of managing his affairs, and that he proposed to his brother William that his property should be taken out of his posses-

sion by consent, and somebody appointed to take care of it, and see that he enjoyed the proper comforts of life. The complainant was dissatisfied with the mode in which his father was living, and tried to improve it. I am unable to avoid the belief that the complainant was sincere in his notions on the subject of his father's capacity. He gives the particulars of his father's conduct upon which he relies. He swears that his brother admitted his father's incapacity, and his sincerity in that behalf is manifested by a letter which he wrote his brother on the 24th of August, 1898. In that letter he complains that his father is left without proper attention, that he is subject to fainting fits, and that he is liable to be imposed upon and deprived of his property by designing persons; and he charges that his brother, who claimed the right as oldest son, is not the proper person to protect him in that behalf, and that he uses this language: "As you say, father is unfit to care for his own interests and you would prevent him from disposing of his property if he attempted it, it naturally follows that he cannot see to it that his affairs are properly managed by his son, who does as he pleases and holds himself accountable to nobody. After a piece of real estate is deeded to a purchaser it is a very difficult matter to get the transaction annulled through the courts. If it were not for the possible annoyance to father (although in the end it would be a positive benefit to him I am sure) I would at once make application to the courts, but if we can all agree without that on some friendly arrangement I would much prefer it." I think it is impossible not to believe that the writer of that letter felt that his father needed protection against designing persons. The defendant William informed his father that the complainant thought he was substantially crazy and unfit to take care of his affairs, and that naturally gave the father some feeling against the complainant, and produced an effect in the matter of the making of the deed which I will refer to later on. The immediate effect of the letter was that the father a few days afterwards executed a sweeping power of attorney to his son William, authorizing him to manage his real estate, collect the rents, and pay the taxes, and look after the repairs, etc.

Complainant swears that William claimed the right, as the oldest son, to manage his father's affairs and act as his guardian. I think the evidence of the complainant is reliable. I think the evidence of Mrs. Martin, so far as it goes, is also reliable. I place confidence in it from her manner on the stand, notwithstanding an attempt to show her unworthy of credit. The same is true of the granddaughter Lena Rose Martin. Other witnesses swear that they saw nothing unusual in the behavior or conduct of the deceased.

The proof is clear that the testator had

for many years intended that his son William should have the house in which they lived, No. 62, and it is an established and admitted fact in the case that that house was considerably more valuable than either of the others, No. 60 or No. 64. He expressed his intention to both the Messrs. Runton. The evidence of Mr. John Runton is very clear that the old gentleman said he intended to leave that house to William, and gave sensible reasons therefor. The witness used the word "leave." Mr. George Runton said he expressed his intention to give one of these houses to William, his boy, and he said that to Mr. George Runton in connection with the fact that his son Charles, who predeceased him, had been troublesome to him, while "Bill" had always been a good boy. And it is fair to infer that when he made these remarks as to his intention Charles was still living, and that his will had already been made, so that he had only three houses to divide between five children. Whether at the time he made these remarks he had advanced the \$2,250 to his daughter Mrs. Knodel does not appear.

On this topic of his desire to give the house to William we have the evidence of Mrs. Martin. Evidence was given by two witnesses that she had stated to them that her father had said and it was understood in the family that her brother William was to have No. 62. Mrs. Martin, in reply to this evidence, swore that she had never had any conversation with one of those witnesses in regard to the matter, but she did have such a conversation with the other one. She says that she told her that her mother often said that Mary Knodel had had her share, and that there were three other remaining children, and she would like each one to have a house (there were three houses), and she thought she would like Billy to have the middle house, because it was the most valuable. That is all she ever said. And she swore that that was the fact—that she had always heard her mother say that Mary had had her \$2,250 for her share, and that there were three children left, and each one should have a house, and that William should have the middle house, because it was the best, but that she did not hear her father speak of it.

I come to the conclusion on this subject that the probability is that at and before the time the deceased executed the deed in question his desire was to divide his property equally among his four children, considering, however, the money advanced to Mrs. Knodel as her share, and for William to have as his share No. 62, which would leave Nos. 60 and 64 to be divided between the complainant and Mrs. Martin. This would be a reasonable and just division of his property, especially in view of the fact that Mrs. Martin seems to be the most needy of all his descendants.

There is evidence that he had taken some

dislike to Mrs. Martin because her little boy, as he seemed to believe, had thrown stones at him in the back yard, and that his mother, Mrs. Martin, had not conducted herself in the matter of the care of the back yard to suit his fancy. I am not at all satisfied that there is any foundation in fact for either of these grounds of dislike. If there was any dislike for Mrs. Martin, it was, in my judgment, wholly without any reasonable foundation, and its existence shows that either his mind was unbalanced, or that he had been the subject of an undue influence against her. The state of his mind toward the complainant has already been alluded to. He was also of the impression that there was an understanding in the family that the \$2,250 advanced to Mrs. Knodel would be counted as a part of her share in the estate. I am also of the opinion that his mind was so far weakened by an incipient disease that he was easily influenced by his son William, who had every opportunity to influence him. The evidence also satisfies me that the deceased feared that the complainant would contest his will, and that he had the very common notion among uneducated persons that a deed was less liable to be successfully contested than a will. At the same time he had an impression that in order to carry out his wishes a will might be necessary. In this state of his mind, we find him on the 2d of May, 1900, coming with his son William to the office of Mr. Besson in Hoboken, and, according to Mr. Besson's evidence, bringing with them Mr. George Runton, who had, as we have seen, witnessed both his will and codicil. Mr. Runton was employed at the office of the Hoboken Land & Improvement Company. His bringing or sending for Mr. Runton is, I think, a significant circumstance. The three, according to Mr. Besson, viz., the testator, his son William, and Mr. Runton, presented themselves to Mr. Besson shortly after 9 o'clock in the morning. This is Mr. Besson's recollection. On the contrary, both Mr. Runton and the defendant William swear that Runton did not accompany the old gentleman to Mr. Besson's office, but that the father and son came there together; that Runton had previous notice that he would be wanted at Mr. Besson's office; and that he was sent for and appeared there after Mr. Besson, as we shall see directly, had left, but in time to witness the execution of the deed in question. I mention this discrepancy between the evidence of Mr. Besson and that of William Krause and Mr. Runton as bearing on the reliability of Mr. Besson's recollection of the circumstances. Further, in reading and considering his evidence, it is to be remembered that he had no previous acquaintance whatever with Mr. Krause, except what had arisen out of the preparation of the power of attorney of 1898. He had simply, as he swears, casually seen, without conversation, the grantor working for the

Hoboken Land & Improvement Company years before that period; and, further, that he was, from the inception of the disputes between the brothers which resulted in this suit, the counsel of the defendant; that he had prepared his answer and defense, and had, up to the moment of his going on the stand as a witness, conducted the trial quite alone. The counsel who examined him was acting in a mere perfunctory manner, and took no further part in the trial of the cause. Moreover, he was testifying to a conversation which had occurred $2\frac{1}{2}$ years previously, and nearly 2 years before he had any occasion to recall it and fix it in his memory.

I will give Mr. Besson's account of the interview in his own words:

"A. It was on the 2d day of May, 1900. I got to my office about nine o'clock, and probably ten minutes afterwards Mr. Bernard Krause and Mr. George Runton came in together [he omitted to state that William B. Krause, the defendant, was with them]; and that morning I had a case set down in the quarter sessions court to defend a boy for larceny. His name was Haus. I had to be up there at a little after ten. Judge Blair generally began his court at half past ten. And Mr. Runton and Mr. Krause told me they had come to get a deed drawn. Mr. Krause came into the middle room, where my partner's desk is, and sat down in a chair there, and told me that he wanted to have a deed drawn from him to his son William of a house and lot that he owned on Jersey City Heights, and he said he expected to have some trouble about it with his son George; that his son George would dispute his rights to make the deed; and he wanted me to take care that it was done all right, so that it would hold. I asked him then what grounds he supposed his son would make trouble on, and he said that, as far as he could understand, he supposed that he would do it because he was so old. I then took him into my own room—the third room, where my own desk is—and shut the door, and sat down with him there, and told him to tell me all about it. I wanted to see for myself what condition he was in, and whether he was competent to make a deed or transact any business; and I asked him questions about how many children he had, and how old he was, and where his children lived, and their names, and whether his wife was living or dead, and what her name was, and how old she was, and also about his property, where it was, and how much he had, and how it was situated, and he told me—gave me very clear satisfactory answers; and I asked him why he wanted to make this deed to William, and he said it was because William had always been a good, dutiful son to him, and always helped him out; when he needed any money, had been willing to advance him money, and had done so, and had paid the insurance premiums on his insurance (life insurance), and had paid

taxes for him, and repairs to his buildings; and had always been kind to him and taken good care of him in his old age; and his son George, he said, had gone away from home when he was young, and had paid very little attention to him, seldom come home to see him, and only stayed a few minutes when he did come; and he wanted to give this house and lot to William because he felt that it was due to William; that it was an obligation resting on him to give William something for the attention and kindness he had shown him, and for the moneys he had advanced to him different times. Then he told me that he had made a will, and I asked him about when he made that will, and what the provisions of the will were, and he told me, substantially about the same as the will reads, and incidentally mentioned that his daughter was dead when I asked him about her, and told me that she had had some money (I think about \$2,200 or \$2,300, something like that), that he intended should be taken out of her share of his estate when it was divided; and he asked me whether I thought he had better make his will over, or whether he had better make this deed, and I told him that, if the will suited him the way it was, I didn't see any reason for making it over, and he said it suited him the way it was; and I asked him then about this daughter—whether he had any arrangement made with her, that she couldn't claim the whole amount of her share of his estate without this deduction; and he told me that all the family were satisfied; there wouldn't be any trouble about that, he said; that he had it understood with them that that was to be deducted from her share. Then I told him there was no need of making his will over, if that was settled, and he said it was. Q. By the Court: Well, but didn't you learn that there were infant children—that she left infant children? A. I don't think we spoke much about them. And I told him I would have the deed drawn then, and I asked him to show me which property it was; and he took the deed, the old deed, out of his pocket, and opened it, and showed me the number of the lot that he wanted me to draw the deed for. The deed that he showed me contained, I think, two lots, and he picked out one, and told me I would have to draw a deed for that one lot to William, and I looked at the name in the old deed he had—had been conveyed to him—the spelling, and I took it out to Mr. Spohr, my partner, and told him to draw the new deed, and use the same spelling of the name that was in the old deed, by which it had been conveyed to Bernard Krause. And by that time it was about time for me to start for the courthouse. I couldn't wait any longer. And I told Mr. Spohr to fix up the deed, and have him sign it and witness it; and I went off then, and went up to the courthouse, to attend to that criminal case."

Cross-examination: "Q. Now, when you

spoke to him about his property, did he say that he had made a will, or did you ask him whether he had made a will? A. He told me he had. Q. Did he volunteer the information? A. Yes, sir. Q. And he asked about this deed with reference to his will, did he? The Court. In connection with the will? A. Well, he spoke about it; he spoke about the deed, first. Q. And having spoken about the deed, he then said he had made a will? A. And he told me he had made a will. Q. And then asked you whether or not he had better make a new will or deed? A. Yes, sir. Q. And you advised him, under the circumstances, it would be better to let the will stand, and make a deed? The Court. He said if the will suited him. Q. If the will suited him? A. He said this: He didn't want to make any will if he could help it, because the will he had made he had made in 1886, and he was younger then, and he thought nobody could interfere with that, and, if he made one now, he said that his son George had threatened to set it aside, and he didn't want to have it set aside, he said. Q. And so instead of that he preferred to make a deed? A. And he said he would rather make a deed if I thought he could make one that could hold. Q. And you told him you thought he could make one that could hold? A. After I talked to him, felt satisfied that I knew what he was at—that he was competent to do business—I told him I thought he could. Q. By the Court. He told you how many children he had? A. Yes, sir. Q. By the Court. He made no mistake about it? A. No. Q. By the Court. You haven't repeated what he said. Did he tell you he had George and William and Mrs. Martin, and that Mrs. Knodel had died? A. Well, yes, I think he did. I think he told me that. Q. By the Court. Did you understand from his will that Mrs. Knodel's children would take her share? A. I supposed so from what he told me. Q. By the Court. You learned from him she had children? A. Yes, sir. Q. By the Court. And of course you inferred from that that her children would take her share? A. Yes, sir. Q. By the Court. Now, what troubles me, Mr. Besson, is this: How could you rely upon his statement that there was a family understanding that the \$2,200 should come out of her share when she left children? How could there be a family understanding with young children? A. Well, this money, as I understood him, had been given to her when she was living, and I didn't know what arrangements they had, only from what he told me. Q. By the Court. He told you that that was to come out of her share? A. He said that it was all consented to by all the family. Q. By the Court. How could it be consented to by infants? A. Well, it was consented to by the mother before she died. Q. By the Court. How could that bind the infants? A. They didn't have any share until— Q. By the Court. They would have a share directly under the will, wouldn't

they? A. That didn't occur to me at the time. I supposed it was all right. Q. By the Court. It didn't occur to you at the time that, by making a deed instead of a will, that Mrs. Knodel's children would get \$2,200, or three-quarters of it more than their grandfather meant they should? A. No, it didn't strike me at that time. I thought he had the thing all fixed, he said. Q. By the Court. How come he to mention that \$2,200 to you then at all? A. He told me that she had had that money, and he expected it to be taken out of her share, he said—so understood. * * * Q. Did he tell you why he thought that George would make trouble for him? A. Yes, sir; he said that George had already threatened to take his property out of his hands, I think he told me, and had threatened to bring a suit after he was dead. Q. Did he tell you who had told him that? Did he tell you who had said so? A. No. Q. That seemed to be uppermost in his mind, did it? He thought George would contest his will? A. He said he was afraid he would. Q. And for that reason he preferred the deed to a testamentary disposition. Is that so? A. Yes, sir. * * * Q. By the Court. Did he say anything about his daughter Mrs. Martin in this conversation? A. Well, he told me her name. Q. By the Court. But didn't say anything about her? A. Didn't say anything further about her. Q. By the Court. Did you call his attention to the fact that the giving of this property to William would reduce her share? A. Yes, sir; I asked him about the rent of it, how much rent he had. I had an idea in my mind he ought not to give it away if it was going to make his income so small that it wouldn't support him, and I got him to tell me what the whole income was, and how much the income of this house William was to have was, and how much he would have left, and I wanted to see whether he was giving everything away or not. Q. By the Court. But did you call his attention to the fact that the giving of this to William would reduce the shares of his daughter Mrs. Martin and the children of Mrs. Knodel, as well as the share of George? A. Yes, sir; he spoke of that. He said it would make theirs so much less, he said, but he wanted William to have that much more, he said, because William had helped him. Q. In what words did he put that when he made that statement you have just made—that he wanted William to have more than the others? How did he say that? What was his language? A. About the way I said it now; just as I said it, as near as I can remember. I couldn't give you his exact words now. It is too long ago. Q. Are you quite sure that when he spoke of that he wasn't speaking— Was it the question of giving the house in addition, or was it the question of additional value that that house had over the other houses? A. He didn't say anything about whether it had any additional value or not. Q. Didn't you know in

fact that it was the most valuable of the three houses? A. No; I didn't know it. Q. Didn't he say so to you at the time? A. I don't think so. Q. And you don't know that when it was said to him—when you said to him that that would be giving William more than the others—that it meant that he was getting more in value, and not more in specific property, do you? You don't know whether that was the meaning of it or not, do you? A. Well, he understood from what he said to me that William was getting more in value than the rest. Q. It was more in value, but you don't know whether he meant more in specific property? The Court. William would get a quarter of all that was left? A. Yes, sir. Q. By the Court. Did he understand that? A. He understood that. Q. What did he say to you to indicate that he understood that? A. Well, he told me that those three houses were there, and, if he didn't do this, he said they would be divided equally, and he said he wanted William to have that one house, and then to have the same share of the rest of his estate as the other children. Q. Did he say, 'I want William to have the same share of my estate as the other children, after giving the house'? A. Yes, sir; I think he used about those words. Q. Did you say that, or didn't you say to him, 'Then do you want him to have the house, and then to have the same share as your other children'? Didn't you say that, and he say 'Yes' to that? A. I think I told him, 'Now, do you understand if I make this deed that William is going to get this house, and he will have the same share as your other children of what is left: I want you to understand that.' I think I told him that, and he said 'Yes,' he understood that; he wanted him to have that that way. Q. Did he say 'Yes,' or simply nod his head? A. He spoke more than 'Yes'; he said he understood that, and he wanted William to have that house and lot. Q. What he said then was, 'I want William to have that house and lot,' and that was all, wasn't it? A. And his share, he said, besides. Q. His share of what? A. Of the rest of his property. Q. Did he say, 'I want him to have that house and lot, and his share of the rest of the property'? A. Yes, sir. Q. Or did he say, 'I want him to have that house and lot, and his share'? A. 'His share in the rest of my estate,' or 'property.' I don't remember the words. Q. Did he use those words? A. I don't know whether he used those exact words, but that is the idea he gave me to understand."

Now, this evidence, in connection with the other circumstances of the case, makes it quite clear that, as before stated, the decedent entertained the notion that a deed of conveyance was more difficult to attack and set aside on account of mental weakness than a will, and hence he preferred a deed, but nevertheless he understood that it might be necessary and proper for him to make a will; and either he, or some one for him,

had previous to his coming to Mr. Besson's office given a notice to Mr. Runton that he might be wanted at Mr. Besson's office; that Mr. Besson, although informed by the deceased of the advance of \$2,250 to his daughter, did not consider the importance of having the status of that advance put beyond all dispute by a new will or codicil; and that he did not inform the decedent that, if he was competent to make a deed of conveyance, he was also competent to make a will. And it is a matter of regret that the visit to Mr. Besson was made at a moment when he felt under pressure to dispose of the matter in hand in time to be enabled to attend to his engagement in Judge Blair's court, and manifestly acted without careful and deliberate consideration. For I cannot but think that, if he had been able to devote more time and thought to the matter, the result would have been a will, instead of a deed, which would have put the intention of the decedent beyond all doubt, and left no room for contention, as a matter of law and fact, that the money advanced to Knodel was in point of fact an advance upon the share of his wife in his estate. And further, the detail of taking instructions for the will, if done in the careful manner which it should be done, would have determined beyond all peradventure the question whether this old gentleman wished that his son William should have the house and lot here in question, over and above an equal share with the other children in his estate, or whether he was to take that as his share in the estate, and allow the balance to be divided between his other children. And just here, in considering this, which is the crucial question in the case, it must be borne in mind that his will made a perfectly equal division of his property among his children, and that he declared to Mr. Besson that "the will, as it stood, suited him." Now, in view of these considerations, I feel constrained to say that taking all the evidence of Mr. Besson in connection with the other evidence in the case, and notwithstanding the explicit language of that gentleman on the stand, I had serious doubts at the hearing, which have not been removed by a careful re-reading of the evidence, whether the old gentleman understood the actual effect upon the distribution of his property of the conveyance he was making, taken in connection with the will. He was, as we have seen, advanced in years, 78 or 79 years old, feeble in body and mind, and more or less affected in its early stages by a disease known as "senile dementia." It was easy for one in that condition of body and mind to fall into error in that matter. He might well think, and in my judgment the probability is that he did think, that the giving to William the title to the lot by deed in his lifetime would be treated as an advance on account of his share in the estate under the will. That was clearly his opinion as to the gift to his daughter, and yet I am constrain-

ed to say that under the evidence of her husband and of William, given incidentally in this cause, it is doubtful if the expectations of the testator will be realized. He was, moreover, and had been for over three years, subjected to the uninterrupted and continuous influence of the grantee of the deed. Now, under these circumstances, it is perfectly clear that the burden of proof is on the grantee to show to the satisfaction of the court that the grantor did understand and did wish that the grantee should have the house and lot conveyed by the deed, in addition to an equal share with the other devisees in the grantor's estate. Upon that question the only affirmative evidence is that of Mr. Besson, and, for reasons already stated, I am not satisfied that the grantor did so understand.

It remains to consider what remedy the complainant is entitled to. It is conceded that the three houses in question comprise all of the real estate which the grantor owned at his death. The inventory of his personal property, signed by both the executors, comprises two items, viz., \$250 of cash in bank, and \$2,250, with interest, "amount of claim against the estate of Mary Knodel, deceased." The two houses, Nos. 60 and 64 Sherman street, were shown to rent for \$20 each per month. The repairs, water rents, taxes, etc., are shown to be heavy, so that they can hardly be treated as worth much more than \$2,000 each.

I think justice will be done by a decree that the conveyance in question shall stand, upon condition that William will accept it as his share in the estate under the will; otherwise that it be set aside.

(65 N. J. E. 116)

In re MINER.

(Court of Chancery of New Jersey. Oct. 15, 1903.)

WILLS—AFTER-BORN CHILD—SHARE—ALLOWANCE FOR WIDOW'S DOWER RIGHT—DISPOSITION OF ALLOWANCE.

1. Under 3 Gen. St. p. 3760, § 19, which provides that the child of a testator born after the making of the will shall succeed to the same portion of the father's estate as such child would have been entitled to if the father had died intestate, towards raising which portion the devisees and legatees shall contribute proportionately out of the part devised and bequeathed to them by the will, the share of an after-born child, so far as the ascertainment thereof is concerned, is subject to the widow's right of dower in real estate and her share as distributee of the personal estate.

2. A testator, after making specific bequests of personality to his four sons and widow, devised the residue of his estate to his executors, in trust to divide four-fifths of the net income between the sons and the remaining one-fifth to the widow. The trust was to terminate at a specified time, at which time the estate should be divided into equal parts, one of which was devised and bequeathed to the widow absolutely, and the other parts to the sons. The gift to the wife was in lieu of dower. The wife elected to accept the provisions of the will. Subsequent to the making of the will another son was

born. Held, that allowance for the value of the widow's dower deducted from the share of the after-born child should be held by the executors for the benefit of all the devisees of the land under the will, and in the same proportion as they were entitled to the balance of the purchase money.

In the matter of the sale of lands of John Lansing Miner, an infant. On application of special guardian of the infant for distribution of proceeds of sale of infant's lands. Distribution ordered.

J. E. Howell, for petitioner. R. H. McCarter, for infant.

EMERY, V. C. Henry C. Miner, domiciled in New York, by his will, dated March 29, 1897, after specific bequests of personal property to his four sons and also to his wife, devised the residue of his estate, real and personal, and wherever situate, to his executors, in trust, among other things, to manage his real estate, collect the rents, etc., and to divide four-fifths of the net income between his four sons, and to pay annually the remaining one-fifth to his wife during the trust. The trust was to terminate on the arrival of his son George at the age of 32, or his death under that age, and on such termination the executors were directed to divide the residuary estate, with accumulations of interest or income, into five equal parts, one of which was devised and bequeathed absolutely to testator's wife. To each of his four sons was also given one-fifth of the residue, with limitations over in case of the death of either. These provisions for the wife from the income and principal fund of the residuary estate were declared by the will to be in lieu of dower. The wife and four sons were appointed executors and trustees, and were authorized to sell any of testator's real estate. By a codicil dated November 22, 1899, the testator devised to his wife in fee his residence in New York City, free from incumbrances. This devise was not expressed to be in lieu of dower. At the time of the execution of the will and codicil testator had four children—the sons especially named in the will and codicil. On January 10, 1900, another son, John Lansing Miner, was born. Testator died on February 22, 1900, seised of real estate in New Jersey as well as New York. The son John Lansing was neither provided for nor disinherited in the will or codicil. Under the statute of wills (3 Gen. St. p. 3760, par. 19) it is provided that the after-born child in such case "shall succeed to the same portion of the father's estate as such child * * * would have been entitled to, if the father had died intestate, towards raising which portion, the devisees and legatees, or their representatives, shall contribute proportionately out of the part devised and bequeathed to them by the same will and testament." On the application of the infant's general guardian, his interest in a tract of land in Newark has

been sold, in connection with a sale by the executors under the will. Of the whole purchase price (\$20,000) one-fifth has been paid into court, and the question now is whether, under the statute, the infant is entitled to the whole amount paid in, or whether this amount must be decreased by the value of the widow's estate in dower. The widow, by documents duly executed and filed in New York, elected to accept the provisions of the will in lieu of her dower, and the sale in this case is free of the widow's dower, but reserving her rights, if any, in the proceeds paid into court.

Two questions arise in applying the statute: First. Is the infant's interest in the proceeds of its sale to be ascertained without making any allowance for the value of the widow's dower? Second. If such allowance is made, to whose benefit does it inure—that of the widow, or of all the devisees proportionately? Upon the first question the language of the statute creating the estate or interest in favor of the after-born child is, in its very terms, a limitation of the extent or amount of the interest, and this interest thus fixed by the words of the statute cannot be made larger by construction or implication. This interest is "the same portion he would have been entitled to if the father had died intestate." For the purpose of ascertaining this portion to which the after-born child is entitled, the will, with all its provisions, whether relating to dower or any other interest in the lands, is to be taken as non-existent and ineffective, and testator is, for the purpose of this ascertainment, to be taken as having made no will which could change, either for or against the after-born child, the extent or character of his interest in the real estate which would have descended to him had there been no will, or his distributive share in the personality. The share must, therefore, so far as the ascertainment is concerned, be subject to the widow's right of dower in real estate and her share as distributee of the personal estate. This method of ascertainment of the value was adopted in *Lutjen v. Lutjen*, 63 N. J. Eq. 391, 396, 51 Atl. 790 (Pitney, V. C., 1902). The same rule as to ascertainment is adopted by courts in other states having similar statutes. *Mitchell v. Blain*, 5 Paige, 588, 589 (Waltham, Ch., 1836); *Ward v. Ward* (1887) 120 Ill. 111, 120, 11 N. E. 836. The value of the widow's dower interest in the lands has been reported by the master to be \$3,723, but I will hear counsel further on this point, and direct special inquiry, if necessary.

2. This sum, deducted from the proceeds of sale to represent the widow's dower, must be held by the executors for the benefit of all the devisees of the land under the will, and in the same proportion as they were entitled to the balance of the purchase money. The present deduction from the proceeds of sale is made solely because it was necessary, in order to ascertain the statutory "portion" of

the estate to which the after-born child was entitled, and the existence of the widow's dower or its value in the lands cast on the infant by the statute is not to be assumed for the purpose of giving such estate to the widow as if the testator had died intestate, if she be not otherwise entitled to dower. Such use of her supposed estate would extend the statute beyond its terms and intention, and, if allowed, would in this case, and probably in most cases, revoke the will of the testator beyond the revocation pro tanto which occurs in order to carry out the statute. All the devisees of the land sold, including the widow, must share proportionately in the loss resulting from the deduction of the portion of the proceeds of sale payable to infant, and in the balance of the proceeds of sale they share precisely as if this balance were the whole proceeds of sale and there were no other directions as to its division than the terms of the will, under which alone they all claim. If the lands had not been sold, the estate in dower to which the estate of the infant is subject would probably be considered as a legal estate held by her under this statute, solely to effect the purposes of this statute, and as a legal title necessarily held by the widow under the statute for the equitable proportionate benefit of the devisees under the will (including herself), whose estates under the will have been diminished solely for the benefit of the after-born infant.

(65 N. J. E. 325)

PFEFFERLE et al. v. HERR.

(Court of Chancery of New Jersey. Oct. 18, 1903.)

TRUSTS—ENFORCEMENT—WILLS—CONSTRUCTION—PARTIES.

1. Where a suit to enforce an alleged trust for the benefit of minors involved the construction of the will creating the trust—as to whether the income of the entire estate was applicable to the maintenance and education of the minors, or only the income of their several shares—all of the minors interested in the estate were necessary parties.

2. Where a testamentary guardian of certain minors had never qualified, and the trust created by the will for the support of the minors could be executed without reference to such guardian, she was not a necessary party to a bill to enforce such trust.

Bill by Gertrude Pfefferle and others against Charles F. Herr, as executor, etc., of the will of John F. Pfefferle, deceased. On demurrer to the bill. Sustained.

Francis Child, for demurrant. Samuel A. Besson, opposed.

STEVENSON, V. C. My conclusion is that the demurrer to the bill should be sustained for the reason specified that Ida Pfefferle and Oscar Pfefferle are not made parties. I do not think that Margaret E. McClelland, widow of the testator, is a necessary party. The demurrer does not object

to the failure to make Margaret E. McClelland, as testamentary guardian, a defendant; but, if it did, it does not seem to me that she is a necessary party, even in that capacity, inasmuch as she has never qualified as guardian, and the trust for the support of the children may be executed without reference to her. The testator made his will in November, 1891, and died in January, 1902. At that time he had a wife and five children, the oldest of which could not have been more than 11 or 12 years of age. All of these children, excepting the eldest, at the time of the filing of the bill, were infants.

The entire estate was left to the five children in equal shares, subject to the widow's right of dower, and subject to the right of the executor to sell the real estate. The fourth paragraph of the will is as follows:

"It is my will and I do hereby order and direct that none of my said real or personal estate shall be conveyed or paid over to my said children before they attain the age of thirty years respectively, they, however, to have so much of the income and profit thereof as may be necessary for their maintenance and education during their minority and their support until they attain said age."

The executor, the defendant, has taken possession of the entire estate, and collects the income of the realty.

Counsel for complainant argues that the estate is in the hands of the executor in trust until the children respectively reach the age of 30 years, and become entitled to their shares. His insistent is that the true construction of the will requires that the executor, as trustee, should keep the five shares separate and distinct, and that each child is entitled to so much of the income of his share as may be necessary for his maintenance and education. He argues, therefore, that each child has a right to come into the court of chancery and compel the trustee to execute the trust for his benefit; each child being entitled to support and maintenance only out of so much of the income of his share as may be necessary. Whether the right of each child to maintenance, etc., applies only to the income of his share, or to the income of the entire estate, is the question of construction to be determined at the start. The will says that "so much of the income and profit thereof [i. e., of the entire real and personal estate] as may be necessary" shall be applied to the maintenance and education of the children. The will does not say that so much of the income of each share as may be necessary shall be applied to the maintenance and education of the child entitled to the share. The executor and trustee, in my opinion, is entitled to the protection of a decree in a suit in which all the infants are made parties. If the application for maintenance had been made by petition by one or more of the infant children, the same rule, I think, should

be applied. The two infants who are not made defendants are the youngest, and what their circumstances are—what the necessities of their case may be in respect of maintenance and education—the bill does not disclose. After a decree allowing maintenance to the three complainants out of the income of their respective shares, another suit might be brought on behalf of the two infant children who are not made parties, in which it would be claimed that a correct construction of the will required the trustee to furnish maintenance out of the income of the entire estate to the several five beneficiaries according to their respective necessities, and that the income of the whole estate might be required for the support and education of two or three of the children, or that half of the income should, in accordance with the will, be appropriated to two of the children.

Counsel for complainants, in an elaborate brief, assumes that the construction of the will giving each child maintenance and education only out of his share is the correct construction. This contention, however, is liable to be disputed at any time in the future.

The demurrer will be sustained.

(55 N. J. R. 691)

In re DONNER'S EX'RS.

(Prerogative Court of New Jersey. Oct. 6, 1903.)

WILLS—CONSTRUCTION—SPECIFIC BEQUEST.

1. By the first clause of his will testator directed his debts, funeral and testamentary expenses to be paid by his executors. By the second clause he bequeathed to his wife certain specific goods and chattels, part of his personal property, expressly declaring that the bequest was not to include such personal property as consisted of money and securities. By the third clause he bequeathed all his personal property to his wife and his two daughters, each to have one-third thereof. *Held* that, no contrary intent being disclosed by other parts of the will, the general bequest contained in the third clause did not revoke the specific bequest contained in the second clause, nor was such specific bequest included in the one-third part bequeathed to the wife by the third clause, but that such specific bequest operated to except from the general bequest the articles so specifically given.

(Syllabus by the Court.)

Appeal from Orphans' Court, Bergen County.

In the matter of the final accounting of the executors of John Otto Donner. From a decree allowing the account, Elizabeth Donner Frankson appeals. *Affirmed*.

John W. Beekman and Frank K. Vandever, for appellant. William H. Corbin and William T. Day, for respondents.

MAGIE, Ordinary. The appeal in this cause is from a decree of the orphans' court of Bergen county made February 19, 1902, allowing the final account of Julia W. L. Donner and Spencer S. Baldwin, executors of the will of John Otto Donner, deceased. Exceptions were presented by Elizabeth Don-

ner Franksen, a legatee and devisee under said will, and she has appealed from the decree.

The question of the greatest importance presented by the appeal arises upon an exception to the account, which is put upon the ground that the executors had not charged themselves with certain of the personal property of the deceased. The fact that the testator died possessed of certain personal property was not in dispute. The property in question was not included in the inventory made by the executors, nor did they charge themselves with it, or its value, in the final account. The executors claimed that it was the subject of a specific bequest in the will of their testator, and that they had delivered it to the legatee to whom it was bequeathed, and therefore that they were not bound to inventory it, or to charge themselves with it in the final account. The contest is therefore upon the clauses of the will affecting the disposition of this property. The executors claim that the property was specifically bequeathed; the appellant claims that it belonged to the general fund, in which she was interested. The property in question is that included in the second item of the will of the testator, which is in these words: "I give and bequeath to my wife, Julia W. L. Donner, all my jewelry, silver, plated-ware, china, furniture, ornaments, bric-a-brac, wearing apparel, all household, domestic and personal articles, and also all my horses, carriages, harness and other horse furnishings, and stable furniture and farming implements, it being my intention to hereby give and devise to my said wife all articles of personal property which I possess at the time of my decease, except money either in cash or in the bank, stocks, bonds and all evidences of indebtedness." Upon the language of this clause, standing alone, no contention has been or can be made but that the articles bequeathed were specific legacies, passing to the legatee the whole interest of the testator therein. While the better course of the executors would have been to inventory these articles as part of the estate, and their omission to do so could have been objected to by creditors of the deceased, such omission has worked no injury to the appellant, unless by other portions of the will she has an interest in that property, or an interest in the estate which will be diminished by the exclusion of that property from the accounting. Appellant claims that she has such an interest, or is thus injuriously affected by the exclusion of this property from that account, under the provisions of the third clause of the testator's will, which is in these words: "Third. I give, devise and bequeath one equal one third part of all my property, both real and personal, wherever the same may be situated, to my wife Julia W. L. Donner, one other equal undivided one third part thereof to my daughter Mary Elizabeth Van Arsdale Franksen, wife of Rudolph Frank-

sen; and the remaining one equal one third part thereof to my daughter Ilse Alberta Anna Donner. If however, either of my said wife, or my said daughter Ilse Donner should die before me, then and in such event I give devise and bequeath the share or portion of my said estate so devised and bequeathed to the one so dying before me, to the survivor of my said wife, and my said daughter Ilse Donner." The contention before me has been of a twofold character. It is first urged that by the third clause all the personal property of the testator was disposed of to the three legatees therein named, and that such disposition is inconsistent with the prior bequest of a portion of his personal property to his widow, so that the bequest to the widow by the second clause of the will was wholly ineffective, and must be disregarded. In the second place, it is urged that, if the general bequest of the third clause does not wholly abrogate and revoke the specific bequest of the second clause, the two clauses must be construed together, and, when so construed, the provision of the third clause, bequeathing to the widow the equal one-third part of the personal property, must be held to be limited by the provisions of the second clause, so that the articles bequeathed by the second clause must be included in the one-third part of the personal property to which the widow became entitled by the third clause. While there is no direct evidence of the value of the specific gifts disposed of by the second clause, there is a justifiable inference that their value would not equal the one-third part of the personal property of the deceased, which was inventoried, and has been included in the account as having a value of over \$160,000. If either of the contentions of appellant be accepted, the omission of the value of the personal property of the deceased named in the second clause of his will from the accounting operates to the disadvantage of the appellant, who is thereby deprived of the one-third part of its value. The court below, in decreeing the allowance of the executors' account with this omission substantially overruled this exception, and the appellant has a right to have the decree, in this regard, reviewed.

The contention that the specific bequest to testator's widow contained in the second clause of his will must be rejected as wholly void is put upon the well-settled and universally recognized doctrine that, when a testamentary instrument contains two bequests or devises which are entirely irreconcilable, and invincibly repugnant to each other, the latter of the two inconsistent clauses is to be taken as expressing the will of the testator, and the former of them is of no avail. Lord Coke gives as the reason of the rule that the will of the testator is ambulatory even to the time of his death, and a later will countermands the first. Co. Lit. 1128. The doctrine is too well settled in the courts

of England and of this country to justify the citation of authorities. The subject of repugnancy and contradiction in wills, is fully discussed by Mr. Jarman in the fifteenth chapter of his treatise on Wills (2 Jarman, Wills [R. & T. Ed.] 44), and by Judge Redfield in section 6 of the ninth chapter of his work on wills (1 Redfield, Wills, 443). See cases collected in 29 Am. & Eng. Enc. Law, 363.

The doctrine above stated, it is equally well settled, is never to be applied so as to avoid and make nugatory a plainly expressed disposition of property, until, after an examination of the whole testament, it fully appears that such disposition is clearly repugnant to a succeeding disposition thereof. As in other cases regarding the construction of wills, the court charged with that duty is bound to seek out of all the provisions made by the testator his intent. To discover that intent, clauses in the will may be transposed, if an intent may be thus discovered. 1 Underhill on Wills, § 362; *In re Mutter's Estate*, 38 Pa. 314; *Hunt v. Johnson*, 10 B. Mon. 342; *Creveling's Ex'rs v. Jones*, 21 N. J. Law, 573. Words having naturally an unlimited meaning may have a limited meaning attributed to them if, from the whole instrument, it reasonably appears that the testator used them in such limited meaning. *Marshall's Ex'rs v. Hadley*, 50 N. J. Eq. 547, 25 Atl. 325. If an intent is disclosed on such examination that clauses apparently inconsistent should not be contradictory, but supplementary, such construction should be given them. If apparently contradictory clauses may, by a reasonable construction, be reconciled and accommodated so that both may stand in whole or in part, such construction should be adopted to prevent the avoidance of testator's expressed design.

Counsel for appellant concedes these propositions to be correct. He suggests that the court may transpose the second and third clauses of this will, not for the purpose of applying to the transposed clause the doctrine first stated (which would be rather making a will for the testator), but for the purpose of discovering testator's intent; and he contends that there is thus revealed an intent which will reconcile the two clauses, and avoid any apparent repugnancy. His argument is that the third clause, standing by itself, disposes of all testator's personal property, and, unless a different intent is otherwise discoverable, it is impossible to read it as disposing of all the residue of such property. But he contends that, if the second and third clauses be transposed, they may be wholly reconciled by finding an intent thus disclosed to include the property specifically bequeathed to the widow by the second clause in the one-third part of the personal property bequeathed to her by the other clause. If it appeared that the value

ceeded one-third part of all testator's personal property, it seems obvious that this argument would not avail. But as a court, in attempting to discover a testator's intent in a will, may put itself in the position of testator, and look at the circumstances under which he made the will, and as it sufficiently appears that the property specifically bequeathed did not exceed in value one-third part of all testator's personal property, the argument should be considered. Unless testator's intent that the specific bequests of the second clause should be included in and make part of the bequest to the same person of one-third part of the personal property contained in the third clause is disclosed by other parts of the will, I am unable to discover such an intent in the mere fact of the apparent opposition of the two bequests.

The third clause, which disposes apparently of all testator's personal property, is not contained in a codicil, nor is it separated in the will by other clauses from the second clause which apparently disposes of certain specified personal property. Both clauses stand in juxtaposition, and it is impossible to conceive that testator had forgotten the provisions of the second clause when the third clause was written or considered by him. Nor can it be conceived that testator consciously intended to abrogate and avoid the provisions of the second clause by the generality of the language of the third clause. If that intent is to be attributed, it must result from the application of the formal rule, which is not to be applied if a different intent can be discovered from the will. By the second clause testator distinguished between two classes of personal property. One class is made up wholly of that kind of personal property which is denominated as "goods and chattels"; the other class is made up of money and securities. If the second clause be read in the order in which testator placed it, I think it may be properly inferred that testator deemed that the personal property disposed of by the third clause was that class of such property before distinguished and excepted from the bequest in the second clause. *Young v. McIntire's Ex'rs*, 3 Ohio, 498. But if the second clause be transposed, and read after the third clause, a plain intent is disclosed to except its bequests from the general disposition of personal property. In either mode in which the two clauses are read, they may both be effective, and the case falls within that class of adjudged cases an examination of which has led Judge Redfield to declare that they establish the rule that when a testator makes a general bequest, which includes the whole of his estate, and by other portions of his will makes specific dispositions, these must be regarded as explanations or exceptions out of the general disposition, and it will not be important in such case whether the general or the specific provisions come first in order, since in either case the general dis-

position will be regarded as made subject to the more specific ones. 1 Redfield, Wills, 445. Mr. Theobald declares the rule to be that, where a gift of all testator's property is followed by gifts of specific portions of it, or vice versa, both gifts may take effect. Theobald on Wills (5th Ed.) 659. When there was a devise of a certain portion of testator's real estate to his widow in terms, which, standing alone, would have carried the fee, and by the next clause of the will there was a devise to his children of all his real estate, to be sold after the widow's death, it was held that the widow took a fee in the real estate devised by the first clause, and that the second clause operated only on testator's other real estate. *Brownfield v. Wilson*, 78 Ill. 467; *Holdfast v. Pardoe*, 2 Sir W. Black. 975; *Roe d. Snape v. Nevill*, 11 Q. B. 466; *Re Arrowsmith Trusts*, 2 De G., F. & J. 474; *Sherratt v. Bentley*, 2 Mylne & K. 149; *Cuthbert v. Lempriere*, 2 M. & S. 158.

But there is language in this will, which, though not adverted to by counsel on either side, requires consideration, and which presents a question which I have not found free from difficulty. The question is whether it does not indicate testator's understanding that the specific bequest was included in and made part of his general bequest in the third clause. By the language of that clause it is clear that testator contemplated that his wife or his daughter *Ilse* might die before him, and that in such case the provisions for them would lapse. He manifestly intended to make provision for the happening of either event. He declared his intention in these words: "In such an event, I give, devise and bequeath the share or portion of my estate so devised and bequeathed to the one so dying before me, to the survivor of my said wife and my said daughter *Ilse Donner*." If this language must be construed as operating only upon the part of his property disposed of to his wife by the third clause, it would afford persuasive evidence that he deemed the bequest therein of one-third part of his personal property to his wife included the previous specific bequests to her contained in the second clause; for it is well-nigh inconceivable that he could have intended to provide against a lapse in one case and not in the other. But I have reached the conclusion, although not without some hesitation, that this language may be properly applied not only to the one-third bequeathed to the wife by the third clause, but also to that portion of his property previously specifically bequeathed to her. It results that the court below properly overruled this exception, and its decree is not erroneous in that respect.

A great number of exceptions were also interposed below to various items of the account of the executors. On the argument before me many of these exceptions were waived, and such waiver was indicated by

erasures and statements by counsel upon the state of the case furnished me. No brief pointing out specifically the objections retained and the grounds for deeming the decree in those instances erroneous has been furnished me. I have examined the exceptions remaining unwaived with all the care possible, and with an effort to discover the grounds on which error in respect to them is asserted. The result is that I have been unable to find that the decree below is shown to be erroneous in respect to any of them.

The result is that the decree must be affirmed.

HOLMES v. STANDARD PUB. CO.

(Court of Chancery of New Jersey. Oct. 15, 1903.)

FIXTURES—LANDLORD AND TENANT—REMOVAL—LEASE—CONSTRUCTION.

1. Where a tenant under a lease for five years, with the privilege of renewal and an option of purchase, constructed a frame one-story addition to the leased building in such a manner that it could not be removed without the commission of waste by leaving the building to which it was attached exposed and in need of repairs, and in its present condition the erection was adapted to the use of the remaining buildings, and could not be removed without being cut up into sections, and, if removed, was of little or no value except for the materials to be used in reconstruction, such annexation was a fixture.

2. Where a lease authorizing the construction of an addition to the building by the tenant provided that no waste or material injury should be done to the building already on the lot, the fact that it contained no provision that the addition should remain on the premises did not authorize a presumption of the tenant's right to remove.

Bill by Amanda V. Holmes against the Standard Publishing Company to restrain defendant from removing an alleged fixture. Decree in favor of complainant.

James E. Degnan, for complainant. John S. Applegate & Son, for defendant.

EMERY, V. C. Defendant occupies as tenant premises of which complainant is the owner by purchase of the fee from defendant's lessor. The question at issue is whether defendant has the right to remove a frame building erected by it on the premises, or whether the building is a fixture attached to the realty. The frame building is a one-story addition or extension erected in the rear of the southerly portion or half of a two-story brick building. Defendant was the lessee of the first floor of this southerly half of the building, together with the lot in the rear of the southerly half. At the time of the lease the southerly half of the store building was divided by a partition, and defendant proposed the erection of a building in the rear for its business of printing. The lease, dated February 1, 1897, between Curtis and Davis, lessors, of the first part, and

¶ 1. See *Fixtures*, vol. 23, Cent. Dig. § 24.

defendant, lessee, of the second part, was for the term of five years at the yearly rent of \$700, and contained the following clause as to erections on the premises: "And it is hereby understood and agreed that the said party of the second part may take away the partition now dividing the store into two, and to put a new front in (said front to be subject to the approval of the said parties of the first part), and also to put up a building in the rear of the present store building, one story high, and of size and kind suitable for the requirements and business of the said party of the second part, and also to make such interior improvements and changes as the said party of the second part may desire, provided that no waste or material injury be done to the building already on the lot." At the execution of the lease there was a small one-story frame building on the rear of the southerly half of the building, about 80 feet in depth, 17 feet in width, annexed to the main building, and communicating with it by a door. This frame building supported an extension connecting with the second story of the main building, and used in connection with a photograph gallery, the second-story extension being about 24 feet long and 12 feet wide. This one-story frame building was entirely removed by the defendant, and defendant erected on the rear of the lot, and connecting with the portion of the main building leased by it, a frame building about 20 feet in width and 61 feet in depth, and about 12 feet high. In height this building erected by defendant is the same as a frame extension erected on the northerly half of the main store building. The building erected by defendant is supported on the south and west sides upon foundations. Its north side, as used, is the south side of the extension on the northerly part of the lot, and for one-half of its width the east side of the building is the main wall of the two-story store building. The remaining portion of this main wall of the southerly portion of the store building has been removed by the defendant, and the southerly portion of the building, from the front of the building to the rear of the frame extension built by defendant, forms one apparently continuous room or building, the ceiling and floor being apparently continuous. The floor beams of the extension rest upon and are spiked to the sill of the northerly extension. The roof beams rest upon and are spiked to the plate in the roof of the northerly extension. The ridge or slope on the roof of this extension was removed in order that a continuous sloping tin roof might cover both extensions at the junction. The frame building is also attached to the main building, and it supports the second-story extension. If removed, new supports for the second-story extension will be necessary, and the use of this portion of the premises will be substantially affected. If the building erected by defendant be now removed, it will

leave one-half of the southerly portion of the first story entirely open, and waste to a lesser extent will occur by the separation of the floor, ceiling and roof of the two extensions and the disconnection of the extension from the main building. Among other things, an entrance formerly existing at the rear of the building to the cellar of the main building has been removed, and this entrance is now through the floor of the extension by a trapdoor. The building in question is in fact annexed to the realty and to the buildings already on the premises, and to some extent it is a substitute for, and supplies the use of, a building for which it has been substituted. It cannot be removed without the commission of waste, by leaving the building to which it had been attached exposed and in need of repairs. In its present condition it is adapted to the use of the remaining buildings. It cannot be removed without cutting it up into sections, and, if removed, it has little or no value, except for the materials to be used in reconstruction.

Actual annexation to the realty and appropriate use, in connection therewith, being clear, the question is whether, from all the proofs in the case, the conclusion is to be reached that the defendant, in making the addition, intended it as a permanent fixture. The lease, it will be observed, was for five years, and contained an option to renew the lease at a rent to be agreed on, or of purchase, in case the lessor concluded to sell during the defendant's occupancy. Taking this privilege of a long lease or purchase, in connection with the character of the building, the mode of its annexation, its use in connection with the building to which it is an extension, the exposed condition of the main building if it be removed, the uselessness of the structure as a building if it be removed, and all the circumstances of the case throwing light on the intention of the defendant in the annexation of the building, I reach the conclusion that this structure was intended as a permanent fixture. The fact that the clause of the lease containing permission for the erection of a building made no provision for its remaining upon the premises is relied on as a conclusive indication of the intention of both parties that the building should be removed, and *Pope v. Skinkle* (Sup. Ct. 1882) 45 N. J. Law, 39, is referred to on this point. That case holds that *prima facie* such clause may give rise to a presumption of the right to remove, but the case decides clearly that the whole question is one of intention, to be determined by all the circumstances showing the intention, the erection by permission being only one circumstance from which an inference is to be drawn. And the express condition that no waste or material injury should be done to the building already on the lot would seem to negative the inference that the removal of a building was intended if the building was so annexed that its removal would occasion waste. The offer of defend-

ant at the argument (but not in the answer, or in the application for injunction) to repair the waste has no bearing upon the question of his intention in making the annexation, and cannot affect the complainant's rights. *Fortescue v. Bowler*, 55 N. J. Eq. 741, 746, 38 Atl. 445 (Grey, V. C., 1897). The building being a permanent fixture, which the defendant has no right to remove, complainant is entitled to an injunction against its removal, in order to prevent waste. *Id.*

A decree for injunction against its removal will be advised.

(39 N. J. L. 642)

RICCIO v. MAYOR, ETC., OF CITY OF HOBOKEN.

(Court of Errors and Appeals of New Jersey. Sept. 21, 1903.)

CONSTITUTIONAL LAW—SPECIAL LEGISLATION—SCHOOL LAW—REGULATIONS—CLASSIFICATION.

1. For the purpose of legislation "providing for the management and support of free public schools," classification of school districts is permissible, within due limits of generality, and divergent legislation based thereon is not "local or special," within the prohibition of article 4, § 7, par. 11, of the Constitution, as amended in 1875.

2. The Legislature, upon subdividing the whole territory of the state into school districts coextensive with the municipal bounds of the several cities, incorporated towns, boroughs, and townships, may establish divergent regulations for the management and support of the schools, based merely upon the common-law classification of the municipalities themselves.

3. A legislative classification of school districts, proceeding on lines germane to the objects and purposes of the law, may serve to make general an enactment providing for the management and support of the schools.

4. The so-called general school law of 1902 (P. L. 1902, p. 69) classifies school districts without adhering either to the common-law classification of municipalities, or to any method of classification that is germane to the purposes of the enactment. It is therefore unconstitutional, as being a local and special law providing for the management and support of free public schools.

5. Unconstitutional provisions may be eliminated from a statute only where they are interjected into an enactment otherwise valid, and are so independent and separable that their removal will leave the constitutional features and purposes of the act substantially unaffected by the process.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Michael Riccio against the mayor and council of the city of Hoboken. Judgment for defendant (54 Atl. 801), and plaintiff brings error. Reversed.

John R. Hardin and Malcolm W. Niven, for plaintiff in error. Robert H. McCarter, Atty. Gen., James F. Minturn, and Michael Dunn, for defendant in error.

PITNEY, J. The question presented for solution is the constitutionality of the so-called general school law of 1902, entitled "An act to establish a system of public instruction" (P. L. 1902, p. 69). It is attacked

as being a "local or special law providing for the management and support of free public schools," and therefore prohibited by article 4, § 7, par. 11, of the Constitution as amended in 1875. The act contains 250 sections. Our present inquiry relates particularly to those portions that have to do with the home government of the schools, as distinguished from state and county supervision. Sections 33 to 41 are grouped under article 5, with the caption "School Districts." Sections 42 to 80 are grouped under article 6, with the caption "Boards of Education in City School Districts." Sections 81 to 99 are grouped under article 7, with the caption "Boards of Education in Township, Incorporated Town and Borough School Districts." Articles 6 and 7 provide separate codes for the school districts covered thereby, respectively. The differences relate principally to the mode of choosing the local trustees, and to the method of raising moneys for the support and maintenance of the schools. For city districts there is a referendum to the people of the question whether the board of education shall be appointed by the mayor, or shall be elected by the people. The annual financial budget is to be made up by a board of school estimate, of which two members are to be appointed by the board of education from its own membership, and the common council or other body having power to make appropriation of moneys raised by tax in such city is to appoint two from its membership, and these four, together with the mayor or other chief executive officer of the city, are to constitute the board. The same board determines the amounts necessary to be raised for the purchase of lands, and construction, etc., of school buildings; the power of appropriating and borrowing money for the purpose being reposed in the common council or other municipal body. In the township, incorporated town, and borough school districts, the board of education is to be chosen by the people at the annual school meeting. Such questions as the raising of money by district tax, the issuing of bonds, the purchase of lands and construction of school buildings, and the condemnation of land, are to be decided by vote of the people of the district. The specific provisions respecting the raising of a district tax for school purposes are found in sections 179 and 180. Those relating to school district bonds are found in sections 188 to 193.

From the opinion delivered by Mr. Justice Dixon in the Supreme Court (54 Atl. 801), it is manifest that the only question discussed before that court was the constitutional validity of a classification of school districts, for the purpose of divergent legislation, made by placing all city school districts in one class, and all other school districts in another class. The act was dealt with as if, either by its terms or by force of previous legislation, all the school districts of the

state were coterminous with the bounds of some municipality. In this court, certain features of the act not adverted to below were pointed out and discussed. As will be presently shown, they result in subdividing the two principal classes of districts just mentioned, and bring into play special discriminations, so that the act does not operate uniformly in all cities, nor uniformly in all the other forms of municipality.

Our Constitution, since the amendments of 1875, has recognized the common-law classification of municipalities into counties, cities, incorporated towns, boroughs, villages, and townships; and it is already established by repeated decisions of this court that the constitutional inhibition against special legislation regulating the internal affairs of municipalities is not violated by laws that make distinctions between the different forms of municipalities, based merely on the common-law classification. *Hermann v. Guttenberg*, 63 N. J. Law, 616, 44 Atl. 758; *Boorum v. Connelly*, 66 N. J. Law, 197, 48 Atl. 955, 88 Am. St. Rep. 469. It is equally well settled that where the Legislature makes a departure from the common-law or constitutional classification, either by subdividing one of the classes, or by excepting a part of a class from a given legislative scheme, the legislative classification thus resorted to must be germane to the purposes of the enactment. It must rest on peculiarities or characteristics that substantially differentiate the localities included from those excluded, and that render divergent legislative enactments appropriate to the several localities respectively.

In the present case we have to consider not only the constitutional prohibition of special laws regulating municipal affairs, but the additional prohibition of special laws "providing for the management and support of free public schools." In *Lowthorp v. Trenton*, 62 N. J. Law, 795, 44 Atl. 755, this court, speaking through the present Chief Justice, intimated a doubt whether under this clause any classification of schools or of school districts was permissible. Upon full consideration we are now unanimously of the opinion that such classification, within due limits of generality, is permissible. Assuming that, for purposes of local management and support, a single school might be treated as a natural, logical unit, and that the adjacent territory, whose children should attend there for education, and whose citizens and property owners ought to contribute especially to its support and to have voice in its management, might be set apart as a "school district," we entertain no doubt that these units may be grouped together, so that single districts may be made to comprise numerous schools, combined for purposes of local government. We are likewise unanimous in the view that schools and school districts having characteristics so nearly alike as to require similar treatment in legislation may be grouped to-

gether in classes, and that such classification may be made the basis of divergent legislative provisions, appropriate to the different classes, respectively. In the opinion of all, a legislative classification of school districts, proceeding on lines germane to the objects and purposes of the law, would serve to make general an enactment providing for the management and support of the free public schools.

Upon one question, however, the court is divided, and upon only one. It is this: May the Legislature, upon subdividing the whole territory of the state into school districts co-extensive with the municipal bounds of the several cities, incorporated towns, boroughs, and townships, establish divergent regulations for the management and support of the schools, based merely upon the common-law classification of the municipalities themselves? A majority of the members of the court have reached the conclusion that this question is to be answered in the affirmative. They consider that the management and support of the schools is so much a matter of local concern as to admit of legislative treatment according to the same lines of classification that apply to the general internal affairs of municipalities. They hold, therefore, that the common-law classification of municipalities may be adopted in legislating about matters of school management and support, when the school districts are made to conform to the corporate limits of the municipalities, and that the declarations to the contrary in the case of *Lowthorp v. Trenton*, 61 N. J. Law, 484, 40 Atl. 442; *Id.*, 62 N. J. Law, 795, 44 Atl. 755—have been in effect overruled by the later cases of *Hermann v. Guttenberg*, 63 N. J. Law, 616, 44 Atl. 758; *Boorum v. Connelly*, 66 N. J. Law, 197, 48 Atl. 955, 88 Am. St. Rep. 469; and *Lewis v. Jersey City*, 66 N. J. Law, 582, 50 Atl. 346.

A minority of the judges, including the writer of this opinion, have found ourselves unable to adopt this view. We give to the constitutional prohibition of special laws respecting schools an independent force and effect, unqualified by the prohibition respecting municipal legislation. We read it in connection with the constitutional mandate that "the Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years." Assuming that the Legislature might make the schools a matter of special concern to the several municipalities, either by establishing school districts coterminous with municipal districts, but having separate local government, or even by delegating the management and support of the schools to the municipal governments themselves, we are unable to see how the constitutional prohibition of special laws for the management and support of the schools can be thus deprived of effect. Differences in the mode of school

management and support, that are made to depend upon the mere circumstance that one group of schools is located within a "city," and another group located within an "incorporated town," seem to us inconsistent with the Constitution. Such was the decision in the Lowthorp Case, and we are unable to see that that decision has been expressly or by necessary implication overruled up to the present time.

Accepting, however, the view of the majority in the present case as settling the law upon this topic, it follows that if the statute under consideration had made the school districts everywhere coterminous with municipal boundaries, and had based its divergent provisions respecting school management and support upon the common-law classification of the municipalities, the act would have been sustained.

But we are all of the opinion that this act contravenes the Constitution, in that, while assuming to adopt in general the common-law classification, it makes exceptions and distinctions with respect to certain school districts that are arbitrarily set apart and separately legislated about, or left subject to previous legislation, in such a manner as to render the act local and special, within the constitutional interdict. How this is done, we will attempt to point out. As already remarked, article 6 assumes to provide a code of government for "city school districts"; article 7, a code for "township, incorporated town and borough school districts." If all school districts were included in one or the other of these classes, and if each code consisted of regulations uniformly operative upon the class in question, the common-law method of classification would be satisfied. Such, however, is not the case.

The provisions respecting the delimitation of the districts are found principally in section 33 of the act (page 80), which reads as follows: "Sec. 33. Each township, city and incorporated town shall be a separate school district, but each incorporated village and each borough hereafter created, shall remain and be a part of the school district in which said incorporated village or borough shall be situate at the time of its incorporation; and each borough heretofore incorporated which shall not have assumed the functions of a separate school district by the election of a board of education, or which shall not have actually acted as a separate school district, shall be and remain, and shall be deemed to have been and remained, a part of the school district in which it was situate at the time of its incorporation as a borough, any law to the contrary notwithstanding: provided that whenever it shall appear to the State Superintendent of Public Instruction that the best interests of any borough require that it be a separate school district he shall make an order creating such borough a separate school district. Such order shall not take effect until approved by

the State Board of Education: provided further, that nothing in this section shall be construed as abolishing any school district which shall have assumed the functions of and acted as a separate school district by the election of a board of education prior to the introduction of this act, or changing the boundaries of any school district possessing complete official autonomy prior to the introduction of this act, but such district shall be and remain a separate school district until consolidated with an adjoining school district as hereinafter provided."

It will be perceived at once that this section makes little, if any, change in the territorial boundaries of the districts as they existed de facto at the time the act was passed. The case is submitted to us without either findings of fact, or evidence upon which to base a finding of fact, determining the actual bounds of the school districts as they existed prior to this act. If, however, they had been uniformly coterminous with municipal boundaries, the second proviso of section 33 would have been uncalled for. Therefore that proviso amounts to a legislative declaration that there existed certain school districts whose boundaries did not conform to the limits of the municipalities. It is a matter of common knowledge that prior to the year 1894 such nonconformity was the rule, and not the exception. Partly under special charters, and partly under the operation of general laws, the territory of the state had been divided, for the purposes of school management and support, in such manner that a single township or other municipality often comprised several school districts, while certain other school districts were made up of parts of two or more townships, or even parts of two or more counties; and in some instances a single district was so made up as to comprise the whole territory of a municipality and part of an adjoining territory. By an amendment to the general school act of 1874, approved May 25, 1894 (P. L. 1894, p. 506; Gen. St. p. 3055), an attempt was made to render district lines generally conformable to municipal boundaries, but the operation of the act was in this respect limited by certain provisos, notably those contained in sections 23 and 24, which made special regulations with regard to school districts acting under special charters. In the following year a further supplement was enacted (P. L. 1895, p. 114; Gen. St. p. 3062) enabling the boards of education of any two adjoining school districts to alter the boundary line between their districts. And still another supplement (P. L. 1895, p. 508; Gen. St. p. 3067) made special provisions respecting the bounds of certain specially incorporated school districts, and at the same time enabled adjoining districts to become consolidated.

We do not undertake to say whether other laws are to be found upon the statute book, under whose operation school district bound-

aries have been rendered nonconformable to municipal boundaries. Enough has been said to show that section 33 of the present act, by its second proviso, excepts from the force and effect of its earlier clauses a group or groups of school districts set apart by themselves according to arbitrary characteristics that existed at the time of the passage of this act. It would seem that specially incorporated districts that were excepted from the operation of the act of 1894—districts whose bounds had been so altered since that act as not to be coterminous with a municipality, consolidated districts, and any other district that comprised only a part of the territory of a municipality, or parts of two or more municipalities, or the whole of a municipality and part of another—remain as before. In view of the saving clauses, it is difficult to ascribe any force or effect to section 33, in the direction of rendering existing districts coterminous with the municipalities. What its effect might be upon school districts hereafter created, or upon the territory of municipalities hereafter incorporated, need not be considered. Nor are we now questioning the power of the Legislature with respect to establishing the bounds of school districts. Our present concern is with the method of their classification for the purposes of this act. It is plain that this classification does not uniformly follow the common-law classification of the municipalities, for the districts do not uniformly coincide with the bounds of the municipalities themselves. How any exceptions are permitted by the act is obscure, and there is nothing before us to elucidate this question. That exceptions exist is entirely clear. That they are arbitrarily made is equally so.

An examination of articles 6 and 7 will disclose that the governmental regulations therein contained are applicable in terms only to school districts that are coextensive with the bounds of a single municipality. It is at least doubtful whether they apply to a district comprising only a part of one municipality, or comprising parts of two or more municipalities. That they were not intended to be applied in their entirety to all the school districts of the state is rendered quite plain by section 244 (page 165), which is as follows: "In any school district which comprises a municipality and a portion of an adjoining municipality, members of the board of education shall be selected in the same manner in all respects as they are selected in said district at the time of the passage of this act, and moneys for the maintenance of public schools therein shall be ordered, assessed, levied and collected in the same manner as they are ordered, assessed, levied and collected therein at the time of the passage of this act." We should note, also, that part of section 249 which declares that members of boards of education in all township, incorporated town, and borough school districts shall continue to be elected or appoint-

ed in the same manner as said members have been heretofore elected or appointed. Therefore, in respect at least to two principal matters relating to the management and support of the schools (to wit, the selection of the local trustees, and the ordering and raising of moneys for maintenance of the schools), arbitrary exceptions have been made from the general applicancy of articles 6 and 7.

In section 250 we find the declaration that "all school districts shall hereafter be governed solely by the provisions of this act," and a general repealer of inconsistent provisions. It is manifest, however, that this language cannot have the effect of overriding special saving clauses and provisos contained in the act itself. It cannot subject to the provisions of article 6 or of article 7 any school district that is not within the descriptive terms of those articles. Neither can any district, so far as the selection of members of the board of education and the ordering and raising of moneys for school support are concerned, be governed by section 244, and at the same time be governed by inconsistent provisions contained in article 6 or in article 7. In short, the language quoted from section 250 must be construed as bringing all school districts within the provisions of this act, so far and so far only as those provisions in terms apply to any district in question.

Two further clauses of this act require specific mention at this point. In section 246 there is a clause confirming all elections or submissions to the voters of any school district under the general school law of 1900, of the question whether in such district the board of education should be elected by the people or otherwise, with the declaration that in every such district hereafter the board of education shall, if the people have voted in favor of an appointive board, be appointed and organized under the provisions of section 42 of this act, and, if the people have voted in favor of an elective board, they shall be elected and organized under the provisions of section 43 of this act. Section 246 at the same time confirms all elections for members of the board of education held pursuant to the act of 1900, and constitutes the members so elected as the board of education of such school district a corporation, as if organized under section 43 of the present act. Again, there is a proviso appended to section 250 declaring "that this act shall not repeal or affect the provisions of any general act which may have been or which may hereafter be accepted by a vote of the people in any city or school district in this state." Now, under the act of 1900 (P. L. 1900, pp. 266, 207, §§ 45, 46), a referendum upon the question whether the school board should be elected or appointed was granted to every municipality, irrespective of its form of incorporation, provided it were divided into wards. In municipalities not divided into wards there was no referendum, and the members of the

board of education were in all cases to be elected by the people, the only local option being as to the number of members that should constitute the board. P. L. 1900, p. 217, §§ 85, 86, etc. It was this discrimination between school districts in municipalities divided into wards, and school districts in municipalities not so divided, that was held illusory and unconstitutional by this court in *Lewis v. Jersey City*, 66 N. J. Law, 582, 50 Atl. 846. Thus the effect of section 246 of the act of 1902, and of the proviso of section 250, in confirming a referendum therefore held under the act of 1900, is to perpetuate the consequences of an unconstitutional classification of school districts, in a limited number of localities that happen to have taken action under the void law prior to the enactment of the present one. For, under the present act, while a somewhat similar and perhaps identical referendum is open to city districts, subject to some qualifications (P. L. 1902, p. 96, § 80), it is not open to districts that are situate in townships, incorporated towns, and boroughs. The referendum contained in section 249 is not identical, for it relates not simply to the method of selecting the school board, but to the powers of the board and the other provisions regulating the management and support of the schools. If the effect of section 246, in confirming the results of a previous referendum, was to lead to uniformity, it might be supported. *Tiger v. Morris Common Pleas*, 42 N. J. Law, 631; *Bumsted v. Governor*, 47 N. J. Law, 868, 1 Atl. 635; *Governor v. Bumstead*, 48 N. J. Law, 612, 9 Atl. 577.

Now, with respect to cities that are divided into wards, the confirmed referendum does tend to uniformity, because by the act of 1902 they are placed on the same basis as cities not divided into wards; and the circumstances of the referendum having been employed prior to the adoption of the act of 1902 might be treated as immaterial. This is on the assumption that the subject-matter of the referendum was the same under the act of 1900 as under the act of 1902—a point we do not stop to critically examine. But with respect to townships, incorporated towns, and boroughs that are divided into wards, the effect of section 246 is to produce diversity. For those divided into wards that have heretofore employed the referendum must have an appointive school board if they have so voted, whereas townships, incorporated towns, and boroughs that have no wards, and those that have wards, but have heretofore voted for an elective board or did not vote at all upon the question, must hereafter have elective boards.

Returning to section 33, it will be noticed that boroughs are thereby divided into two classes. The territory of boroughs heretofore incorporated, if already organized as a separate school district, is to so remain, unless afterwards consolidated with adjoining territory. In boroughs hereafter in-

corporated, the people are not to have independent school government, unless the State Superintendent of Public Instruction and the State Board of Education shall unite in so determining. If any rational basis exists for this discrimination, it has not been pointed out. Again, sections 81 and 82 seem to embody some arbitrary discriminations respecting the membership of those boards of education that are subject to the provisions of article 7. It is unnecessary, however, to spend time upon the point. We must not be understood as undertaking to make an exhaustive disclosure of all the special features in so voluminous a statute. Enough has been said to demonstrate that the act adheres neither to the common-law classification of municipalities, nor to any legislative classification that is germane to the subject-matter. The classification of school districts is intricate, and not easily followed. Plainly, however, numerous subclasses are dealt with, and these, as a rule, are distinguishable only by unimportant characteristics. As already appears, these minor classifications, as they may be called for convenience, are made the basis of discriminations in the act that have no reasonable pertinency to the needs or circumstances of the districts thus set apart. The classification is purely arbitrary. It was very properly conceded by the learned Attorney General that in this respect the act under consideration is in contravention of the fundamental law.

It is argued, however, that these unconstitutional features may be treated as excrescences upon the general scheme of the act, and may be totally disregarded, leaving the statute in its main features to remain. Upon this question we adhere to the declaration of Mr. Justice Depue, afterwards Chief Justice, speaking for this court, in *Johnson v. State*, 59 N. J. Law, 535, 539, 37 Atl. 949, 950, 38 L. R. A. 373: "It is undoubtedly elementary law that the same statute may be in part constitutional and in part unconstitutional, and, if the parts are wholly independent of each other, that which is constitutional may stand, and that which is unconstitutional will be rejected; but if the different parts of the act are so intimately connected with and dependent upon each other as to warrant a belief that the Legislature intended them as a whole, and that if all could not be carried into effect the Legislature would not have passed the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent upon each other must fall." In the absence of any express declaration to the contrary contained in the act itself, the presumption is that the Legislature intended any given enactment to be effective in its entirety. *Iowa Life Ins. Co. v. East Mut. Life Ins. Co.*, 64 N. J. Law, 340-346, 45 Atl. 762. In seeking the legislative intent, the presumption is against any mutilation of a statute, and the courts will resort to elimina-

tion only where an unconstitutional provision is interjected into a statute otherwise valid, and is so independent and separable that its removal will leave the constitutional features and purposes of the act substantially unaffected by the process.

Assuming the act sub judice to be constitutional in its general features, we might perhaps say that so much of section 246 as undertakes to perpetuate the discriminations that result from the employment of a referendum under a previous unconstitutional statute might be excised as a mere excrescence. But the other discriminations stand, we think, on an entirely different basis. Section 33, for instance, contains in and of itself nothing unconstitutional, unless it be the provisions respecting boroughs. It purports to establish the bounds of the several school districts of the state, and, as already mentioned, it leaves the existing school districts to remain as they stood prior to the passage of the act; no existing school district being abolished or being changed in respect to its boundaries. We are not prepared to say that the Legislature may not by special act create a school district, just as they create new municipalities, by the delimitation of a specified portion of the area of the state for that purpose. What may be done by specific description may be done by reference to other legislation or by reference to the existing status. The unconstitutionality of the present law arises not from the mode in which the bounds of the several school districts are pointed out in section 33, but from the mode in which the act elsewhere makes discriminations between different school districts, with respect to the management and support of the public schools therein, on grounds of distinction that render the act local and special. Moreover, if section 33 were unconstitutional, in enacting that each township, city, and incorporated town shall be a separate school district, while at the same time providing that nothing in the section should be construed as abolishing or changing the boundaries of any existing school district, how can it be said that it is the proviso which contains the unconstitutional feature? The proviso establishes nothing, enacts nothing. It is merely a total or partial negation of what is contained in the earlier part of the section. If we were to strike out the proviso, we should be giving to the former part of the section a meaning that the Legislature has in the same breath declared it was not to have. Manifestly, we should be exercising the functions of a Legislature, not of a court. And if we should attempt to eliminate any portion of the section, by what process of reasoning could we come to the conclusion that the Legislature considered the second proviso—the negative part of the section—less important than the affirmative portion. The proviso has a wider scope than all that precedes it, since it saves from the

operation of the enacting clauses all school districts existing de facto at the passage of the act—that is to say, the entire territory of the state. If, therefore, any part of section 33 can be treated as comparatively insignificant, it would be the enacting clauses, and this would nullify the entire section. Were this done, we should still have the de facto school districts as they stood at the passage of the act, some of them coterminous with the bounds of cities, townships, incorporated towns, or boroughs, and a remaining group not coterminous with any municipality, being either made up of a portion of one municipality, or portions of two or more municipalities, or comprising the whole of one municipality and a portion of another. Then we find article 6 prescribing a code for city school districts; article 7, a code for township, incorporated town, and borough school districts; and section 244, applying especially to those districts which comprise a municipality and a portion of an adjoining municipality, so far as the selection of members of the board of education and the ordering and raising of school moneys are concerned. The very presence of section 244 in this act shows that the provisions of articles 6 and 7 were not intended to apply to composite districts. If, therefore, we could even eliminate section 244 as unconstitutional, it would leave the districts therein described out of the act, unless we could give to the other portions of the act a meaning that the Legislature did not ascribe to them. Nor is the matter much bettered by the declaration in section 250 "that all school districts shall hereafter be governed solely by the provisions of this act," even if we could ignore the second proviso, which saves the provisions of any general act theretofore accepted by vote of the people in any city or school district. Supposing a district to be made up in part of city territory and in part of township territory, by what provision of the act is it to be governed? Is it by article 6, which applies to city school districts, or by article 7, which applies to township school districts? It is impossible to ascribe to the Legislature such an intent; equally impossible to suppose that they contemplated that one set of regulations should apply to one portion of the school district, and another set to the remaining portion.

Our attention is called to a supplement approved March 2, 1903 (P. L. p. 22), by which sections 244 and 250 are amended. Under *Allison v. Corker*, 67 N. J. Law, 596, 52 Atl. 362, 60 L. R. A. 564, the amendments, so far as they go, may relieve the act of unconstitutionality. This could have no effect upon the present decision, however, for this case arose before the passage of the supplement. The effect of the supplement is to strike out the second proviso of section 250, and thereby to eliminate one feature which seems to contribute to render the act unconstitutional. But section 244, as

amended, while conferring upon the board of education in any school district which comprises a municipality and a portion of an adjoining municipality or municipalities the same powers and duties provided in article 7 of the act of 1902, still retains that feature which perpetuates the former method of selecting the boards of education and of raising money for the school support. Little seems to be gained in the direction of generality by subjecting composite districts to the provisions of article 7, for the result is, in the case of a school district comprising a city and a portion of an adjoining township, that the district would be governed by the township code, although the greater part of its territory might be within the city.

For these reasons, the judgment of the Supreme Court must be reversed, and the proceedings under review be set aside, with costs.

RICHARDSON v. HATCH.

(Court of Chancery of New Jersey. Oct. 12, 1906.)

PARTNERSHIP—ACCOUNTING—SETTLEMENT—OVERDRAFTS—INTEREST—FINDINGS.

1. In a bill for the settlement of the affairs of a partnership after the death of one of the partners, evidence held to justify a finding that a settlement had been entered into between the partners on a certain date, at which time their accounts had been balanced.

2. Where, in a suit for the settlement of the affairs of a partnership, it was established that the partners had settled their accounts on a particular date, a finding of a master disallowing the surviving partner's claim for interest on an alleged balance overdrawn by the deceased partner at and before the date of the settlement was proper.

Action by Joseph K. Richardson, as administrator of the estate of Joseph Hatch, deceased, against Hugh Hatch. On exceptions to the report of a master. Overruled.

The bill in this cause is filed by Joseph K. Richardson, as administrator with the will annexed of Joseph Hatch, deceased, and makes as sole defendant Hugh Hatch. The bill alleges that in 1869 Joseph Hatch, in his lifetime, and his brother, the defendant, Hugh Hatch, entered into a partnership for the manufacture of bricks, etc. No written articles of copartnership were made between the parties, and they had no special agreement except that the profits of the concern were to be equally divided between them. The copartnership continued until the 3d day of June, 1898, when Joseph died, leaving a last will, which the complainant in this cause has undertaken to execute as administrator with the will annexed. The bill further alleges that the defendant, Hugh Hatch, the surviving partner, claimed the right to settle up the copartnership business; that he has neglected to present such an account as fully settles the same; that moneys are owing to the estate of Joseph—a settlement which the

complainant is unable to recover without an accounting. He prays that the defendant, Hugh Hatch, may answer without oath, and that he may render an account of the said partnership, so that it may be ascertained what balance, if any, is due to each of the said partners. The answer of the defendant, Hugh Hatch, admits the equal partnership between Joseph and Hugh, states that the real estate owned by the firm has been divided and settled, and that the defendant, subsequent to the death of Joseph, has paid to the complainant, as Joseph's representative, the sum of \$8,265 on account of his interest in the business of the firm, and that by that settlement the interest of Joseph was overpaid \$424.79 by mistake, and that by a true and accurate account between the partners there is a balance due to the defendant from the estate of Joseph to the amount of \$424.27. To the answer as originally filed the defendant has appended a tabular statement of account, giving the amounts placed to the credit of Joseph and of Hugh in the conduct of the partnership business, showing that previous to March 2, 1885, Joseph had considerably overdrawn his account. For this overdraft a summary annexed to the answer charges interest against Joseph's estate. Upon this basis the account filed with the answer exhibits a summary claiming that the final balance in favor of Hugh Hatch is \$424.79. Subsequently the defendant, Hugh Hatch, filed a supplement to his answer, exhibiting additional statements of his transactions as surviving partner since the death of Joseph. It appearing that a statement of account was necessary between the parties, an order of reference was, by consent of parties, made to Richard T. Miller, Esq., one of the special masters of this court, to state an account of the partnership dealings between Joseph Hatch in his lifetime and the defendant, Hugh Hatch, and the transactions of Hugh Hatch as surviving partner since the death of Joseph. Under this consented reference the master has taken some testimony and stated an account, the result of which is that he finds that there is due from the defendant, Hugh Hatch, to the complainant, representing the estate of Joseph Hatch, a final sum of \$6,156.53. Upon the coming in of the master's report the defendant excepted to the master's report by a number of exceptions challenging the master's account between the parties. At the hearing the criticism by the defendant of the account as stated by the master was addressed solely to the matters referred to in the third, fourth, fifth, and sixth exceptions, which are as follows: "Third. Because the master failed to inquire into the accounts between the parties as partners prior and up to March 2, 1885. Fourth. Because the master assumed, found, and reported that the accounts between the parties were settled and balanced at that date. Fifth. Because the master found and reported as follows: 'That the

manner of closing the two accounts of Hugh Hatch and Joseph J. Hatch on March 2, 1885, in the ledger, Exhibit No. 1, of the firm of Hatch & Bro., cannot now be questioned, nor the accounts be opened, by the surviving partner, Hugh Hatch, and that he is liable to the complainant for the one-half of the sum of eight thousand three hundred and twenty-three dollars and fifty-five cents (\$8,323.55), drawn by him from the firm account on January 30, 1898, to balance accounts, in the words of the ledger entry.' Sixth. Because the said master found and reported that there was nothing due from the estate of Joseph J. Hatch to the defendant, and that the defendant is liable to the complainant for one-half of the sum of eight thousand three hundred and twenty-three dollars and fifty-five cents (\$8,323.55), with interest thereon." The master, in stating the account, decided that on March 2, 1885, the decedent, Joseph Hatch, and his brother, Hugh Hatch, who is now the surviving partner, had come to a settlement touching the moneys which the several partners had theretofore drawn from the partnership; that by this agreed settlement previous inequalities of the amounts drawn from the partnership by the several partners were adjusted, and thereafter the amounts severally drawn by them were equal. The master therefore started the statement of account between the parties from the second day of March, 1885. It is undisputed that several months after Joseph's death, Hugh Hatch, the surviving partner, drew from the firm business the sum of \$8,323.55, as he claimed, to balance accounts as between him and Joseph. He arrived at this sum by going behind the settlement recognized by the master to have been made between the parties on March 2, 1885, and charging interest from that date against Joseph's estate on his alleged overdrafts before that date. This claim of the defendant is disallowed by the master, and the disallowance is the ground of several of the exceptions.

The defendant's counsel argues that there is no sufficient evidence of any settlement between the parties on the 2d day of March, 1885, and insists that previous to that time Joseph had drawn from the partnership sums greatly in excess of those drawn by Hugh, and that the effect of the master's account in determining that there was a settlement between the parties on the 2d day of March, 1885, was to deprive Hugh of his right to retain the \$8,323.55 to compensate himself for Joseph's overdrafts precedent to March 2, 1885. It is admitted that the partnership began in 1869 between these brothers. For the first four years no books or accounts are produced to show what amounts were drawn by the several partners from the firm. From 1873 up to the time of Joseph's death, in 1898, a book of accounts is produced, beginning the accounts of the partners in 1873, and showing the several items debited and cred-

ited to them. Neither side challenges either the accuracy of the bookkeeping in this book or the correctness of the entries therein in any particular, save two several items, both entered on the 2d day of March, 1885, one in the account of Joseph Hatch of that date and the other in the account of Hugh Hatch of the same date. These entries are both in the same words and figures and in the same handwriting, and are as follows: "At a meeting of the heirs of J. J. & M. L. Hatch held at No. 206 North 6th St. on March 2/1885 this account was settled by agreement." The master accepted these entries as settlements of the several accounts of the respective parties, Joseph Hatch and Hugh Hatch. The master started at that date to ascertain the amounts thereafter severally due the parties from the partnership, and, having found a balance due Joseph's estate as above indicated, the defendant, Hugh, filed his exceptions. The exceptions were argued by the counsel of the respective parties upon the master's report and account, the evidence returned therewith, and the exhibits produced.

H. F. Carr and D. J. Pancoast, for exceptant. P. V. Voorhees and H. M. Cooper, for respondent.

GREY, V. C. (after stating the facts). There is but one substantial question in controversy between these parties, and that is whether the defendant, Hugh Hatch, in accounting for the partnership assets of the firm of Hatch & Bro., is entitled to consider the accounts between the several partners and the firm for moneys received by them from the partnership preceding March 2, 1885, and to charge the decedent partner, Joseph Hatch, with interest from March 2, 1885, upon the amount alleged to have been by him overdrawn from his share precedent to that date. The whole controversy is conceded to turn upon the question whether, on March 2, 1885, there was in fact a settlement made between Joseph and Hugh, whereby their accounts were balanced at that date. Hugh Hatch claims that the evidence does not justify the master's conclusion that there was such a settlement. The complainant, representing Joseph Hatch, claims that the entries in the books above quoted in the accounts of Hugh Hatch and of Joseph Hatch, respectively, the conversation shown to have taken place at about the date of March 2, 1885, between Joseph and Hugh, and Hugh's own conduct since March 2, 1885, show that at that date the accounts between the partners as to their previous respective drawings from the partnership were balanced, and that thereafter for a period of 10 years they drew coincidentally equal sums each year. In the management of the firm's business it is shown that Joseph Hatch was the bookkeeper from the beginning of the firm's business up to about the year 1896,

when, because of his illness, he went to California, and that his brother Cooper B. Hatch was employed as bookkeeper during the two years of Joseph's absence. Hugh Hatch, in the arrangement of the business, does not appear to have kept any of the books. His attention having been called to the entries of March 2, 1885, balancing accounts, he declares that he does not know in whose handwriting those entries are, and that he did not authorize them to be made, did not think they had any relation to the partnership business, and did not know they had been made until after Joseph's death. The book in which the entries were made contains the accounts of Joseph and Hugh from the year 1873, as well as the general accounts of those dealing with the partnership. The challenged entries are plainly written on the face of page 127 of Joseph Hatch's account and on 129 of Hugh Hatch's account. Immediately following each entry is a double line, indicating a closing of each account in the same manner as they had been theretofore closed each year. Nothing suggests, nor has it been contended, that the entries were made at a different date from that stated in them, March 2, 1885. It is of little importance that Hugh Hatch did not authorize them to be made, if they do in fact express the truth. His statement that he did not think they had any relation to the partnership business is in direct contradiction of the obvious meaning and intent of the entries, and is entirely unexplained, for he does not suggest to what, other than the partnership business, they could possibly refer. This statement, and his claim that he did not know the entries had been made until after Joseph Hatch's death, must both be tested by all the proofs submitted. It is undenied that the book in which these entries appear was kept from March, 1885, when they were made, until after Joseph's death, in 1898, in the office of the firm of which Hugh was an active member, and that it was at all times accessible to his observation. It appears to be the only book of its kind used in the firm's business. It contains accounts against all general customers as well as the partners. This was a period of thirteen years, during the last two of which Joseph was absent, and Hugh alone carried on the firm's business, and was the only person who could explain the entries in the books and the mode of doing business to Cooper B. Hatch, the new bookkeeper who took Joseph's place.

The defendant contends that the entries in the book are not such entries as are admissible to charge a partner with a settlement between himself and his copartner. The book was offered in evidence and admitted before the master, and marked as "Exhibit No. 1" on the part of the complainant, for the purpose of proving these entries, without any objection then taken on the part of the defendant to its admissibility. The defendant himself gives credit to all

the book entries which favor him, for they furnish the basis on which he makes up his account to justify his withdrawal of the large sum he retained after Joseph's death. He challenges only these particular entries which indicate that a settlement was made between the partners on March 2, 1885. It is not claimed that they do not indicate a balancing of the accounts of the several partners at the date named, nor that in the mode of keeping the firm's books such an entry was not proper to express that fact, if there was in truth a balancing of their accounts as therein stated. The defendant claims that in fact there never was such a settlement, and that he never knew that there were entries on the books stating that there was such a settlement, and that they are not, therefore, binding upon him. The proof is that there was a meeting of the Hatch heirs in March, 1885, as is named in the entries; that some seven of them were present; that at that meeting there was conversation between Joseph and Hugh touching the partnership business, and that Joseph stated that he had taken more money out of the firm's business than Hugh had, and that he thought that a great many things counterbalanced it by reason of Hugh's living on the farm and receiving the benefit of that, and Joseph having nothing other than that which he had from the business. It is also proven that Hugh had lived on the farm for about 15 years prior to that time; that before he went there \$800 rent was received for the farm each year, and that after he went there Hugh paid no rent, but said that he had laid it out in improvements. The foregoing account of the meeting was given by one of the sisters, who admitted that she was deaf, and did not hear all that took place. Cooper B. Hatch, one of the brothers, was present at the same meeting, and says that they were talking about the settlement, but does not remember just exactly what it was; that there was a statement made by Joseph about the amount of money which was taken out of the firm, to the effect that he thought that he ought to be entitled to a little larger share; and that to the best of his knowledge there was a settlement made there. No testimony was offered by the defendant in contradiction or explanation of any of these statements, although it is proven that several of his sisters, who were present at the family meeting, might have been, but were not, called as witnesses. There is no proof of any kind that the settlement was not in fact made as entered in the books. There is also evidence which justifies an inference that Hugh Hatch recognized the fact that he and Joseph had in March, 1885, balanced their several accounts with the firm, as stated in the challenged entries. That appears in this way: Before March, 1885, Joseph and Hugh had for years drawn money from the firm in varying sums at different times, and in such a manner that their several drawings of

cash from the business were plainly unrelated. After March, 1885 (when the witnesses testify there was a settlement), there was a radical change in their method of drawing money from the firm. Payments of cash to the several partners were thereafter substantially coincident as to both time and amount of money drawn. When Joseph drew any money, Hugh drew the same amount, thus making in fact a settlement with each other at each payment. This continued for 10 consecutive years after March 2, 1885. It is uncontradictedly proven that at the family meeting in 1885 Joseph's overdraft from the firm was brought to Hugh's attention by Joseph, with a claim that Hugh's advantageous position as occupant of the farm for years entitled Joseph to counterbalance this difference, and that there was a settlement between them. For 10 years thereafter Hugh and Joseph drew cash in equal portions from the firm's business, and nothing appears to indicate that Hugh claimed that he was still entitled to the large balance in his favor which he took from the firm after Joseph's death. With such opportunity to the defendant to see the entries now challenged that it is difficult to believe they were not known to him, and an acquiescence in the conduct of the business of the firm thereafter, which was in entire accord with their significance, and no assertion of his presently claimed right for some 13 years and more after it had accrued, and not until death had prevented all explanation from his copartner, and no showing by the defendant of any reason for his laches, it must be held that he is bound by the settlement which he has ignored.

It is claimed that the defendant is by the law excluded from testifying regarding transactions and dealings with Joseph, and that, if he could only explain, he could show that he was justified in retaining the large sum yet in his hands. In his explanation before the master the defendant was never brought so near to any attempted disclosure of his relations with the decedent that his testimony was challenged. The defendant is no worse hampered by the law than Joseph Hatch's estate is by his death. The defendant did not exhaust the possibility of throwing light on the making of an agreement for a settlement at the family meeting by calling as witnesses the other persons who were present.

Considering the whole case, the master appears to have been justified in finding that there was a settlement between the partners in March, 1885, balancing their accounts, and in holding that the circumstances of the case show that the defendant so acted as to recognize that settlement, and be bound by the entry thereof on the books of the firm.

In retaining the sum which he has kept, the defendant justifies himself as to part thereof by charging interest from March 2, 1885, against Joseph's estate, upon the bal-

ance which he claims was overdrawn by Joseph at and before that date. There is no proof of any contract between the parties for the payment of this interest, nor of any practice between them in charging interest on overdrafts by either from the partnership funds. The master has disallowed this claim for interest. The circumstances proven justify his action.

There is in the testimony some proof regarding an item of \$486.35 of firm assets collected since Joseph's death by the defendant from one Pfeiffer, a debtor to the firm. The testimony of the defendant attempts to show that an equal amount—\$486.35—was paid to the complainant as Joseph's share of this debt. The proof is clear that the defendant did in fact receive in this way \$486.35, and it is equally clear that no such equal amount was paid, either to the complainant or to anybody representing him. The result is that the defendant owes to the complainant one-half part of this collection. The same may be said of the \$402.22 which appears the defendant had in bank as surviving partner. No specific exceptions appear to have been filed to the findings of the master upon these smaller items, and the master's report thereon should be confirmed.

Upon the whole case, the exceptions taken by the defendant should be dismissed, and the master's report should be confirmed, with costs.

(3 Pen. 67)

GEORGE W. EMORY & CO. v. COMMISSIONERS OF TOWN OF LAUREL.

(Superior Court of Delaware. Suffolk. April 6, 1900.)

MECHANIC'S LIEN LAW—MUNICIPAL CORPORATIONS—APPLICABILITY.

1. The mechanic's lien law (Rev. Code 1852, as amended in 1893, p. 818, c. 145), though applying to "all buildings," and to "corporations as well as individuals," does not extend to the waterworks constructed by a municipal corporation.

Mechanic's lien proceedings by George W. Emory & Co. against the commissioners of the town of Laurel. Motion for judgment notwithstanding affidavit of defense. Motion denied.

Argued before LORE, C. J., and SPRUANCE and GRUBB, JJ.

Woodburn Martin, for plaintiffs.

James H. Hughes, for defendants.

The plaintiffs filed a mechanic's lien against Edwin F. Kitson, contractor, and the defendant, for bricks furnished the said contractor for building an engine house for the waterworks for the said town of Laurel. The defendant filed an affidavit of defense setting forth that the said town of Laurel is a municipal corporation, and that the waterworks for the said town are for the public benefit and improvement, and that a me-

¶ 1. See *Mechanics' Liens*, vol. 34, Cent. Dig. § 14.

chanic's lien would not lie, under the statutes of the state of Delaware, against such a building. The statute under which the proceeding is brought is the mechanic's lien law (Rev. Code 1852, amended in 1893, p. 818, c. 145). While, by the terms of section 5 of said statute, said law applies as well to corporations as individuals, it was contemplated that the word "corporation" should include municipal corporations. The statute provides an unusual remedy for the collection of claims for labor and material furnished in the erection of buildings, etc., and is in derogation of the common law. Such statutes are construed strictly. *Endlich* on Interpretation of Statutes, §§ 127, 350; *Suth. on Statutory Construction*, § 428; *Switzer v. City of Wellington*, 40 Kan. 250, 19 Pac. 620, 10 Am. St. Rep. 196. It is well settled by a uniform line of decisions that the waterworks of a municipal corporation cannot be seized and sold on execution process. A claim against such a corporation can only be collected by obtaining a judgment and writ of mandamus, compelling such corporation to raise money by taxation for the payment of such judgment. Such property, not being liable to sale on execution process, is not subject to mechanic's lien, which, under our law, is a specific lien on the building or structure against which it is filed. Such specific lien would not entitle the plaintiffs to a writ of mandamus to compel the defendant to raise by taxation the money necessary to discharge it. Though our statute is broad in its terms, applying to "all buildings," etc., and to "corporations as well as individuals," it must be construed so as not to contravene settled principles of public policy. 2 *Dillon's Munic. Corp.* § 577; *Bolsot on Mech. Liens*, §§ 208, 209; *Com. of Parke County v. O'Conner*, 86 Ind. 531, 44 Am. Rep. 338; *Leonard v. City of Brooklyn*, 71 N. Y. 498, 27 Am. Rep. 80; *Foster v. Fowler & Co.*, 60 Pa. 27; *Harrison & H. Iron Co. v. Council Bluffs City Water Works Co.* (C. O.) 25 Fed. 175, note.

LORE, C. J. We refuse judgment. This is not the ascertainment of the amount of the liability on the part of a municipal corporation for its own debt, but it is the special condemnation of the particular piece of property in execution; a proceeding in rem, as it were. It is sought here to extend the remedy to municipal property. This the courts will not do, unless it is expressly provided for in the statute.

Judgment refused.

(206 Pa. 451)

In re RALEIGH'S ESTATE.

(Supreme Court of Pennsylvania. July 9, 1903.)

WILLS—NATURE OF ESTATE—CONTINGENT INTEREST—CONVERSION.

1. Testator directed his business should be closed up and his debts paid, and thereafter

an annuity paid to his wife of \$2,400 for life, the balance of the income to be divided between his children until the death of his wife. On the death of any one of the children without leaving heirs their portion was to be divided among the others, any lawful heirs of the children to receive their parent's share of the income. The will further provided for division among his living children or their lawful heirs on the death of his wife, giving the youngest child her choice of the shares as they might be allotted by the executors in making the division of the estate. *Held*, that the children took contingent interests.

2. Where executors are empowered to sell real estate to pay the debts of the testator, any surplus remaining after payment of the debts is to be distributed as real estate.

3. A devise of real estate to the heirs of a son does not include his widow.

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Maurice Raleigh, deceased. From a decree dismissing exceptions to an adjudication, Mary F. Kelly Raleigh appeals. Affirmed.

The material portion of the will of Maurice Raleigh was as follows:

"(2) Item. I give and bequeath unto my beloved wife Bridget Raleigh during her life, the house in which we at present reside, No. 1617 N. 5th street, together with all household goods, furniture, books, wearing apparel, pictures, etc., contained therein.

"Also the house next door, No. 1619, N. 5th street, taxes, water, rents, interest on mortgage and repairs of both properties to be paid out of my estate, and at her death they revert to and become part of my estate.

"(3) Item. I do hereby order and direct my executors to pay over to my wife one hundred dollars (\$100) per month, and to each of my children twenty-five dollars per month until all my debts shall be paid and business settled up.

"(4) Item. If it should seem necessary at any time to dispose of a portion of my real estate for the payment of my debts, I hereby give my executors power so to do at either public or private sale.

"(5) Item. I do hereby order and direct my executors to carry out all agreements I may have entered into, leases, etc., the same as I should have done if living, and to exercise their own judgment in reletting and making sales when it would seem wise and prudent so to do, and reinvesting in such securities as the laws of Pennsylvania would require.

"(6) Item. It is my will and I do hereby direct that the business shall be continued by my executors, for the benefit of my estate, until the expiration of the year in which my death occurs.

"(7) Item. It is my will and I do hereby direct, that after my business is closed up and all my debts paid, there shall be paid to my wife by my executors, in the place of

¶ 2. See *Executors and Administrators*, vol. 22, Cent. Dig. § 531.

one hundred dollars per month, an annuity of twenty-four hundred dollars (\$2,400.⁰⁰/₁₀₀) for and during all the term of her natural life; and the balance of the income of my estate from whatever source to be equally divided between my six children, viz.: James, Walter, Mary, Martha, Aggie and Kate, share and share alike—until the death of my wife. In case of the death of one or more of my children without any lawful heirs, their portion shall be equally divided among the others. If any lawful heir or heirs they to receive said amount annually the same as their parents would have had if living; I desire these payments to my wife and children should be made monthly.

"(8) Item. It is my will, and I do hereby direct, that upon the death of my wife, my executors shall divide my entire estate into as many equal proportions as I shall have children living or that should be represented by lawful heirs and make a plain and clear statement of the division, describing the properties and numbering each lot or share and have them of as near equal value as possible, then make the distribution as follows, viz: Give the youngest child her choice of shares, and so on, with those living, according to age, and following with the lawful heirs of any deceased child or children, if any such there be, my executors to represent their interest and to choose for them."

"(12) Item. My executors shall have the power to sell my real estate from time to time as it shall seem wise and prudent so to do, and invest the net proceeds in such securities as the laws of the state of Pennsylvania require."

By a codicil testator directed as follows: "It is my will and I hereby direct that my said executors, B. Lobenthal and Thomas W. Dell shall continue the business of M. Raleigh & Co. under the same firm name for the benefit of my estate as long as they may think prudent and beneficial to the estate, and should they deem it prudent at any time to dispose of a portion of my real estate or to realize upon any securities they may hold in order to place themselves in funds for the successful prosecution of the business they shall have full power to do so without an order from the court."

One son, James Raleigh, died in the lifetime of the widow, leaving surviving a widow and child. The questions were whether the son took a vested interest, and, if he did, whether his widow was entitled to share therein as an heir. The auditing judge refused the claim of the widow of James Raleigh.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Henry J. Scott, for appellant. Samuel Wakelin, for appellees.

POTTER, J. Maurice Raleigh died at Philadelphia, January 10, 1882, testate, and

leaving to survive him a widow, Bridget Raleigh, and six children. He was indebted to various creditors to an amount exceeding \$360,000. James Raleigh, a son of the testator, died intestate September 26, 1896, leaving a widow, Mary F. Kelly Raleigh (the appellant) and one child, Martha Raleigh, of whose estate the Commonwealth Title Insurance & Trust Company was appointed guardian. The debts of the decedent were fully paid at the date of October 1, 1900. Bridget Raleigh, the widow of the testator, died July 6, 1901. By his will, dated March 30, 1879, and duly probated at Philadelphia on January 17, 1882, Maurice Raleigh devised and bequeathed unto his wife, Bridget, the premises at 1617 and 1619 North Fifth street, Philadelphia, with his household goods, for life, and directed his executors to pay her the sum of \$100 per month until such time as his indebtedness should be discharged and his business settled, and to each of his children \$25 per month during such period, and after the payment of his debts and the closing of his business he directed that his widow should have an annuity of \$2,400 during her life, and that the balance of the income during her life should be equally divided between his children. In case any of them died without heirs, then to the survivors; thus indicating the exclusion of collaterals. If any lawful heirs, they were to receive the share that their parents would have taken if living. He further directed that upon the death of his wife his executors should divide his entire estate into as many equal proportions as he should have children living, or that should be represented by lawful heirs, and that his executors should make a plain and clear statement of the division, describing the properties and numbering each lot or share, which should be made as nearly equal in value as possible. The executors were then to make distribution by giving the youngest child her choice of shares, and so on with those living, according to age, following with the lawful heirs of any deceased child or children, if any such, the executors of the testator to represent their interest and choose for them. He appointed Bernard Loebenthal and Thomas W. Dell as executors and trustees, to whom letters testamentary were granted, and who acted as trustees under the will. Prior to the death of the widow the executors filed 10 accounts, but no distribution of the principal was made. The eleventh account was filed September 30, 1901, and showed balances both of principal and income in the hands of accountants. Upon the audit, the appellant, as widow of James Raleigh, claimed that her husband, at the date of his death, in 1896, was entitled to a vested interest in his father's estate, which should be awarded to his administrator when appointed, and also that she was entitled to share in the income of the estate since her husband's death. The auditing judge disallowed both of these

claims, holding that the estate given to James Raleigh was not vested, but was contingent on his surviving his mother, and that the income was to be distributed as real estate (having accrued from the proceeds of sales of real estate made under the powers in the will); that there had been no conversion, and therefore the widow, not being an heir of her husband, could not share in the distribution. The appellant excepted to the adjudication and upon argument before the court in banc the judges were equally divided in opinion. The exceptions were accordingly dismissed, and the adjudication confirmed. The questions involved are: (1) Whether James Raleigh took a vested estate under the will of his father; (2) whether, under the will of Maurice Raleigh, the widow of James Raleigh was entitled, after her husband's death, to share in the distribution of income as one of his lawful heirs.

The testator evidently appreciated the fact that a large indebtedness existed, which would require careful management and some time to discharge without detriment to his estate. He therefore made specific pecuniary provision to a limited amount for the maintenance of his wife and children during that period. After it had elapsed, and the debts were paid, the amounts to be paid the wife and children were increased, but they still bore the impress of distinct specific gifts. In so far as the son James is concerned, the gift of income to him was for the life of the widow, if he outlived her; if he did not, his lawful heir was to receive the same amount annually which he would have received if living. The intention of the testator in this respect is clear. In like manner, upon the death of his wife, the testator provided that in the distribution of the corpus of his estate the heir should be substituted for the parent in case any of the testator's children were not then living, and the right of choice in the division of the properties was expressly bestowed upon the heir. How can the right of the heir to succeed to the share of the parent in the income during the life of the testator's wife, and the equally clear right of the heir to a choice of the real estate at the period of its distribution, be reconciled with the theory that the interest of the son was a vested one? His interest was not one for his life, but its character depended upon his outliving the widow. His share both in income and in principal was contingent upon that event. We regard the provision that in case of the death of a child his heir should be substituted to the parent's share of the income during the life of the widow, and should also exercise the right of choice in the after-distribution of the principal of the estate as annexing the condition of time to the substance as well as to the payment of the gift. It could only go to the beneficiary living at the time of distribution.

In *Rudy's Estate*, 185 Pa. 359, 39 Atl. 968, 55 A.—71

64 Am. St. Rep. 654, a remainder, after the death of the testator's widow, to children, naming them, "if they be living, or the issue of such of them as may then be deceased," was held to be contingent. In the opinion of Judge Ashman, approved by this court, it is said, on page 360, 185 Pa., and page 960, 39 Atl., 64 Am. St. Rep. 654: "In Pennsylvania the rule is well established that, where persons who are to take must be living at a certain time, the gift is contingent, because until the time arrives the persons who will answer to that description cannot be ascertained. Hence a gift 'to such of his children as might then be living' (*McBride v. Smyth*, 54 Pa. 245), or to a child for life, and after her death 'to all her children then living' (*Buzby's Appeal*, 61 Pa. 111; *Delbert's Appeal*, 83 Pa. 462), has been esteemed contingent. It is difficult—perhaps it is better to say impossible—to harmonize the latter cases with *Crawford v. Ford*, 7 Wkly. Notes Cas. 532, and *Laguere's Estate*, 12 Wkly. Notes Cas. 110, where the gift at the end of the life estate was to 'all my children who shall be then living and the lawful issue of such as shall be dead'; or *Manderson v. Lukens*, 23 Pa. 31, 62 Am. Dec. 312, to 'be equally divided among his children which should be then alive'; and *Womrath v. McCormick*, 51 Pa. 504, where the estate was to 'be divided into as many parts as testator should then have children living and be given to his living children and the issue of those dead'—in all of which cases the estates were held to be vested." See, also, *Martin's Estate*, 185 Pa. 51, 39 Atl. 841.

Mr. Justice Sharswood says in *Provenchere's Appeal*, 67 Pa. 463: "There are no arbitrary or unbending rules in the construction of the words of a will. No two wills are in all respects alike. Where, indeed, the same precise form of expression occurs as may have been the subject of some former adjudication, unaffected by any indication of a different intention in other parts of the instrument, the courts, with a view to certainty and stability of titles, will follow the precedent. Counsel can thus be enabled to advise with confidence. Nevertheless the cardinal canon still holds good that the intention of the testator of each will separately is to be gathered from its four corners. Hence almost every general rule has its recognized special exceptions, with exceptions to such exceptions which bring us back to the general rule again, and this may be, and sometimes has been, carried further in the vain attempt to generalize and classify all the decisions upon this most difficult and doubtful subject—the ascertainment of the intention from the words of a man, who in many cases had no intention at all, the question not being present in his mind at the time the words were used. These remarks are particularly applicable to the controversies which have arisen as to whether the future legacies give present vested or contin-

gent interests. The determinations are very numerous—not always reconcilable—and, in the nature of the subject, this was inevitable. Vice Chancellor Sir Launcelot Shadwell has remarked very justly: "The question is one of substance, and not of form. The question in all cases has been whether the testator intended it as a condition precedent that the legatee should survive the time appointed by him for the payment of their legacies, and the answer to this question has been sought for out of the whole will, and not in particular expressions." *Leeming v. Sherratt*, 2 Hare, 14."

In the present case there was no gift of any part of the testator's estate (except legacies of \$100 a month to his widow and \$25 a month to each of his children) "until all my debts shall be paid and business settled up," or, as he puts it again, "after my business is closed up and all my debts paid." The earliest point of time, therefore, at which it could possibly be held that the legacy to James Raleigh of a distributive share in the estate could take effect would be the date of the final closing up of the business and payment of testator's debts. This date was October 1, 1900. But James Raleigh died September 26, 1896, long before that date. Therefore no interest in the share of the estate bequeathed to him ever became vested in him. He was not even a life tenant. His interest was only that of a monthly legatee until the debts were paid. As he died before that was done, the share of income which had gone to him passed to his child as a new object of bounty, until the death of testator's widow, after which the child took one-sixth of the corpus. This was the manifest intent as shown in the will. We do not regard this case as one of a clear life estate to the widow, with remainder to the children, free from conditions as to the period of vesting and time of enjoyment. The will created an active trust to operate through two specific periods of time before there could be any vesting, or any ascertainment of the parties who would take the corpus of the estate.

The remaining question—as to the right of appellant to share in the income—depends upon whether there was a conversion of the real estate under the will. That there was no conversion effected by the will is clear from the doctrine of *Oliver's Estate*, 199 Pa. 509, 49 Atl. 215, and *Yerkes v. Yerkes*, 200 Pa. 419, 50 Atl. 186, and the later case of *Sauerbier's Estate*, 202 Pa. 187, 51 Atl. 751, where the authorities are considered at length in a learned opinion by Judge Bland, affirmed by this court. There being no conversion, the income was the proceeds of real estate, and distributable as such. The gifts to the "heirs" of James Raleigh did not include his widow. *Dodge's Appeal*, 106 Pa. 216, 51 Am. Rep. 519; *Lesieur's Estate*, 205 Pa. 119, 54 Atl. 579.

The assignments of error are overruled, and the decree of the court below is affirmed.

(206 Pa. 429)

In re MIFFLINVILLE BRIDGE.

(Supreme Court of Pennsylvania. June 2, 1903.)

RAILROADS—GRADE CROSSINGS—PETITION—INJUNCTION.

1. Act 1901 (P. L. 531) provides that railroad crossings of highways hereafter established shall, except in certain cities, be above or below the grade thereof. *Held*, that the fact that a grade crossing of a railroad over a highway is incidental to the relocation of an existing highway under the act of 1836, giving the court of quarter sessions jurisdiction in such matters, does not relieve such crossing from the provision of section 1 of the act of 1901, providing that all crossings hereafter established shall be above or below grade.

2. In a petition under Act June 7, 1901, to locate a grade crossing of a railroad over the approach to a county bridge, it was alleged that the railroad tracks were so far removed from the bridge as to be under the control of the township authorities, who were not before the court, and not of the county commissioners, who had charge of the erection of the bridge. *Held*, that a decree dismissing the petition on the ground that the proceedings in the quarter sessions under Act 1836 (P. L. 555) were conclusive should be affirmed by reason of the facts in the case, and defendant railroad company relegated to a bill of injunction to restrain the highway commissioners from so constructing the bridge as to cross the railroad at grade.

Appeal from Court of Common Pleas, Columbia County.

In the matter of the petition to regulate a grade crossing at Mifflinville Bridge. From a decree dismissing the petition, defendant Pennsylvania Railroad Company appeals. Affirmed.

The following is the opinion of the court below, filed by Little, P. J.:

"This is a proceeding instituted by the county commissioners under Act 1901, § 4 (P. L. 531), which, by its terms, became effective on June 1, 1902. The petition recites that under certain proceedings had in the court of quarter sessions for the location of a county bridge across the Susquehanna river at Mifflinville, the proceedings of such county bridge were confirmed absolutely on July 7, 1902. The petitioners further aver in their petition that the southern end of the bridge crosses the tracks of the Pennsylvania Railroad Company. It also recites further proceedings had by the county commissioners for the construction of the bridge and other matters, and prays for the court to make an order to establish a grade crossing of the railway, and for gates, signals, and other safeguards to be maintained by the railroad company, and assigns nine separate reasons why the court should make the order asked. Answer was filed by the Pennsylvania Railroad Company, respondent, and a hearing was had. Upon the hearing testimony was offered on the part of the petitioners respecting the desirability and the necessity of a crossing at grade of the right of way of the railroad company. The respondents offered testimony as to the desirability for an overhead crossing. From the evidence produced

at the hearing it appears that on July 29, 1902, the commissioners entered into a contract with one Charles H. Reimard for the construction of the bridge and the approaches thereto as far as the wing walls, and that the same be completed by August 1, 1903, for the price of \$93,985. The contractor is actively engaged in the construction of the bridge. The proposed bridge is so designed as to meet the highway on either side of the river at grade. In order to do this, the floor at the southern or Mifflinville end of the bridge will be six feet or more higher than the floor at the northern abutment. The respondents' proposed plan for an overhead crossing of the tracks of their railroad, affording nineteen feet in the clear above the level of the tracks at the point, involves an addition to the height of the piers of the bridge as already planned and contracted for, by the addition of steel cylinder piers three-eighths of an inch in thickness, securely fastened to the piers as designed, and to be filled with concrete, and the floor of the bridge placed upon an incline from the northern to the southern abutment. The addition added to the southern pier will be some eighteen or more feet in height, and also the construction of an additional pier on the south side of the railroad company's right of way. That the increased cost of the construction will be some \$16,300, of which sum the respondents have offered to the county commissioners to contribute the sum of \$12,000.

"We are of the opinion that the act of 1901 (P. L. 531) under which this proceeding was instituted has no application to the facts here. The purpose of the act was not to abolish all grade crossings. The act is entitled 'An act relating to railroad crossings of highways, and for the regulation, alteration and abolition of grade crossings, except in cities of the first and second classes.' Its first section provides: 'That, except as in this act elsewhere provided, all crossings, hereafter established, whether of highways by railroads or of railroads by highways, shall, except in cities of the first and second classes, be above or below the grade thereof.' The second section relates to railroad companies constructing new lines of railroad. And the third section provides: 'Every municipality or other authority, hereafter constructing a highway, * * * across an existing railroad, shall construct the same above or below the grade thereof, unless permitted, in the manner hereafter provided, to construct the same at grade, and the cost of said work shall be paid one half by said municipality and one half by the railroad company owning said railroad.' Its fourth section provides: 'Whenever it shall be desired by any railroad company, constructing a new railroad, or by any municipality or authority, constructing a new highway, except in cities of the first and second classes, that the railroad or highway should be so

constructed that the railroad and highway shall cross each other at the same grade, a petition shall be presented by the party desiring such construction to the court of common pleas of the district within which said crossing is situated, upon ten days' notice to the corporation owning said railroad or to such municipality or authority, describing the proposed construction, and setting forth the reasons that are supposed to make the same necessary and desirable; and the court of common pleas shall thereupon have jurisdiction of the parties and the subject-matter of such petition, and may proceed summarily or otherwise, and upon such notice as it shall deem sufficient, to examine the matter, either by evidence, by reference to a master or commissioners, or otherwise, and if satisfied that such construction is reasonably required to accommodate the public or to avoid excessive expense in view of the small amount of traffic on the highway or railroad, or in view of the difficulties of other methods of construction, or for other good and sufficient reasons, then it shall make an order or orders permitting such crossing at grade to be established; and it may, in such orders, in its discretion, prescribe what gates, signals or other safeguards shall be maintained by the railroad company, in addition to the signals and safeguards prescribed by the statute; and all such orders shall be binding upon the parties, and shall be observed by them; all costs and expenses of the proceedings shall be ascertained and allowed by the court of common pleas, and shall be paid by such party as it shall decide, or be by it apportioned between the parties, and may be collected by execution out of said court.' The tenth section of the act briefly provides that 'nothing in this act shall prevent any railroad company from laying additional tracks on crossings previously existing, or from constructing switches and sidings and branch lines from their lines of railroad, now or hereafter constructed, to any mill, factory or other manufacturing establishment, * * * or from laying additional tracks to increase their yard facilities at terminal or other points, across public highways at the grade thereof, outside of the corporate limits of cities of the first and second classes; but such sign posts and signals shall be employed for the protection of such crossings as are by law prescribed for railroad crossings of public highways.' It will be observed that this act relates to crossings hereafter established, first by railroad companies constructing new lines of railroad and any municipality hereafter constructing a new highway, while the tenth section allows crossings at grade of highways by railroad companies as mentioned in that section. There is nothing in the act which in any way interferes with the jurisdiction of the court of quarter sessions under the act of 1836 (P. L. 555). The jurisdiction of the court under that act could not be interfered

with except by some express legislative provision. The proceeding for the location of this Mifflinville bridge was not a proceeding for the location of a highway under general law, but for the location of a county bridge to connect parts of an existing highway under the thirty-fifth, thirty-seventh, and thirty-eighth sections of the act of 1836 (P. L. 560, 561).

"A petition was presented to the quarter sessions, asking for the appointment of viewers for the location of a bridge 'over the north branch of the Susquehanna river * * * at a point where said river crosses the public road or highway leading from a point in the public road between Bloomsburg and Berwick, near the village of Willow Grove, to the village of Mifflinville.' At the next February sessions, 1901, the viewers made report in favor of the bridge, and under the powers conferred upon them by the thirty-seventh and thirty-eighth sections of the act they further reported: 'That we have carefully examined the routes of the road crossing the said river over which the bridge is prayed for, and are of the opinion that the changes or variations in the bed of the said road would be an improvement and saving of expense in the erection of said bridge, which variations we have caused to be accurately surveyed, and have returned a plot thereof with this our report, said changes being as follows: * * * At the southern end of said proposed bridge, beginning at a point in the northern line of First street in the village of Mifflinville, 270 feet west of the western line of Market street; thence across the village common north, twenty-one degrees west, 139 feet, to the right of way of the N. & W. B. R. R. Company; thence crossing said right of way at grade north, twenty-one degrees west, 130 feet to the southern abutment of said bridge, said abutment standing on said commons at high-water mark.' The viewers were authorized to make that change in the highway. The statute gives the bridge viewers authority to report also whether any change in the course or bed of the road to be connected therewith will be necessary in order to the erection of said bridge at the most suitable place or in the best manner, * * * and cause every such variation to be accurately surveyed, etc. Sections 37, 38, Act 1836 (P. L. 561). There is no ground for the contention now made that the road, as shown by the draft accompanying the report of viewers, from First street in Mifflinville to the southern abutment of the proposed bridge, is a new road. The case *In re County Bridge* (Pa.) 24 Atl. 695, was one in which the viewers exercised the powers of changing the bed of the highway, as was done by the viewers in the present proceedings. The second exception to the report of viewers there alleged that the viewers unlawfully laid out two entirely new roads, and vacated no part of the old highway. The exceptions were dismissed, and

the report confirmed absolute. The order was affirmed by the Supreme Court. This action of the viewers did not lay out a new or additional public road, or establish a new or additional grade or other crossing of the tracks of the railroad company. The result of their action on the south side was to change the bed of this previously existing road leading from the village on the south side of the river to the north village on the north side, where it intersects First street in Mifflinville, westwardly far enough to be in line with the southern abutment of the proposed bridge. In this highway between the two villages there has been a grade crossing for a number of years. Probably it was located and constructed when the railroad company laid its tracks at the grade of that highway, and when the bridge viewers made this change in the bed of the road the crossing was thereby changed as a necessary incident to the use of the highway as changed. The words employed by the viewers, 'thence crossing said right of way at grade,' have no special significance. They are rather descriptive of what the viewers saw as forming part of the highway. While a county bridge is a part of the highway, yet this act of 1901 does not require an over or under crossing where, as in this instance, a grade crossing has long since been in use in the highway, parts of which the bridge was designed to connect. The judgment of confirmation absolute of these bridge proceedings July 7, 1902, became conclusive, unless appeal was duly taken. The bridge was established by that decree. The duty devolves upon the county to build and keep this and all other county bridges in repair, as well as the approaches thereto. The approach to the bridge is a part of the bridge itself. The township road terminates where the approach begins. In *re Catawissa & Main Twp. Road*, 17 Pa. Super. Ct. 21; *Westfield Boro. v. Tioga County*, 150 Pa. 152, 24 Atl. 700. This road leading from the village on the south to the north side of the river, the bed of which is changed, will be required to be taken care of by the supervisors of the respective townships, as formerly. It is a mistaken view urged on the part of the petitioners that the southern approach of this bridge extends to First street.

"Being of the opinion that the decree of the court of quarter sessions confirming these bridge proceedings is now conclusive, and, in view of what the county commissioners have done subsequent to that decree, that certain rights of the contractor have attached, we should feel reluctant to make any changes in the construction of this bridge, unless great necessity required it, even if there were a statute which expressly provided for such change. The respondent's proposition involves a change in the proposed construction as already planned and designed. By reference to the testimony of Oscar Thompson, a witness produced by the respondent,

this change would appear to be of doubtful propriety. The respondent's proposed change of this bridge so as to accommodate an overhead crossing would greatly enlarge the bridge, and increase the cost of its construction. It has been held that 'where a bridge is to be enlarged or improved, viewers should be appointed as for a new bridge.' *Riddle v. County Com'rs*, 3 Delaware County Rep. 165. The circumstances here show that the second section of the act of April 11, 1848 (P. L. 507), would present another barrier to the accomplishment of such purpose, because the contractor and county commissioners have not agreed to the proposed alteration. The point of crossing of the railroad company's right of way can be observed for quite a distance eastwardly, and at a much greater distance westwardly. The court of common pleas will make no order which will in any way affect the judgment of the court of quarter sessions entered July 7, 1902. And therefore, for the reasons hereinbefore given, it is now ordered that these proceedings be dismissed, at the cost of the county of Columbia."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

H. M. Hinckley and L. E. Waller, for appellant. Herring and J. B. Robinson, for appellee.

PER CURIAM. The settled policy of this state, legislative and judicial, is against the further increase of grade crossings. The act of June 19, 1871 (P. L. 1361) gave the courts jurisdiction over crossings of one railroad by another at grade, and this court has more than once expressed its regret that the control did not extend to the crossing of a railroad and an ordinary highway. This control the act of June 7, 1901 (P. L. 531), has now given. Any grade crossing which thereafter comes before the court, comes with a heavy burden of proof upon it.

Under the conceded facts the crossing involved in this controversy is a new grade crossing, and as such is prohibited by the act of 1901. The fact that it is incidental to the relocation of an existing highway under the authority of the act of 1836 does not relieve it of the ban of the act of 1901. The language of section 1 of the latter act is that "all crossings hereafter established" shall be above or below grade. This is a crossing in a different place, and is therefore "established" after the date of the act. The command of section 1 is peremptory and universal except in the single instance specifically prescribed. The court of common pleas is authorized under section 4 to permit a grade crossing under certain conditions. But this jurisdiction must be exercised in the mode pointed out by the statute, and is exclusive. There is no substitute for it, either in manner or form. The proceedings in the present case in the quarter sessions to authorize the bridge and the reloca-

tion of the old highway were wholly irrelevant. They were in a different court having no jurisdiction over this subject, and the accidental fact that both courts were held by the same judge did not mingle or combine their separate jurisdictions. The discretion of the common pleas under the statute can only be exercised in a direct proceeding for the purpose in the proper court.

A technical objection to a review of the decree is based on the ground that the appellant, in its answer, asked that the petition be dismissed, and that the prayer was granted. With the reasons given by the court in its opinion it is said we have no concern. This point is not free from difficulty. In an action at law the opinion of the court is not part of the record, and the judgment is the only matter strictly reviewable. In a proceeding in equity the rule is otherwise, and the chancellor's reasons are proper subject of consideration. The proceeding in the present case was unknown to the common law, and the statute, by committing it to the discretion of a judge, who may proceed summarily in such manner as he thinks best, and by the latitude of powers with which it invests him, and in other ways, has assimilated it closely to a proceeding in equity. Whether, therefore, we might not take up the case as if upon an appeal in regard to an injunction is far from clear. But some questions have been raised as to the facts. It is said that the duties of the county commissioners end at the bridge, and the railroad tracks are so far from it that the construction of the crossing will be the work of the township authorities, who are not before us. Under these circumstances we have thought it best, without deciding the other question, to turn over the appellant to the more plastic and convenient remedy of a bill to enjoin the construction of the bridge in such manner as will require the highway to cross the railroad at grade.

This appeal is therefore dismissed, without prejudice.

(206 Pa. 438)

NORRIS v. CROWE et al.

(Supreme Court of Pennsylvania. July 9, 1903.)

CONTRACT—CANCELLATION—MISTAKE OF LAW—REMEDY AT LAW.

1. An owner, under threat of payment of principal, agreed to reduce the rent from 6 to 5 per cent. Both of the parties were ignorant at such time of the decision of the Supreme Court that such a ground rent as was in question was an irredeemable one. *Held*, that a bill would not lie by the owner of the ground rent to cancel the agreement for a mistake in law.

2. A bill in equity will not lie to cancel an agreement to reduce ground rent as made in mistake of law, plaintiff having a complete remedy at law by an action to recover the ground rent as provided for in the original agreement.

¶ 2. See Cancellation of Instruments, vol. 3, *Cent. Dig.* § 7.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Isaac Norris against James Crowe and the Ninth United Presbyterian Congregation of Philadelphia. From a decree dismissing the complaint, plaintiff appeals. Affirmed.

The following is the opinion of the court below, filed by Willson, J.:

"On December 7, 1866, Charles Norris et al., trustees of the Fairhill estate, and Samuel Norris, made a conveyance to James Crowe of a certain lot of ground situate on the west side of Hancock street and south side of Susquehanna avenue, reserving thereout a yearly six per cent. ground rent of \$340, payable in equal half-yearly installments on the 1st day of January and July in each year thereafter. The deed also contained a provision that in case the grantee, his heirs and assigns, should, within ten years from the date of the deed, pay to the grantors, or their heirs or assigns, the sum of \$5,668.67, and the arrears of rent, the rent reserved should cease and be extinguished. The said James Crowe took title to the said premises only to hold it for the benefit of the church of which he was pastor, and subsequently, on December 13, 1893, by deed duly recorded, he conveyed the same to the Ninth United Presbyterian Congregation of Philadelphia, the defendant in this case. By proceedings in partition the estate in the grantors became vested in Isaac Norris, Sr., and subsequently in the plaintiff in this proceeding.

"The proper discussion of the case does not require any fuller recital of the matters which have been referred to. The real controversy arises upon what took place in the year 1891. The bill averred that in May of that year a committee of the defendant corporation called upon J. Parker Norris, the brother of the plaintiff, and who acted for him, and informed the said Mr. Norris that the defendant would pay off the ground rent, unless the yearly rent was reduced from six to five per cent. per annum. In consequence of this movement on the part of the defendant corporation, an agreement under seal was entered into between the plaintiff, acting by his brother, J. Parker Norris, and the defendant, in the following language:

"Memorandum of agreement made this twelfth day of June, A. D. 1891, between the Norris Square United Presbyterian Church of the one part, and Isaac Norris, M. D., of the other part.

"Witneseth, that in consideration of the said Isaac Norris, M. D., not demanding more than five per cent. interest on a certain annual ground rent reserved by deed dated December 7, 1866, the said Norris Square United Presbyterian Church, doth hereby agree that they will not pay off the principal of the said ground rent until the expiration of five (5) years after the first day of July, 1891, and the said Isaac Norris, M. D., doth hereby promise and agree that he will not,

at any time, ask, demand, or sue for more than five per cent. interest on said ground rent so long as the said church continues to pay the same with reasonable punctuality.

"Witness our hands and seals the day and year aforesaid.

"Isaac Norris, M. D.

"By His Attorney in Fact,

"J. Parker Norris. [Seal.]

"Robert G. Bitten,

"[Corporate Seal.] President.

"C. W. Crowe,

"Secretary Board of Trustees."

"At the time this agreement was entered into, all parties concerned in it were of the impression that the defendant corporation had a right at any time to make payment of the principal sum of the ground rent, and thereby extinguish the ground rent; in other words, that the ground rent was a redeemable ground rent. They were not aware that it had been decided by the Supreme Court in *Palaret v. Snyder*, 106 Pa. 227, that, upon the failure of the covenantor in the ground rent deed to pay the principal sum within the time limited in such a deed, the ground rent became irredeemable. However, it must be regarded as beyond question that if Dr. Norris, acting through his attorney in fact, had not consented to the reduction of the annual rent, and the defendant corporation had carried out its expressed intention of paying off the said rent, payment would have been received, and the ground rent would have been extinguished. This, no doubt, would have been done under a mistaken view of the law. At the same time, if it had been carried into effect, the act would unquestionably have been beyond recall. The plaintiff, by this proceeding, endeavors to have the agreement referred to abrogated, and to reinstate himself in the position in which he was before that agreement was entered into, notwithstanding for a period of about ten years the church corporation has paid the annually accruing ground rent as reduced, and the same has been accepted by the plaintiff. It is claimed that this can be done, because the parties entered into the agreement in question under a mistaken view of the law.

"Suit was brought in this court upon the ground-rent deed against the defendant in March, 1901, for the purpose of recovering the amount due on January 1, 1901, at the full rate of six per cent. instead of five. In that proceeding the defendant filed an affidavit of defense, setting up the matters which have been previously stated, and the court, after argument, refused to enter judgment for the plaintiff. Nothing further has been done in that case since the refusal to enter judgment. We are now asked to decree that the defendant shall surrender for cancellation the agreement before mentioned, and be enjoined from setting up the agreement as defense in the action at law referred to, or in any future action. It seems to

us that it would be a sufficient reason for us to sustain the demurrer which has been filed in this case that the plaintiff has a full and complete opportunity, in the case at law which he has brought, to have the question upon which he relies fully and conclusively determined as between him and the defendant. In other words, he has a full and adequate remedy at law, and he has, by instituting action upon the covenant contained in the ground-rent deed, already attempted to bring the question which is now at issue to determination upon the law side of the court. Nevertheless, it may be well for us to go further in the case, and express our views in regard to the main question involved in it.

"As has already been said, the parties to the agreement reducing the amount of annual rent from six to five per cent. entered into it with a mistaken view as to what their legal rights were. Ordinarily, parties will not be relieved against the consequence of a mistake of the law, even though it be mutual. This principle is so fundamental as to have been embodied in a well-known maxim. It may be true, as has been argued before us, that the rule has its exceptions, and that where the mistake has been one which does not involve ignorance of a general principle of the law, but rather ignorance as to the legal effect of a particular agreement or transaction in which the parties are interested, then a court of equity may relieve against the effect of a mistake, in order to avoid manifest injustice. Even the presence of seals attached to such an agreement might constitute no obstacle to relief, notwithstanding the general principle that the presence of a seal imports a consideration. If, however, the case required us to pass upon the question, we are inclined to the opinion that the plaintiff could not have the relief which he seeks upon the ground relied upon by him, viz., that his case falls under an exceptional class of a mutual mistake relative peculiarly and exclusively to the rights of the parties growing out of a particular agreement or transaction, as distinguished from a mistake concerning a general and larger principle of law. We rather think that, even upon that aspect of the question, the plaintiff ought to be held to his agreement by an application of the general and salutary principle which has been referred to that, when two persons solemnly enter into an agreement, and act upon it for a term of years on the common understanding that an advantage accrues to one of the parties or a disadvantage to the other, the fact that there was a mistake made as to their legal rights and obligations will not relieve either party from an obligation so entered into and acted upon. Besides, it is impossible not to be influenced by the thought that the agreement which the parties entered into, although it was made under a mistaken view of the law, withheld the defendant corporation from taking such steps as would have resulted in an extin-

guishment of the ground-rent estate. Such an extinguishment was evidently not desired by the plaintiff or his representative, and it was averted by the making of the agreement which the plaintiff now endeavors to set aside. That was a real advantage which he thus secured, and he obtained it by entering into a formal agreement, to which he attached the ordinary evidence of a valuable consideration. For the reason stated, we think that he must be held to the bargain which he then made, and that he cannot be relieved from it, notwithstanding he and the defendant now know and admit that they acted under a mistaken impression of what their legal rights and obligations were.

"The demurrer must, therefore, be sustained and the bill dismissed, with costs."

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

John G. Johnson and Horace M. Rumsey, for appellant.

DEAN, J. In this appeal appellee has given us no aid by filing a paper book, and we are left to dispose of the issue by the presentation of appellant's side of it and on the carefully considered opinion of the learned judge of the court below. The facts are about as follows: On December 7, 1866, the trustees of the Norris estate conveyed to Rev. James Crowe, minister of the Ninth Presbyterian Congregation of Philadelphia, a lot of ground on the corner of Hancock street and Susquehanna avenue, reserving thereout a yearly 6 per cent. ground rent of \$340. Afterwards, in 1893, the Reverend Crowe conveyed the property to his congregation, which at that date had become incorporated. By proceedings in partition of the estate of Isaac Norris, Sr., in 1867, this particular ground rent became the property of Dr. Isaac Norris, this appellant. J. Parker Norris, his brother, was in 1891 his attorney in fact, and in that year a committee of the church corporation called upon and notified him that, unless the ground rent was reduced from 6 to 5 per cent., the congregation would pay it off. Both parties assumed that the ground rent was redeemable, and therefore could be paid off at the option of the lot owner. It was agreed that the reduction to 5 per cent. should be made, but that the option should not be exercised for five years. Thereupon the following agreement in writing, signed and sealed, was executed: "That in consideration of the said Isaac Norris, M. D., not demanding more than five per cent. interest on a certain annual ground rent reserved by deed dated December 7, 1866, the said, the Norris Square United Presbyterian Church, doth hereby agree that they will not pay off the principal of the said ground rent until the expiration of five (5) years after the first day of July, 1891, and the said Isaac Norris, M. D., doth hereby promise and agree that he will not, at any time, ask, demand, or sue for

more than five per cent. interest on said ground rent so long as the said church continues to pay the same with reasonable punctuality." The case of *Palairret v. Snyder*, 106 Pa. 227, appeal from common pleas No. 1 of Philadelphia, had been decided by this court in 1884. The reservation of ground rent in that deed was substantially the same in terms as in the one before us, and we held the ground rent was irredeemable. Although that case had been the law for seven years, both parties were ignorant of it. The congregation thereafter continued to pay the ground rent at 5 per cent. as stipulated in the agreement, and Norris continued to accept the same without objection until January 28, 1901, when Norris discovered the decision in *Palairret v. Snyder*, and concluded that his ground rent was irredeemable. He at once demanded from the congregation 6 per cent., and on refusal to pay brought assumpsit in common pleas No. 4 of Philadelphia. To this the congregation filed an affidavit of defense denying liability for more than 5 per cent., and averring the stipulation in the agreement as limiting liability to that amount. While the record of the action at law stood in this condition, on January 10, 1902, Norris filed this bill, praying that the agreement be declared void, and that it be delivered up for cancellation on the ground that it was entered into under a mistake as to the law by both parties, and further specially praying that defendant be enjoined from setting it up as a defense in the action of assumpsit. The defendant demurred on the grounds that an action at law involving the same matter was then pending, and that on the face of the bill plaintiff had no equity of which a court of equity would take jurisdiction. The court below sustained the demurrer, and dismissed the bill, first, because plaintiff had an adequate remedy at law; and, second, because the mistake of law was one which, under the facts averred in the bill, equity would not relieve against.

We think that plaintiff had an adequate remedy at law. He had brought his action in assumpsit and defendant had filed affidavit disclosing fully its defense, based on the agreement. At the trial plaintiff would have offered his deed of 1886 to Rev. Crowe reserving his 6 per cent. ground rent. Defendant would then have put in evidence the agreement of June 13, 1891. Plaintiff would then have replied with evidence of mutual mistake of the law by the parties. It would then have been for the court to interpret the agreement and declare its effect in view of the undisputed evidence, and to have directed a verdict. Why would not this have been an adjudication of the very issue raised by this bill and demurrer? It is suggested that it would not have been an adequate or convenient remedy, because suits could still have been brought in the future for each 6 per cent. annual ground rent as it fell due. We do not think so. The judgment would

have been res adjudicata as to whether the ground rent was 5 or 6 per cent. If plaintiff had won, he could have brought suit for 6 per cent., and defendant could have defended only on proof of payment of that rate; but, if defendant had won, and plaintiff had sued for 6 per cent., plaintiff would have lost his case. Obviously one suit at law would have ended litigation. We think the remedy at law was both adequate and convenient, and that the court below might properly have dismissed the bill on this ground alone. But probably because the same question would have had to be determined in the action at law—that is, the effect of the agreement made under a mutual mistake of law—the court saw fit to go further, and determine whether on the facts the plaintiff should in equity be relieved from the consequence of it. The maxim, "*Ignorantia legis neminem excusat*," undoubtedly applies where the ignorance is of a well-known rule of law, or, as it is sometimes stated, ignorance of a general rule of law; but where the ignorance of the law is specially applicable to the determination of a private right, and the ignorant party complains because he has been prejudiced by the contract, it does not follow that equity will in all cases afford relief. By simply filing a demurrer, of course, the defendant admits the material averments of the bill, and the material averment is that the agreement was prompted by a mutual ignorance of the law as applicable to reservations of ground rent in the terms incorporated in this deed; both parties acting in the belief that this ground rent was redeemable, whereas in law it was not. Will equity, under these facts, afford plaintiff relief from the consequences of his ignorance of the law? Under what circumstances and as to what contracts the maxim would be enforced seems to have been first fully discussed by this court in *Good v. Herr*, 7 Watts & S. 253, 42 Am. Dec. 236, in an elaborate opinion by Rogers, J. In that case a childless man died intestate possessed of a large estate in land, leaving a widow, two brothers, and a sister living, and nephew and nieces, children of two brothers who were dead. The widow accepted one of the purparts of the land at the valuation of \$20,000, and entered into recognizance to pay to all persons entitled thereto, their respective shares. She paid to each of the brothers and the sister living one-fifth, and to the children of each deceased brother as representing their fathers per stirpes one-fifth. All parties believed at the time that the payments were in accord with the law of descent. All were ignorant that the two uncles and aunt were entitled to the whole, and the nephews and nieces to nothing. All, on receiving the money, executed releases to the widow. One of the surviving brothers having, after receiving the money and executing the release, died, his administrator discovered that instead of one-fifth he had been entitled to one-third, and brought suit against

the widow for the difference. When she set up the release, he sought to avoid it by showing mutual ignorance of the law of descent by all parties; each being of the belief that the children were entitled to the shares of their parents. There was no question but that at the time of the distribution all parties were ignorant of the law, and that was the only fact on which the release could be treated as void. By sustaining it the surviving brothers and sister lost two-fifths of the estate; by declaring it void the widow would have had to pay over again the two-fifths paid to the nephews and nieces. There was no serious hardship in the case. The estate remained in the family of the dead brother. His brothers and sister got a fraction less than the law allowed them; the nephews and nieces a fraction more. It was a case of ignorance of the law alone, and this court declined to set aside the release. In the opinion the court cites a number of authorities from the Supreme Court of the United States, as well as Story's Equity Jurisprudence, in support of the rule that mere ignorance of the law itself is no ground for relief in equity, and concludes thus: "We grant that, where there is a mistake of a clear, well-established, and well-known principle of law, whether common or statute law (for in this respect we can conceive no difference), equity will lay hold of slight circumstances to raise a presumption that there has been some undue influence, imposition, mental imbecility, surprise, or confidence abused; but it is obvious that in such cases the mistake itself is not the foundation of relief, but the relief is had on entirely independent grounds, so as not to impinge the general rule. We are therefore of the opinion that in no case is ignorance or mistake of the law with a full knowledge of the facts *per se* a ground for equitable relief." Justice Rogers admits there are rare exceptions to the rule, and we concede that the trend of decision in our state has been to multiply the exceptions, as witness *Heacock v. Fly*, 14 Pa. 540; *Peters v. Florence*, 38 Pa. 194; *Gross v. Leber*, 47 Pa. 520; *Whelen's Appeal*, 70 Pa. 410; *Goettel v. Sage*, 117 Pa. 298, 10 Atl. 889; *Wilson v. Ott*, 173 Pa. 253, 34 Atl. 23, 51 Am. St. Rep. 767; and perhaps others; but in each of the cases cited the relief granted was not based solely on the ground of ignorance of the law, but there were in addition circumstances of great hardship resulting from the ignorance, or, in addition to the mistake of law, facts pointing strongly towards fraud or undue influence, yet which would not have been so certainly established as to warrant setting aside the contract.

Notwithstanding the remarks of McColum, C. J., in *Wilson v. Ott*, *supra*, the last case cited, tending to throw doubt on the continued existence of the rule in *Good v. Herr*, *supra*, yet it will be noticed he cites *Good v. Herr*, and distinguishes it from the

one before him. What he says in disparagement of the rule is based on an essay in the *American Jurist*, and was not necessary to a decision of the case before him, and therefore, to some extent, is dicta. The case before him was a "hard" case, in which, if the contract had been enforced according to law, the defendants would have been compelled to pay \$4,000 for a title they did not get—a case of gross hardship clearly constituting it an exception to the rule. Therefore no assault on the general rule was necessary. This is the Pennsylvania case on which appellant seems to most confidently rely. But, nevertheless, we adhere to that rule as the law of this commonwealth; that is, "In no case is ignorance or mistake of the law with a full knowledge of the facts *per se* a ground for equitable relief." If the evidence shows that in addition there would be great hardship in enforcing the contract made in ignorance of the law, equity may afford relief. But between the border of great hardship and actual fraud there are many contracts made in ignorance of the law, yet which result in no inequitable consequences from the enforcement of the general rule. In such cases the rule should be enforced. The principle of the inviolability of contracts made with a full knowledge of the facts, and where there has been no overreaching or serious injury, should not be disturbed for slight reasons. There are very few cases where the title of a grantee of land has failed that the failure is not the result of ignorance of law by the grantee or of his counsel. The ignorance may only be demonstrated in a subsequent judicial trial, yet the legal theory is that the law as announced at the trial was always the law, though its first promulgation may have been only at that particular trial.

But a case directly in point is decided by the Supreme Court of California reported in *Kenyon v. Welty*, 20 Cal. 637, 81 Am. Dec. 137. In this case a contract was entered into by both parties under the belief that the law had been established by a decision of the Supreme Court made some time before. Clearly, both parties entered into the contract under the view of the law as announced by the Supreme Court. Some time after, the court overruled its decision in the first case, and an action was brought to set aside the agreement on the ground that it had been made because of a mutual mistake of law. The court refused to disturb the contract, saying: "Indeed, the weight of authority in the United States is that mistakes [of law], unless accompanied with special circumstances, such as misrepresentation, undue influence, or misplaced confidence, constitute no ground for relief." In the case before us there was no new law announced relating to contracts in *Palairot v. Snyder*, *supra*, of which plaintiff might easily have been ignorant. That case only announces a law old as English law; that is, that where the gran-

tee of land by deed covenants to pay annually forever an annual rental of a certain sum of money, unless, within 10 years he pays the full purchase money for the land, and he fails to pay the purchase money within the 10 years, the annual rental becomes perpetual. It only promulgates the old law that parties are bound by their contracts. It would have been new law if this court had decided they were not. This, however, was the law of which plaintiff was ignorant. By reason of his ignorance, in an agreement under seal, he made a reduction of 1 per cent. in the annual rental because he believed if the reduction was not made defendants would pay the principal. The only reasonable inference is, because his investment at 5 per cent. was better than he could get elsewhere. No misrepresentation as to the law was made to him by anybody. Lawbooks and lawyers were thick around him, but he did not take the trouble to inquire. He was induced to enter into the bargain because of its profit to him. It is just as profitable now, for, while the legal rate of interest is 6 per cent., the commercial rate is 5 or less. As he avers, the ignorance of the law was mutual. If plaintiff had not entered into the agreement, defendants, in equity and good conscience, could then and there have paid off and extinguished the ground rent. By their mistake that opportunity was lost. By his mistake he has lost nothing that he expected to make by the bargain. We can see no hardship in this contract which should move a chancellor to reach forth his hand and destroy it.

As to the question of want of consideration, the plaintiff suffers no hardship from his contract which will move equity to rescind it. The contract, then, is in full force. It met the approval of plaintiff when he signed it. He got the consideration he demanded. The seal imports a consideration. On its face the contract expresses one. Therefore, as long as equity refuses to abrogate it, it must be taken to be what it purports to be, a good contract in law.

The decree of the court below is affirmed, and the appeal is dismissed, at costs of appellant.

(206 Pa. 529)

CUSTER v. BALTIMORE & O. R. CO.

(Supreme Court of Pennsylvania. July 9, 1903.)

RAILROADS—SPEED OF TRAINS—ACCIDENT AT CROSSING.

1. Though in cities and populous districts the speed of trains must be moderated, there is no limit to the speed at which a railroad company may run its trains through the open country and over country road crossings.

2. A railroad may run its trains at a high speed across a highway where it has stationed a watchman, though the highway is within the limits of a city or a populous district.

3. In an action for injuries at a grade crossing, evidence held insufficient to take the case to the jury.

Appeal from Superior Court.

Action by Isaac R. Custer against the Baltimore & Ohio Railroad Company. From a judgment of the superior court affirming an order, plaintiff appeals. Affirmed.

Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

Oliver B. Dickinson, for appellant. William B. Broomall, for appellee.

POTTER, J. The trial court entered judgment of compulsory nonsuit in this case, and refused, upon motion, to take it off. The superior court affirmed the judgment of the trial court, and its action in so doing is here assigned as error.

The appellant contends that he was entitled to have the jury pronounce upon the effect of the facts, which were undisputed, and that it, rather than the court, should have determined whether the defendant was negligent. But as the conduct of the parties is not in dispute, and as all the facts appear clearly and distinctly in the evidence, and there is no conflict in the testimony, the only question for decision was as to the legal effect or value of the facts. Whenever the facts are ascertained, the rule of conduct, or, in other words, the rule of law, to be applied, is to be determined and laid down by the court, and is not to be left to be defined by the accidental feelings of a jury. It would be an easy way for the court to avoid responsibility, when the circumstances are complex, or the question is difficult, to throw the whole case in a lump to the jury. But to do this, when, as in the present instance, no doubt exists as to the actual conduct of the parties, and where none of the facts are in dispute, would be an evasion of duty and the surrender of a judicial function. The law tends constantly towards the attainment of greater certainty of definition, and to the substitution of specific rules of conduct, instead of featureless generalities. It is always desirable that the standard by which parties are judged should be one of specific acts or omissions, with reference to the special circumstances of the case. It has been well said in Holmes' Lectures on the Common Law that "if, in the whole department of unintentional wrongs, the courts arrived at no further utterance than the question of negligence, and left every case, without rudder or compass, to the jury, they would simply confess their inability to state a very large part of the law which they require the defendant to know, and would assert by implication that nothing could be learned by experience." Hence the long and growing line of decisions in which, instead of relying upon the vague and uncertain estimate of a jury as to the degree of care which would be exercised under the circumstances by a prudent man, there has been substituted the more precise and definite rule of certain specific acts, whose existence or omission constitutes negligence. The definition of negligence and

the determination of a standard of duty is always a matter of law for the court. In case of a dispute it is, of course, for the jury to say whether or not the facts come within the standard. But where the facts are clear, and nothing remains but the definition and application to them of the rule of conduct, the responsibility is upon the court alone.

In the present case this responsibility was properly assumed and carefully discharged by the trial court. The conclusion reached by it is so well vindicated, and the case is so fully discussed in the opinion of the superior court (19 Pa. Super. Ct. 365) in affirmance of the court below, that little remains to be said. The accident occurred at a grade crossing in a populous district. The defendant company had provided safety gates and a watchman to protect travelers upon the highway. The train which caused the damage was running at a high rate of speed—probably 60 miles an hour—and the engineer was unable to stop in time to avoid the collision. The plaintiff's horses were smooth shod, and in approaching the crossing the team was stalled, so that, instead of passing at once and directly across the tracks, it remained upon the line of the railroad for about four minutes, until the train came. The watchman was not in any way at fault in permitting the driver and horses to enter upon the crossing when they approached, for there was ample time to have crossed and recrossed in safety, had the team proceeded in the ordinary way and with the usual celerity. Even after it was seen that there was some difficulty, it was not at once apparent that the wagon could not be moved in time to escape the coming of the train. As soon as there was cause to believe that a collision was imminent, every one in the vicinity seems to have done everything which it was reasonably possible to do to stop the train and avoid the accident. The evidence shows that the engineer, too, used his utmost efforts as soon as he saw and comprehended the danger. The accident was simply the result of an unusual and exceptional occurrence, viz., the stalling of the team upon the edge of the track, and its remaining there for some considerable time. The defendant company had sought to make it safe for the public to cross its tracks at this point by providing safety gates and a watchman, and there was no failure in the use of the means thus provided, nor any neglect of duty in connection therewith. It went upon the theory that its tracks would thus be kept clear, and it acted upon that assurance, rather than upon the ability to stop its trains after coming in sight of the crossing before reaching it.

We find nothing in the evidence which would have warranted a verdict against the defendant, unless it is to be held that it was negligence, under the circumstances, to run trains through the vicinity at a speed of 60

miles per hour. Each of the tribunals which has had this case under consideration has reached the conclusion that, in the light of the present-day conditions and the popular demand, such a rate of speed cannot be considered negligent, when proper means are taken to protect the public who use the crossings in the ordinary way. An examination of the decisions in Pennsylvania shows that they sustain these propositions: (1) There is no limit to the rate of speed at which a railroad company may run its trains through the open country and over the crossings of country roads, so long as the bounds of safety to patrons are not transgressed. *Reading, etc., R. Co. v. Ritchie*, 102 Pa. 425; *Newhard v. Penna. R. Co.*, 153 Pa. 417, 26 Atl. 105, 19 L. R. A. 563. (2) In cities, towns, and populous districts, the speed of trains must be moderated, or else the railroad must take reasonable precautions to make it safe for the public who have occasion to cross its tracks. *Phila. & Reading R. Co. v. Long*, 75 Pa. 257; *R. Co. v. Ritchie*, supra; *Ellis v. Lake Shore, etc., Ry. Co.*, 138 Pa. 506, 21 Atl. 140, 21 Am. St. Rep. 914; *Childs v. Penna. R. Co.*, 150 Pa. 73, 76, 24 Atl. 341; *L. V. R. Co. v. Brandtmaier*, 113 Pa. 610, 6 Atl. 238. The conclusion which was reached by the trial court in this case would seem to follow naturally, that where a railroad has placed gates across a highway, and has stationed a watchman there to protect travelers on the highway, it may run its trains at high speed at that point, even if it be within the limits of a municipality or in a populous district. Grade crossings are always obnoxious, as they are a constant menace to public safety, and their continued existence is much to be deplored. But this is not a question as to the establishment or the regulation of a grade crossing. The conditions which prevail at the place of the accident seem to be of long standing, although the growth of traffic and the demand for increased speed have probably added to the danger. We agree with the view taken by the trial court, and approved by the superior court, that a high rate of speed is demanded of railroad companies by the traveling public, and that such a rate is sanctioned by the law, where the usual and proper means are taken to guard the crossings and make them reasonably safe for those desiring to use them. We can only suggest that this case presents another illustration of the wisdom of the policy which prohibits, wherever it is possible to do so, the crossing of steam railroads at grade. So long as they are permitted to exist, even where, as here, all reasonable precautions to secure safety in the ordinary use of the crossing are taken, danger from sudden breakdown or other exceptional cause will always be present.

The assignments of error are overruled, and the judgment is affirmed.

MEMORANDUM DECISIONS.

ROTH v. HALLWOOD CASH REGISTER CO. (Court of Appeals of Maryland. June 29, 1903.) Appeal from Baltimore City Court; Henry Stockbridge, Judge. Action by Charles N. Roth against the Hallwood Cash Register Company. Judgment for plaintiff by default, and from an order refusing to strike out the same the defendant appeals. Affirmed. Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ. John C. Rose, for appellant. James J. McNamara, for appellee.

SCHMUCKER, J. This case was tried on appeal along with those of Munro Smith (55 Atl. 525) and Louis C. Wunder (infra) against the present appellee. All three cases present precisely the same issue, and the three appeals were included in one record. We will therefore affirm the order appealed from in the present case, for the reasons set forth in our opinion filed in Smith's Case. Order affirmed, with costs.

WUNDER v. HALLWOOD CASH REGISTER CO. (Court of Appeals of Maryland. June 29, 1903.) Appeal from Baltimore City Court; Henry Stockbridge, Judge. Action by Louis C. Wunder against the Hallwood Cash Register Company. Judgment for plaintiff by default, and from an order refusing to strike out the same the defendant appeals. Affirmed. Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, and SCHMUCKER, JJ. John C. Rose, for appellant. James J. McNamara, for appellee.

SCHMUCKER, J. This case was tried on appeal along with those of Munro Smith (55 Atl. 525) and Charles N. Roth (supra) against the present appellee. All three cases present precisely the same issue, and the three appeals were included in one record. We will therefore affirm the order appealed from in the present case, for the reasons set out in our opinion filed in Smith's Case. Order affirmed, with costs.

(72 N. H. 596)

BURKE v. ELLINWOOD. (Supreme Court of New Hampshire. Hillsborough. May 5, 1903.) Trover by L. C. B. Burke, a deputy sheriff, against J. G. Ellinwood, the receiptor of the goods attached in *Fairfield v. Day*, 55 Atl. 219. The facts are stated in the report of that case. Upon a trial at the May term, 1902, of the superior court, before Young, J., judgment was ordered in favor of the defendant, subject to the plaintiff's exception. Matthews & Sawyer, for plaintiff. Isaac L. Heath and Brown, Jones & Warren, for defendant.

CHASE, J. The question thus raised was decided in *Fairfield v. Day*, 55 Atl. 219. Exception overruled.

BINGHAM, J., did not sit. The others concurred.

(64 N. J. E. 333)

BALDWIN et al. v. TUCKER et al. (Court of Errors and Appeals of New Jersey. March 3, 1902.) Appeal from Court of Chancery.

PER CURIAM. The decree appealed from is affirmed, for the reasons given in the court

of chancery by Vice Chancellor EMERY, whose opinion is reported in 48 Atl. 547, 61 N. J. Eq. 412.

(64 N. J. E. 374)

BEIDEMAN et al. v. SPARKS. (Court of Errors and Appeals of New Jersey. March 19, 1902.) On appeal from an order advised by Vice Chancellor GREY, whose opinion is reported in 61 N. J. Eq. 226, 47 Atl. 811. George H. Peirce, for appellant. John F. Harned, for respondents.

PER CURIAM. The order in this case is affirmed, for the reasons given in the opinion of the vice chancellor.

(65 N. J. E. 766)

CARTER v. CARTER et al. (Court of Errors and Appeals of New Jersey. July 20, 1903.) Appeal from Court of Chancery. Bill by George F. Carter, trustee, against Mary L. K. Carter and others. Decree for complainant (53 Atl. 160), and defendants appeal. Affirmed. Edward Q. Keasbey & Sons, for appellants. El A. S. Man, for respondent.

PER CURIAM. The decree appealed from in this case is affirmed, for the reasons set forth in the opinion of Vice Chancellor STEVENSON, filed in the Court of Chancery.

(65 N. J. E. 768)

In re CORBLISS' WILL. (Court of Errors and Appeals of New Jersey. July 20, 1903.) Appeal from Prerogative Court. In the matter of the estate of John Corbliss. An order admitting the will to probate was affirmed in the prerogative court (52 Atl. 986), and contestant appeals. Affirmed. Queen & Tennant, for appellant. Corbin & Corbin, for respondents.

PER CURIAM. The decree appealed from in this case is affirmed, for the reasons set forth in the opinion of Vice Ordinary REED, filed in the Prerogative Court.

GUMMERE, C. J., and **VAN SYCKEL, DIXON, GARRISON, HENDRICKSON, SWAYZE, VOORHEES, and GREEN, JJ.,** concur. **FORT, BOGERT, VREDENBURGH, and VROOM, JJ.,** dissent.

(65 N. J. E. 764)

HALLINGER v. ZIMMERMAN. (Court of Errors and Appeals of New Jersey. July 20, 1903.) Appeal from Court of Chancery. Bill by Hiram G. Hallinger against Walter Zimmerman. Decree for complainant (51 Atl. 936), and defendant appeals. Affirmed. John F. Harned, for appellant. George H. Pierce and Henry H. Stickwell, for respondent.

PER CURIAM. The decree appealed from in this case is affirmed, for the reasons set forth in the opinion of REED, V. C., filed in the Court of Chancery.

(69 N. J. L. 451)

IVINS et al. v. CITY OF TRENTON. (Court of Errors and Appeals of New Jersey. June 19, 1903.) Error to Supreme Court. Certiorari, by Minor H. Ivins and others against the city of Trenton, to determine the validity of a certain city ordinance. From a judgment in favor of the city, relators bring error. Affirm-

ed. John H. Backes, for plaintiffs in error. Charles E. Bird, for defendant in error.

PER CURIAM. The judgment of the Supreme Court is affirmed, for the reasons given in the opinion of HENDRICKSON, J., in that court. 53 Atl. 202.

MURRAY et al. v. LYNCH. (Court of Errors and Appeals of New Jersey. March Term, 1903.) Appeal from Prerogative Court. For opinion below, see *In re Cartwright's Will*, 51 Atl. 713. Joseph A. Beecher, for appellants. Coult, Howell & Ten Eyck, for respondent.

PER CURIAM. Judgment affirmed.

(65 N. J. E. 763)

NORTON v. PERRINE et al. (Court of Errors and Appeals of New Jersey. July 20, 1903.) Appeal from Court of Chancery. Bill by Richard D. Norton against William D. Perrine and others. From an order overruling a demurrer, plaintiff appeals. Affirmed. Howard W. Hayes, for appellant. A. S. Appleget, for respondents.

PER CURIAM. In this case the order of the Court of Chancery overruling the demurrer is affirmed, for the same reasons as in the case of *Warwick v. Perrine* (at the present term) 55 Atl. 738.

(65 N. J. E. 764)

SCHULTZ et al. v. VAN DOREN et al. (Court of Errors and Appeals of New Jersey. July 20, 1903.) Appeal from Court of Chancery. Bill by Emil Schultz, Jr., and others, against Howard J. Van Doren and others. Decree for defendants (53 Atl. 815), and plaintiffs appeal. Affirmed. McCarter, Williamson & McCarter, for appellants. E. A. & W. T. Day, for respondents.

PER CURIAM. The decree appealed from in this case is affirmed, for the reasons set forth in the opinion of the Vice Chancellor, filed in the Court of Chancery.

(69 N. J. L. 452)

SULLIVAN et al. v. VISCONTI et al. (Court of Errors and Appeals of New Jersey. June 19, 1903.) Error to Supreme Court. Certiorari by the state, on the prosecution of Dominick Visconti and others, against Michael Sullivan and others, to review a judgment of the Jersey City district court in favor of respondent. From a decree reversing such judgment, respondent brings error. Affirmed. McEwen & McEwen, for plaintiffs in error. Robert Carey, for defendants in error.

PER CURIAM. The judgment of the Supreme Court is affirmed, for the reasons given in the opinion of PITNEY, J., in that court. 53 Atl. 598.

ALLAIRE WATER SUPPLY & LAND CO. v. FREEHOLD & J. AGRICULTURAL R. CO. et al. (Supreme Court of New Jersey. Oct. 1, 1903.) Action by the Allaire Water Supply & Land Company against the Freehold & Jamesburg Agricultural Railroad Company and the Pennsylvania Railroad Company. Demurrer to the complaint. Demurrer overruled. Argued February term, 1903, before GUMMERE, C. J., and FOLT, HENDRICKSON, and PITNEY, JJ. S. C. Cowart and Aaron E. Johnston, for plaintiff. Alan H. Strong, for defendants.

PER CURIAM. This is a demurrer to the first and fourth counts in the plaintiff's declaration. We have gone very carefully over the cause of demurrer in this case, and we find no reason for sustaining the same on any of the grounds alleged in the brief of the defendants'

counsel. Other grounds, if they exist, have not been considered by the court, and the demurrer is not sustained. Judgment may be entered overruling the demurrer, with leave to the defendants to plead within 20 days. The plaintiff is entitled to costs.

DIEHL et al. v. BLAIR, Judge. (Supreme Court of New Jersey. June 15, 1903.) Demurrer by Diehl and others to alternative writ of mandamus issued by Blair, Judge. Issue of peremptory writ ordered. Argued February term, 1903, before GUMMERE, C. J., and FORT, HENDRICKSON, and PITNEY, JJ. Crouse & Perkins, for demurrer. Thompson & Hall and Charles H. Hartshorne, opposed.

PER CURIAM. The only question presented by this demurrer is whether the Legislature is prohibited by the Constitution from conferring upon a member of the judiciary the power to appoint park commissioners. This same question was before the Court of Errors and Appeals for its consideration at its March term, 1903, in the case of *Ross v. Essex County Park Commission*, 55 Atl. 310; and it was then decided by that court that the conferring by the Legislature of that power upon a member of the judiciary did not violate any constitutional provision, and was within the province of the Legislature. The decision in that case rules this. A peremptory mandamus should issue.

LAKELAND v. NORTH JERSEY ST. RY. CO. (Supreme Court of New Jersey. June 12, 1903.) Error to Circuit Court, Essex County. Action by Gertrude Lakeland against the North Jersey Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed. Argued February term, 1903, before GUMMERE, C. J., and FORT, HENDRICKSON, and PITNEY, JJ. Chauncy H. Beasley, for plaintiff in error. Samuel Kalisch, for defendant in error.

PER CURIAM. The plaintiff, a little girl five years of age, was run over by a trolley car of the defendant company. We are asked to set aside the judgment rendered in her favor upon the ground that the testimony taken at the trial did not disclose any negligence on the part of the motorman who was operating the car. An examination of the testimony discloses that there was sufficient evidence upon this point to go to the jury. The judgment should be affirmed.

McMAHON v. NORTH JERSEY ST. RY. CO. (Supreme Court of New Jersey. June 12, 1903.) Error to Circuit Court, Essex County. Action by James McMahon against the North Jersey Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed. Argued February term, 1903, before GUMMERE, C. J., and FORT, HENDRICKSON, and PITNEY, JJ. Chauncy H. Beasley, for plaintiff in error. Samuel Kalisch, for defendant in error.

PER CURIAM. We find nothing in any one of the 17 assignments of error in this case which would justify this court in reversing the judgment under review. The judgment should be affirmed.

McTIERNAN v. NORTHRUP. (Supreme Court of New Jersey. June 8, 1903.) Appeal from District Court of Hoboken. Action by Michael J. McTiernan against Simon P. Northrup. Judgment for plaintiff, and defendant appeals. Appeal dismissed. Argued November term, 1902, before GARRISON and GARRET-

SON, JJ. J. F. Minturn, for appellant. Gar-
rison, Enright & McManus, for appellee.

PER CURIAM. This appeal comes before the court upon a state of the case that is unsigned by the counsel in the cause and uncertified by the court below, which state of the case, if duly authenticated, contains nothing that could, as matter of law, disturb the judgment entered in the court below, if in point of fact there is any judgment, concerning which the case in this court is silent. The appellant can take nothing by his appeal.

MEYER v. CAHILL. (Supreme Court of New Jersey. June 8, 1903.) Appeal from District Court of Newark. Action by Benjamin Meyer against John Francis Cahill. Judgment for plaintiff, and defendant appeals. Affirmed. Argued February term, 1903, before DIXON, GARRISON, and SWAYZE, JJ. Herbert Boggs, for appellant. J. L. Newman, for appellee.

PER CURIAM. The facts established by the case settled by the court below, and not subject to challenge in this court, admit of no other judgment than that given in the district court, which is affirmed.

OEFFINGER v. DELAWARE, L. & W. R. CO. (Supreme Court of New Jersey. June 8, 1903.) Action by Emil Oeffinger against the Delaware, Lackawanna & Western Railroad Company. There was verdict for plaintiff, and defendant rules to show cause. Discharged on condition of filing remittitur; otherwise, made absolute. Argued February term, 1902, before GUMMERE, C. J., and FORT, PITNEY, and HENDRICKSON, JJ. Robert H. McCarter, for the rule. Benjamin & Benjamin, opposed.

PER CURIAM. We are unable to discover in the record any judicial error whereby the defendant suffered injury at the trial below; nor can we say that the verdict is so clearly against the weight of the evidence as to justify us in setting it aside for that reason. We do think, however, that the verdict for \$5,000 damages, under the circumstances of this case, is unreasonably excessive. If the plaintiff will consent to remit the excess thereof above \$3,000, the verdict may stand; otherwise, the rule to show cause will be made absolute.

ROSENBERG et al. v. NORTH JERSEY ST. RY. CO. (Supreme Court of New Jersey. June 12, 1903.) Action by Ida Rosenberg and Morris Rosenberg, her husband, against the North Jersey Street Railway Company. There was verdict for plaintiffs, and defendant rules to show cause. Discharged on condition of filing remittitur; otherwise, made absolute. Argued February term, 1903, before GUMMERE, C. J., and FORT, HENDRICKSON, and PITNEY, JJ. Chauncey H. Beasley, for the rule. Benjamin M. Weinberg, opposed.

PER CURIAM. Three reasons are given by counsel upon which the motion for a new trial is rested: First, because the verdict was against the weight of the evidence; second, because the verdict was contrary to the charge of the court; third, because the verdict was excessive. Our examination of the testimony leads us to the conclusion that the first and second reasons are without merit, that a verdict for the plaintiffs was not against the weight of the evidence, and that it was not contrary to the charge of the court. We think, however, that it was excessive. The jury allowed to the female plaintiff, for the injuries received by her, \$3,000, and to the husband, for the expenses incurred by him on account of his wife's

injury and for the temporary loss of her consortium, the sum of \$500. If plaintiffs will consent to reduce the amount of the verdict rendered in favor of the wife to the sum of \$1,500, the rule to show cause will be discharged; otherwise, it will be made absolute.

SCHMIDT v. NORTH JERSEY ST. RY. CO. (Supreme Court of New Jersey. June 12, 1903.) Error to Circuit Court, Essex County. Action by Rose Schmidt against the North Jersey Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed. Argued February term, 1903, before GUMMERE, C. J., and FORT, HENDRICKSON, and PITNEY, JJ. Chauncey H. Beasley, for plaintiff in error. Samuel Kalisch, for defendant in error.

PER CURIAM. We find nothing in any of the assignments of error which merits discussion. The judgment under review should be affirmed.

ATLANTIC CITY & S. TRACTION CO. v. WEST JERSEY & S. R. CO. (Court of Chancery of New Jersey. Sept. 21, 1903.) Suit by the Atlantic & Suburban Traction Company against the West Jersey & Seashore Railway Company to restrain defendant from interfering with complainant's effecting a crossing over defendant's tracks. Injunction granted, unless defendant file a bill raising the question of the mode in which complainant shall construct its crossing over defendant's railroad tracks, and bringing in the municipality of Atlantic City as a party. Eli H. Chandler, for complainant. Joseph H. Gaskill, for defendant.

GREY, V. C. The cause being duly noticed, counsel appeared as above stated. Mr. Chandler, for complainant, filed an amendment to the bill of complaint, setting forth that the locus in quo is within the bounds of the city of Atlantic City. Previous to the opening of the case, Judge Gaskill, counsel for the defendant, stated that the defendant, since the amendment of the bill, would not deny the complainant's right to build its trolley across the defendant's tracks, but he proposed to show in the cause that the nature of the crossing by the complainant of the defendant's right of way, referred to in the bill of complaint, was such that there should be an adjudication by this court as to the mode of crossing. The Vice Chancellor said that nothing in the pleadings presented any such question, and that, to raise the question of the mode in which interfering easements should be used, all parties entitled to use an easement in the same place ought to be brought into court. In this case the municipality of Atlantic City is conceded to have a right to use the public highway in which the complainant's trolley and the defendant's railroad cross. Such a suit is an appeal to the equity power of the court to adjust the use of easements at a common crossing. All easement holders should be parties. Atlantic City is not a party to the present suit. Mr. Chandler, for the complainant in the suit, insisted that the court had no jurisdiction to entertain a suit to adjust the use of interfering easements in this case, because the locality is within the bounds of Atlantic City, and the power to adjust the mode of crossing within cities lies in such cases with the municipal authorities, and not with the court. The Vice Chancellor said that question is not presently before the court, because the pleadings in this suit do not raise it. After further conference, it is agreed that the right of the complainant company to cross the tracks of the defendant company at the place set forth in the bill of complaint is not

disputed; this suit not defining or fixing the mode of crossing. The Vice Chancellor then announced that he would advise a decree in the cause on the statements of the parties, made in open court, that the complainant company has a right to cross the defendant's tracks at the place mentioned in the bill of complaint, and should have an injunction restraining the defendant company in accordance with the prayer of the bill, unless within 10 days the defendant shall file a bill in this court raising the question of the mode in which the complainant company in this suit shall construct its crossing of the defendant's railroad tracks at the point named in the bill of complaint in this suit, and also the mode in which the highway at the common point of crossing may be used and protected; the bill to bring in as defendants the complainant in this suit, the municipality of Atlantic City, and all other persons or corporations interested, who have any easement in the highway at the place of said crossing. The Vice Chancellor further stated that, if counsel would obtain the cause to be referred to him, he would, within 10 days after issue joined, assign a day for final hearing.

CURRIE et al. v. NEW YORK TRANSIT CO. et al. (Court of Chancery of New Jersey. June 2, 1903.) Suit by Mungo J. Currie and others against the New York Transit Company and others. Case heard on bill, answers, and depositions. Bill dismissed. Charles C. Black, for complainants. Charles L. Corbin, for defendant New York Transit Co. Charles W. Fuller, for defendant Standard Oil Co. Charles D. Thompson, for defendant National Docks Co.

STEVENSON, V. C. The above-stated cause is submitted for decision on final hearing without argument. The case was before me some months ago on a motion for a preliminary injunction, which I denied for reasons stated orally. While I expressed views adverse to the claim of the complainants to an injunction at any stage of the cause, the only matter actually decided was that the complainants were not entitled to a preliminary injunction. Inasmuch as the final decree will in any event be taken to the Court of Errors and Appeals for review, it is suggested that the oral opinion on the motion for a preliminary injunction may well be deemed the opinion of this court on the final hearing. Counsel for the respective parties state that the pleadings and proofs present precisely the same case for a final injunction as that which was presented by the bill and affidavits for a preliminary injunction. Under these circumstances I shall advise a decree denying the injunction prayed for and dismissing the bill of complaint, for the reasons indicated in my oral opinion on the motion for a preliminary injunction, without any reconsideration of the views therein expressed.

(206 Pa. 303)

CARSON et al. v. BOROUGH OF AUSTIN et al. (Supreme Court of Pennsylvania. May 18, 1903.) Appeal from Court of Common Pleas, Potter County. Action by E. E. Carson and others against the borough of Austin and others. Decree for plaintiffs, and defendants appeal. Affirmed. Argued before DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

PER CURIAM. The questions raised by this bill and answer are the same as those in No. 87 of the same term. 55 Atl. 991. We affirmed that decree on the opinion of the court below, and we do the same in this case. Decree affirmed.

(206 Pa. 241)

ELLWANGER et al. v. MOORE et al. (Supreme Court of Pennsylvania. May 18, 1903.) Appeal from Court of Common Pleas, Philadelphia County. Proceedings by George Ellwanger and William C. Barry against A. H. Moore and others. From an order discharging a rule to strike off writ of fieri facias, Moore appeals. Modified. Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

MESTREZAT, J. For the reasons stated in the opinion this day filed at No. 65, January term, 1903, 55 Atl. 966, the order discharging the rule to strike off the writ of fieri facias is reversed, and the rule is now made absolute, and the writ is set aside. The judgment of the court below against the garnishees is so far modified as to restrain its collection until the interest, if any, of the defendant in the estate of Andrew M. Moore, deceased, is due and payable, and, as thus modified, the judgment is affirmed; the costs of this appeal to be paid by the appellee.

(206 Pa. 241)

GERMANTOWN REAL ESTATE DEPOSIT & TRUST CO. v. MOORE et al. (No. 64.) (Supreme Court of Pennsylvania. May 18, 1903.) Appeal from Court of Common Pleas, Philadelphia County. Action by the Germantown Real Estate Deposit & Trust Company against Albert H. Moore and others. From a judgment discharging a rule, the trustees of Andrew M. Moore, deceased, appeal. Modified. Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

MESTREZAT, J. For the reasons stated in the opinion this day filed at No. 65, January term, 1903, 55 Atl. 966, the order discharging the rule to strike off the writ of fieri facias is reversed, and the rule is now made absolute, and the writ is set aside. The judgment of the court below against the garnishees is so far modified as to restrain its collection until the interest, if any, of the defendant in the estate of Andrew M. Moore, deceased, is due and payable, and, as thus modified, the judgment is affirmed; the costs of this appeal to be paid by the appellee.

(206 Pa. 242)

GERMANTOWN REAL ESTATE DEPOSIT & TRUST CO. v. MOORE et al. (No. 75.) (Supreme Court of Pennsylvania. May 18, 1903.) Appeal from Court of Common Pleas, Philadelphia County. Proceedings by the Germantown Real Estate Deposit & Trust Company against Albert H. Moore and others. From the judgment, Albert H. Moore appeals. Affirmed. Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

MESTREZAT, J. For the reasons stated in the opinion this day filed at No. 65, January term, 1903, 55 Atl. 966, the order discharging the rule to strike off the writ of fieri facias is reversed, and the rule is now made absolute, and the writ is set aside. The judgment of the court below against the garnishees is so far modified as to restrain its collection until the interest, if any, of the defendant in the estate of Andrew M. Moore, deceased, is due and payable, and, as thus modified, the judgment is affirmed; the costs of this appeal to be paid by the appellee.

(206 Pa. 218)

KELLEY v. SHAY et al. (Supreme Court of Pennsylvania. May 11, 1903.) Appeal from Court of Common Pleas, Washington County. Bill by H. A. Kelley against John W. Shay and others. Decree for plaintiff, and de-

fendant S. F. McCaulley appeals. Affirmed. Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

POTTER, J. This appellant is entitled to one-eighth of the stock owned by the firm of Shay & Kelley in the Greensboro Natural Gas Company. The only question raised by this appeal is as to the amount of that holding. As this has been determined by the decision in Kelley v. Shay, 55 Atl. 927, in which an opinion has just been filed, nothing further need be here added. The assignments of error are overruled, and the decree is affirmed.

(206 Pa. 355)

QUAKERTOWN & E. R. CO. v. GUARANTORS' LIABILITY INDEMNITY CO. OF

PENNSYLVANIA et al. (Supreme Court of Pennsylvania. May 25, 1903.) Appeal from Court of Common Pleas, Philadelphia County. Action by the Quakertown & Eastern Railroad Company against the Guarantors' Liability Indemnity Company of Pennsylvania and others. From a decree dismissing exceptions to master's report, Henry C. Terry appeals. Dismissed. Argued before MITCHELL, DEAN, BROWN, MESTREZAT, and POTTER, JJ.

POTTER, J. The opinion which has just been filed at No. 281, January term, 1902, disposes of this appeal. 55 Atl. 1033. We there held that the court below had no jurisdiction to determine the matter in dispute, but that the questions of fact involved must be submitted to a jury. This appeal is therefore dismissed.

END OF CASES IN VOL. 55.

